

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALPHONSO LAMONT VANN,

Defendant-Appellant.

UNPUBLISHED

September 29, 2009

No. 284714

Macomb Circuit Court

LC No. 2007-003750-FC

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant Alphonso Vann appeals as of right from his jury convictions of assault with intent to murder,¹ receiving or concealing a stolen firearm,² felonious assault,³ felon in possession of a firearm,⁴ and possession of a firearm during the commission of a felony, second offense.⁵ We affirm.

I. Basic Facts And Procedural History

Complainant Jennifer Lesosky and Vann began a romantic relationship in early 2007. On June 9, 2007, Vann visited Lesosky at her place of employment. Lesosky alleged that, after she and Vann argued, Vann displayed a gun and threatened her.

Lesosky stated that she drove home to find Vann standing in her kitchen speaking on her cell phone to someone she believed to be Robert Wilson, her sister's boyfriend. Lesosky testified that Vann, while still on the phone, said, "I will kill this bitch right now," and then fired a shot at her and left her home. Later, Lesosky was driving and encountered Vann. Lesosky testified that Vann entered her car, put the gun to her head, and told her to drive while

¹ MCL 750.83.

² MCL 750.535b.

³ MCL 750.82.

⁴ MCL 750.224f.

⁵ MCL 750.227b.

threatening to kill her again. Vann had Lesosky drive to an apartment complex, where she parked the car. An occupant of the apartment complex testified that she looked out her window to see Vann pointing a gun at Lesosky while they were sitting inside the car. This witness then called police.

The police recovered the handgun, which was loaded. The police recovered a fired bullet and a spent shell casing from Lesosky's home. The spent shell casing found at the home matched the caliber and brand of ammunition found in Vann's handgun.

Robert Wilson, the sole defense witness, testified that he spoke with Lesosky by phone several times on the day of the incident and that only when Lesosky was driving did she sound agitated, as if she had been arguing with someone. Wilson testified that he did not hear anything during the phone calls that indicated that Vann had either threatened or tried to harm Lesosky. Wilson denied hearing any gunshots while on the phone with Lesosky and denied talking to Vann while Vann was at Lesosky's home or while he was in her car. Wilson testified that he was in jail and that he had some concern about testifying in this case. He testified that he told police that he heard a man making hostile statements when he spoke to Lesosky while she was at her home, but Wilson denied that the voice he heard was that of Vann. Upon being confronted with a written statement he previously gave the police, Wilson admitted that he had written that he had called Lesosky "on her cell phone and a man answered. There were threats being made and the tone was hostile."

The prosecutor stated in his closing argument:

"[Ms. Lesosky] went home on June 9th and found [Vann] talking on the phone. Do you remember she said she didn't even have a phone? That night when she was on her way home. [Vann] took it with him. She got home and he was there. He was pissed. He said he was talking to her. She said he was talking to Mr. Wilson. And Mr. Wilson, frankly I don't believe a word he said. You can take it for what it's worth, but I'll tell you what he said right after the incident. He called her phone, a man answered, he was making threats and he was hostile. He doesn't say I was conversing with Jennifer Lesosky. He doesn't want one time say I was speaking to Jennifer Lesosky. Doesn't even say it. . . ."

The jury found Vann guilty on all counts. As part of Vann's sentence, the trial court ordered him to repay the cost of his appointed counsel.

II. Prosecutorial Misconduct

A. Standard Of Review

Vann argues that the trial prosecutor committed misconduct when he told the jury during closing argument that he personally did not believe anything about which Wilson, the sole defense witness, testified during the trial. Vann failed to object to the remark or request a

curative instruction, so this issue is unpreserved.⁶ We review unpreserved allegations of prosecutorial misconduct for plain error affecting a defendant's substantial rights.⁷

B. Legal Standards

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial.⁸ Prosecutorial misconduct issues are decided on a case-by-case basis, and we must examine the record and evaluate a prosecutor's remarks in context.⁹ "The propriety of a prosecutor's remarks depends on all the facts of the case."¹⁰ "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."¹¹

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence,¹² but is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case.¹³ A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully.¹⁴ A prosecutor may, however, argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief.¹⁵ A prosecutor is permitted to make fair comments to the jury on the credibility of witnesses when there is conflicting testimony and the question of guilt or innocence turns on which witness is believed.¹⁶

The goal of a defense objection to prosecutorial remarks is a curative instruction.¹⁷ We will not find a miscarriage of justice if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.¹⁸ Thus, in the absence of an objection, review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been

⁶ See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

⁷ *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

⁸ *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

⁹ *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

¹⁰ *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

¹¹ *Brown*, *supra* at 135.

¹² *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008).

¹³ *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Unger*, *supra* at 236.

¹⁴ *Bahoda*, *supra* at 276; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

¹⁵ *Dobek*, *supra* at 67; *Thomas*, *supra* at 455.

¹⁶ *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983).

