

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TONEY JAY SMITH,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2003

No. 242712

Montcalm Circuit Court

LC No. 02-000378-FH

Before: Cooper, P.J., and Markey and Meter, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction for perjury, MCL 750.422. He was sentenced to ten months in jail and placed on probation for two years. We affirm.

Kathy Nance moved to enforce the divorce judgment after her divorce from Vincent Smythe. At the hearing on the motion, defendant and Lenard Halfacre falsely testified that they had helped Smythe move some items, including a wooden cabinet, into Nance's truck.

Defendant first argues that he was denied the effective assistance of counsel because his attorney did not object to hearsay testimony from Nance's attorney regarding the enforcement proceedings, testimony indicating that the judge in the enforcement proceeding had found Smythe in contempt, and that Smythe had told Halfacre what to say at the enforcement hearing.

To prevail on this claim, defendant must show that counsel's performance fell below an objective standard of reasonableness, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Given the overwhelming evidence of defendant's guilt, we conclude that even if defendant could establish the other criteria, he cannot establish a reasonable probability that the verdict would have been different if counsel had objected to this testimony. Accordingly, he has failed to establish ineffective assistance of counsel.

Defendant next argues that the prosecutor impermissibly suggested to the jury that it was their civic duty to find defendant guilty in order to "make the system work." Defendant failed to preserve this issue by raising it at trial so that a curative instruction could have been given. Thus, reversal is warranted only for plain error, which exists when an actually innocent defendant is convicted or the error seriously affected the fairness, integrity, or public reputation of the judicial

proceedings. See *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 886 (2003). Although a prosecutor may not urge jurors to convict a defendant as part of their civic duty, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), the prosecutor's remarks in context indicate that he was not asserting that the jurors had a civic duty to convict. Rather, he was pointing out that perjury compromised the system. He was discussing the nature and effect of perjury. This was within the realm of permissible argument. See *Bahoda, supra*. There is no plain error.

Finally, defendant argues that the prosecutor impermissibly shifted the burden of proof to defendant when he compared reasonable doubt to a puzzle and suggested that reasonable doubt was satisfied even if some pieces were missing so long as there were enough pieces to figure out the picture. Defendant characterizes this as an assertion that the jury could convict even if they were not reasonably sure about how all the evidence fit together. But, the prosecutor indicated that the jurors needed enough pieces to understand what happened; his remarks did not insinuate that the jurors could convict if they were not reasonably sure. We find no error.

We affirm.

/s/ Jessica R. Cooper  
/s/ Jane E. Markey  
/s/ Patrick M. Meter