

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENNIE MARCUS FRANKLIN,

Defendant-Appellant.

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UNPUBLISHED

March 13, 2003

No. 237196

Oakland Circuit Court

LC No. 01-176163-FH

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, second or subsequent offense, MCL 750.520f. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to ten to forty years' imprisonment. Defendant appeals as of right. We affirm.

Motion for Mistrial

Defendant argues that the trial court erred in denying his motion for mistrial. We disagree.

Defendant moved for a mistrial after some jurors witnessed an altercation between defendant and the complainant's father, Melvin Randolph. During a break in the trial, Randolph approached defendant and his wife in the hallway outside the courtroom. Randolph pushed defendant and swung at defendant but did not hit him. A detective intervened and attempted to separate Randolph and defendant. Randolph swung again and struck defendant's wife in the head. The complainant was also present when the incident occurred, and she was hysterical. Defendant was not behaving aggressively.<sup>1</sup>

When the trial court was apprised of the incident, the court asked the jurors whether they could disregard what they knew about the altercation, and all jurors indicated that they could.<sup>2</sup>

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<sup>1</sup> These facts were taken from the record which was made of the incident later during trial.

<sup>2</sup> The record indicates that all of the jurors were aware of the incident. Some of the jurors witnessed the incident and then told the other jurors about it.

The court was satisfied that the jurors would not hold the incident against defendant and would not consider it in deciding the case. The court instructed the jury regarding the altercation that defendant was not at fault in any way, and that defendant may have been the victim of an assault. The court denied defendant's motion for mistrial.

We review a trial court's ruling on a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). We review de novo a defendant's claim that he was denied his constitutional right to a fair trial. *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

Defendant's argument on appeal is based primarily on additional information about the altercation that was not made a part of the record during trial. Defendant relies on the police reports and the written statements of Randolph, defendant, defendant's wife, and other family members, which indicated that during the incident Randolph told defendant that the complainant was not lying. Defendant argues that Randolph's statement to defendant that the complainant was not lying effectively provided improper testimony to bolster the credibility of the complainant. Defendant argues that the irregularity was so significant that it denied defendant a fair trial. Defendant asks this Court to grant him a new trial, or in the alternative, to remand to allow him to make a complete record of the incident.

We conclude that defendant was not denied a fair trial. The trial court questioned the jurors about any prejudice that may have resulted from their knowledge of the altercation. The jurors indicated that they would not consider the incident in deciding the case. After reviewing the trial court's handling of the situation, we find no abuse of discretion in the court's denial of defendant's motion for mistrial. Further, we are not persuaded that the additional information regarding Randolph's words during the altercation would have changed the outcome of the motion for mistrial. The trial court was satisfied with the jurors' assurances that they could and would put aside any impression they might have improperly obtained from the incident in considering the case. The court instructed the jury to base its verdict only on the evidence and the court's instructions, and we find no basis to conclude that the jurors did not follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (A jury is presumed to follow the instructions given to it.).

### Prosecutorial Misconduct<sup>3</sup>

Defendant argues that instances of prosecutorial misconduct denied him a fair trial. Defendant failed to object at trial to the prosecutor's questions and arguments that defendant now challenges on appeal. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

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<sup>3</sup> We address together defendant's second and fourth issues raised in his appellate brief because both allege prosecutorial misconduct.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Schutte, supra* at 721 (citation omitted). Prosecutors "are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Id.*, citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant argues that the prosecutor improperly commented on LaTasha Wilkerson's assertion of her right to remain silent, and thereby insinuated that she refused to talk to police because the allegations against defendant were true. We disagree.

The prosecutor elicited testimony from LaTasha and the investigating officer that LaTasha's mother, defendant's wife, refused to allow the police to interview LaTasha. In closing argument, the prosecutor asked the jury to consider why LaTasha did not make a statement to police soon after the incident. Defendant maintains that the prosecutor improperly suggested that she did not allow the interview because LaTasha had knowledge of defendant's guilt. Contrary to defendant's argument on appeal, the prosecutor did not suggest that LaTasha exercised her right to remain silent. Rather, the prosecutor merely elicited testimony about the reason that LaTasha had not previously told police what she testified to in court. The fact that LaTasha's mother denied permission for LaTasha to speak with police was relevant to a determination of LaTasha's credibility and a proper subject of questioning and argument. We find no impropriety in the prosecutor's questions or argument.

Defendant next argues that the prosecutor shifted the burden of proof by asserting that LaTasha and Kanisha Bell had an obligation to go to the police with information about this case. We disagree.

Contrary to defendant's characterization, the prosecutor did not "admonish" Kanisha for not having taken some affirmative action once the complainant allegedly told Kanisha that defendant did not touch her. The record shows that the prosecutor asked Kanisha whom she told about the complainant's statement to her, and whether Kanisha had told the police or anyone in authority. The prosecutor did not ask why she did not come forward or suggest that she had an obligation to do so. In closing argument, the prosecutor's reference to the failure of Kanisha and LaTasha to provide information to the police called into question the witness' credibility; it did not shift the burden of proof. The prosecutor did not argue that defendant had an obligation to take affirmative steps to disprove the charges against him. We find no prosecutorial misconduct.

#### Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel. Defendant claims that his counsel was ineffective for failing to call two witnesses, Keon Seay and defendant's wife, Joanne Franklin. Defendant maintains that their testimonies would have established that during the time the offense was alleged to have been committed, defendant was in his bedroom with his wife.

Defendant did not move the trial court for a new trial or a *Ginther*<sup>4</sup> hearing. Defendant argues that remand is necessary to develop a record on this issue. This Court denied defendant's motion to remand this case for a *Ginther* hearing.<sup>5</sup> Therefore, our review of this issue is limited to errors apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

This Court will not reverse a conviction on the basis of ineffective assistance of counsel unless the defendant establishes that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). This Court will not second-guess counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The failure to call witnesses will only constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.*

Defendant has not shown that he received ineffective assistance of counsel. The decision whether to call witnesses is a matter of trial strategy. *Garza, supra* at 255. The record is devoid of any indication why defense counsel did not call Joanne and Keon to testify, or of the substance of their purported testimony. Defendant has not shown that the absence of their testimony deprived him of a substantial defense, nor are we persuaded of the need to remand this matter for an evidentiary hearing.<sup>6</sup>

Affirmed.

/s/ Patrick M. Meter  
/s/ Kathleen Jansen  
/s/ Michael J. Talbot

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<sup>4</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>5</sup> Defendant's motion before this Court to remand was denied because he failed to convince this Court of the necessity for a remand. *People v Franklin*, unpublished order of the Court of Appeals, entered July 2, 2002 (Docket No. 237196).

<sup>6</sup> We note that the information contained in the affidavits submitted with defendant's appellate brief would not have exculpated defendant. Keon stated that he was in the living room where the incident was alleged to have occurred, but he also stated that he fell asleep for about five minutes and then he left the residence for about thirty minutes. Joanne attested that she did not recall defendant getting up or going into the living room. Contrary to defendant's suggestion that Joanne was awake at the pertinent times, Joanne stated in her affidavit that she was "not sound asleep" and that after she got up and returned to bed, she "did not fall into a deep sleep."