

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KOSTANDINO J. PFEIFFER,

Defendant-Appellant.

UNPUBLISHED

April 25, 1997

No. 176763

Oakland Circuit Court

LC No. 94-130291

Before: McDonald, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of malicious destruction of a building over \$100, MCL 750.380; MSA 28.612, and malicious use of a telephone to threaten, MCL 750.540e(1)(a); MSA 28.808(5)(1)(a), and from his guilty plea to attempted breaking and entering with the intent to commit malicious destruction of a building over \$100, MCL 750.92; MSA 28.287; MCL 750.110; MSA 28.305. We affirm.

On appeal, defendant alleges three separate instances of prosecutorial misconduct. We review these issues on a case by case analysis to determine whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant first argues that the prosecutor improperly vouched for Goss' credibility. We disagree. A prosecutor may not vouch for the character of a witness or place the prestige of his office behind his witnesses. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). The record must be read as a whole, however, and the allegedly impermissible statements judged in the context in which they are made. *Id.*, 398-399.

We conclude that the prosecutor did not vouch for Goss' character when she asked him whether his statements to the police were true. The prosecutor asked Goss a non-leading question which could have been answered affirmatively or negatively. Goss testified at trial as to what he observed at Osborn's residence on the night in question and as to the contents of his statement to the police. The prosecutor did not vouch for the truthfulness of this testimony, nor did she place the prestige of her office behind it when she asked Goss if he was telling the truth.

In any case, a prompt admonishment to the jury regarding its role as factfinder cured any potential error. *McElhaney, supra*. The trial court sustained defense counsel's objection, and told the prosecutor that whether Goss said he told the truth was up to the jury to determine from the surrounding facts. Therefore, any potential error was cured by this comment to the prosecutor, which was made in the jury's presence.

Defendant next argues that the prosecutor improperly disparaged defense counsel by calling his argument preposterous and ridiculous. We disagree.

A prosecutor may properly respond to issues previously raised by defense counsel. *People v Modelski*, 164 Mich App 337, 348; 416 NW2d 708 (1987). However, a prosecutor must refrain from denigrating a defense counsel with intemperate and prejudicial remarks. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). A review of the prosecutor's remarks demonstrates that she properly responded to defense counsel's comments that the police laid a trap for defendant and called him to Novi to teach him a lesson. Defense counsel failed to object to the alleged misconduct, and we conclude that no miscarriage of justice would result from this Court's refusal to consider this unobjected-to comment because a cautionary instruction would have cured any impropriety in the remark. *People v Ullah*, 216 Mich App 669, 682; 550 NW2d 568 (1996). The trial court properly instructed the jury that the attorney's arguments were not evidence.

Defendant's final allegation of prosecutorial misconduct is that the prosecutor improperly appealed to the civic duty of the jury in her rebuttal closing argument. We disagree. Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *Bahoda, supra* at 282. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. However, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of the jury members. *Id.*, 282-283.

In the instant case, the prosecutor argued the evidence presented at trial, i.e., that defendant used foul language with the police and was unruly when arrested. Since prosecutors are accorded great latitude regarding their arguments and conduct, *Bahoda, supra*, we conclude that defendant was not denied a fair and impartial trial by these remarks because they were based on the evidence presented at trial.

Even if this Court were to find that the prosecutor injected an improper civic duty argument into her rebuttal closing argument, the trial court instructed the jury that the attorney's arguments were not evidence. Therefore, any impropriety was cured by this cautionary instruction. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Lastly, defendant argues that should this Court hold that his trial counsel's failure to object to all of the above allegations of prosecutorial misconduct waived his appellate rights, then he was denied the effective assistance of counsel. We disagree. Since defendant failed to move for a new trial or request an evidentiary hearing, our review is limited to the extent that trial counsel's claimed mistakes are apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Our review of the record demonstrates that defendant was not denied the effective assistance of counsel. We hold that defendant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). We conclude that defendant has failed to overcome the strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In the instant case, defense counsel's failure to object to all of the alleged instances of prosecutorial misconduct was not ineffective because we have concluded that none of the challenged remarks deprived defendant of a fair trial and because the lack of defense counsel's objections during the prosecutor's rebuttal closing argument may have been trial strategy. Since no evidentiary hearing was held to determine why defense counsel failed to object, and we have concluded that the prosecutor's remarks were proper, we hold that defendant has not overcome his burden that defense counsel's actions were not sound trial strategy. *Stanaway, supra*.

Affirmed.

/s/ Gary R. McDonald
/s/ Richard Allen Griffin
/s/ Richard A. Bandstra