¹⁷ *Stanaway*, *supra* at 687; *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

¹⁸ *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

cured by an appropriate instruction.¹⁹ “The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice.”²⁰

C. Applying The Standards

The prosecutor’s theory was that Vann shot at Lesosky with the intent to murder her. But Lesosky and Wilson gave conflicting testimony regarding the phone calls. And since a conviction on the charge of assault with intent to murder depended on Lesosky’s testimony, Vann attempted to show that Lesosky should not be believed. However, the prosecutor theorized that Wilson freely gave his statement to police six months prior to his trial testimony, but at the time of trial, he was reluctant to cooperate out of fear of facing Vann in prison. Therefore, the prosecutor’s statement that he did not believe a word that Wilson said was simply offered to oppose Vann’s attempt to have the jury focus exclusively on the believability of Lesosky’s testimony.

Even if the prosecutor’s statement was improper, any prejudice would have been cured by an instruction to the jury.²¹ Moreover, the jury instructions actually given specifically informed the jury that it could consider only the evidence that was properly admitted and that the attorneys’ arguments were not evidence. We presume that a jury follows its instructions.²² Therefore, the instructions cured any prejudice.²³

Moreover, Vann’s substantial rights were not affected because sufficient other evidence supported the charge of assault with intent to commit murder. A bullet and spent shell casing that matched the live ammunition loaded in Vann’s gun were found in Lesosky’s home. Lesosky testified that Vann pointed the gun at her and fired it. A complainant’s testimony alone can be sufficient evidence to establish a defendant’s guilt beyond a reasonable doubt.²⁴ In this case, the prosecutor’s statement did not deny Vann a fair and impartial trial.

III. Ineffective Assistance Of Counsel

A. Standard Of Review

Vann argues that he was denied the effective assistance of counsel when his trial counsel failed to object to the prosecutor’s statement of personal disbelief in Wilson’s testimony. Vann

¹⁹ *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).

²⁰ *Brown, supra* at 134.

²¹ *Duncan, supra* at 15-16; *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005).

²² *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

²³ *Bahoda, supra* at 281 (stating that when a trial court instructs the jury that the arguments of attorneys are not evidence, this instruction dispels any prejudice).

²⁴ *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

failed to move for a new trial or an evidentiary hearing pursuant to *People v Ginther*;²⁵ thus, our review is limited to errors apparent on the record.²⁶

B. Legal Standards

For a defendant to succeed on a claim of ineffective assistance of counsel, the defendant must show that: (1) the acts of trial counsel do not pass an objective standard of reasonableness; (2) but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different; and (3) the result of the proceeding was fundamentally unfair or unreliable.²⁷

Trial counsel is presumed to have given effective assistance, and the defendant bears a heavy burden of proving otherwise.²⁸ We will not substitute our judgment for that of trial counsel, nor will we assess counsel's competence with the benefit of hindsight.²⁹

C. Applying The Standards

Vann's argument is without merit. The prosecutor's remark was not improper; therefore, defense counsel did not render ineffective assistance by failing to object to the remark.³⁰ Regardless, even if we were to find that the remark was improper, we would conclude that Vann was not denied the effective assistance of counsel for failing to object because he has not shown a reasonable probability that, had an objection been made, the result of the proceedings would have been any different. The trial court instructed the jury to consider only the evidence properly admitted, and the trial court instructed the jury that the attorneys' arguments were not evidence. These instructions dispelled any prejudice.³¹ Further, independent evidence established that Vann committed an assault with intent to murder.

IV. Attorney Fees

A. Standard Of Review

Vann argues that the trial court erred when it ordered him to reimburse the county for the costs of his court appointed attorney without providing some indication that it considered his

²⁵ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

²⁶ *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

²⁷ *Strickland v Washington*, 466 US 668, 689, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

²⁸ *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

²⁹ *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

³⁰ *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

³¹ *Bahoda*, *supra* at 281.

financial situation before ordering reimbursement. Vann failed to object to the reimbursement order; thus, we review this unpreserved issue for plain error affecting his substantial rights.³²

B. Legal Standards

A defendant who was afforded appointed counsel can be ordered to reimburse the county for the costs of that representation. If the trial court determines after a trial that a defendant is guilty, the court may impose the expenses of providing legal assistance to the defendant.³³ In *People v Jackson*,³⁴ the Michigan Supreme Court held that the question of a defendant's ability to repay the cost of appointed counsel does not arise at sentencing, but rather only when enforcement of the reimbursement order begins. Furthermore, a remittance order of funds in an inmate's prison account obviates the need for an assessment of the inmate's ability to pay because the relevant statute³⁵ is structured to take funds only if a prisoner is presumed not to be indigent.³⁶

C. Applying The Standards

Vann has not established that enforcement of the provision in the judgment of sentence requiring reimbursement of the cost of appointed counsel has begun; thus, we conclude that the reimbursement order is valid on its face.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

³² *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

³³ MCL 769.1k(1)(b)(iii).

³⁴ *People v Jackson*, 483 Mich 271, 275; 769 NW2d 630 (2009).

³⁵ MCL 769.1l.

³⁶ *Jackson*, *supra* at 275.