

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PERCY LEE WHITE, a/k/a MC WHITE,

Defendant-Appellant.

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UNPUBLISHED

April 13, 2004

No. 246021

Wayne Circuit Court

LC No. 01-010543-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 132 months to 20 years' imprisonment for the second-degree murder conviction, and to two years' imprisonment for the felony-firearm conviction, the two sentences to run consecutively. On appeal, defendant challenges the trial court's decision to admit rebuttal evidence, the trial court's suggestion that the medical examiner be recalled to the stand, remarks made by the prosecution in its closing argument, and finally argues that he was denied the effective assistance of counsel at trial. After reviewing the record we are not persuaded by any of defendant's arguments. We affirm.

Defendant first claims the trial court erred in suggesting that the medical examiner, who had previously testified during the prosecution's case-in-chief, be recalled to the witness stand after both parties rested. The court stated that either of the parties could recall the witness, or the court would. It is unclear whether defendant is arguing that the trial court abused its discretion in allowing testimony that was not proper rebuttal evidence, or that the court abused its discretion in making the suggestion that the medical examiner be recalled to the stand. Because defendant appears to be making both arguments we will address each of the arguments in turn.

"Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). "An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments 'were of

such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.” *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

With regard to the proper purposes and scope of rebuttal evidence, our Supreme Court has stated:

Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination . . . . [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [*Figures, supra*, 451 Mich 399 (internal quotation marks and citations omitted). See also *People v Griffin*, 235 Mich App 27, 38; 597 NW2d 176 (1999).]

The medical examiner testified during the prosecution’s case-in-chief that the fatal bullet entered the rear left side of the victim’s head. The medical examiner also stated that he found no indication a weapon had been fired at the victim’s head from close range. Defendant, who claimed the shooting was accidental, subsequently gave testimony directly contradicting the medical examiner’s testimony concerning the location of the entrance wound. On rebuttal, the medical examiner defined a “through and through gunshot wound” and explained the process of distinguishing the exit wound from the entrance wound. The medical examiner also repeated his earlier conclusion about the location of the entrance and exit wounds on the victim’s head and estimated the distance of the gun from the victim’s head when it was fired.

Our review of the record reveals that the medical examiner’s rebuttal testimony directly contradicted or disproved defendant’s version of the shooting, including defendant’s claim that the victim was close enough to actually grab the gun, and actually did grab it immediately before it discharged. Given that the medical examiner’s rebuttal testimony tended to directly contradict or disprove defendant’s version of the circumstances surrounding the gun’s discharge, and that it was responsive to a theory developed by the defendant, it was proper both in purpose and scope. *Figures, supra*, 451 Mich 399. It cannot reasonably be said that “an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made.” *Tate, supra*, 244 Mich App 559. Consequently, the trial court did not abuse its discretion in allowing the testimony.

Defendant also argues that the trial court “forced” the recall of the medical examiner as a rebuttal witness and this was an abuse of discretion. After reviewing the transcript, we disagree. Defendant mischaracterizes the trial court’s action as “forcing” the prosecution to call the witness. The court expressed a desire that the medical examiner testify, and said that a party could call the witness or it would. The prosecutor ultimately recalled the medical examiner to the stand.

MRE 614(a) provides: “The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.” MRE 614(b) further provides: “The court may interrogate witnesses, whether called by itself or by a party.” The trial court can, after both parties have rested, express a desire that a witness testify and then allow the prosecution to reopen the case and question the witness where there are conflicting versions of the testimony and the court does not know what to believe. *People v Betts*, 155 Mich App 478, 480-482; 400 NW2d 650 (1986).

In the case at bar, the court stated that there were multiple versions of what happened, and thought it would be helpful for the trier of fact to have the information it needed to decide the facts in the case. Plainly, the trial court could have called the medical examiner to the stand to clarify issues. MRE 614(a); MRE 614(b); *Betts, supra*. The only difference in what actually occurred at trial is that the court stated it wished to have a party recall the medical examiner, rather than recalling the witness itself. This is insignificant and is not an abuse of discretion.

Defendant next claims that remarks made by the prosecution in its closing argument were improper and denied him a fair trial. Since defendant did not object to these remarks at trial, he did not properly preserve the issue for appeal. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Consequently, we review this issue under the plain error doctrine. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). “To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings . . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” *Id.* at 763-764 (citations omitted).

While some of the remarks made by the prosecutor in his closing arguably constitute plain error, these brief remarks did not prejudice defendant, and therefore, reversal is not warranted. This Court “review[s] claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Id.* Prosecutors are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). “Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel.” *People v Duncan*, 402 Mich 1, 16 (Ryan, J.); 260 NW2d 58 (1977).

Defendant first contends the prosecutor attacked defense counsel while the prosecutor made his closing argument. After acknowledging that the medical examiner had testified that the victim had alcohol and cocaine in his system, the prosecutor stated that defense counsel, having no case, was just trying to get the jury “off track.” Since it appears that this comment was not made in response to defense counsel’s comments, this comment may have been improper.

*Watson, supra*, 245 Mich App 588-589. However, the trial court instructed the jury that it was to decide the case only on the evidence, and that closing arguments were not evidence. This instruction would lessen the impact of any improper comment by the prosecutor. See *People v Thomas*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 243817, issued 2/3/04), slip op, p 3; *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). It is also proper, in determining the effect of the prosecution’s misconduct, to consider the defendant’s failure to object, and the potential effect of a curative instruction. *Watson, supra*, 245 Mich App 593. Because defendant has not provided us with any evidence to the contrary, we will presume the jury followed the court’s instructions and decided the case based on the evidence alone.

We also note that the prosecutor’s comments at issue were brief. Given their brevity, it is unlikely they affected the outcome of the trial. See *People v Howard*, 226 Mich App 528, 545; 575 NW2d 16 (1997). We also recognize that there was ample evidence adduced at trial proving defendant killed the victim. The record shows defendant and the victim argued before the shooting and defendant had expressed an intent to kill the victim. Defendant had a gun and pointed it at the victim. A witness saw defendant shoot the victim. Defendant’s explanation of the shooting as accidental was in direct conflict with the forensic evidence. In light of the ample evidence that defendant committed the crime, the brevity of the prosecution’s comments, and the un rebutted presumption that the jury followed the court’s instructions and decided the case based on the evidence alone, defendant has not shown that the alleged error “resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Carines, supra*, 460 Mich 763. Consequently, reversal is not warranted.

Defendant next contends that the prosecutor vouched for witnesses. After asking why two of the witnesses would lie, the prosecutor stated as follows:

Why is [she] gonna say the defendant shot him in cold blood? For what? What cross does she have to bear with this defendant? He had, according to him he hadn’t done anything so why make up this lie on him? Why? It’s not plausible. It’s not reasonable. It didn’t happen. They didn’t make up a lie. They told the truth. They told you what they remembered from this incident.

“[A] prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecutor’s theory of the case.” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). However, “a prosecutor may not vouch for the credibility of his witness by implying that he has some special knowledge of their truthfulness. But a prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witness the jury believes.” *Thomas, supra*, slip op, p 3 (internal citations omitted).

Viewing the prosecutor’s comments in context, the comments were a proper argument from the evidence that the witnesses were credible, and were made in response to arguments raised in defendant’s closing. The prosecutor’s alleged vouching came immediately after he made statements to the effect that the witnesses had no motive to fabricate their testimony, and that one was in fact a friend of defendant. Defendant does not explain how these comments

indicate the prosecutor had some special knowledge of the witnesses' truthfulness, and the comments cannot reasonably be seen as indicating the prosecutor had some special knowledge regarding the witnesses' veracity. *Howard, supra*, 226 Mich App 548. We also find significant that the prosecution's comments at issue can also be seen as responding to defense counsel's closing, where defense counsel implied one of the witnesses was biased and the other's story was implausible. The fact the comments were made in response to defendant's closing is another indication they did not prejudice defendant. *Rodriguez, supra*, 251 Mich App 32. For these reasons we do not find improper vouching on this record.

Defendant also contends that several times during his argument the prosecutor set forth his personal belief in defendant's guilt. The prosecutor stated in closing: "I've proven to you beyond a reasonable doubt that this defendant committed first[-]degree murder premeditated on [the victim]." Viewing the prosecutor's argument in context, it was a proper argument on the evidence rather than an expression of a personal belief in defendant's guilt. See *People v Johnson*, 46 Mich App 212, 218; 207 NW2d 914 (1973). The prosecutor was merely expressing a belief that the evidence presented was sufficient to prove the matter in issue, and was not "implying he ha[d] some special knowledge of their truthfulness." *Thomas, supra*, slip op, p 3. Consequently, the prosecutor's statements were not improper. See also *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995).

Finally, defendant asserts that his trial counsel's failure to object to the allegedly improper remarks made by the prosecution constituted ineffective assistance of counsel and denied him a fair trial. "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In applying this test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because defendant has not established that any of the prosecutor's comments resulted in plain error, and defendant cannot meet his burden of showing that "there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different," defendant's argument that he was not afforded effective assistance at trial fails. *Effinger, supra*, 212 Mich App 69.

Affirmed.

/s/ Michael J. Talbot  
/s/ Janet T. Neff  
/s/ Pat M. Donofrio