

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEROY LAMAR HOSKINS,

Defendant-Appellant.

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UNPUBLISHED

April 11, 2006

No. 259305

Wayne Circuit Court

LC No. 04-005294-01

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction arises from an incident in 2004 in which he assaulted complainant with a firearm and took complainant's purse from her person. When complainant was helping her grandchildren into her vehicle outside a party store, defendant came up behind her, pressed a gun into her back and demanded her purse. Defendant grabbed the purse from complainant and ran away with it.

Anthony Seaburn witnessed the robbery and identified defendant as the assailant. After Seaburn stated he did want to testify, the prosecutor asked Seaburn why he did not want to testify, asking if it was because he was scared. Seaburn admitted he was scared, and when asked by the prosecutor what he was afraid of, Seaburn testified that he was afraid his family would get hurt. The prosecutor also asked Seaburn if he did not come to the earlier court date because he had been threatened. Seaburn admitted to being scared and threatened.

On appeal, defendant argues that the prosecution engaged in misconduct by eliciting testimony from Seaburn that threats were made against him because there was no competent evidence that defendant had any knowledge of, involvement in, or was aware of the alleged threats. Therefore, defendant claims the testimony of threats unduly prejudiced his defense.

Because defendant failed to object or request a curative instruction, we review this unpreserved issue for plain error that affected defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). To avoid forfeiture under the plain

error rule, three requirements must be met (1) an error must have occurred; (2) the error was plain; (3) and the plain error affected substantial rights, i.e., that the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *Rodriguez, supra* at 29-30. Prosecutorial misconduct issues are decided on a case-by-case basis, and this court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *Id.* at 30.

Generally, evidence of a defendant threatening a witness is admissible to show consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). It is also generally true that for such evidence to be considered, it must be connected to the defendant. *People v Salsbury*, 134 Mich 537, 569-570; 96 NW 936 (1903); *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). However, in the present case, the prosecution did not offer the evidence to show consciousness of guilt. The testimony was admitted for the purpose of assessing the witness's credibility. Evidence of threats is relevant to witness bias when there is an indication that the witness was reluctant to testify against the defendant.<sup>1</sup> *People v Johnson*, 174 Mich App 108, 112; 435 NW2d 465 (1989). Here, Seaburn testified that he was in court testifying only because he had been subpoenaed to do so and that he felt scared due to threats made by friends of defendant.

The prosecutor's questions were proper to show witness bias. Therefore, there was no plain error. Consequently, reversal on this basis is not warranted.

In the second issue raised on appeal, defendant contends he received ineffective assistance of counsel when his counsel failed to object or seek a curative or limiting instruction for Seaburn's testimony that he felt scared and threatened.

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the trial court's factual findings for clear error and its constitutional determination is reviewed de novo. *Id.*

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See also *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). To overcome this presumption, the defendant must meet a two-pronged test. The defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Strickland, supra* at 687-688; *Pickens, supra* at 312-313. Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that

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<sup>1</sup> "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony." *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984).

but for counsel's unprofessional errors the trial outcome would have been different. *Strickland, supra* at 687-688; *Pickens, supra* at 309.

As previously stated, the prosecutor's questions regarding threats made against Seaburn were proper and Seaburn's testimony of threats made against him was admissible. Therefore, any objection to the prosecutor's questions or witness' testimony would have been futile. Counsel is not ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Affirmed.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio