

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
October 9, 2012

v

KEVIN MICHAEL-DORMAN BELTOWSKI,  
Defendant-Appellant.

No. 304254  
Wayne Circuit Court  
LC No. 10-011466-FC

---

Before: MURRAY, P.J., AND CAVANAGH AND STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. On April 27, 2011, defendant was sentenced, as a third habitual offender, MCL 769.11, to 20 to 40 years' imprisonment for the second-degree murder conviction. We affirm.

Defendant argues that the prosecution deprived him of a fair trial when it interjected issues at trial beyond defendant's innocence or guilt, vouched for the credibility of a witness, and impermissibly incorporated facts not present in the record during closing arguments. We disagree.

"Because the challenged prosecutorial statements in this case were not preserved by contemporaneous objections and requests for curative instructions, appellate review is for outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). In reviewing for plain error, "[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). This Court will not find "error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

In reviewing for prosecutorial misconduct, this Court must determine "whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *Id.* at 63-64. Defendant bears the burden to show that the alleged prosecutorial misconduct resulted in a miscarriage of justice. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Issues of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Mann*, 288 Mich

App 114, 119; 792 NW2d 53 (2010). Additionally, “[p]rosecutorial 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.” *Brown*, 279 Mich App at 135.

Defendant first argues that the prosecution improperly interjected issues at trial beyond innocence or guilt. Essentially, defendant argues that the prosecution framed questions or made comments that cast a bad light on defendant. The questions and comments related to defendant’s history of drug abuse, drug usage at defendant’s workplace and his involvement in such activity, and defendant’s marijuana growing and selling operation, which were issues inextricably part of defendant’s and the prosecution’s theories at trial. While the language employed by the prosecution when questioning defendant and comments made by the prosecutor implicitly undermined defendant’s character, such comments “did not prejudice defendant by causing the jury to convict because of prejudice rather than the evidence.” *People v Bahoda*, 448 Mich 261, 271; 531 NW2d 659 (1995). Regarding one of the instances of challenged conduct, the trial court instructed the jury to disregard questions relating to defendant providing his work crew Vicodin. That instruction is presumed to have been sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Likewise, concerning the remaining alleged improper comments and questions, “a timely objection and cautionary instruction could have cured any possible prejudice from the prosecutor’s comments.” *Callon*, 256 Mich App at 330. Further, after closing arguments, the trial court instructed the jury to disregard the attorneys’ statements, arguments, and questions as they are not considered evidence in reaching its verdict and provided a prior bad acts instruction regarding the evidence related to defendant’s growing and selling marijuana operation, and this Court presumes that the jury follows such instructions during deliberations. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Accordingly, defendant has failed to establish that the prosecution’s comments and questions prejudiced him at trial.

Defendant next argues that the prosecution deprived him of a fair trial by vouching for the credibility of Jeffrey Moraczewski’s (“Moraczewski”), the decedent’s brother, during closing arguments. We disagree.

A prosecutor may not vouch for the credibility of his witnesses to the effect that the prosecution has special knowledge regarding the truthfulness of the witness testifying. *Bahoda*, 448 Mich at 276. Nevertheless, a prosecutor may argue from the facts in evidence that a witness is worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). During closing arguments, a prosecutor may comment on his own witnesses’ credibility, “especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Before allegedly vouching for Moraczewski, the prosecution generally stated,

But I ask you, when you view this case, and when you view the credibility of witnesses, which [sic] is the judgments that you’re going to have to make, what does that person have to gain or lose?

The prosecution then continued by stating that “[Moraczewski], has already lost everything. He lost his brother. He has nothing to gain by lying, at this point; not a thing.” As permitted, the

prosecution argued from facts on the record regarding whether Moraczewski was worthy of belief. *Howard*, 226 Mich App at 548. Through these statements, the prosecution did not suggest that it had special knowledge regarding the truthfulness of Moraczewski but rather, responded to defendant's attack on Moraczewski's credibility during his case-in-chief. Accordingly, the prosecution did not vouch for Moraczewski's credibility.

Lastly, defendant asserts that the prosecution improperly introduced "facts" during closing arguments that were not supported by the record. We agree but find no prejudice to defendant and conclude that any alleged prejudice could have easily been cured by a curative instruction.

"A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case." *Dobek*, 274 Mich App at 66 (internal citations omitted). Here, the prosecution stated the following during closing arguments:

And he talks to Jerry Kopinski (phonetic). You remember Jerry Kopinski (phonetic). He's the guy that got up there (pointing). And, again, I nearly fell outa' [sic] my chair. "So?"

He mentioned about how he was scared of the victim for his children. What a man. What a man, as he grows weed in his house, outside with his wife and kids. What a guy. What a sterling father. And then he says to you, and here's the attitude: "So?"

I don't know. "So?" So, children who, for example, who are outdoors – I think [sic], just recently, we had a State Trooper, who I know, whose car flipped. And he was hit by an individual who was on marijuana. So?

While this statement clearly incorporated a factual assertion that was not supported by the evidence, *Dobek*, 274 Mich App at 66, because a timely instruction would have cured any alleged prejudice, defendant has failed to establish that there was error requiring reversal. *Williams*, 265 Mich App at 70-71. Further, as discussed above, the trial court instructed the jury to disregard the prosecution's statements and comments as such comments are not evidence, and jurors are presumed to follow such instructions. *Matuszak*, 263 Mich App at 58. Accordingly, defendant has failed to establish that any of the alleged instances of prosecutorial misconduct cumulatively deprived him of a fair trial. *Long*, 246 Mich App at 587-588.

Defendant next argues that the trial court infringed on his right to a fair trial by committing various errors at trial. Defendant first argues that the trial court's comments and questions deprived him of a fair trial. We disagree.

This Court reviews defendant's unpreserved claims concerning the trial court's questioning of a witness and denial of a jury request for plain error, *People v Carines*, 460 Mich 750, 763-767; 597 NW2d 130 (1999), while reviewing the trial court's decision to deny defendant's motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). To establish plain error and avoid forfeiture, defendant must show that: (1) an error occurred; (2) the error was plain; and, (3) the plain error affected

defendant's substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). Generally, to establish that the alleged error affected defendant's substantial rights, prejudice must be shown. *Id.*

"The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). While the trial "court may interrogate witnesses, whether called by itself or by a party," MRE 614(b), it "must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). "The trial court's comments must be fair and impartial, and the court should not make known to the jury its own views regarding disputed factual issues, the credibility of witnesses, or the ultimate question to be submitted to the jury." *People v Anstey*, 476 Mich 436, 453-454; 719 NW2d 579 (2006) (internal citations omitted). "The test is whether the judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, . . . and whether partiality *quite possibly could* have influenced the jury to the detriment of defendant's case." *Conyers*, 194 Mich App at 405 (internal quotations omitted).

The trial court improperly commented on the rifle strap's positioning during the following questioning of the medical examiner:

*Q.* In order to cause strangulation, or, [sic] or the tourniquet example that we gave you, would that weapon have to be turned, because of this, the length of the strap?

*A.* Yes.

*Q.* This – is that an adjustable strap, sir?

*A.* It does not appear to be. It appears to be knotted at both of its attachment sites.

*Q.* Okay. Knotted at both attachment sites?

*A.* Yes, sir.

*Q.* Okay.

***The Court:* Uhm, [sic] I have to beg to differ with you. That is an adjustable strap. Does it not have a buckle on it?**

*Witness:* There is a buckle. However - -

*The Court:* Is it just one strap?

*Witness:* It is one strap.

*The Court:* But isn't it looped at one end? [Emphasis added.]

While the trial court made an inappropriate statement, the trial court reinforced that it was within the province of the jury to ultimately decide issues of fact concerning the strap. For example, after the trial court “publish[ed] the rifle” for the jury, it stated, “Now, if this sling is adjustable, do not move it right now.” The trial court then signaled to the jury that it could “do with it what you wish” with the rifle and strap during deliberations. Most importantly, the fact that the trial court believed that the strap was adjustable did not obviously contradict defendant’s testimony that the strap was loose as he left the Cadieux residence, and, therefore, defendant has failed to establish prejudice from the comment.

Additionally, the jury was later instructed to disregard any of the trial court’s comments. The trial court also instructed the jury regarding *its* role in determining the *facts* of the case. Because jurors are presumed to follow such instructions, *Matuszak*, 263 Mich App at 58, and for the reasons discussed above, defendant has failed to establish that the comments constituted plain error affecting substantial rights.

Defendant next argues that the trial court committed error requiring reversal when it denied the jury’s request for a copy of his testimony during deliberations. We disagree.

Under MCR 6.414(J):

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.<sup>[1]</sup>

“A defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court.” *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000).

A little over two hours after deliberations commenced, the trial court received two notes from the jury. The jury requested to see the gun, Moraczewski’s videotaped statement, the photographs of defendant’s wounds, and a copy of defendant’s testimony. The trial court noted that the rifle and photographs of defendant’s wounds had already been provided to the jury and a part of Moraczewski’s videotaped statement would be played for the jury. Regarding the request for a copy of defendant’s testimony, the trial court stated:

I am not going to provide you a copy of [defendant’s] testimony. You must rely on your collective memories in that regard.

---

<sup>1</sup> On June 29, 2011, MCR 6.414 was repealed and replaced with MCR 2.513. See 489 Mich lxii; 489 Mich lxxv; see also MCR 6.414.

While the record does not set forth the reasons for the denial of the jury's request, the trial court did not abuse its discretion in denying the jury's request because the request was unreasonable.<sup>2</sup> Defendant testified for nearly six hours over two days, which amounted to approximately 270 pages in transcripts, and as defendant concedes, the request would have significantly delayed deliberations.

Defendant argues that the trial court nevertheless erred in foreclosing an opportunity to review the requested testimony later during deliberations. Even if there was an error regarding the application of MCR 6.414(J), defendant cannot establish that he was prejudiced by the trial court's decision. First, the record suggests that defendant not only failed to object but acquiesced to the trial court's decision. Secondly, the transcript was far more harmful than helpful to his defense. The prosecution thoroughly cross-examined defendant, and it was elicited that defendant discussed ways to deceive the jury and "handle" the prosecution, and that defendant referred to the decedent in a hostile manner, which was completely inconsistent with the way in which defendant portrayed his view of the decedent while he testified. Thus, defendant has failed to establish plain error.

Lastly, defendant argues that the trial court abused its discretion by denying his motion for a mistrial. We disagree.

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citation omitted). As discussed above, the curative instruction was sufficient to cure the alleged error concerning the questioning of defendant's participation in providing Vicodin to his employees, and therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Accordingly, defendant has failed to establish that the trial court committed error that deprived him of a fair trial.

Defendant next argues that defense counsel was ineffective for failing to object to various alleged errors and for failing to retain his credibility at trial. We disagree. Because defendant failed to move for an evidentiary hearing, this Court's review is confined "to errors apparent on the record." *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). To establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient and that such deficiencies prejudiced the defendant's case. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel performed deficiently if his performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999). To establish prejudice, a defendant must show that a reasonable probability exists that, but for counsel's error, the outcome of the proceeding would have been different. *Carbin*, 463 Mich at

---

<sup>2</sup> While the jury did request "certain testimony", i.e., defendant's testimony, our Supreme Court has similarly held that a trial court does not abuse its discretion in denying a "jury's request for a copy of the entire transcript after a little over an hour of deliberation" where the requested transcript amounted to nearly one day of testimony. *People v Holmes*, 482 Mich 1105; 758 NW2d 262 (2008).

600. This Court presumes that a defendant received effective assistance of counsel and places a heavy burden on the defendant to prove otherwise. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions to decline to object to procedures, evidence or an argument may also fall within sound trial strategy. *Unger*, 278 Mich App at 253. Defense counsel is afforded wide latitude on matters of trial strategy, and this Court abstains from reviewing such decisions with the benefit of hindsight. *Id.* at 242-243. “A particular strategy does not constitute ineffective assistance of counsel simply because it does not work.” *Matuszak*, 263 Mich App at 61.

While defense counsel failed to make certain objections to alleged errors at trial, such failures were not objectively unreasonable. Defendant first argues that defense counsel failed to object to Officer Williams’s improper comment on defendant’s pre-custodial silence. Because defendant neither invoked his Fifth Amendment right nor remained silent in reliance on given *Miranda*<sup>3</sup> warnings, such evidence was admissible, and therefore, defendant has failed to establish that defense counsel made a serious error by failing to make an objection. *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004).

Defendant also argues that defense counsel failed to object to various instances of prosecutorial misconduct. Concerning the prosecution’s allegedly improper comments and questions, defendant has not established that the failure to make objections was objectively unreasonable as the comments were not unduly prejudicial. While it may have been prudent to object and request curative instructions, this Court refrains from reviewing such decisions with the benefit of hindsight. *Unger*, 278 Mich App at 242-243. Defendant also criticizes defense counsel for failing to object to the prosecution’s alleged vouching for a witness and its incorporation of facts into the record. Because the prosecution did not vouch for a witness, defense counsel was not ineffective for failing to make a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Also, defense counsel’s decision not to “raise objections, especially during closing arguments, can often be consistent with sound trial strategy.” *Unger*, 278 Mich App at 242. Specifically, defense counsel may have decided to refrain from objecting to the prosecution’s improper incorporation of facts because he intended to likewise discuss matters that were not part of the record during closing arguments and reasonably assumed that if he raised an objection here, the prosecution would likewise raise that same objection.<sup>4</sup>

Defendant next argues that defense counsel was ineffective by failing to object to the trial court’s improper questioning of a witness and the trial court’s refusal to provide a transcript of defendant’s testimony to the jury. Since the trial court promptly cured any error associated with its questioning, defense counsel was not ineffective for failing to make a futile objection.

---

<sup>3</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>4</sup> During closing arguments, defense counsel discussed his son’s martial art experience.

*Ackerman*, 257 Mich App at 455. While not clear, it appears that defense counsel acquiesced to the trial court's decision to refuse the jury's request for a copy of defendant's transcript. Presumably, defense counsel believed it would harm defendant's case if the jury was presented with another opportunity to review defendant's testimony. Because it is not apparent on the record that defense counsel acted in an objectively unreasonable manner when deciding to abstain from objecting to the alleged errors at trial, defendant has failed to overcome the strong presumption that he received the effective assistance of counsel. *Seals*, 285 Mich App at 17.

Lastly, defendant argues that defense counsel failed to retain his credibility. In support of this argument, defendant only cites to portions of the prosecution's closing argument where the prosecutor attacked the credibility of Carlos Collins ("Collins"), defense counsel's private investigator, and implicitly argued that Collins was part of defendant's plan to deceive the jury by introducing staged photographs of the crime scene. The evidence demonstrated that defense counsel was present when Collins visited the crime scene to conduct his investigation. The prosecution never suggested, however, that defense counsel himself orchestrated or staged the scene. Hence, defendant has failed to show that defense counsel failed to retain his credibility. Further, defendant has not shown that the jury's verdict in this matter was dependant on its opinion regarding defense counsel's credibility. Contrary to defendant's argument on appeal, the present case is not analogous to *State v Moorman*, 320 NC 387; 358 SE2d 502 (1987), the non-binding opinion on which defendant has relied in regard to this portion of his argument.

Overall, defense counsel presented several witnesses, thoroughly cross-examined the prosecution's witnesses, effectively presented an argument of self-defense, and was successful in persuading the jury to find defendant not guilty of first-degree murder. While defendant would have liked defense counsel to make different decisions regarding strategy, it cannot be concluded that defense counsel acted in an objectively unreasonable manner or performed deficiently in implementing his trial strategy. Further, as noted above, it was defendant's own testimony that harmed his defense and severely undermined his argument of self-defense. Thus, even if defense counsel had performed deficiently, defendant could not show that, but for those errors, the outcome of his trial would have been different.

Finally, defendant argues that the cumulative effect of the alleged errors above requires reversal. We disagree.

Since defendant did not preserve this issue, we review this issue for plain error affecting substantial rights. *Carines*, 460 Mich at 764-767. While "the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal," this Court will not grant a new trial unless the cumulative effect of such errors "undermine[s] the confidence in the reliability of the verdict." *Dobek*, 274 Mich App at 106. While there were individual errors, such errors did not undermine the reliability of the verdict as the discussed errors were either cured or prejudice was not established. Moreover, the evidence presented overwhelmingly weighs in favor of the jury's verdict. Defendant admitted that he choked the decedent but testified his actions were taken in self-defense and that the decedent was still breathing when he left the Cadieux residence. The prosecution, however, thoroughly undermined defendant's testimony. Medical testimony revealed that it normally takes three to five minutes to cause death by asphyxiation and unconsciousness would occur shortly after asphyxiation begins, which contradicted defendant's statement that he only choked

the decedent briefly to subdue him. Moraczewski and another witness testified that they both found the decedent with a strap around his neck that was so tight that they were unable initially to remove it, which undermined defendant's statement that the strap had slack and that the decedent was still breathing when defendant left the Cadieux residence. Further, as discussed above, defendant's story was severely damaged on cross-examination. Therefore, given the weight of the evidence against defendant, the cumulative effect of the errors did not undermine the reliability of the verdict or establish plain error that affected defendant's substantial rights.

Affirmed.

/s/ Christopher M. Murray  
/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens