

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEMUEL EDWARD JOSEPH,

Defendant-Appellant.

UNPUBLISHED

January 17, 2003

No. 235179

Kent Circuit Court

LC No. 00-008813-FH

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of assault with intent to rob while armed, MCL 750.89, assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to concurrent terms of ten to twenty years' imprisonment for the assault with intent to rob conviction and three to ten years' imprisonment for the assault with intent to commit great bodily harm conviction, to be served consecutively to a two-year prison term for the felony-firearm conviction. We affirm.

The trial took place in April 2001. Gregory Griffin, a Grand Rapids police officer, testified as follows: He received a report in early July, 2000, that someone had been shot three times. He interviewed the shooting victim, Winston May, several days after the shooting. May, who might have been under the influence of alcohol and marijuana at the time of the shooting, indicated that someone called "Joey"¹ had shot him, and he gave Griffin the name of the street on which defendant lived. May then chose defendant as the shooter from a photographic lineup. He indicated that the shooter had been wearing a black hooded sweatshirt at the time of the shooting. Defendant was arrested a month after the incident, and he denied knowing anything about it.

Defense counsel vigorously cross-examined Griffin, suggesting, among other things, that May's younger brother had had an altercation with defendant. Counsel implied that May had offered his brother as someone who could identify defendant as the shooter.² Griffin admitted to

¹ Apparently, "Joey" is defendant's nickname.

² Counsel was apparently trying to imply that defendant did not actually know who shot him but that May's brother, who had an adverse relationship with defendant, supplied him with the identification.

defense counsel that May told him the shooter's face had been covered with a cloth mask at the time of the shooting. Griffin testified that May could nonetheless recognize defendant as the shooter because he had seen defendant before the shooting, standing with a group of acquaintances.

Keith Hefner, another Grand Rapids police officer, testified that he was dispatched to a hospital on July 1, 2000, because someone had been brought in with three gunshot wounds. The shooting victim, May, had been shot in both knees and in the left foot. Hefner testified that he spoke to the individuals who had brought May to the hospital and that one of them, Darrell Brooks, described the shooter as wearing a cream-colored hat, a cream-colored denim shirt, and cream-colored denim pants. On cross-examination, Hefner admitted that Brooks (1) referred to someone by the name of "Joey" speaking with defendant before the shooting but (2) described another person, i.e., someone besides "Joey," as being the shooter. On redirect, the prosecutor suggested that Brooks' description of "Joey" and of the shooter were not in fact inconsistent with one another.

Hefner also admitted on cross-examination that Ron Robinson, who had also come to the hospital with May and who had observed the incident from the same place as Brooks (a porch), described the shooter as wearing a black baseball cap, a gray tee shirt, and black pants or shorts, a description differing from that provided by Brooks.

May testified as follows: He visited his cousin in Grand Rapids on July 1, 2000, for an impromptu get-together in the afternoon. At a certain point during the get-together, he went to his car, which was parked in the driveway of his cousin's house, to change the music, and he then saw defendant "come out the bushes, you know, with a mask and everything, with a gun. . . ." Before the shooting, he had seen defendant and a group of other people observing the get-together from an alley and giving him and his friends "dirty looks." He recognized defendant as "one of the kids that I have always seen in the neighborhood." When defendant jumped out of the bushes, he stated, "Give me all your money, give me everything you got, I'm not playing around with you," and he then shot May. Defendant was wearing a black and white handkerchief mask and a hooded black sweatshirt.

On cross-examination, May admitted that he had been smoking marijuana and drinking beer on the day in question. He claimed that he did not know anyone by the name of Darrell Brooks or Ron Robinson, but he admitted that two of his cousins, who were present during the shooting, had given these names (falsely) to the police. According to May, they gave false names because they had outstanding arrest warrants and did not want to be arrested. One of the cousins, Roy May ("Roy") knew defendant. May stated that he knew which street defendant lived on (and conveyed this information to the police) because he had seen defendant on the street "day after day." Defense counsel implied that May did not learn defendant's name or the name of defendant's street until he spoke with Roy, but May denied the implication. Counsel further implied that May did not even know who shot him until he heard rumors that defendant was the perpetrator. Defense counsel also elicited that at the preliminary examination, May had stated that he could not remember if the handkerchief mask covered the shooter's nose, whereas at trial, May testified that the handkerchief mask only covered the shooter's mouth.

On redirect, May testified that after the shooting, May's brother and Roy went looking for defendant to see "if he did do it" and that defendant pulled the same gun on them that he had

used to shoot May. On recross, defense counsel implied that Roy should not have needed to find out if defendant “did do it” because Roy was present at the time of the shooting and had earlier identified defendant as the shooter.

Steven LaBrecque, another Grand Rapids police officer, testified that he spoke with May on the day of the incident and that May did not specify defendant’s name or nickname at that time and did not mention that the shooter had been wearing a black hooded sweatshirt. LaBrecque also testified that May told him the shooter had held the weapon in his left hand.

