

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUEMONDO JUAN GOOSBY,

Defendant-Appellant.

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UNPUBLISHED

October 16, 2008

No. 278796

Oakland Circuit Court

LC No. 2006-211558-FC

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, and sentenced to 10 to 40 years' imprisonment. He appeals as of right, and we affirm.

I. Facts

Defendant's conviction arises out of the carjacking of Richard Metcalf outside his girlfriend's residence in Ferndale at approximately 1:00 a.m. on October 8, 2006. While riding his motorcycle to Ferndale from Detroit that night, he noticed two men following him in a car. The men continued to follow him when he turned onto his girlfriend's street. When he arrived at his girlfriend's house, he got off the motorcycle and was opening the gate when two men approached him. The stockier of the two men, Earl Rembert, was wearing a German-style helmet and pointed a gun at Metcalf while the other man, later identified as defendant, demanded Metcalf's wallet and the keys to the motorcycle. Defendant then rode away on the motorcycle and Rembert ran away.

The police apprehended Rembert, who was wearing a German-style helmet, after chasing him on the motorcycle shortly after the incident. Metcalf identified defendant as the other perpetrator at a photographic lineup conducted a few days later and identified him again at a corporal lineup. At trial, defendant denied being involved in the incident and testified that a previous injury rendered him unable to ride a motorcycle.

II. Analysis

Defendant first argues that evidence regarding a threat against Rembert was inadmissible hearsay and violative of the Confrontation Clause. We disagree. Because defendant did not preserve this issue by objecting to the evidence at trial, our review is limited to plain error

affecting his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is generally not admissible at trial. MRE 802. A statement that does not constitute hearsay, however, may be properly admitted. See *People v Fisher*, 449 Mich 441, 450; 537 NW2d 577 (1995).

Defendant argues that the following rebuttal testimony of Lieutenant Gary Whiting constituted inadmissible hearsay evidence:

Q. Lieutenant Whiting, did you listen to the testimony of Earl Rembert?

A. I did.

Q. Were you necessarily surprised by his testimony?

A. Yes.

Q. Since Mr. Rembert gave you the name Ruemondo Goosby, has he ever recanted that statement to you?

A. No.

Q. Prior to him providing you with that name, did you have any suspect, lead information as to the second individual in this carjacking?

A. No.

Q. Did you know who Ruemondo Goosby was?

A. Never heard of him.

Q. The placing of Ruemondo Goosby's photograph into the line-up and subsequently putting his body into the physical line-up, was that done based on the identification by Earl Rembert?

A. Yes.

Q. So when Earl Rembert denies having given you that name, is there anything left to call him besides a liar.

A. No.

Q. Has Mr. Rembert expressed any of his fears with regard to retaliation to you?

A. No. Someone else did, but he has not.

Q. So those concerns have been brought to your attention?

A. Yes.

Q. Prior to Mr. Rembert getting on the stand, did you know that those threats were going to cause him to recant?

A. I did not.

Lieutenant Whiting's testimony was not hearsay because it was not offered to prove the truth of the matter asserted, i.e., that Rembert received threats or feared retaliation. Rather, it was offered to show why Rembert changed his story during trial and denied telling Whiting that the individual known as "Chris," who committed the carjacking with Rembert, was actually defendant. Because the testimony was not hearsay, the rule against hearsay did not preclude its admission. *Fisher, supra* at 450. Moreover, the evidence was relevant because it pertained to Rembert's credibility, see *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995), and relevant evidence is generally admissible. MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). In any event, evidence of threats to Rembert had already been admitted by the time that Lieutenant Whiting testified on rebuttal. Rembert testified during defendant's case-in-chief that he had heard threats "on the streets" pertaining to his testimony in this case and that he is "a dead man walking." Thus, Whiting's challenged testimony did not add anything substantive to the previously admitted evidence regarding threats.

Further, Whiting's testimony did not violate defendant's right to confront witnesses against him. This Court recently recognized that "the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). Thus, even if the statement made to Lieutenant Whiting was testimonial, because it was not admitted to establish its truth, its admission did not violate defendant's right of confrontation. Accordingly, defendant's argument lacks merit.

