

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HENRY VANCE,

Defendant-Appellant.

UNPUBLISHED

February 15, 2007

No. 264582

Kalamazoo Circuit Court

LC No. 04-000543-FC

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and assault with intent to rob while armed, MCL 750.89. The charges and convictions stemmed from the March 2004, beating of the victim, Lazaro Hernandez, who lost his right eye and teeth, and suffered a fractured cheekbone. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 76 months' to ten years' imprisonment for assault with intent to do great bodily harm less than murder, and to 25 to 50 years' imprisonment for the assault with intent to rob while armed. Defendant appeals as of right. We affirm.

On appeal, defendant first asserts that he was prejudiced by an ex parte communication between the bailiff and the jury. Unpreserved claims alleging constitutional error are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture of an issue on appeal under the plain error rule, three requirements must be met: (1) error must have occurred; (2) the error was plain, that is, clear or obvious; (3) and the plain error affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*

A trial court's ex parte communication with a deliberating jury is prohibited by MCR 6.414(B). However, a trial court's communication with the jury in violation of MCR 6.414(B) does not require automatic reversal; rather, the determination whether reversal is required "centers on a showing of prejudice." *People v France*, 436 Mich 138, 142; 461 NW2d 621 (1990). To determine the prejudicial effect, the communication must first be categorized into one of three categories: (1) substantive, (2) administrative, and (3) housekeeping. *Id.* at 142-143.

Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. . . .

Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication carries no presumption. The failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial. . . .

Housekeeping communications are those which occur between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general “housekeeping” needs that are unrelated in any way to the case being decided. A housekeeping communication carries the presumption of no prejudice. [*Id.* at 143-144.]

In this case, the *ex parte* communication is an administrative communication because the jury asked the bailiff about seeing trial transcripts and later about reviewing a video of the proceedings. An administrative communication has no presumption of prejudice and the failure to object when made aware of the communication will be taken as evidence that the instruction was not prejudicial *Id.* The burden of persuading the court of the absence of prejudice falls on the prosecution. *Id.* at 164 n 36.

We find no prejudice in this case and we reject defendant’s contention that, when the bailiff told the jury that transcripts did not exist, it may have led the jurors to believe that the possibility of reviewing evidence was completely foreclosed. MCR 6.414(J) maintains:

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.

When asked by the jury about transcripts, the bailiff answered that there were no transcripts available. When later asked about a review of a videotape of the proceedings, the bailiff informed the jury that its question needed to be directed to the judge and attorneys. After these two questions, however, the jury never inquired into transcripts or review of the testimony again before reaching a verdict. The fact that the jury asked about viewing a videotape of the proceedings, after the bailiff had told them no transcripts were available, indicates the jury did not believe the possibility of reviewing the testimony was foreclosed when the bailiff first spoke to them. If the jury felt there was no possibility of reviewing evidence, it would not have bothered asking the bailiff the second question concerning the videotape. Consequently, no plain error has been established because there is no indication that the bailiff’s *ex parte* communications with the jury affected the jury’s right to review testimony. The record supports the prosecution’s argument that there was no prejudice resulting from the *ex parte* administrative communication.

Defendant next argues that the prosecutor committed prosecutorial misconduct in violation of defendant's constitutional due process rights. Because this claim of error was not properly preserved by objection before the trial court, we shall review it for plain error affecting defendant's substantial rights. *Carines, supra*.

We review claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Claims of prosecutorial misconduct must be evaluated on a case-by-case basis within the context of the particular facts of the case. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). A prosecutor's comments must be examined in light of the defendant's arguments and the evidence presented at trial and otherwise improper remarks may not require reversal if they are raised in reply to issues introduced by the defense. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

Defendant argues the prosecution's comment on his failure to produce his brother as a witness was plain error. Defendant argues that the argument was prejudicial because it invited the jury to infer that the testimony would not support defendant's claim of innocence and would be adverse to defendant. We disagree. Defendant took the stand on his own behalf and testified that he saw his brother assaulting the victim and actually tried to stop the altercation. During closing arguments, defendant attacked the prosecution's case, arguing that there was no credible testimonial evidence because the witnesses who identified defendant were known to lie and were lying under oath at trial. Defendant also claimed that there was no corroborating evidence. In rebuttal, the prosecutor asserted:

There's been no reference of motive to lie for any of the witnesses that testified on behalf of the people. The defendant has plenty of motive to lie. He lied to the police when they spoke with him. He lied to Eric Epinger partially. And he lied to you when he got on the stand. And he's the only one that got up there and lied.

I guess we could all be wondering if Mickey Vance is the one that was beating on Mr. Hernandez, and Mr. Van –Mickey – or Robert Vance had nothing to do with it, where's Mickey Vance to tell us that.

The prosecutor's comments were directly applicable to the defendant's own testimony and were made in response to defendant's closing argument. The prosecutor was not prohibited from commenting on the improbability of the defendant's theory or evidence, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), and was within his right to argue regarding defendant's failure to produce a corroborating witness. *People v Jackson* 108 Mich App 346, 351-352; 310 NW2d 238 (1981). Defendant chose to offer a defense that depended on his own credibility and that of his brother. In opting to use this defense, defendant invited argument by the prosecutor concerning the validity and weight of the evidence in support of his theory. Hence, the prosecutor could properly comment on defendant's failure to produce his brother. *Fields, supra* at 115-116.

Defendant also asserts on appeal that he was denied a fair trial by an improper reference to a polygraph examination by a witness. Defendant failed to preserve this claim by objection before the trial court. Where a defendant fails to preserve for appeal arguments related to the

admission of evidence, this Court reviews for plain error affecting defendant's substantial rights. *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001).

Normally, reference to a polygraph test is not admissible before a jury. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). However, although reference to a polygraph test is inadmissible, it does not always constitute error that warrants reversal. *Id.* To determine if reversal is warranted, this Court analyzes a number of factors, including:

- (1) whether defendant objected and/or sought a cautionary instruction;
- (2) whether the reference was inadvertent;
- (3) whether there were repeated references;
- (4) whether the reference was an attempt to bolster a witness's credibility; and
- (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981).]

Considering these factors, we conclude that defendant's substantial rights were not affected by the cursory reference to the polygraph test. First, defendant did not object to this testimony and did not seek a cautionary instruction. Second, the reference to the polygraph was inadvertent, and was made in response to a question by defense counsel on cross-examination. It was not prompted by the prosecution. The challenged statement was at the tail end of a rambling answer, and it was non-responsive to the question asked. Third, there was only one brief reference to a polygraph in the presence of the jury. Defense counsel quickly interrupted that reference before the witness could go into further detail, and the issue was never mentioned again. Fourth, there is no indication on the record that the reference to the polygraph test was made in an attempt to bolster the credibility of a witness. Lastly, the results of the polygraph test were never disclosed to the jury.

Based on the context of the reference and, considering all of the other evidence presented against defendant, the error in the reference to the polygraph examination did not affect defendant's substantial rights.

Defendant's last argument on appeal is that his attorney's failure to call two witnesses deprived him of a substantial defense and violated his rights to have the effective assistance of counsel. To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). That is, defendant must show that counsel's error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant contends that his attorney erred by not calling two additional witnesses to testify on his behalf. The two witnesses would allegedly have testified concerning the victim's intoxication at the time of the attack, the affect of that intoxication on the victim and the victim's veracity. A trial counsel's decisions concerning what witnesses to call and what evidence to present are matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would

have affected the outcome of the proceeding.” *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant was not deprived of a substantial defense by his trial counsel’s failure to call these witnesses. The victim admitted that he was drinking, and a toxicology report determined his blood-alcohol level was .16 at the time. Further, defendant admitted to lying under oath at the preliminary examination. Hence, the testimony of the two additional witnesses would merely have been cumulative.

There were no errors warranting reversal.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski
/s/ Christopher M. Murray