Roy testified that he told the police on the night in question that his name was “Darrell Brooks.” He claimed that he gave a false name because he was afraid of retaliation from the shooter against his sister, who lived in the neighborhood where the shooting occurred. He testified that he saw the shooter during the shooting and had doubts at first about his identity but that later on the day of the incident, he saw defendant on a bicycle and asked him “to come here,” at which point defendant pulled “the gun out on” him. He did not report this incident to the police. On cross-examination, Roy admitted that he told Hefner the shooter was wearing cream-colored clothing. At trial, he testified that “he had on dark clothes.” He stated, “I told [Hefner] he had on some cream and he had on dark, he had on dark clothes.” He later stated that “it was like a dark shade of cream.” Roy stated that when defendant pointed the gun at him from the bicycle, he had on “[I] think a black hooded sweatshirt,” but Roy later stated he was not sure what defendant was wearing.

Defendant called one witness, Richard Peacock. Peacock testified that he was May’s cousin and that he gave the police the false name of “Ron Robinson” on the day of the shooting. He claimed that he gave the false name because a warrant for his arrest existed and he did not want to be arrested. He stated that he witnessed the shooting and that he was “pretty sure” at the time that defendant was the shooter. Peacock testified that he did not tell the police on the night in question that defendant was the shooter because they did not ask; instead, they merely asked for a *description* of the shooter, which he gave them. Peacock indicated that he realized at a later date (i.e., after speaking initially with the police) that the shooter had been wearing a black shirt. However, he claimed that when defendant was standing with the group of people in the alley before the shooting, defendant was wearing a gray tee shirt.

On appeal, defendant contends that the prosecutor committed several instances of misconduct requiring reversal. We review claims of prosecutorial misconduct on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We examine the prosecutor's remarks in context to decide if the comments deprived the defendant of a fair and impartial trial. *Id.* Moreover, “[a] prosecutor's comments must be considered in light of the defense arguments.” *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant first contends that the prosecutor improperly personally attacked defense counsel by suggesting that defense counsel was intentionally trying to mislead the jury. Defendant cites, among other things, the following statements made during the prosecutor’s rebuttal closing argument:

This is my favorite part of a trial, because Mr. Nunzio [defense counsel] doesn't get an opportunity to speak after me. And I say that in anger, because I do get angry when I see what's happening.

Ask yourself – Mr. Nunzio wants you to believe the witnesses are practicing deception. Ask yourself, who's practicing deception? Mr. Nunzio tells you right now, a few minutes ago, that this is a horrible thing that happened to Mr. May, a horrible thing. But a day or two ago when Mr. May was testifying, he calls him a drug dealer, okay?

If you call someone a drug dealer, what you're saying is they get what's coming to them, okay, that it's not a horrible thing that a drug dealer gets shot. Maybe it isn't a horrible thing. Who's deceiving who [sic]?

One minute it's, "Oh, it's so horrible that he got shot." The next minute it's, "You're a scumbag drug dealer. What are you even doing in front of this jury?" Who's deceiving who [sic]?

I don't know if you noticed this, but there came a point yesterday when a witness was testifying, and I think it was Mr. Peacock but I'm not sure. Do you remember Mr. Nunzio asked him some questions about, "Do you remember what hand the gun was in?" and I think he said, "Left hand." Five minutes later, who [referring to defendant] do you see writing on a note pad at the table with their right hand –

* * *

Ask yourself, did you see him take any notes before that incident and did you see him taking any notes since that time? Who's practicing deception?

* * *

Mr. Nunzio wants you to believe that they [the police] failed to do something. What they've done is protect the constitutional rights of [defendant], and they're getting blamed for doing that now.

Folks, you know he did this, okay? Mr. May got up here. Winston May got up here, and there's no doubt in his mind. He sleeps well at night knowing what he's just told you.

While defendant objected to the prosecutor's reference to defendant's note-taking by stating that "my client is allowed to write notes," and while defendant objected to another of the prosecutor's comments by stating that the prosecutor was improperly "commenting on a court ruling now," defendant did not object on the grounds he raises on appeal, i.e., that the prosecutor personally attacked defense counsel. Accordingly, defendant did not properly preserve this issue for appeal. See *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). We therefore review the issue under the plain error doctrine. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief, defendant must demonstrate the existence of a clear or

obvious error that likely affected the outcome of the case. *Id.*; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if defendant satisfies this initial burden, reversal is appropriate only if the plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763; *Schutte, supra* at 720. Moreover, “[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Schutte, supra* at 721.

Defendant’s contention that the prosecutor committed misconduct by questioning defense counsel’s veracity is correct. See *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984) (“[t]he prosecutor may not question defense counsel’s veracity”), and *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988) (it is improper for the prosecutor to suggest “that defense counsel was intentionally trying to mislead the jury”).³ Moreover, given the existence of this case law, the prosecutor’s error in doing so was clear or obvious. However, we cannot conclude on the facts of this case that the prosecutor’s comments affected the outcome of the proceedings. Indeed, the prosecutor may have even aided defendant’s case by pointing out that defendant wrote a note with his right hand, when earlier evidence indicated that the shooter shot using his left hand. Moreover, the trial court instructed the jury that “[t]he lawyers’ statements and arguments are not evidence” and that “you may only consider the evidence that has been properly admitted in this case.” These instructions lessened any prejudice resulting from the prosecutor’s statements.⁴ See *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). Moreover, any prejudicial effect of the prosecutor’s comments also could have been cured by a contemporaneous objection and curative instruction. *Schutte, supra* at 721. Under these circumstances, and given the eyewitness identification of defendant, we cannot conclude that defendant met the requirements for reversal under *Carines, supra* at 763.

Second, defendant contends that the prosecutor improperly commented on facts not in evidence by referring to defendant writing a note with his right hand. Once again, however, defendant did not object below to the prosecutor’s comment on the grounds he asserts on appeal, see *Maleski, supra* at 523, and we therefore we review this issue under the plain error doctrine. As noted in *People v Viaene*, 119 Mich App 690, 696-697; 326 NW2d 607 (1982), a “prosecutor may not make a statement of fact unsupported by the evidence. . . .” Here, no *admitted evidence* existed that defendant wrote a note with his right hand. Accordingly, the prosecutor did indeed err by referring to defendant’s note-writing. As discussed *supra*, however, we cannot conclude that the prosecutor’s statement affected the outcome of the trial. Accordingly, reversal is unwarranted. *Carines, supra* at 763.

Third, defendant contends that the prosecutor’s comment about defendant’s note-taking “violated the defendant’s constitutional right to remain silent.” Yet again, defendant did not object to the comment below on this basis, see *Maleski, supra* at 523, and plain error review is

³ We agree with defendant that the prosecutor’s comments cannot validly be characterized as a proper response to defense counsel’s arguments.

⁴ We note that jurors are presumed to follow the instructions of the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

thus appropriate. We once again agree that the prosecutor erred by referring to defendant's note-writing but conclude, as discussed *supra*, that reversal under *Carines* is not warranted.

Fourth, defendant contends that the prosecutor argued facts not in evidence by telling the jury that defense counsel had called May a drug dealer. Defendant did not object to the prosecutor's comment, so plain error review is appropriate. While cross-examining May, defense counsel asked him, "Were you flashing cash that day?" and "Were you involved in buying drugs that day?" As noted in *Viaene, supra* at 697, a prosecutor "may draw inferences for the jury from the facts of the case." Here, the prosecutor's statement that defense counsel "call[ed] May a drug dealer" was essentially a reasonable inference from defense counsel's questioning. Accordingly, defendant has not established a plain error with regard to this issue, and reversal is unwarranted. *Carines, supra* at 763.

Finally, defendant contends that the prosecutor erred in making the "drug dealer" comment and by stating that May "sleeps well at night knowing what he's just told you" because, as defendant states in his appellate brief, "the prosecutor use[d] th[ese] comment[s] to imply that defense counsel and the defense feels that the victim deserved getting shot thus invoking sympathy for Mr. May and infus[ing] prejudice against the defense and the defendant in particular." Appeals to the jury to sympathize with the victim constitute improper argument. *Wise, supra* at 104. Here, however, we cannot conclude that the comments were "blatant appeals to the jury's sympathy," and they were "were not so inflammatory that defendant was prejudiced." *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Further, the trial court instructed the jury not to be influenced by sympathy or prejudice. Under these circumstances, defendant has failed to show plain error that affected the outcome of the trial with respect to these unpreserved allegations of error. *Carines, supra* at 763.⁵

⁵ Defendant also suggests, without much elaboration, that the prosecutor erred by stating that "you know he [defendant] did this, okay?" Defendant cites no case law in making this suggestion, thereby waiving the issue for appeal. See *People v LaPorte*, 103 Mich App 444, 452; 303 NW2d 222 (1981). At any rate, we note that a prosecutor may argue facts that are supported by the evidence and all reasonable inferences arising from the evidence as they relate to his theory of the case, and prosecutors in general are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor was simply arguing from the evidence that defendant was guilty. He did not communicate that he had special knowledge that the witnesses were testifying truthfully or use the prestige of his office to urge a conviction. *Bahoda, supra* at 277, 286-287. Moreover, the trial court instructed the jury to consider only the evidence presented in the case in making its decision and informed the jurors that the attorneys' arguments were not evidence. Under the circumstances, no clear or obvious error occurred that likely affected the outcome of the case. *Carines, supra* at 763.

Affirmed.

/s/ Patrick M. Meter

/s/ Janet T. Neff

/s/ Pat M. Donofrio