Defendant next argues that defense counsel was ineffective for failing to object to Lieutenant Whiting's rebuttal testimony and for affirmatively eliciting such testimony during counsel's cross-examination of Whiting. We disagree. Because defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); see also *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable

probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer, supra* at 75-76. A defendant must also overcome the strong presumption that counsel's actions constituted sound trial strategy. *Id.* at 302.

Defendant cannot establish prejudice with respect to counsel's failure to object to Lieutenant Whiting's challenged testimony. As previously discussed, Whiting's direct-examination rebuttal testimony was not hearsay and did not violate defendant's right to confront witnesses against him. A defense attorney is not ineffective for failing to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Defendant also contends that defense counsel was ineffective for affirmatively eliciting inadmissible hearsay during counsel's rebuttal cross-examination of Whiting. Counsel cross-examined Whiting as follows:

Q. There's a question that was put to you about the threats to Mr. Rembert. The prosecutor's attempting to paint a picture that he's been threatened so he'd change his story. You apparently have heard that there were some threats made?

A. I did hear that, yes.

Q. Did you hear that from the prosecutor?

A. No.

Q. Okay. Who did you hear it from?

A. I received a phone call just before court started.

Q. I don't want to know what was said, I just want to know who you heard it from?

A. I don't know who the person on the other end of the phone was.

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Q. . . . What were the nature of the threats that were communicated to you by phone?

A. The caller told me that Mr. Rembert had received death threats regarding his testimony here today and wanted to make sure that he relayed that information to the prosecutor.

Similar to the prosecutor's direct examination of Whiting, Whiting's cross-examination testimony regarding the substance of the phone call was not elicited to prove the truth of the matter asserted, but rather, to explore the prosecutor's theory that Rembert changed his story because he had received threats. Accordingly, Whiting's testimony was not hearsay. Further, questioning Whiting regarding the prosecutor's theory constituted sound trial strategy

considering Rembert's testimony that no one from defendant's family had threatened him and that he was telling the truth when he testified that defendant was not involved in the incident. Thus, defendant was not denied the effective assistance of counsel.

Defendant next argues that the prosecutor committed misconduct that denied him his right to a fair trial. We disagree. Because defendant did not preserve this issue by objecting to the prosecutor's conduct at trial, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763, 774; *Knapp, supra* at 375. Although defendant argues that the prosecutor committed misconduct by eliciting testimony from Whiting regarding the anonymous telephone call that Whiting received before trial, the prosecutor's questioning did not violate the Confrontation Clause and Whiting's testimony was not hearsay. Therefore, defendant's argument lacks merit.

We also reject defendant's argument that the prosecutor distorted the burden of proof by informing the jury that it was required to determine which party's witnesses to believe, i.e., either the prosecutor's witnesses or defendant's witnesses, but not both. Some courts have held that a prosecutor can distort the burden of proof by incorrectly suggesting what jurors must find in order to reach a certain verdict. *United States v Vargas*, 583 F2d 380, 386 (CA 7, 1978).<sup>1</sup> "Even assuming that the testimony of the prosecution and defense witnesses contained unavoidable contradictions," a prosecutor may not equate a not guilty verdict with a finding that prosecution witnesses lied and a guilty verdict with a finding that they were truthful. *Id.* at 387.

Here, the prosecutor did not suggest that the jurors had to believe the prosecution witnesses and disbelieve defendant's witnesses in order to convict defendant. Likewise, the prosecutor did not inform the jury that it had to believe the defense witnesses and disbelieve the prosecutor's witnesses in order to acquit defendant. Rather, the prosecutor argued as follows:

You saw a lot of other people sit in your seats and asked to leave, but you were picked because we believed you were capable of using reason and common sense which is what we require of jurors and in this case, using your reason and common sense is going to be very important because it's going to be your job to decide who's telling the truth. That's going to be your function in this trial. . . . *What you need to decide as a group is who you believe.* That's going to be your job and in doing that, you need to rely on your common sense and your everyday experience. We call it credibility, believability and you're going to get a very specific jury instruction from the judge on credibility. Use it. They [sic] are tools we give to you to help you do your job, no different than my three-ring binder or my court rules, okay? These are your tools for being jurors in determining legally who you believe, what are we supposed to rely on. You heard so many different things from the people in this chair. Who[m] do you believe? The credibility instruction gives you the tools to make those determinations as well as your common sense and everyday experience, okay?

