

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN DIARRA MCSWAIN,

Defendant-Appellant.

UNPUBLISHED

April 18, 2013

No. 309023

Wayne Circuit Court

LC No. 11-007813-FC

Before: WILDER, P.J., and METER and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of kidnapping, MCL 750.349, and three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c) (during the commission of a felony). Defendant was sentenced to serve 39 to 60 years in prison for each conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied his right to a fair trial when the prosecution made an improper remark during closing argument. He also claims he was denied his right to the effective assistance of counsel when his trial counsel failed to object to the prosecutor's statement. Because defendant failed to preserve either of these claims, our review of his prosecutorial misconduct claim is limited to plain error that affected defendant's substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), and our review of his ineffective assistance of counsel claim is limited to errors apparent on the record, *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29; 650 NW2d 96 (2002). This test is context-sensitive and requires the reviewing court to examine the pertinent portion of the transcript and evaluate the challenged remarks in light of defense arguments and the evidence admitted at trial. *Id.* at 30. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the defendant's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, when drawing reasonable inferences from the evidence admitted at trial, the prosecution need not phrase its arguments in the blandest of terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

It is well established that a prosecutor may not vouch for the credibility of witnesses by implying that she has some special knowledge of the witnesses' truthfulness. *People v Thomas*,

260 Mich App 450, 455; 678 NW2d 631 (2004). Nor can a prosecutor place the prestige of her office behind the testimony of witnesses. *People v McGee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). However, a prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), especially when “the question of guilt depends on which witnesses the jury believes,” *Thomas*, 260 Mich App at 455.

Defendant challenges the portion of the prosecutor’s rebuttal argument in which she stated, “And I submit to you what you heard up there from that defendant was lie, after lie, after lie, carefully trying to calculate it with the evidence that he’s heard, the evidence that was present against [him].” The prosecution committed no error in commenting on defendant’s credibility. Read in context—following defense counsel’s closing argument, which focused on the truthfulness of defendant’s and the alibi witnesses’ testimonies—this statement was a proper response to a defense argument. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007) (finding that the prosecutor’s comments were “appropriately responsive to [the] defendant’s closing comments”). The prosecution supported its statement that defendant’s testimony “was lie, after lie, after lie,” by highlighting the inconsistencies in his version of events and how it did not match up *with the other evidence presented at trial*. For instance, at trial, defendant testified that he visited a casino on the night in question; but when questioned about his involvement in the charged offense, defendant never told police about a visit to the casino. Moreover, immediately following the contested remark regarding defendant’s credibility, the prosecution commented on the other facet of defense counsel’s argument, the testimony of the alibi witnesses. The prosecution argued that, in contrast to defendant’s version of events, the testimony of the alibi witnesses was not necessarily inconsistent with the prosecution’s theory of the case. This further supports the conclusion that the prosecution was simply responding to a defense argument and *using the evidence* to draw reasonable inferences regarding the credibility of defense witnesses. In addition, after referencing the conflicting testimony regarding defendant’s whereabouts on the night in question and drawing reasonable inferences regarding whether his version of events matches the evidence presented at trial, the prosecution concluded, “I submit to you that’s what I believe *the evidence shows*, it’s up to you to decide whether that’s a lie or not.” Thus, contrary to defendant’s contention on appeal, the prosecutor did not improperly imply that she had any special knowledge about the credibility of defendant but, instead, properly used the evidence and inferences from that evidence to argue that defendant was not credible. Moreover, to the extent that the statement may have been prejudicial, any potential for prejudice was cured by the trial court’s instructions that only the jury is to determine witness credibility and the attorneys’ arguments are not evidence. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that he was denied the effective assistance of counsel when his counsel failed to object to the above prosecutor statement. However, because the prosecutor’s statement was not erroneous, defense counsel was not ineffective for failing to object. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Defendant's remaining claim—that the trial court violated his Fifth and Sixth Amendment rights by engaging in judicial fact-finding under a preponderance of the evidence standard to increase his minimum sentence—is foreclosed by our Supreme Court.¹ In *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), the Court stated, “As long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” Here, defendant’s maximum sentences of 60 years necessarily fell within the statutory maximums because the statutory maximum for each of his convictions was “life” imprisonment. MCL 750.349(3); MCL 750.520b(2)(a). Accordingly, defendant failed to demonstrate any error related to his sentencing.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Michael J. Riordan

¹ Defendant concedes that current case law contradicts his argument but nevertheless raised the argument in order to preserve it for later appeal.