

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
November 20, 2012

v

KIRK DOUGLAS BAKER,  
  
Defendant-Appellant.

No. 307831  
Cheboygan Circuit Court  
LC No. 11-004383-FH

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Before: BORRELLO, P.J., and FITZGERALD and OWENS, JJ.

PER CURIAM.

A jury convicted defendant of aggravated domestic violence, MCL 750.81a(3), and the trial court sentenced him to an 11-month jail term and one year of probation. Defendant appeals as of right. We affirm.

Defendant was temporarily residing in the home of his ex-wife, Bambi McGarth, when an altercation ensued that resulted in the loss of McGarth's bottom two front teeth. According to McGarth, she came home to find defendant asleep on her couch. After she asked him to move his van so that she could park in her driveway, defendant punched her in the eye and then in the mouth. Defendant then got her onto the ground and punched her in the head. Eventually, McGarth bit defendant and he left her home. McGarth then called 911. Defendant, on the other hand, testified that when McGarth approached him about his van, he stuck his finger up at her and she bit it. As he removed his broken finger from her mouth, the two bottom teeth were pulled out as a result of dental disease.

Cheboygan City Police Officer Roy Hartman testified that McGarth had clearly been involved in an altercation. Her eye and mouth were "puffy," her bottom teeth were missing, and she had blood in her mouth. Dr. Robert Armstrong, a dentist who had treated McGarth for five to seven years before the incident, opined that any dental disease that McGarth suffered would not have caused weakening of the teeth and that it was more likely that her teeth had been knocked out. Photographs depicting McGarth's injuries at the time of the offense were introduced into evidence.

Defendant first claims that statements made during the prosecutor's closing argument improperly shifted the burden of proof, thereby depriving him of a fair trial. We disagree. Because defendant failed to raise an objection or request a curative instruction during trial, this

issue is unpreserved and our review is for outcome-determinative, plain error. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

Defendant asserts that the following comments were improper:

Additionally, he says his finger's broken. We had our doctor come in and testify as to her teeth. He could have called the doctor to verify that his finger was broken, but he's asking you to believe it. I could say my finger is broken right now, but it's not. So he wants you to believe that. He presented nothing to verify it other than his statements, and let's not forget, he's the guy who's standing by all I did was this.

The prosecution may comment on the validity of the defendant's theory of the case. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Though the defendant does not have a burden to produce evidence, comments about his failure to do so, as long as not about the defendant's failure to testify, are permissible. *Id.* Such comments do not shift the burden of proof to the defendant. *Id.* It is within the permissible scope of a prosecutor's closing argument to comment upon the failure of the defendant to produce a witness who could have corroborated the defendant's version of the facts. *People v Harris*, 113 Mich App 333, 337; 317 NW2d 615 (1982). However, if calling a witness who could corroborate the testimony would be improper, a prosecutor should not "denigrate" the defendant for failure to do so. *People v Swindlehurst*, 120 Mich App 606, 612; 328 NW2d 92 (1982).

Here, the prosecutor merely addressed the fact that defendant failed to corroborate his testimony about having seen a medical professional about his finger and that his finger was actually broken. Pointing out a failure to corroborate evidence is permissible prosecutorial conduct. *Harris*, 113 Mich App at 337. In addition, there is no claim or reason to believe that a corroborative witness, namely the medical professional who allegedly treated defendant's allegedly broken finger, would be improper to call as a witness. As such, the prosecutor's statements during trial that defendant failed to corroborate evidence regarding his allegedly broken finger or insinuations that defendant's story is not believable on the evidence were not improper. *Id.*; *Unger*, 278 Mich App at 240. In addition, the trial court told the jury that the burden of proof was on the prosecutor and that statements by the attorneys were not evidence. Because juries are presumed to follow the court's instructions, the jury knew the burden of proof was on the prosecutor. *Unger*, 278 Mich App at 237. For the foregoing reasons, the burden of proof was not impermissibly shifted to defendant.

Defendant argues that he was denied effective assistance of counsel when his trial counsel failed to object to statements made by the prosecutor during closing arguments and failure to object to testimony by Dr. Armstrong. We disagree. In order to establish a claim for ineffective assistance of counsel, a defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness," which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must then demonstrate that "the deficient performance prejudiced the defense," which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial . . ." *Id.* at 687. The Supreme Court has held that this second prong is asking whether "there was a reasonable probability that the outcome of

the trial would have been different had defense counsel” adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004). When reviewing a claim of ineffective assistance of counsel that has not been preserved for appellate review, a reviewing court is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

First, as discussed above, trial counsel had no grounds to object to the prosecutor’s statements, and attorneys are not required to make meritless or futile objections. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Second, Armstrong was qualified as an expert in the field of dental medicine. He testified that he treated periodontal disease up until Stage 4. Armstrong testified that McGarth had periodontal disease at Stage 2 and 3 and, therefore, his testimony was within the scope of his expertise. In addition, it is clear from the record that defendant’s attorney was attempting to use Armstrong’s expertise to lend credence to the claim that McGarth’s teeth were pulled out when she bit defendant. Without testimony about McGarth’s periodontal disease, such a claim would have been unreasonable. Therefore, defense counsel’s failure to object seems to be a matter of trial strategy, particularly in light of the fact that defense counsel used Armstrong’s testimony to support the defense theory that McGarth’s teeth had been pulled from her mouth as a result of her periodontal disease. Defendant has failed to show that counsel’s representation fell below an objective standard of reasonableness.

Finally, defendant claims that the verdict was against the great weight of the evidence. To preserve a claim that the verdict is against the great weight of the evidence, a defendant must move for a new trial. *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991). Defendant failed to move for a new trial and, therefore, we review this unpreserved for plain error affecting the defendant’s substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

A “new trial based upon the weight of the evidence should be granted 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). In general, conflicting testimony or questions concerning the credibility of the witnesses are not sufficient grounds for granting a new trial. *Id.* at 643.

Defendant’s argument is premised on his assertion that the physical evidence did not support McGarth’s version of events and that McGarth’s testimony was not credible. A review of the record reveals that defendant’s argument is without merit. Although the defense contests the “credible” evidence offered by the prosecution, the credibility of witnesses presents an issue for the trier of fact. Moreover, the testimony of Hartman and Anderson, as well as photographic evidence, supported McGarth’s version of events. The evidence does not clearly preponderate heavily against the verdict.

Affirmed.

/s/ Stephen L. Borrello  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens