

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO GARCIA-DORANTES,

Defendant-Appellant.

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UNPUBLISHED

October 23, 2003

No. 239306

Kent Circuit Court

LC No. 00-011664-FC

Before: Donofrio, P.J., Fort Hood and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.317, and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was involved in a fight where he stabbed two people and one death resulted. On appeal defendant argues he was denied a fair and impartial trial because the prosecutor made prejudicial statements, as well as underrepresentation of minorities in the prospective jury panel due to a computer glitch in the selection process. In a late filed standard 11 brief defendant argues he was denied the effective assistance of counsel. Defendant's substantive challenges fail because we find no error after reviewing the record. But, defendant also points out an error on his judgment of sentence. The prosecutor concedes the error and thus we remand for correction of defendant's judgment of sentence to properly reflect defendant's jail credit. We affirm and remand.

Defendant was involved in a fight in Grand Rapids during the early morning hours of October 22, 2000 where he fatally stabbed Jose Gomez and also stabbed Manuel Garcia. Defendant first argues that the prosecutor's comments at trial denied him of a fair trial. Specifically, defendant argues that the prosecutor referred to Gomez and Garcia as "victims" at least fifteen times during his opening statement and this was error because the characterization of Gomez and Garcia as victims was a factual question for the jury and prejudiced defendant. Defendant also points to the comment, "it certainly would be an insult to the life of Jose Gomez . . ." that the prosecutor made during closing argument as error. At trial, defense counsel objected to the latter comment but did not object during the prosecutor's opening statement.

A defendant must object to preserve a claim of prosecutorial misconduct for appellate review. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Because defendant did not object to the prosecutor's comments during his opening statement, this portion of the

issue is unpreserved. But, defendant did object to one of the prosecutor's comments in his closing argument and thus this specific argument is preserved for our review. *Id.*

Generally, prosecutorial misconduct is a constitutional claim, that this Court reviews de novo. *People v Pfaffle*, 246 Mich App 282, 288; 631 NW2d 162 (2001). This Court reviews unpreserved claims of prosecutorial misconduct for plain error; to find plain error, this Court must find that error occurred, and that such error was clear or obvious, and affected a defendant's substantial rights. *Schutte, supra*, 240 Mich App 720. Plain error warrants reversal only when it has resulted in the conviction of an innocent defendant, or when it has seriously affected the fairness, integrity, or public reputation of a judicial proceeding. *Id.* This court reviews claims of prosecutorial misconduct on a case by case basis, and must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

The prosecutor's statements must be considered as a whole and evaluated in light of defense arguments and the relationship they bear on the evidence admitted at trial. *People v Farnsley*, 94 Mich App 34, 36, 287 NW2d 361 (1979). Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may not mischaracterize the evidence. *Id.* A prosecutor may not make a statement of fact to a jury unless it is supported by the evidence presented. *Schutte, supra*, 240 Mich App 721. A prosecutor is empowered to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Id.*

Our review of the challenged comments in the prosecutor's opening statement in context reveals no reversible error. The court instructed the jury that the lawyers' arguments were not evidence. Any undue prejudice created by the prosecutor's statements would have been cured by a timely objection and a curative instruction. *Watson*, 245 Mich App 586. Regarding the prosecutor's statement in his closing argument, as noted by the trial court, the prosecutor was not required to phrase his arguments in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). This was an isolated comment and did not deprive defendant of a fair trial and impartial trial. *Bahoda, supra*, 448 Mich 266-267; *Truong (After Remand), supra*, 218 Mich App 336.

Defendant next argues that he was denied a fair trial because minorities were either excluded or underrepresented in the prospective jury panel. Defendant specifically argues that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community because of a computer "glitch" in the Kent County juror selection system. Defendant failed to preserve his challenges to the venire and the jury selection process because he did not object to the jury array before the jury was impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 465; 552 NW2d 493 (1996). Therefore, defendant forfeited appellate consideration of the issue. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Defendant's reliance on *Hubbard* is misplaced. In *Hubbard*, unlike this case, defense counsel made an objection to the jury array before the jury panel was sworn.

*Hubbard, supra* at 465. Here, defense counsel failed to object to the jury array or panel and thus any alleged error is forfeited.

Defendant also argues that this case should be remanded to the trial court because he was not given proper jail credit. The prosecution concedes that remand is proper and acknowledges in its brief on appeal that defendant's judgment of sentence incorrectly indicates that defendant's sentence began on October 22, 2001 rather than the date of defendant's arrest, October 22, 2000. We therefore remand this case to the trial court for the limited purpose of correcting defendant's judgment of sentence to correctly reflect defendant's jail credit toward his sentence.

In a late filed standard 11 brief, defendant argues that he was denied the effective assistance of counsel because counsel failed to request a suppression hearing and attempt to suppress defendant's statement to police on the basis of illegal arrest. This Court reviews de novo questions of constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to establish ineffective assistance of counsel, generally a defendant must show that trial counsel's performance did not meet an objective standard of reasonableness, that such performance affected the outcome of the trial, and that an outcome so affected was unfair. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that although there was a *Walker*<sup>1</sup> hearing in this case, defense counsel was inadequate because he never specifically argued that defendant's arrest was illegal and that defendant was illegally detained. What defendant does not mention in his brief is that although his counsel did not raise this issue at the *Walker* hearing, counsel raised the point during trial after hearing testimony from some of the police officers involved in defendant's arrest.

During the trial, defense counsel specifically argued that defendant's arrest was illegal because there was no probable cause to support it and that anything derived from the illegal arrest had to be excluded because it was exploitation of the illegality. The trial court stated that although this issue should have been raised in a pretrial motion, that it would be addressed during the trial outside the presence of the jury. The jury was excused, and the court heard testimony on the issue as well as extensive oral argument from defense counsel and the prosecutor. The trial court then decided that there was probable cause to support defendant's arrest and thus defendant's arrest as not illegal. Upon hearing the trial court's ruling, defense counsel again objected to it in order to preserve the record. Because defense counsel did raise this issue of illegal arrest before the trial court, albeit not during a pretrial motion, we find that defendant has not shown prejudice and that he was not denied the effective assistance of trial

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<sup>1</sup> *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

counsel.

Affirmed and remanded to the trial court for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Karen M. Fort Hood  
/s/ William D. Schuette