

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

R. C. LEE OSLER,

Defendant-Appellant.

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UNPUBLISHED

October 16, 2003

No. 240735

Berrien Circuit Court

LC No. 2001-403734-FC

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felon, MCL 750.227b. The court sentenced defendant to 45 to 360 months in prison for the armed robbery charge and a consecutive twenty-four month sentence for the felony firearm conviction. We affirm.

Ashley Baggett was working behind the counter at a video store in Benton Harbor when she observed two men enter the video store and begin to peruse shelved video tapes. A few minutes later, Baggett turned around and observed defendant standing approximately five feet from her, pointing a gun directly at her with his right hand, close to his waist. Baggett described the gun as a “revolver” with a round chamber for bullets. Baggett further described the gun as having a five to six-inch-long barrel, with the very tip of the barrel being silver with gold trim on the handle. Baggett testified that defendant had demanded money and that she had given him approximately \$55 before he left the store.

In addition to Baggett’s eyewitness testimony, the prosecution also elicited testimony from Norman Eddie, who had accompanied defendant to the video store. Eddie testified that defendant “robbed the store” while he stood just outside the entrance.

Eight days after the robbery, Benton Township Police apprehended defendant in a home approximately three to four miles from the video store. The only items seized at that time were a .25-caliber bullet and a black stocking cap.

Defendant first argues there was insufficient evidence to convict him of the felony-firearm charge. In evaluating a claim of insufficient evidence, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v*

*Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). We will not interfere with the jury's determination regarding the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The felony-firearm statute states that “[a] person who carries or has in his or her possession a firearm when he or she commits . . . a felony . . . is guilty of a felony.” MCL 750.227b. Defendant is not claiming there was insufficient evidence that he committed the armed robbery. Therefore, the only question before us is whether defendant possessed a firearm during the commission of that felony.

Defendant argues that there was insufficient evidence presented for a reasonable trier of fact to conclude that defendant possessed a firearm during the robbery because Baggett did not provide sufficient testimony that defendant had a real gun. In doing so, defendant primarily relies on the “negative aspect of Baggett’s” testimony, i.e., that during cross-examination, Baggett testified that she did not identify or see any bullets, she did not feel threatened that she would be shot, and no statement was made to her about being shot. However, not only does defendant mischaracterize Baggett’s testimony, but as noted above, Baggett specifically testified that: (1) defendant pointed a handgun at her from five feet away; (2) defendant was holding the gun in his right hand, close to his waist; (3) the gun was described as a “revolver” with a round chamber for bullets, and had a five to six-inch-long barrel, with the very tip of the barrel being silver, and gold trim on the handle, and (4) that it appeared to be a real gun. Based on this testimony, we conclude that sufficient evidence was presented for the jury to reasonably conclude that defendant possessed a firearm during the commission of the felony.

Defendant next argues that the prosecutor committed misconduct by asking a question to a juror that revealed that defendant was currently in jail. Defendant contends this is irrelevant information that jurors could use to infer guilt and should not have been brought out. We disagree.

We review preserved claims of prosecutorial misconduct de novo to determine whether defendant was denied a fair and impartial trial. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

In this case, when the prosecutor’s question is read in context, it did not deprive defendant of a fair and impartial trial. *Bahoda*, *supra* at 267. The question was asked in the following context:

Q. Do you actually do the teaching and come into the jail --

A. Yes

Q. -- and do that?

A. No. I and a partner.

Q. Okay.

A. We – the two of us handle male and female inmates so we have a male and female teacher.

Q. All right. And how often do you come into the jail?

A. Five days a week, eight-thirty to eleven-thirty

Q. All right. *Do you know if Mr. Osler is one of your students?*

A. *He is not. I don't recognize him.* [Emphasis added.]

Defendant seeks to analogize the present situation to cases in which Michigan courts have ruled that it is prejudicial for a jury to see a defendant in shackles, *People v Baskin*, 145 Mich 526, 546; 378 NW2d 535 (1985), or in which a defendant is brought for trial in jail clothing. The identified prejudice in those circumstances is that the presumption of innocence is compromised and that a defendant in jail garb is denied “the appearance, dignity, and self-respect of a free and innocent man,” *People v Shaw*, 381 Mich 467, 474; 164 NW2d 7 (1969), or that a shackled defendant is dangerous and not to be trusted. *Baskin, supra* at 546. This is not, however, the situation presented by the mere indication that a defendant was in jail after being arrested for the charge for which he is on trial. Jurors are likely to assume that, as a person on trial for a felony, defendant would have been in jail at some point.

Therefore, this line of questioning was not prejudicial. The question was necessary given the fact that the potential juror worked at the jail in which defendant was being held. As this Court observed in *People v Tyburski*, 196 Mich App 576, 585-586; 494 NW2d 20 (1992), Michigan courts have long recognized that the purpose of jury voir dire is to allow counsel “to develop a rational basis” for excluding jurors for cause or for peremptory challenges. Whether a prospective juror knows the defendant in a context outside the courtroom certainly is the kind of information that counsel could use “to develop a rational basis” for excluding that juror. The prosecutor’s questioning did not constitute error. Moreover, for the same reason, we hold the trial court did not abuse its discretion in denying defendant’s motion for mistrial brought on the same basis.

Defendant also argues that the prosecutor committed misconduct by making the following remark during his closing:

So, where’s the motivation? There isn’t. Defendant couldn’t give him—the police during his interview back in August, any explanation for why Norman Eddie would lie about him. *He still hasn’t given anything—any explanation about why Norman Eddie is lying or would lie about placing him at the store with Norman Eddie and him robbing the store.* [Emphasis added].

Defendant argues this comment was an improper commentary on defendant’s failure to testify. Assuming defendant is correct in that assertion, we nevertheless hold the prosecutor’s error was harmless beyond a reasonable doubt given the ample supporting evidence of guilt. *People v Parcha*, 227 Mich App 236, 247; 575 NW2d 316 (1997).

Not every error requires reversal of a criminal conviction. *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000). With regard to constitutional error, a court must determine whether the error was harmless beyond a reasonable doubt. *Id.* In this case, despite the prosecutor's remarks during his closing argument that defendant failed to provide an explanation for eyewitness testimony that he robbed the video store, there is evidence beyond a reasonable doubt to uphold defendant's convictions. First, immediately following plaintiff's comment, the trial judge gave a curative instruction that any inference from defendant's failure to testify should be disregarded as non-evidence for determining guilt. The trial court's instruction to the jury that arguments of attorneys are not evidence dispels any prejudice. *Bahoda, supra* at 281. Moreover, there was sufficient eyewitness confirmation that defendant robbed the video store from the clerk, defendant's friend, and from the police officer who had witnessed defendant running from the video store.

Defendant next argues that the prosecutor admitted misconduct by introducing the .25-caliber bullet found in defendant's room when he was apprehended. However, because the alleged error was not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain (outcome determinative) error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal 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 Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *Schutte, supra* at 720.

To the extent that evidence of the bullet may have been prejudicial, irrelevant, or improper, reversal is unwarranted because there is no basis to conclude that the evidence in the conviction of an actually innocent defendant (or that it was a determinative factor in defendant's conviction at all), or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Schutte, supra* at 720.

Defendant next argues that the prosecutor committed misconduct when he introduced improper character evidence in violation of MRE 404(b). Defendant insists it was error for the prosecutor to question the video store owner regarding defendant's rental of a video game system and the verbal altercation that ensued when the owner tried to get defendant to return the system three weeks before the robbery. We disagree. In the absence of a timely objection to the admission of evidence, such as here, any error is forfeited unless the error was plain and affected substantial rights. *Carines, supra* at 763. There was no plain error here.

MRE 404(b)(1) allows for the introduction of prior bad acts to show motive. In this case, the evidence was relevant to motive because it showed the animus defendant had toward the video shop owner. Defendant has not demonstrated that his substantial rights were affected because he fails to demonstrate that he was unfairly prejudiced by the video store owner's testimony.

Defendant next argues that the prosecutor committed misconduct by stating, during his rebuttal argument, that defendant's closing argument reminded him of the childhood story about the "Big Bad Wolf." Defendant did not object to this remark; therefore, defendant must demonstrate outcome determinative plain error in order to avoid forfeiture of this issue. *Carines, supra* at 763. We hold that defendant has failed to demonstrate plain error.

A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The prosecution's comments must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). "[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

We believe the prosecutor used the "Big Bad Wolf" metaphor on rebuttal to emphasize his belief that there was overwhelming evidence of guilt. This remark followed defense counsel's closing argument in which he attempted to characterize eyewitness testimony of the store clerk and the accomplice as weak at best. We find that the prosecutor did not imply that defense counsel was misleading the jury by attempting to discredit eyewitness testimony. Instead, the prosecutor was merely emphasizing that defendant was clearly guilty given the evidence against him. An emphatic response to defendant's closing argument is not prosecutorial misconduct. Furthermore, "[a] prosecutor need not confine argument to the 'blandest of all possible terms.'" *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant next argues his sentence was disproportionate. However, because his sentence was within the guidelines, the sentence must be affirmed pursuant to MCL 769.34(10), which provides in part:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals *shall affirm* that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.<sup>[1]</sup> [Emphasis added.]

See also, *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Finally, defendant alleges he was denied the effective assistance of counsel because his defense attorney failed to object to the prosecutor's introduction of the .25-caliber bullet and failed to object to evidence of defendant's prior encounter with Junior Baggett. Defendant also claims he was denied the effective assistance of counsel because defense counsel did not object to the proportionality of defendant's sentence or to the prosecutor's "Big Bad Wolf" comment. To warrant a new trial on the grounds of ineffective assistance of counsel, defendant must show that but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). As we

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<sup>1</sup> Defendant also argues MCL 769.34(10) is unconstitutional because it violates the separation of powers by interfering with a judicial function, it is in derogation of the Michigan Constitution granting defendants a right to appeal, and it is a violation of the due process clauses of the Michigan and United States Constitutions. We disagree. Defendant's constitutional challenges to the legislative sentencing guidelines have already been rejected by the Michigan Supreme Court in *People v Hegwood*, 465 Mich 432, 436-440; 636 NW2d 127 (2001).

have already concluded that there was no outcome determinative error, this issue is without merit.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Christopher M. Murray