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<sup>1</sup> Opinions of lower federal courts, although not binding, may be considered persuasive authority. *Walters v Nadell*, 481 Mich 377, 390 n 32; 751 NW2d 431 (2008).

Accordingly, the record does not support defendant's argument that the prosecutor suggested that the jurors had to either believe or disbelieve each party's witnesses "as a group." The prosecutor's statement that the jury must decide "as a group" whom to believe, when read in context, meant only that the jurors had to collectively decide which individual witnesses were credible. Thus, defendant's argument lacks merit.<sup>2</sup>

Defendant also contends that the prosecutor disparaged defense counsel during closing argument. Regarding Rembert, the prosecutor stated, "I did not call him as a witness. I was not going to put life at risk and have him testify nor suborn perjury knowing the truth, but he was called to testify and he did commit perjury." Although the remarks arguably accused defense counsel of risking Rembert's life by calling him to testify, they constituted valid commentary on Rembert's testimony that he had heard threats "on the streets" regarding his testimony in this case. A prosecutor is free to argue the evidence and all inferences drawn therefrom. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Moreover, defense counsel conceded that Rembert is a "liar" and that some of his testimony may not have been truthful.

Further, defendant contends that the prosecutor ridiculed defense counsel's arguments by referring to them as a "red herring" and "smoke and mirrors." The prosecutor's remarks properly responded to defense counsel's closing argument regarding the police's failure to dust the motorcycle for fingerprints and conduct DNA testing on fibers or hairs that may have been found in the German-style helmet. Because the remarks were merely responsive, even if improper, reversal is not required. *Dobek, supra* at 64. And, because all of defendant's allegations of prosecutorial misconduct are meritless, there can be no improper cumulative effect that denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Accordingly, defendant has failed to establish plain error.

Defendant's final argument is that the trial court denied him his right to due process by instructing the jury that its request for a definition of "probable cause" was irrelevant. We again disagree. We review de novo claims of instructional error. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004).

Generally, jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "The instructions must include all elements of the charged offenses and any material issues, defenses, and theories if supported by the evidence." *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

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<sup>2</sup> Defendant contends that the prosecutor committed misconduct by asserting that he lied. A prosecutor is free to argue from the facts that certain witnesses are credible while others, including the defendant, are not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The record shows that the prosecutor relied on the evidence presented during trial in support of her assertion that defendant lied. The prosecutor did not suggest that she possessed special knowledge regarding defendant's credibility.

The trial court did not err by instructing the jury that the definition of “probable cause” was irrelevant. The definition of that term was not material to whether defendant committed the offenses alleged. Defendant’s theory was that the police failed to thoroughly investigate the case, and Whiting testified that he did not believe that he had probable cause to obtain a search warrant for defendant’s home. During closing argument, defense counsel argued that the police never went to defendant’s neighborhood to investigate and never obtained a search warrant to search defendant’s home for possible evidence. The prosecutor’s argument merely responded to that of defense counsel. The trial court instructed the jury that it must decide the case based on the evidence presented. Therefore, the definition of “probable cause” and whether Lieutenant Whiting had probable cause to obtain a search warrant was not relevant to whether the evidence supported a guilty or a not guilty verdict. It was for the jury to determine whether the lack of physical evidence connecting defendant to the incident compelled his acquittal, not whether Whiting had probable cause to obtain a search warrant that may or may not have led to the discovery of physical evidence. Accordingly, the trial court’s instruction was not erroneous.

Affirmed.

/s/ Patrick M. Meter  
/s/ Michael J. Talbot  
/s/ Christopher M. Murray