

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SOLIVAN FRANCISCO SOLIVAN,

Defendant-Appellant.

UNPUBLISHED

September 23, 2008

No. 277829

Kent Circuit Court

LC No. 06-000219-FC

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his February 22, 2007, jury trial convictions for armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.529(c); possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. On April 9, 2007, defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 23 to 75 years' imprisonment for the armed robbery conviction, 10 to 20 years' imprisonment for the conspiracy to commit armed robbery conviction, two years' imprisonment for the felony-firearm conviction, and 365 days' imprisonment for the felon in possession of a firearm during the commission of a felony conviction. We affirm.

This matter arises out of the robbery of the Super Mercado Latino Store on 957 Davis in Grand Rapids. Juana Hernandez testified that on November 29, 2005 she was working at the store, with her three year old son in her care, when two men entered the store. According to Hernandez, the smaller of the two men remained at the door while the other pointed a gun at her, pushed her, kicked her, and repeatedly demanded money. Hernandez testified that she gave the gunman the money from the cash register and prepaid phone cards that were in a duffel bag at the store. Hernandez described the man with the gun as tall with shoulder-length braids in his hair, although her description of his complexion varied from a "light-skinned black man" to "yellow." Hernandez was seven months pregnant at the time of the robbery.

Martin Harris testified that he, defendant, and another individual drove to the store with the intention of robbing it. Harris testified that he obtained a gun for defendant to use during the robbery and that he stayed in a van that was parked nearby while the robbery occurred. After the robbery, the men proceeded to another store where Harris and defendant sold the prepaid telephone cards obtained during the robbery. Harris testified that he entered into a plea bargain for his role in the crime wherein he agreed to testify against defendant at trial. The surveillance

videotape of the store and the tape recording of Hernandez's telephone call to 911 were played for the jury.

Defendant first claims that he received ineffective assistance of counsel in violation of his Sixth Amendment Rights under the United States Constitution. US Const, Am VI. Defendant claims he is entitled to a presumption of prejudice because the fact that his trial counsel only met with him twice before trial amounted to a complete deprivation of counsel. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *United States v Cronin*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). This argument has no merit. The record reflects that, even if trial counsel only met with defendant twice before trial, defendant's trial counsel was involved in his case at various phases of the pretrial process, and was actively involved in defending defendant at trial. Defendant presented no allegations or evidence that his two meetings with counsel were inadequate or of short duration, or what benefit defendant's case would have had with additional meetings. Defendant was not completely deprived of counsel, and thus, was not entitled to a presumption of prejudice.

Defendant alternatively argues that under *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984), he was prejudiced by several errors committed by his trial counsel. Generally, in order to warrant reversal based on a claim of ineffective assistance of counsel, defendant must demonstrate that his counsel's "performance was deficient" by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). Defendant must also demonstrate that counsel's performance prejudiced the defense, meaning that counsel's errors were so serious they deprived defendant of a fair trial. *Id.* In making this showing, defendant must overcome the presumption that the challenged actions were trial strategy, and he must show that there is a reasonable probability that the result would have been different in the absence of counsel's errors. *Id.* at 6. In addition, defendant bears the "burden of establishing the factual predicate for his claim of ineffective assistance of counsel." *Id.*

Defendant first argues that counsel was ineffective because his preliminary examination was waived. However, defendant signed this waiver, he does not indicate what additional evidence defense counsel would have uncovered if a preliminary examination was held, and he fails to demonstrate that the waiver resulted in prejudice to his case. He has not demonstrated that counsel was ineffective with respect to the preliminary examination.

Defendant further asserts that defense counsel erred in failing to object to the introduction of the tape recording of the victim's emergency telephone call as prejudicial and cumulative. The telephone call may have elicited an emotional response from the jury. However, it was not so prejudicial to defendant that it required exclusion as it was highly relevant to the victim's description of the robbery and the robbers. *People v Slaton*, 135 Mich App 328, 333-334; 354 NW2d 326 (1984); MRE 403. Such an objection, then, would have been futile, and counsel is not required to raise a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Moreover, given that it highlighted the victim's varying descriptions, defense counsel's failure to object could have been a matter of sound trial strategy. This Court will "not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Lastly, defendant argues that trial counsel's failure to object to allegedly improper statements made by the prosecution constitutes ineffective assistance of counsel. However, as will be discussed below, defendant has failed to establish that any of the prosecutor's comments resulted in plain error. Defendant cannot show that there is a reasonable probability that, but for the failure to object, the result of the trial would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). And, again, defendant's counsel "is not required to advocate a meritless position." *Snider* at 425.

Defendant's next claim of error is that the trial court's instructions to the jury on the meaning of reasonable doubt constituted structural error requiring automatic reversal, or, at the very least, constituted unpreserved plain error requiring reversal. We disagree.

Jury instructions are reviewed, de novo, in their entirety when examined for error. *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). This Court will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Defendant bears the burden of establishing the claimed error. *People v Bartlett*, 231 Mich App 139, 144; 585 NW2d 341 (1998).

Constitutional error, such as that claimed here, must be classified as either structural or nonstructural. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). An example of a structural error is a defective instruction on reasonable doubt. *Id.* If the error is structural, reversal is automatic. *People v Anderson (After Remand)*, 446 Mich 392, 404-405; 521 NW2d 538 (1994). If the constitutional error is not structural, it is subject to the harmless beyond a reasonable doubt test. *Id.*

A reasonable doubt instruction, read in its entirety, "must leave no doubt in the mind of the reviewing court that the jury understood the burden which was placed upon the prosecution and what constituted a reasonable doubt" in order to pass scrutiny. *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). The given definition "may not shift the burden of proof by requiring the jurors to have a reason to doubt the defendant's guilt." *Id.* Instead, it "must convey to the jurors that a reasonable doubt is an honest doubt based upon reason." *Id.* Reasonable doubt "is a state of mind that would cause the jurors to hesitate when acting in the graver and more important affairs of life." *Id.*

In *Jackson*, "the trial court characterized reasonable doubt as a doubt that is founded in reason, that arises from the evidence or from a lack thereof and that is not based on a 'funny feeling' in the pit of the stomach or on sympathy, prejudice or bias." *Id.* at 391-392. This Court concluded that the definition did not shift the burden of proof by requiring the jurors to have a reason to doubt defendant's guilt, and upheld the given instructions. *Id.* at 392. Similarly, in *People v Nickson*, 120 Mich App 681, 688; 327 NW2d 333 (1982), the trial court's instruction that a reasonable doubt was "an honest doubt based upon reason" and was comparable to "a state of mind which would cause [the jurors] to hesitate in making an important decision" was also upheld.

Here, the trial court explained the concept of reasonable doubt at length, and made an analogy to chicken soup. The analogy was used to reinforce the idea that the jury should consider all of the evidence as a whole, instead of piecemeal. In addition, the trial court explained that reasonable doubt required more than a “probably” but less than a “certainty” or 100 percent. It cautioned the jury to consider the evidence “carefully, as if you were making one of the most important decisions in your own life, and as[k] Am I firmly convinced.” The trial court again reiterated, “Just decide whether the evidence leaves you, like I said, firmly convinced,” and “ask yourself, collectively, does it leave me firmly convinced, after very careful consideration, of these elements we’re going to talk about, or does it leave you less than firmly convinced, in which instance, then things haven’t been proven adequately.”

Viewing the instruction as a whole, we conclude that the trial court’s instruction on reasonable doubt did not constitute structural error requiring automatic reversal because it was not misleading. In addition, the instruction did not amount to plain error affecting defendant’s substantial rights. *Allen, supra* at 89-90.

Defendant’s third issue on appeal is that the trial court improperly enhanced his sentence based on facts not found by the jury in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). However, as defendant concedes, in *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006), our Supreme Court held that the rule of *Blakely* does not apply to Michigan’s legislative sentencing guidelines. There is thus no merit to defendant’s argument on this issue.

Defendant next claims that several instances of prosecutorial misconduct, to which no objection was made during trial, resulted in plain error affecting defendant’s substantial rights. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Allegations of prosecutorial misconduct are examined on a case-by-case basis, viewing the prosecution’s statements in context, including defendant’s arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Generally, prosecutors have great latitude in their arguments and conduct during trial. *Unger, supra* at 236. “They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *Id.* In addition, if a curative instruction would have alleviated the prejudicial effect of an improper statement by the prosecutor, this Court is precluded from finding error requiring reversal. *Id.* at 234-235.

Defendant first asserts that the prosecution impermissibly vouched for the truthfulness of its witness, Harris. The prosecution is not permitted to vouch for the credibility of a witness by implying that he has special knowledge that the witness is giving truthful testimony. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, the prosecution is allowed to argue, based on the facts placed into evidence, that a witness is worthy of belief. *Thomas, supra* at 455. Prosecutors are not required to “state inferences and conclusions in the blandest possible terms.” *Unger, supra* at 239.

Defendant specifically objects to statements made during the prosecutions opening and closing arguments regarding Harris’s plea bargain, stating, “[s]o yes, we cut a deal with the getaway driver to get to the person who had a gun.” Further, “[t]here’s all these reasons that have nothing to do with [Harris] not snitching out a friend. The requirement is clear: truthful testimony. That’s what he needed to do.” First, admission of a plea agreement such as the one

in this case does not amount to error unless the prosecution uses the agreement to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. *Bahoda, supra*, at 276.

Second, examined in context, these statements were made in reference to defendant's argument that Harris's plea deal implied that Harris refused to testify against Hercules-Lopez because he was his "cohort." In fact, Harris offered to testify against Hercules-Lopez, but the prosecution decided not to have him testify because of a potential conflict of interest it might create, because Hercules-Lopez confessed, negating the necessity for Harris's testimony, and because the prosecution did not want to offer Harris a better plea deal than it already had. Although the prosecution stated that the deal required Harris to give truthful testimony, this was in counterpoint to defendant's argument that Harris' testimony would be untruthful. Thus, we find that the prosecution did not impermissibly vouch for Harris's credibility.

Finally, Harris testified regarding the terms of the plea agreement, so the prosecution did not impermissibly argue facts not in evidence. Where a witness testifies as part of a plea agreement requiring truthful testimony, this does not constitute the prosecution impermissibly expressing his personal opinion that the witness is being truthful. *Id.*

Defendant also argues that the prosecution denigrated defendant in his closing argument by insinuating that defendant tried to mislead the jury by twisting the meaning of the plea agreement. The prosecution "must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal." *Bahoda, supra* at 283.

In the prosecution's rebuttal closing argument, it clarified that Harris offered to testify against Hercules-Lopez, but the prosecution decided against this because Hercules-Lopez confessed and the prosecutor did not want to give Harris a better deal than he already received. He stated, "[t]hat's what's confirmed in the letter, not the twisting of it that you heard from the defense counsel." The statement, made in the prosecution's rebuttal closing argument, followed defense counsel's argument that Harris "may have fooled the police department," but not to "let him fool you about how he was involved." Defense counsel further argued:

Can you imagine coming down to a police department claiming I'm just turning myself in for some robberies, in the plural, when talking about the FBI and the police departments? And then, twice being questioned, saying I didn't do anything wrong. You ain't got nothing on me. And then, coming down to check out what they have, and then, hearing more than 21 times what to say in order to help himself out. And the deal was clear. And I submit to you he would sell out anybody to get the deal that he did.

Examined in the context of the plea bargain agreement and defense counsel's argument that Harris was lying in order to strike a deal and to protect his alleged cohort, Hercules-Lopez, we find that the prosecution's remarks did not constitute misconduct. Moreover, even if we agreed with defendant that the prosecution's comments were improper, defendant has failed to show that there was plain error affecting his substantial rights. The trial court instructed the jury at the end of the trial not to consider the attorneys' closing arguments as evidence, and jurors are presumed to follow the instructions. *People v Knapp*, 244 Mich App 361, 382-383; 624 NW2d

227 (2001). Error will not be found where a curative instruction could have rectified any prejudice resulting from the statements, *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005), and we find that the trial court's instruction cured any prejudice.

Defendant next argues that the prosecution appealed to the jury's sympathy during his closing argument when he stated, "[Defendant] terrorized Juana Hernandez and her child to get some money. And when enough money wasn't there, or he wanted more for whatever reason, he said give me more. Give me more. . . ." Although the prosecution is not permitted to appeal to the jury's sympathy regarding the victim, the prosecution is not required to couch his arguments in the blandest terms possible. *Unger, supra* at 236-239. The prosecution's description of Hernandez's testimony at trial closely reflected Hernandez's actual testimony regarding defendant's behavior in the Super Mercado. Further, this comment alone does not amount to plain error affecting defendant's substantial rights. *Thomas, supra* at 454.

Defendant next asserts that the prosecution elicited speculative answers when he asked Harris what drugs defendant appeared to be high on. Defense counsel objected to this question, but then withdrew his objection when the trial court explained that any answer would not require speculation because "people who are involved with the drugs know how they operate, and we're all experts in one regard or another." Defendant also argues that the trial court's ruling was an abuse of discretion. However, defendant fails to cite authority in support of its argument that the question called for a speculative answer, and therefore, he abandoned this issue. *Martin, supra* at 315. In addition, Harris testified that he met defendant because of drug transactions; thus, it was not an abuse of discretion for the trial court to rule that Harris was not speculating when he testified as to his observations of defendant.

Defendant also maintains that the prosecution failed to present evidence at trial regarding statements he made about defendant's drug use during the opening statement. However, the police officer who interviewed defendant after his arrest testified that defendant appeared to be high on drugs during his interview with the police. In addition, Harris testified that he met defendant through drug transactions. The prosecution's comments during his opening statement were supported by the testimony of Harris and the officer.

Defendant further argues that the prosecution's questions regarding the gun used, and Harris's response to the questions, were impermissibly broad. Specifically, the prosecution asked:

- Q. How – how had a gun been discussed between the two of you prior to November 29th?
- A. 'Cuz he stated to me that the last time he did some, when he got the weed from this guy, he didn't, you know, he just broke into the place or whatever. But, he said to get this, he goin' need a gun to make sure everythin' go right. So, I was like all right.

Before this exchange, Harris testified that defendant asked him for a gun on the day of the robbery. Defendant argues the question and answer was "broader than guilt or innocence," and thus prejudicial. However, defendant was charged with armed robbery, which involves the use of a weapon, and Harris's testimony related directly to that issue. Moreover, defendant's

citation to authority, *Bahoda, supra* at 266, does not support his argument, where it refers to the injection of racial or ethnic remarks by the prosecution into the trial. *Id.*

We further find that the testimony of Hernandez's mother-in-law, Maria Pena, who was the first person Hernandez called after the robbery, and the first person to arrive on the scene, was not prejudicial or cumulative as argued by defendant on appeal.

Defendant failed to object during the trial that the trial court was improperly admitting cumulative evidence. Unpreserved evidentiary rulings are reviewed for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Pena testified as to Hernandez's emotional state immediately after the robbery, and also that Hernandez's three-year-old son told Pena "there was a bad guy that had hit his mom." This testimony was relevant and admissible. It was not cumulative, and there was no plain error requiring reversal.

Defendant next argues that the trial court abused its discretion in allowing Hernandez to testify as to what she would have done if the robber had no gun, and in allowing the prosecution to pose a slightly leading question because of Hernandez's language barrier. We disagree.

The trial court abuses its discretion when the outcome falls outside of the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Reversal because of an erroneous evidentiary ruling is only required if the error resulted in prejudice. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). We find no abuse of discretion with respect to either of defendant's assertions.

Hernandez was not asked to speculate regarding a matter about which she had no personal knowledge, MRE 602, such as if the prosecution would have asked her what another person would have done, or what defendant would have done, in a particular situation, or questioned her about something that she did not observe. And, more importantly, Hernandez did not answer the question.

In addition, the trial court also did not abuse its discretion in allowing the allegedly leading question: "How would you describe the racial or physical characteristics that you were talking about with [defense counsel] of that person in the picture?" As defendant recognizes, the trial court permitted the leading question because of Hernandez's limited ability to speak and understand English. "The decision whether to permit leading questions is within the discretion of the trial court." *People v Maghzal*, 170 Mich App 340, 348; 427 NW2d 552 (1988). As in *Maghzal*, where the witness had "some difficulty with the English language," the trial court did not abuse its discretion in permitting the leading question because of the witness's "significant language barrier." *Id.*

Finally, defendant argues that the cumulative errors during his trial constituted a denial of his right to a fair trial. If the cumulative effect of errors during trial deprived defendant of a fair trial, reversal is warranted. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). While combined errors can amount to a constitutional violation, errors must first be found to exist before defendant's claim that their cumulative effect deprived defendant of a fair trial can be successful. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). In

this case, there were no errors which could cumulatively support an ineffective assistance of counsel claim.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto