

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 13, 2014

v

DEMEREST LAVEFT SMITH,

Defendant-Appellant.

No. 314590
Saginaw Circuit Court
LC No. 11-036533-FH

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right her jury convictions of felonious assault, MCL 750.82, reckless driving, MCL 257.626, and disturbing the peace, MCL 750.170. She was sentenced to 18 months' probation. We affirm.

I. FACTUAL BACKGROUND

The victim, a crossing guard, was performing her duties when the altercation occurred. She was helping a group of about 10 children cross at the corner of Southfield and Williamson Streets in Saginaw. When the light changed, she stepped into the street, and put up her stop sign. She noticed that defendant's car was coming forward to turn, even though children had started to cross the road. The crossing guard immediately told defendant to stop. The defendant ignored the guard's plea for her to stop.

The crossing guard then placed herself in front of defendant's vehicle, shouted at the children to go back, and repeatedly ordered defendant to stop. Despite the crossing guard's efforts, the defendant continued to drive forward until she made contact with the crossing guard. Defendant kept nudging the crossing guard with her car, told the crossing guard to get out of the way, and used profanity. The crossing guard eventually rolled off the hood, and defendant sped off.

One of the children who witnessed the assault testified that the crossing guard was behaving like normal, but that defendant kept coming forward with her car until the car hit the guard. That child's mother testified that her daughter came home panicking and in tears over the incident. Another child witness testified that the crossing guard held up her stop sign but that defendant's car kept "ramming against" the crossing guard while the crossing guard was begging

the defendant to stop. The crossing guard then rolled off the car's hood. A man in a nearby driveway testified that he witnessed the incident and saw defendant's car push the crossing guard along. He testified that he had never seen anything like it in his life.

Defendant, however, testified that when she came to the intersection, the crossing guard did not have her sign up but suddenly ran in front of defendant's car, used her hand to hit the hood of the car, and put up her sign while saying "this say[s] stop." Defendant's son, who was in the car, likewise testified that the crossing guard appeared in front of the car suddenly. Defendant claimed that she did not hit the crossing guard with the car but that they did get into a verbal confrontation. After her car's path was clear, the defendant drove away.

A jury convicted defendant of felonious assault, reckless driving, and disturbing the peace. She was sentenced to 18 months' probation. Defendant now appeals on several grounds.

II. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Defendant first argues that the prosecution committed misconduct during its opening statement and closing argument. "In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Because "there was no contemporaneous objection or request for a curative instruction in regard to any alleged error, [our] review is limited to ascertaining whether plain error affected defendant's substantial rights." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

B. ANALYSIS

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). We review such issues on a case-by-case basis, and examine the entire record to evaluate the prosecutor's comments in context. *Id.* at 64. We also examine a prosecutor's comments in light of the defendant's arguments, "and the relationship the comments bear to the evidence admitted at trial." *Id.* "Generally, prosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation marks, citation, and brackets omitted). A prosecutor is not required to use the blandest terms possible. *Dobek*, 274 Mich App at 66.

In the instant case, defendant contends that the prosecutor made several comments that amounted to improper appeals to emotion and civic duty. Prosecutors may not "urge the jury to convict as part of its civic duty or on the basis of its prejudices." *Unger*, 278 Mich App at 237. "This type of argument unfairly places issues into the trial that are more comprehensive than a defendant's guilt or innocence and unfairly encourages jurors not to make reasoned judgments." *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

Although defendant highlights several comments that were allegedly improper, all of these references constituted permissible commentary on the evidence admitted at trial. While the prosecutor commented that a disaster and tragedy had been averted, this was a reasonable inference based on the fact that defendant was ramming the crossing guard with her car while children were in the street. The prosecutor also reasonably commented that the crossing guard put herself in harm's way for the children, as that was consistent with the crossing guard's testimony. Further, references to the crossing guard taking responsibility for the children's safety conformed to the testimony at trial, as the crossing guard was performing her job when the assault happened. The term "responsibility" is merely descriptive, not inflammatory.

In sum, the prosecutor's comments were based on the evidence admitted during the trial, and cannot be said to have inflamed the jury. None of the comments constituted civic duty arguments that "inject[ed] issues broader than guilt or innocence or encourage[ed] jurors to suspend their powers of judgment." *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004). Further, because a curative instruction would have alleviated any potential prejudice, reversal is not justified. *Unger*, 278 Mich App at 235.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Defendant next argues that there was insufficient evidence to convict her of disturbing the peace. We review "de novo a challenge on appeal to the sufficiency of the evidence." *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "In determining whether the prosecutor has presented sufficient evidence to sustain a conviction, an appellate court is required to take the evidence in the light most favorable to the prosecutor" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (internal quotations and citations omitted). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222.

B. ANALYSIS

MCL 750.170 provides that "[a]ny person who shall make or excite any disturbance or contention in any tavern, store or grocery, manufacturing establishment or any other business place or in any street, lane, alley, highway, public building, grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor." A disturbance is an act that causes annoyance or disquiet, interferes with a person's pursuit of a lawful occupation, or interferes with the peace and order of a community or meeting. *Black's Law Dictionary* (9th ed. 2009); see also *People v Weinberg*, 6 Mich App 345, 351; 149 NW2d 248 (1967). In other words, it "is an interruption of peace and quiet; a violation of public order and decorum; or an interference with or hindrance of one in pursuit of his lawful right or occupation." *Weinberg*, 6 Mich App at 351.

Here, defendant argues that there was no evidence that she created a disturbance, as the incident only lasted 90 seconds, the children did not notice anything happening and continued to behave normally, the children did not testify about any screaming or cussing, and the crossing guard was able to carry out her duties. These arguments are meritless.

Defendant intentionally hit the crossing guard with her car multiple times while the crossing guard was attempting to escort children across the street. Defendant was yelling at the crossing guard to get out of the way, and used profanity. At least one student watching the incident was in “shock” and her mother testified that her daughter was in a panic and crying when she got home. Another child was “sad” and “scared” as a result of defendant’s actions. An adult witness to the incident testified that he had never seen anything like it before in his life.

In light of the foregoing, we find that there was sufficient evidence that defendant intentionally created a disquieting situation that caused disorder and hindered the crossing guard’s ability to perform her job responsibilities.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Defendant also asserts that defense counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct and for conceding during closing argument that defendant was involved in a “disturbance.” Generally, whether a defendant received effective assistance of counsel is a mixed question of fact and law, as a “trial court must first find the facts and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). However, “[a] claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing.” *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Because defendant filed neither of these motions, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

B. ANALYSIS

“To establish ineffective assistance of counsel, a defendant must show (1) that the attorney’s performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney’s error or errors, a different outcome reasonably would have resulted.” *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). The second prong requires a showing of a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Because the prosecutor’s comments were proper, as discussed *supra*, any objection would have been meritless. “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *Ericksen*, 288 Mich App at 201. Nor has defendant established that remanding for an evidentiary hearing is warranted.

Defendant also posits that defense counsel was ineffective for conceding during closing argument that defendant had participated in a “disturbance.” During closing argument, defense counsel stated:

[L]et me first talk about disturbing the peace, requires the defendant did make or excite a disturbance [sic]. I would submit to you she participated in one, absolutely. Didn't deny it. Said hey, I'm screaming, she's screaming at me. Who started it? Does that make a difference to you. That's something you'll have to decide. Sounded to me like [the crossing guard] is the one who's there, stop means stop, provoking a response. And then did a disturbance happen? Absolutely, no doubt about it.

However, it is “only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel.” *People v Kryztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). When the evidence clearly establishes one element of an offense, counsel may make the strategic decision to cede that element in order to reinforce defendant's credibility and focus the jury's attention on the remaining disputed elements. See, e.g., *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988) overruled in part on other grounds 456 Mich 693 (1998). Here, defense counsel conceded that there was a disturbance, but argued that it was the crossing guard who caused it, not defendant. Defendant has not overcome the strong presumption that defense counsel was utilizing sound trial strategy. Furthermore, given the overwhelming evidence of defendant's guilt, discussed *supra*, we find that defendant has not shown that any error would have resulted in a different outcome. *Vaughn*, 491 Mich at 669.

Therefore, defendant has not demonstrated that she was denied the effective assistance of counsel.

V. CONCLUSION

There were no instances of prosecutorial misconduct warranting reversal. Nor was defendant convicted of disturbing the peace based on insufficient evidence. Lastly, defendant has not demonstrated any instances of ineffective assistance of counsel, or that a remand for an evidentiary hearing is warranted. We affirm.

/s/ Donald S. Owens
/s/ Christopher M. Murray
/s/ Michael J. Riordan