

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VALERIE DENISE YOUNG,

Defendant-Appellant.

UNPUBLISHED

April 27, 2006

No. 259438

Macomb Circuit Court

LC No. 04-000098-FH

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

PER CURIAM.

Defendant appeals as of right her jury trial conviction of assault with intent to do great bodily harm, MCL 750.84. Defendant was sentenced to two years' probation, with the last nine months to be served in the county jail. We reverse. The facts of this case clearly indicate a credibility contest between defendant and the alleged victim, and the inclusion of hearsay testimony of a police officer and the officer's testimony indicating confidence in the victim's credibility, and thus defendant's guilt, were therefore plain error. We note that this holding is limited to the facts of this case. Even given the plain error standard that we must apply, where a conviction rests almost solely on the weight given to improper testimony, reversal is mandated.

These proceedings arise out of an incident involving defendant and the purported victim, who lived together at the time of the incident and continued to see one another after the incident and during the trial, although their relationship involved a history of violent incidents¹. On December 27, 2003, both parties were drinking in the afternoon when they started to argue. The argument escalated, and he [victim] says she [defendant] left the room and came back with a knife, but handed it to him when asked. He says the argument continued and she then got a second knife, and when he tried to take that knife from her she stabbed him in the shoulder. Several hours later he went to the hospital where the wound was treated with two stitches. She says she got the knife because he threatened to hit her, and claims that she had reason to fear him

¹ Defense counsel in the opening statement mentioned several incidents of violence, three of which resulted in charges against defendant; one charge was dismissed and defendant was found not guilty in both other cases. Defense counsel also referred to incidents where victim was the aggressor, including one instance where the victim shot defendant with a BB gun.

because he had given her a black eye already, which wound was visible on the day in question. He says the black eye was caused in a Christmas day fight between defendant and her sisters.²

The dissent includes a significantly longer outline of facts and allegations than we do here, because it is apparent to the majority that the events of December 27 are known only to defendant and victim, and that at least one of them is therefore not telling the story accurately. However, it is also apparent to this Court that because there were no witnesses to the events and no dispositive physical evidence, no third party called at trial can do more than guess as to who was the aggressor, and because the trial was therefore a credibility contest, it ought to have been left to the trier of fact to hear the testimony of the two and draw conclusions without the added weight of a police officer's credibility assessment tipping the scales.

Defendant's arguments on appeal allege infringement of fourteenth amendment due process rights, prosecutorial misconduct, and incompetence of counsel. We agree.

Defense counsel failed to timely and specifically object to any of the allegedly improper conduct complained of on appeal, so our review is limited to a review for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). This Court will reverse the defendant's conviction if it is determined that, although defendant was actually innocent, the plain error caused her to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of her innocence. *Carines, supra* at 763; *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004).

I. Due Process and Fair Trial Rights

The due process guarantees of the fourteenth amendment and our state constitution ensure every defendant a fair trial, and while the trial court is impartial arbiter rather than advocate, the trial court ought nonetheless to correct errors that threaten to significantly impact those guarantees, even if the advocates fail to properly raise objection. Here defendant's substantial rights were prejudiced where the trial court allowed hearsay evidence and allowed a witness police officer to give an opinion directly related to defendant's credibility. Limited to the facts of this case, we find this plain error prevented a fair trial.

The victim was interviewed at the hospital by Officer Lake of the Warren Police Department.³ At trial Officer Lake testified as to the substance of that conversation. Defendant argues that the officer's statements improperly bolstered the victim's credibility because they confirmed the victim's prior statements about the events in question. The prosecutor argues the testimony was offered to provide a foundation for the continued investigation by the police into

² Defendant's father testified that on Christmas day defendant fought with her sisters and one of them hit her in the eye. Defendant's sisters were not called as witnesses.

³ According to the victim and defendant, the argument started at approximately 2:30 p.m. on December 27, 2003. Officer Lake interviewed the victim at the hospital at 4:45 a.m. on December 28, 2003.

the alleged stabbing. However we need not accept as true the mere assertion of proper purpose by the prosecutor; we conclude that the statements at issue here were hearsay not within any exception. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). We find that Officer Lake’s testimony included statements previously made by the victim offered to prove the truth of what the victim asserted. On these facts, we cannot see a valid non-hearsay purpose for the statements. We find that inclusion of this hearsay evidence was plain error because it directly weighed into the determination that the trier of fact had to make as to defendant’s credibility.

In addition to eliciting hearsay evidence, in the course of Officer Lake’s testimony the prosecutor asked: “At the time you were talking to Mr. Brandish did you come to any conclusion about what happened?”⁴ Officer Lake replied: “That he was the victim.” Several questions later, Officer Lake again stated “I would believe he was the victim.” Officer Lake compounded both this issue and the hearsay issue by adding that “another unit was dispatched over there and they came to the conclusion that she was the aggressor.” The prosecutor asserts in its brief on appeal that “[t]he import of this questioning was to explain the decision made between [Lake] and the other officers to place the defendant under arrest, nothing more.” It seems to this Court somewhat disingenuous reasoning to argue that the testimony was offered to support the officers’ decision to arrest defendant because they thought she was guilty, and at the same time to assert it was not offered to prove that the officer thought she was guilty.

