

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 21, 2013

v

ANTHONY ERIC ANDERSON,

Defendant-Appellant.

No. 312574
Macomb Circuit Court
LC No. 2011-003639-FC

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for armed robbery, MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a. The trial court sentenced defendant to 5 to 20 years' imprisonment. Because the prosecutor did not impermissibly vouch for the complainant's credibility nor improperly appeal to the jury's sympathy, and because defendant's trial counsel was not constitutionally ineffective, we affirm.

Defendant was arrested, along with two other individuals, on suspicion of armed robbery. At trial, the complainant testified that three men approached her while she was walking to a friend's apartment, put a gun to her head, and demanded money. She stated that the three men were wearing bandanas over their faces. One man pointed a gun at her, another rifled through her purse to find her wallet, and the third took her cell phone out of her hand before they left the scene. At trial, the complainant testified that defendant was the individual that took her cell phone.

Defendant argues that the prosecutor committed misconduct by appealing to the jurors' sympathy for the complainant and improperly vouching for the complainant's credibility.¹ Specifically, defendant refers us to the fact that at one point during closing argument, the prosecutor characterized the complainant's testimony as "truthful testimony" and stated that the

¹ Due to defendant's failure to contemporaneously object to the prosecutor's allegedly improper remarks and request a curative instruction, his claim is reviewed for plain error. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

jury should “feel sorry for” her. In addition, at another point, the prosecutor referred to the complainant’s fear during the incident:

Now, just think for a second what a woman really want[s] to do by herself in the evenings. Nobody wants to take a bus at night by themselves and walk a couple of blocks to a girlfriend’s house to catch a ride to work the midnight shift. That’s not what they want to do. Why? Because we know a woman walking alone at night is not a safe thing. You just know it. She didn’t want to do but she had to because she’s got kids and she needs to work for them, she needs to provide for them, she needs to provide for herself.

“[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

A defendant’s opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant’s guilt or innocence. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor’s remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “The propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. *Jones, supra* at 353. [*Dobek*, 274 Mich App at 63-64.]

We do not believe that the prosecutor’s remarks about the complainant’s fear were improper given the facts of this case. The prosecutor’s characterization of the complainant as a “scared woman” directly relates to the elements of armed robbery. Under MCL 750.530, robbery is defined as a larceny in which the perpetrator “uses force or violence against any person who is present, or who assaults or *puts the person in fear*[.]” (Emphasis added.) The complainant testified that she feared for her life during the robbery and was “hysterical” following the incident. The prosecutor was allowed to argue reasonable inferences from the evidence presented at trial. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

The prosecutor’s statement that the jury should feel sorry for the complainant and her children also did not constitute prosecutorial misconduct. In closing, defense counsel argued that defendant did not take part in the robbery and was merely a scared teenager. The prosecutor responded to defense counsel’s characterization of the events on the night of the robbery by arguing that it was the complainant, not defendant, with whom the jury should sympathize. Statements made by the prosecutor must be evaluated in light of defense arguments, and a prosecutor may fairly respond to issues raised by a defendant. *Dobek*, 274 Mich App at 64. The prosecutor’s statement was a permissible rebuttal to an argument made by defense counsel and did not invite the jury to abandon their impartiality and find defendant guilty based on their personal feelings. Thus, the statement did not constitute misconduct. Moreover, the trial court

instructed the jurors that they were not to let sympathy influence their decision, and that statements by the attorneys were not evidence. *Unger*, 278 Mich App at 237 (juries are presumed to follow their instructions).

Next, defendant alleges that the prosecutor impermissibly vouched for the complainant's credibility by characterizing her testimony as "truthful." "Although a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue and make reasonable inferences from the evidence to support a witness's truthfulness." *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012). "When a defendant argues that the prosecution's witness testified dishonestly, the prosecutor may respond by arguing that the witness had no motive to lie." *Id.*

In *Cain*, in response to a defense attorney's challenge to the credibility of a prosecution witness, the prosecutor stated in rebuttal argument, "I believe [the witness] was very honest about everything. He tried, you know, to be very honest." *Id.* at 37. This Court found that, because defense counsel argued that the witness was not credible, the prosecutor could permissibly argue in response that the witness had no motive to lie. *Id.* *Cain* is analogous to the instant case in that much of defense counsel's cross-examination of the complainant attacked her recollection of the events and probed the question of whether she had given conflicting statements to the police. Because defense counsel questioned the complainant's credibility, the prosecutor could permissibly argue in support of her credibility in rebuttal. *Id.* Moreover, the prosecutor's characterization of the complainant's testimony as "truthful" was a single statement in his closing argument. He never implied that his opinion was based upon any special knowledge of the truthfulness of the complainant's testimony, but rather argued from the facts in evidence, that the jury should view the complainant's testimony as credible.

Accordingly, we conclude that the prosecutor's statements did not constitute prosecutorial misconduct that deprived defendant of a fair and impartial trial, *Dobek*, 274 Mich App at 63, and, therefore, did not constitute plain error, *Callon*, 256 Mich App at 329-330.

Defendant also argues that his trial counsel proved ineffective by failing to object to the prosecutor's allegedly improper statements.² As discussed above, the prosecutor's statements did not constitute prosecutorial misconduct.

² "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Thus, any objection by defense counsel would have been futile, and counsel is not ineffective for failing to raise meritless or futile objections. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012).

Affirmed.

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

/s/ Douglas B. Shapiro