STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW LORENZO JENKINS,

Defendant-Appellant.

UNPUBLISHED
April 22, 1997

No. 185236
Recorder's Court
LC No. 94-008853

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of carrying a concealed weapon. MCL 750.227; MSA 28.424. He was sentenced to two years' probation, the first six months on tether. We affirm.

I

On appeal, defendant first contends that the trial court erred in failing to grant his motion for a new trial, as his conviction was against the great weight of the evidence. This Court reviews a trial judge's decision regarding a motion for a new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). In reviewing defendant's contentions here, we find no abuse.

The prosecution presented the testimony of Detroit Police Officer Randall Craig as eyewitness proof that defendant was guilty of carrying a concealed weapon. The lower court concluded that, despite conflicting testimony of defense witnesses, the jury had enough evidence upon which to base a decision. It is permissible for a trial judge to deny a new trial based on the credibility of the witnesses for the prevailing party. Therefore, the court did not abuse its discretion in denying defendant's motion. *Id*., 475-476.

II

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also asserts a new trial should have been granted on the basis of prosecutorial misconduct. In order to preserve the issue of prosecutorial misconduct, a defendant must timely and specifically object to the prosecution's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, he did not object. Where there is no objection, our review is limited to a miscarriage of justice. *Stanaway, supra*.

No manifest injustice exists in the prosecutor's remarks made at the trial of this case. Defendant claims that the prosecutor improperly denigrated defense counsel by inferring that any delay or inconvenience in the trial would be due to defendant, that the trial was insignificant and not serious in nature, and that the jury should forget the testimony presented. An examination of the record discloses that defendant's claims are directly contradicted by the prosecutor's statements at trial.

The prosecutor did not infer that any delay in the trial was attributable to defendant. Instead, he informed the jury that, as the party with the burden of proof, he was calling only two witnesses and that the circumstances surrounding the case were not complicated but fairly straightforward. Next, the prosecutor did not trivialize the significance of the trial. During closing argument, he pointed out that, while more serious things may have been occurring in the criminal justice system on the day of the trial, it was a serious matter to both the People of the State of Michigan and to the defendant. Finally, the prosecutor did not instruct the jury to forget the testimony of defense witnesses, but merely asked them to utilize their common sense in considering the testimony. Therefore, the prosecutor did not commit misconduct by denigrating defense counsel.

Defendant also contends that the prosecutor inappropriately appealed to the sympathies of the jury during closing argument when he stated that it was fortunate that a morgue wagon did not arrive to take the complainant away. A prosecutor violates his responsibility to serve justice when he makes remarks calculated to inflame the passions of the jury. We review an allegation of an inappropriate remark in its context to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995); *People v Simon*, 174 Mich App 649, 654-655; 436 NW2d 695 (1989). Here, taking the prosecutor's statement in context, we conclude that the prosecutor was merely trying to point out to the jury the seriousness and significance of the crime. He was making the logical inference that, when a gun is involved in an altercation, someone may be killed. No prosecutorial misconduct occurred.

Defendant also asserts that the prosecutor committed prosecutorial misconduct by misstating facts not in evidence in making an analogy to an incident which happened in a world series baseball game. He also stated that the bullet found on defendant during his police station search was of the same manufacture as the bullets found in the nine millimeter weapon retrieved from the crime scene. We find no error. The prosecutor's baseball analogy was in direct response to defendant's theory that Officer Craig only imagined that he saw defendant with a gun. Comments by the prosecution intended to rebut a defense theory are not prosecutorial misconduct. Therefore, the prosecutor's rebuttal statement here was not inappropriate. *Bahoda, supra*, 448 Mich 266.

Finally, the prosecutor incorrectly stated that the bullet found by Officer Easton during the police station search of defendant was of the same manufacture as the ones found in the gun retrieved from the

porch on Fullerton. However, a miscarriage of justice did not occur, as the prejudicial effect of the comment could have been cured by a timely objection and curative instruction. *Stanaway, supra,* 446 Mich 687. Here, although there was no objection, immediately after closing arguments, the lower court instructed the jurors. It specifically admonished them that "[t]he lawyers statements and arguments are not evidence." Therefore, any prejudice caused by the prosecutor's statement could have been and, indeed, was cured by a timely instruction. The lower court did not abuse its discretion in denying defendant's motion requesting a new trial on these bases.

III

Defendant also argues that his conviction should be reversed because he received ineffective assistance of counsel. We review such a claim to determine if counsel's performance was deficient. We examine whether, under an objective standard of reasonableness, counsel made an error so serious that he or she was not functioning as an attorney, as guaranteed under the Sixth Amendment. *People v Reed,* 198 Mich App 639, 646; 499 NW2d 441 (1993), aff'd 449 Mich 375 (1995). We find no ineffective assistance of counsel here.

Defendant first states that counsel's failure to object to the prosecutor's inappropriate comments during trial was behavior below an objective standard of reasonableness under prevailing professional norms. As discussed above, the prosecutor did not improperly denigrate defense counsel, did not appeal to the jury's sympathies, and did not misstate facts not in evidence by referring to a baseball analogy. Counsel is not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). As an argument that the prosecutor had behaved improperly on these bases would have been fruitless, a claim of ineffective assistance of counsel is unwarranted.

Defendant also contends that counsel failed to oppose the admission into evidence at trial of the bullet found on defendant. Specifically, defendant argues that counsel should have objected to the lack of foundation for the bullet's admission, to the prosecutor's remark during closing argument that the bullet was of the same manufacture as the bullets found in the weapon retrieved from the porch at 2677 Fullerton, and to the discrepancies surrounding the evidence tag concerning the bullet.

Taking defendant's contentions in order, a review of the record illustrates that the prosecution laid an adequate foundation for the admission of the bullet through the testimony of Officer Easton. He testified as to how he found the bullet and the procedure he followed upon retrieving it from defendant. Therefore, having established the relevance of the proposed exhibit and the circumstances surrounding its discovery, the prosecutor laid a proper foundation for the admission of this evidence. Any objection by defense counsel would have been meritless.

Counsel should have objected to the prosecutor's statement during closing argument that the bullet was of the same manufacture as the bullets found in the gun. However, no evidence exists on the record to indicate that, if counsel had objected, the result of the proceedings would have been different. Without evidence of prejudice, ineffective assistance cannot be found. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Finally, there is no evidence on the record that discrepancies exist surrounding the evidence tag attached to the bullet retrieved from defendant. As the record is devoid of evidence that an objection would have produced different results, defendant's claim of ineffective assistance of counsel on this basis is meritless.

Defendant's final area of alleged ineffective assistance is that defense counsel erred by failing to move for a directed verdict at the close of the prosecution's case. A trial court grants a motion for a directed verdict only when no factual question exists after the testimony and all legitimate inferences from it have been reviewed in a light most favorable to the nonmoving party. *Garabedian v William Beaumont Hosp*, 208 Mich App 473, 475; 528 NW2d 809 (1995).

A motion by defense counsel for a directed verdict would have been frivolous here. The testimony of Officer Craig established evidence sufficient to demonstrate a prima facie case of carrying a concealed weapon. As counsel is not required to argue a frivolous motion, defendant's claim of ineffective assistance on this basis must fail. *Gist, supra*, 188 Mich App 613.

Affirmed.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress