

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID WARTLEY, JR.,

Defendant-Appellant.

UNPUBLISHED

April 20, 2006

No. 258816

Wayne Circuit Court

LC No. 04-006945-01

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, and one count each of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 15 to 25 years for each of the armed robbery convictions; two to five years for the felon-in-possession conviction; and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of the March 21, 2004, robbery of Larissa Hudson and Demeia Hubbard. The robbery took place in the parking lot outside of the shoe store where the two women worked as manager and assistant manager, while they were on their way to make a bank deposit on behalf of their employer. At trial, Hudson testified that she recognized defendant because she had seen him several times before the robbery. Several months after the robbery, Hudson and Hubbard each separately participated in a photographic lineup, and each identified defendant as the robber without hesitation. Defendant denied that he was the perpetrator. At trial, defendant's girlfriend testified as an alibi witness, claiming that defendant was with her in church, attending a baptism, at the time of the crime.

On appeal, defendant first argues that the prosecutor engaged in several instances of misconduct which denied him a fair trial. Because defendant did not preserve these issues by objecting at trial, the allegations of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). No error requiring reversal will be found if the prejudice from the challenged conduct could have been cured by a timely instruction. *Id.*

Defendant argues that the prosecutor made improper civic duty arguments during the closing argument: an improper civic duty argument plays on the fears or prejudices of the jury,

injects issues broader than the defendant's guilt, or calls upon the jury to suspend their powers of judgment. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999); *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Defendant challenges the prosecutor's statements to the jury that this matter was serious, that it needed to be treated seriously, and that, while defendant's life was in the balance, so were the lives of the victims. The prosecutor's reference to justice does not automatically constitute an improper civic duty argument. See *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991) (no error found where prosecutor told jury that "justice demands [a guilty verdict]"); *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004) (no error found where the prosecutor asked the jury to hold defendant accountable because the facts established guilt beyond a reasonable doubt). Viewed in context, the challenged remark was likewise not improper here.

Defendant next challenges as an improper civic duty argument the prosecutor's argument that defendant "thinks he doesn't have to go to work . . . he'll just go along and rob somebody," that he was "smug" about the robbery, that he preyed on vulnerable victims, and that the jury should send the message that this is unacceptable conduct. These arguments were not improper because in context, the prosecutor was asking the jury to hold defendant accountable because the evidence established his guilt. *Matuszak, supra*. Defendant may not appreciate the prosecutor's colorful language, but during the closing argument, "[e]motional language . . . is 'an important weapon in counsel's forensic arsenal.'" *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Here, the prosecutor argued for conviction based on the evidence and reasonable inferences, not the fears or prejudices of the jury, and we find no plain error.

Defendant next challenges the prosecutor's argument that defendant's alibi witness lied and that other potential alibi witnesses did not testify for him because they did not want to lie. Based on a review of this record, the comment on the demeanor of the alibi witness and the fact that her testimony was directly contradicted by the testimony of the victims support the prosecutor's argument that the witness was not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). We also conclude that the prosecutor's comments related to defendant's failure to produce other potential alibi witnesses were not improper. When a defendant advances an alternate theory at trial, such as an alibi, the prosecutor may comment on his failure to call corroborating witnesses or produce corroborating evidence. *People v Fields*, 450 Mich 94, 111-112; 538 NW2d 356 (1995). Defendant has failed to establish plain error here.

Defendant additionally argues that the prosecutor improperly appealed to the jury's sympathy during closing argument by referring to the victims' interest in seeing justice done and suggesting that defendant had attempted to detract from the evidence against him by placing the victims on trial. Appeals to the jury to sympathize with the victims may be improper, but here we do not find that the challenged comments were blatant appeals for sympathy or were so inflammatory that they prejudiced defendant. *Watson, supra* at 591.

Defendant argues that the prosecutor denied him a fair trial by suggesting that defense counsel was intentionally trying to mislead the jury. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury, but viewing the challenged remarks here in context, we find the prosecutor was commenting on the deficiencies in defendant's case, not suggesting intentional deception. See *Watson, supra* at 592; *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *Howard, supra* at 544-545.

Finally, defendant argues that the prosecutor denigrated him personally by referring to him as a “robbing machine” in her opening and closing statements. The context of these statements was that defendant completed the robbery while simultaneously conducting a conversation on his cellular phone, and the inference from that evidence is that defendant was therefore able to commit this crime without giving it much attention, as if in a robotic or machine-like way. The evidence supports the statements, and the prosecutor may “argue the evidence and all reasonable inferences.” *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). “Hard language” is not necessarily improper. *Ullah, supra* at 678. In context, the prosecutor’s remarks here were not improper.

We note that even if any of the above challenged comments had been improper, reversal would not now be required because a curative instruction could have cured any prejudice, *Crawford, supra*, and although defense counsel did not request such instruction, nonetheless the trial court instructed the jury that the lawyers’ arguments were not evidence to be considered in deciding the case. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant additionally argues that he was denied the effective assistance of counsel because trial counsel failed to object to the multiple instances of prosecutorial misconduct and failed to call corroborating alibi witnesses, who were identified and available. Our review of these claims is limited to errors apparent on the record because no *Ginther*¹ hearing was requested or held. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To prevail on an ineffective assistance of counsel claim, a defendant must prove “that counsel's representation prejudiced him so as to deprive him of a fair trial.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). This is a difficult threshold to cross, because the “Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.” *Id.* Defendant must also show “that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant has met neither burden in this case.

Defendant argues that if this Court concludes the alleged instances of prosecutorial misconduct could have been cured by timely objections and the consequent cautionary instructions at trial, defense counsel should be deemed ineffective. We find that even if defense counsel could or should have objected to some of the challenged comments, defendant has not demonstrated that the failure to object affected the outcome of the trial. The evidence against defendant was overwhelming: the crime occurred in daylight; the robber did not conceal his face; one of the victims recognized defendant; and both victims independently and without hesitation identified defendant as the robber. Moreover, the jury was instructed that it was to decide the case based on the evidence, and that the attorney’s arguments are not evidence. Defendant cannot meet his burden of establishing that counsel was ineffective for failing to object to the prosecutor’s arguments. *Stanaway, supra*.

¹ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

Defendant also argues that counsel was ineffective for failing to call other alibi witnesses. We disagree. At trial, defendant's girlfriend testified that several members of defendant's family were at church with herself and defendant at the time of the robbery. Defendant argues that defense counsel should have called other family members at trial to further support his alibi defense.² Decisions as to what evidence to present and which witnesses to call are matters of trial strategy, and this Court will not substitute its judgment for that of counsel with respect to such matters. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, trial counsel's decision to rely on only one alibi witness is presumed to be a matter of trial strategy, and on the record before us, it is not apparent that calling only one alibi witness was unsound strategy.³ Defendant has not established that other alibi witnesses would have testified and that their testimony would have strengthened his defense. We emphasize that it is defendant's responsibility to establish the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). We find that defendant has not met the weighty burden of establishing ineffective assistance of counsel.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

² Defendant's brief on appeal, filed in May of 2005, refers to attached affidavits of other alibi witnesses. We note that no affidavits were attached, but two affidavits were filed with the Court on November 23, 2005, one from defendant himself. One was dated November 17, 2005 and one November 18, 2005. These affidavits were not part of the record below and defendant did not move for remand or a *Ginther* hearing, so they are not properly before this Court now.

³ Multiple witnesses may contradict one another, some may be more or less credible, some may decline to testify, or counsel may have other reasons to decline to call a witness, for example where counsel lacks faith in a witness's veracity.