

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 24, 2011

v

JOHN HAROLD GRAVELLE,  
  
Defendant-Appellant.

No. 294352  
Chippewa Circuit Court  
LC No. 2009-000049-FH

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Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84.<sup>1</sup> Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 5-20 years' imprisonment. We affirm.

On the afternoon of December 26, 2008, Charles McClusky and several others, including defendant, went to Joe's Bar in Rudyard, Michigan to socialize. While there, defendant and McClusky, who had not previously known each other, became engaged in an argument. At some point, McClusky and defendant were in the men's bathroom at the same time and the argument continued. One of defendant's friends, Justin Dufresne, entered the bathroom and the argument escalated into a physical assault upon McClusky, with Dufresne and defendant punching and kicking McClusky repeatedly as he lay on the bathroom floor. McClusky suffered a broken nose, a fractured nasal bridge and eye socket, and various cuts and bruising. Defendant was charged with assault with intent to do great bodily harm less than murder and was convicted at the conclusion of a jury trial of that offense.

On appeal, defendant first argues that there was insufficient evidence to support his conviction. We disagree.

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<sup>1</sup> Defendant was acquitted of the charge of conspiracy to commit assault with intent to do great bodily harm less than murder.

We review a claim of insufficient evidence de novo, viewing the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). In reviewing the sufficiency of the evidence, this Court is careful not to interfere with the jury's role as the sole judge of the facts. *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). It is for the trier of fact, not the appellate court, to determine the credibility of witnesses and what inferences may be fairly drawn from the evidence, as well as the weight to be accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

To establish that defendant committed the crime of assault with intent to do great bodily harm less than murder, the prosecution must prove that defendant engaged in (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and that he had (2) an intent to do great bodily harm less than murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). The second element requires proof of specific intent, as opposed to general intent. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). “An intent to harm the victim can be inferred from defendant's conduct.” *Id.*

Viewing the evidence in light most favorable to the prosecution, a rational trier of fact could have found that the prosecution proved the essential elements of the crime beyond a reasonable doubt. It is undisputed that defendant and McClusky had a verbal disagreement at the bar. While there is some question as to whether defendant followed McClusky into the bathroom or whether it was the other way around, the evidence establishes that McClusky did not elevate the argument to a physical level, and that not only did defendant attempt and succeed in using violence against McClusky, he did so with the intent to cause great bodily harm.

Shannon Davis, McClusky's ex-girlfriend, testified that after defendant and McClusky were arguing at a table in the bar, they separately went into the men's bathroom. After the two had been alone in the bathroom for several minutes, Davis went into the bathroom to see what was happening. Davis testified that when she entered the bathroom, the two were still verbally arguing, so she stood between them. Davis testified that defendant walked around her and pushed McClusky against a bathroom wall, at which point Dufresne entered the bathroom and immediately punched McClusky in the face. Davis testified that McClusky fell to the floor and both men then began punching and kicking him. The owner of the bar similarly testified that when he entered the men's room, he saw three men repeatedly kicking a man who was lying on the floor.<sup>2</sup> Another witness, Douglas Clegg, testified that there was a ruckus coming from the men's bathroom such that the walls were literally shaking. Clegg testified that when he went into the bathroom, he observed a man lying on the floor and two guys on top of him, kicking

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<sup>2</sup> There is a conflict in the testimony. The bar owner testified that there were three perpetrators, while other witnesses testified to seeing two perpetrators. All witnesses, however, agreed that defendant was one of the perpetrators.

him. Clegg testified that defendant was one of the men kicking McClusky, and that he pushed him off McClusky.

By all accounts, McClusky lay on the floor attempting to cover his face while both defendant and Dufresne kicked and punched him repeatedly. The assault continued until broken up by the bar owner and a bar patron. There was no testimony that McClusky at any time hit or kicked defendant or Dufresne. *After* the physical altercation was broken up, McClusky undisputedly shouted at defendant and perhaps attempted to engage him in another fight. However, the assault leading to defendant's conviction had already been completed and no further physical altercation occurred. Defendant's contention that there was insufficient evidence of criminal intent must fail.

Further, while defendant classifies McClusky's testimony as unbelievable due to his lack of any serious injury, McClusky's injuries were substantiated by several witnesses, including the testimony of the attending physician at the hospital. Defendant also argues that McClusky's testimony was not credible because of inconsistencies<sup>3</sup>. However, we leave it to the jury to determine witness credibility. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Based upon the evidence presented, a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Cline*, 276 Mich App at 642.

Defendant also contends that the verdict was against the great weight of the evidence. He moved for judgment notwithstanding the verdict, for new trial and/or a directed verdict of acquittal before the trial court asserting that the jury's verdict was not supported by the evidence. The trial court denied the motion. We find that the trial court did not err or abuse its discretion in denying defendant's motion.

Though evidence may be legally sufficient to support a conviction, a new trial should be granted where a verdict is against the great weight of the evidence, but "only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998)(citation omitted). We review a trial court's decision denying a defendant's motion for a new trial for an abuse of discretion, *Unger*, 278 Mich App at 232, and its ruling on motions for JNOV and directed verdict de novo. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000).

Here, defendant's great weight argument is based on the same claims that he presented with respect to his sufficiency of the evidence argument. Again:

When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must

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<sup>3</sup> Notably, defendant relies heavily upon McClusky's testimony at the preliminary examination to establish inconsistencies which, he admits, "unfortunately the jury was not made aware of."

defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, even if it is arguably inconsistent, if there is an interpretation of the evidence that provides a logical explanation for the findings of the jury. *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006)(internal citations and quotations omitted).

Moreover, conflicting testimony, even if impeached, is not a sufficient ground for granting a new trial. *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003). Unless directly contradictory testimony was (1) so far impeached that it was deprived of all probative value; (2) the jury could not believe it, or; (3) it contradicted indisputable physical facts or defied physical realities, a court must defer to the jury's credibility determination. *Lemmon*, 456 Mich at 646. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Zantel Mktg Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). Because there was competent evidence establishing that defendant physically assaulted McClusky, causing him injuries, there is no basis to grant defendant a new trial on the theory that the verdict was against the great weight of the evidence.

Defendant next asserts that the prosecution engaged in several instances of misconduct that served to deprive him of his right of due process. We disagree.

We generally review 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). However, where, as here, no objection to the prosecutor's conduct was made, we review a claim of prosecutorial misconduct for plain error affecting substantial rights. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Claims of prosecutorial misconduct are reviewed on a case-by-case basis and are considered in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not intentionally inject inflammatory arguments into trial with no apparent justification except to arouse prejudice. *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). The challenged remarks must be read, however, as a whole and evaluated in light of defense arguments and the relationship of the remarks to the evidence admitted at trial. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

Defendant first cites as misconduct the prosecutor's alleged intentional and repetitive eliciting of testimony that defendant was a white supremacist. According to defendant, the prosecution's references were highly prejudicial and intended to both inflame the jury and show that defendant was a bad person. We disagree.

The following exchange took place on direct examination of McClusky:

Q: At some point was there an argument?

A: Oh, yes.

Q: And who was that between?

A: Between me and Mr. Gravelle.

Q: What was that about?

A: It was about white supremacists.

Q: Describe how that gets going, who is saying what, what points are being made?

A: Mr. Gravelle just made comments or what about being released from prison, et cetera, et cetera. He said white power, he carries the shit where he goes, whatever. I told him—I mean, there was a disagreement. There was arguing. Honestly, I basically told him to shut the hell up.

Q: You told him that?

A: Basically.

Q: Any why is that?

A: Because it was getting carried away . . .

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A: . . . He was getting louder and louder about the white power shit so-

While defendant categorizes this line of questioning as an intentional attempt to portray him in a bad light and inflame the jury, it is clear that the prosecutor was trying to establish the basis for the argument between defendant and McClusky that ultimately led to McClusky being assaulted. The prosecution's questions were intended to tell the jury the complete story, and there is no indication that she knew that McClusky would refer to their argument as stemming from white supremacist issues, rather than using a more neutral description of the basis for their argument. And, there is no indication that the references were intentionally elicited by the prosecutor to impugn defendant's character rather than to explain how the physical assault began.

Defendant also points to witness references to him as a skinhead and indications that he was previously incarcerated as amounting to prosecutorial misconduct. We disagree.

At one point, the prosecutor asked McClusky whether the person who beat him up in the bar was the same person that he saw in a truck later that day. McClusky responded, "Yes, he looks a little different now, but--" The prosecutor then questioned how defendant looked different and McClusky responded, "Before he was a completely shaved skinhead and, you know." This was the singular reference to defendant as a skinhead. The prosecutor then asked McClusky to identify the defendant in court, and concluded her questioning. There is no

indication that the prosecutor intentionally elicited from McClusky that defendant was a skinhead, and she did not dwell on the isolated remark. As such, there was no misconduct on the prosecutor's part based upon McClusky's description of defendant as a skinhead.

Moreover, while other witnesses, when describing defendant's physical appearance, indicated that he had a shaved head, there is nothing to indicate that the description was intended to be or was, in fact, inflammatory. The description of his shaved head was given as one part of the witness's overall description of defendant, including his facial hair and the clothing he wore. And, defendant does not challenge the description of his head as shaved as inaccurate. Because the description of defendant was relevant to his identity and was not inflammatory or prejudicial, we find no misconduct arising from these statements.

As pointed out by defendant, several witnesses made reference to his prior incarceration. However, looking at the references in context, it is clear that the references were made to describe how the argument between defendant and McClusky began, what it concerned, and how it ultimately led to the physical assault. It is also clear that the prosecutor tried to steer the witnesses away from referencing prison. For example, when Davis testified that everyone at the table was cussing and McClusky told defendant to stop, the prosecutor asked:

Q: Okay. Could you hear what in particular the defendant was swearing? Do you know what he was saying?

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A: Chuck asked him a couple of times to stop swearing and I don't know what the tension was between them, kind of grew a little bit and then they started talking about prison.

Q: Don't say what they said. The tension is rising?

A: Okay.

Q: Then what? Let me backtrack. Is it fair to say they are arguing?

A: They weren't arguing at this point. They were just talking. They were talking about prison and whatnot, what was going on, what happened in prison or what. He got, Chuckie got on the phone with his father. At this point they had realized [defendant] served time with—

Q: Don't tell what they were arguing about. They are discussing something, then it becomes an argument?

Other witnesses made reference to defendant being or having been in prison as well. When defense witness Angela Hood was questioned by the prosecutor as to whether she was friends with defendant, Hood answered that she was. Hood then volunteered that she has not talked to him since he "has been locked up." The context of this and other remarks establishes that the prosecutor did not deliberately draw the references out, or call attention to them once

made. Further, defendant admits that this was a volunteered, unresponsive answer. Thus we find no prosecutorial misconduct based on the above.

Defendant also asserts that trial counsel was ineffective for failing to object to the testimony regarding his prior incarceration, and references to him as a white supremacist and skinhead. We reject defendant's assertion that trial counsel was ineffective for failing to object in connection with the claims of prosecutorial misconduct discussed above on the ground that there was in fact no prosecutorial misconduct to object to. See *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008)(Defense counsel is not ineffective for failing to make a futile objection.).

Defendant next avers that the prosecutor engaged in misconduct by vouching for the credibility of McClusky and arguing facts not in evidence. We agree.

A prosecutor may argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). A prosecutor may not, however, vouch for the credibility of witnesses by implying that she has some special knowledge whether the witnesses testified truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

The testimony defendant points to as improper occurred during counsels' closing statements:

Defense: Now, I delivered, ladies and gentlemen. You got what I told you. The prosecutor did promise a couple other things. She promised that she was going to call Emily Miller so she did not do that. I did.

Prosecutor: That is a mischaracterization.

Court: I think she was listed as a witness who may testify. I don't know she specifically said she was going to call her.

Defense: She was going to call Donald Lawrence to the stand. She never called Donald. She told you she was going to call Trooper Sliger to the stand to testify an [d] she didn't put him on. I wonder what he may have to say that was so damaging he couldn't testify?

Prosecutor: I'm going to object.

Court: That is a mischaracterization so disregard that, ladies and gentlemen.

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Prosecutor: Thanks. Emily Miller, Angela Hood, and Donald Lawrence, I did name at the beginning that I may call them and the defense attorney knows full well, I told her, Judge, I think these three people I can't ethically put on someone I think is going to lie. I told her I was not going to call

them, however, I will keep them under subpoena power if the defendant chooses to call them they certainly could call Donald Lawrence if they thought he would be helpful for them. That's their decision. He certainly was available. The same with Emily. I think she minimized, if not more than that, on several things. I know for sure Angela Hood did. So there is no funny business about the witnesses here. We have done actually more than the law requires us to do by making sure they were here and available should the defense want to call them.

It is true that an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001). It is also true that the prosecutor was responding to defense counsel's suggestion that the prosecutor did not call certain witnesses because they may be damaging to her case. However, the prosecutor's comments crossed the boundary of being merely responsive. The prosecutor explicitly stated that she thought that the witnesses (one of which was ultimately called by defense counsel) would lie on the stand and that she could not ethically call them to testify. She also explicitly stated that one witness minimized "if not more" several things, adding, "I know for sure Angela Hood did." These statements clearly indicate a special, personal knowledge about the truthfulness of these witnesses, which is impermissible. *Bahoda*, 448 Mich at 276. The prosecutor also improperly referenced facts outside the evidence, remarking about an out of court conversation to suggest that defense counsel was made aware that the witnesses would not be truthful.

We thus must determine whether the act of misconduct affected defendant's substantial rights, i.e., whether the statements had the effect of denying defendant a fair trial. Angela Hood and Emily Miller were called as defense witnesses. Hood testified that defendant and McClusky were arguing at the bar and that defendant at one point went into the bathroom. According to Hood, McClusky followed him. Hood testified that she heard a ruckus coming from the bathroom and that she, with several others, went into the bathroom. Hood testified that because there were so many people in the bathroom, she could not see who was fighting and she did not see what happened. Given that Hood's statements essentially consisted of assertions that she did not see anything, and were not damaging or beneficial to either party, the prosecutor's statement that she "knew" Hood minimized several things did not deprive defendant of fair trial.

Miller testified that after arguing at the table with McClusky, defendant went into the bathroom. According to Miller, McClusky followed him in, then Dufresne opened the door to the bathroom and she saw Dufresne hit McClusky. Miller also testified that after Dufresne hit McClusky, several other people in the bar went into the bathroom and intervened. Miller did not see McClusky hit anyone, and she did not see him lying on the bathroom floor. Like Hood, Miller testified that she saw essentially nothing, with the exception of seeing Dufresne hit McClusky. While the prosecutor asserted that she thinks Miller minimized "if not more" several things, thinking a witness is not testifying truthfully is not the same as indicating one has a special knowledge of that witness' truthfulness.

More importantly, a curative instruction could have removed any risk of prejudice that the improper statements created. See, *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds in *Crawford v Washington*, 541 U.S. 36, 64; 124 S Ct 1354; 158 L.Ed.2d 177 (2004)( no error requiring reversal will be found if the prejudicial effect

of the prosecutor's comments could have been cured by a timely instruction). The trial court did, in fact, instruct the jury that the lawyer's statements and arguments are not evidence and that the jury should only accept statements by the lawyers that are supported by the evidence or their own common sense and general knowledge. Taking into account the substantial evidence against defendant (outside of any testimony by Miller and Hood) and the trial court's instruction to the jury, defendant has not shown plain error affecting his substantial rights.

Defendant finally contends that defense counsel was ineffective for failing to object to the prosecutor's statements during closing arguments and move for a mistrial. To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under 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. *Strickland v. Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 LEd2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Because defendant did not move for a new trial or a *Ginther*<sup>4</sup> hearing below, our review of the claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

There is no question that counsel should have objected to the prosecutor's remarks. It was obvious that the statements constituted inappropriate vouching and counsel's failure to object to the statements was erroneous. That being said, we cannot conclude that but for counsel's failure to object or move for a mistrial, the outcome of his trial would have been different.

The only testifying eyewitnesses to any part of the altercation consistently testified that defendant punched and kicked McClusky many times while he was lying on the bathroom floor trying to cover his face. There was no testimony by any witness that McClusky did anything but engage in a verbal argument with defendant before defendant and Dufresne assaulted him. Testimony was also presented that after the fight was broken up and the parties went outside, defendant came toward McClusky again, appearing as though he desired to further fight. The jury heard the testimony of all of the witnesses, and there was nothing inconsistent with the testimony of the prosecutor's witnesses and the defense witnesses. Again, the witnesses that the prosecutor improperly vouched against testified to not seeing the altercation between defendant and McClusky. They simply testified, consistent with other witnesses, that defendant and McClusky had a verbal argument and that McClusky followed defendant into the bathroom. They did not see what transpired thereafter between defendant and McClusky. As such, defendant has failed to show that had defense counsel properly objected, the outcome of the trial could have been different.

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<sup>4</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Affirmed.

/s/ Amy Ronayne Krause

/s/ Deborah A. Servitto

/s/ Elizabeth L. Gleicher