The prosecutor argues that Officer Lake’s testimony as to the credibility of the victim was not improper because “[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” *People v Dewald*, 267 Mich App 365, 377; 705 NW2d 167 (2005), citing MRE 704. However Officer Lake was neither introduced nor qualified as an expert witness, so MRE 704 does not apply to his testimony. Furthermore, this is not just any witness opining as to an ultimate issue, he is a police officer stating that the victim is to be believed, and thereby implying that defendant is not, and that is not acceptable: “The prosecutor may not attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty.” *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

The prosecutor states in its brief on appeal that “[t]he defendant and the complainant were both present in the home, both testified that they argued, and both testified to the defendant picking up the knife. That, along with the objective evidence of the complainant’s stab wound in the shoulder, boiled down to the issue of who’s [sic] version the jury chose to believe.” And that is exactly the problem. The prosecutor asserts that the officer’s testimony was “merely cumulative and if error, was harmless.” We disagree and find that the officer’s testimony was the tipping point in this credibility contest, and we so find for exactly the reasons the prosecutor has so neatly laid out: the jury had to choose whom to believe, and having the officer so explicitly state that the victim is the credible party necessarily put defendant at an unfair disadvantage, which on these facts is plain enough error to warrant reversal.

⁴ Officer Lake testified that he only spoke with the victim for “ten to 15 minutes.”

II. Prosecutorial Misconduct

Defendant alleges prosecutorial misconduct based on three issues: the prosecutor's questioning of Officer Lake eliciting hearsay evidence, the questions eliciting an opinion on defendant's guilt, and the prosecutor's closing argument statements about defense counsel's credibility.

A defendant asserting prosecutorial misconduct faces a difficult burden, because in general the standard requires a showing of bad faith: "The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). However, the second half of that standard clarifies the level of conduct that prosecutors are held to, a standard that requires they consider the rights of the defendant and the integrity of the process as well as their own trial strategy. "The law is clear that a prosecutor's fundamental obligation is to seek justice, not merely to convict." *People v Pfaffle*, 246 Mich App 282, 632 NW2d 162 (2001) (citing *People v O'Quinn*, 185 Mich App 40, 43; 460 NW2d 264 (1990); relying on Comment following MRPC 3.8 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.")). Here the hearsay evidence introduced by the prosecutor did prejudice the defendant. We note that this finding is limited to these facts, where the prosecutor improperly influenced this clear cut he-said/she-said situation.

Defendant also argues it was misconduct for the prosecutor to elicit testimony from Officer Lake that defendant, rather than the victim, was the aggressor. The prosecutor's questions as to whether Officer Lake had "come to any conclusion about what happened," eliciting the response that the defendant was the aggressor, were clearly inappropriate. Because the jury's determination as to whether victim or defendant was the aggressor was outcome determinative here, the questions rise to the level of prosecutorial misconduct.

Defendant next contends that the prosecutor committed misconduct during her closing argument by indicating 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." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). While the prosecutor's argument that defense counsel's strategy was "tricks," "magic," and "smoke and mirrors," nears the line of inappropriate, this aggressive trial strategy does not cross that line. This Court has before rejected the contention that a prosecutor's statement that defense counsel's argument is "smoke and mirrors" amounts to prosecutorial misconduct. *People v Rodriguez*, 251 Mich App 10, 40; 650 NW2d 96 (2002).

III. Ineffective Assistance of Counsel

Defendant next argues that she was denied the effective assistance of counsel. We agree as to one of the claimed errors. Defendant failed to move for a new trial or a hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); therefore, this Court is limited to review facts contained in the lower court record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error, and its constitutional determinations de novo. *Id.*

To successfully claim ineffective assistance of counsel, 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 contends that she was denied the effective assistance of counsel because defense counsel failed to object to the admission of Officer Lake’s testimony. In light of our findings above, this failure to object rises to the level of ineffective assistance. Officer Lake’s testimony, including both the hearsay evidence bolstering the victim’s credibility and his outright statement that he believed the victim, was outcome determinative. We find that where, as here, the single dispositive issue is which party the trier of fact believes, counsel’s failure to object to testimony directly addressing the credibility question cannot be attributed to any reasonable trial strategy. See *Garza, supra* at 255. Accordingly, defendant has met the high threshold for ineffective assistance of counsel.

Defendant also argues that she was denied the effective assistance of counsel because defense counsel failed to object during the prosecutor’s closing argument. However, defense counsel is not required to advocate a meritless position or raise a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Again, as discussed above, because the prosecutor’s closing argument was proper, defense counsel was not ineffective for failing to raise an objection.

Defendant next argues that she was denied the effective assistance of counsel because defense counsel questioned her regarding her prior conviction during direct-examination. A review of the lower court record reveals that it is unclear what charge, if any, defendant was previously convicted of. However, decisions concerning what questions to ask are presumed to be matters of trial strategy. *People v Rockety*, 237 Mich App 74, 76; 601 NW2d 887 (1999). And defense counsel’s introduction of defendant’s prior criminal history may constitute a matter of trial strategy.⁵ *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990), mod on other grounds 190 Mich App 707; 476 NW2d 500 (1991). Thus, we conclude that, on the record presented, defendant has failed to overcome the presumption that defense counsel’s questions regarding her prior conviction were trial strategy.

Finally, defendant argues that the cumulative effect of errors requires that she be granted a new trial. Given our findings above as to the claims of prosecutorial misconduct, ineffective assistance of counsel, and due process violations, we agree that the cumulative effect of the errors requires a new trial. We hold that in the limited circumstances where the outcome of a criminal trial rests solely on whom the trier of fact believes as between the purported victim and

⁵ The victim had testified already that he did not want these charges brought against defendant because he “didn’t want her going to jail again.” Given that statement, it was arguably reasonable trial strategy for defense counsel to ask about defendant’s prior convictions.

the defendant, allowing a police officer who was not a witness to the actual events in question to testify as to which party is more credible is plain error.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Mark J. Cavanagh