

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARNELL MISSOURI,

Defendant-Appellant.

UNPUBLISHED

February 15, 2005

No. 251307

Wayne Circuit Court

LC No. 03-005934-01

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant appeals as of right his jury conviction for assault with intent to murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), discharge of a firearm at a dwelling, MCL 750.234b; felony-firearm, MCL 750.227b, and malicious destruction of a building, MCL 750.380(3)(a). We affirm.

On appeal, defendant first argues that he was denied a fair trial because of prosecutorial misconduct. He asserts that the prosecutor improperly introduced evidence about defendant's drug use and dealing, and vouched for the credibility of prosecution witnesses.

Appellate review of allegedly improper prosecutor conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Unpreserved issues are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Callon, supra*, 329.

The prosecutor properly presented evidence of defendant's involvement with drugs to show bias, where defense witnesses had a special interest in his acquittal because they acquired drugs from him. Defendant did not object to this testimony, and there is no showing that it affected the outcome of the case.

While a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue from the facts that a witness is worthy or not worthy of belief. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Here, the prosecutor asked the jury to use its common sense, and carefully reflect on the testimony, which would show his witnesses were credible. The prosecutor's argument was appropriate and did not ask the jury to convict based on the prosecutor's special knowledge.

Defendant next argues that the trial court erred in allowing a witness to testify that he first saw defendant when he was breaking into another house. The prosecutor concedes that this bad acts evidence should not have been admitted. However, error requires reversal only if it is prejudicial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). Whether a preserved nonconstitutional error is harmless depends upon the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). The error is presumed to be harmless and the defendant bears the burden of showing that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999). Error justifies reversal if it is more probable than not that it affected the outcome. *Id.*, 495-496.

Here, it is unlikely that the error affected the outcome of the case. The comment was brief, and it was not supported by any additional evidence. Given the strength of the eyewitness testimony and the weakness of the defense, defendant has failed to show that it is more likely than not that the evidence affected the outcome of the case. *Whittaker, supra*, 427-428.

Finally, defendant argues that he was denied the effective assistance of counsel where his counsel failed to object to bad acts evidence, failed to challenge the identification evidence, and failed to object to prosecutorial misconduct.

To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

The bad acts evidence and alleged prosecutorial misconduct did not affect the outcome of the case, thus, failure to object was not prejudicial. Counsel's decision not to seek an expert in eyewitness identification was reasonable trial strategy where the two eyewitnesses were familiar with defendant, and his own witness told police defendant was the one who did the shooting. Defendant has failed to show that he was denied the effective assistance of counsel.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen