

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 23, 2013

v

BRENDA YVONNE WYATT,
Defendant-Appellant.

No. 308187
Wayne Circuit Court
LC No. 11-005654-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of embezzlement of \$100,000 or more, MCL 750.174(7), using a computer to commit a crime, MCL 752.796, uttering and publishing, MCL 750.249, embezzlement of \$1,000 or more but less than \$20,000 from a nonprofit organization, MCL 750.174(5)(c), unlawful use of a financial transaction device, MCL 750.157q, stealing or retaining a financial transaction device, MCL 750.157n(1), and two counts of identity theft, MCL 445.65. Because the prosecutor did not commit misconduct and defendant was not denied the effective assistance of counsel, we affirm.

Defendant argues that the prosecutor committed misconduct in several respects during her closing and rebuttal arguments, and that defense counsel rendered ineffective assistance by failing to object to the misconduct. We review unpreserved claims of prosecutorial misconduct “for plain error that affected the defendant’s substantial rights.” *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction. [*People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002) (citation omitted).]

“Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor’s remarks in context.” *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). “[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented” and may not express his or her personal opinion regarding the defendant’s guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659

(1995); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). In addition, a prosecutor may not appeal to the jury's sympathies or denigrate a defendant or defense counsel with intemperate and prejudicial remarks. *Bahoda*, 448 Mich at 283; *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). A prosecutor is free, however, to argue the evidence and all reasonable inferences arising from it as the evidence and inferences relate to the prosecution's theory of the case. *Dobek*, 274 Mich App at 66. A prosecutor may also respond to an issue that the defendant raised. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Attacking the defendant's theory of defense and commenting on the weaknesses in the defendant's case do not shift the burden of proof and do not constitute prosecutorial misconduct. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

Defendant challenges the following italicized comments that the prosecutor made during closing argument, quoted here in context:

And, lastly, she's charged with a financing transaction device [sic].

First, illegal use.

Second, possessing it without consent.

We know she didn't have permission to use it. She went to the casino with it. And we know she didn't have permission to have it. Dr. Weathers never consented to that. He didn't even know it existed.

Mr. Miller [co-counsel for the prosecution] told you in the beginning of the case that there's one key to figuring out this case. *We know she took the money. That's, that's [sic] out of the picture. We know she took the money.*

The question is did she have permission to take the money? Absolutely not. *And there is absolutely no doubt about that.*

Why didn't she have permission? How have we proven that?

Look at the testimony

Defendant argues that, by making the italicized comments, the prosecutor improperly expressed her personal opinion regarding defendant's guilt. To the contrary, the prosecutor was properly arguing the evidence and the reasonable inferences arising from it as those inferences related to her theory of the case. *Dobek*, 274 Mich App at 66. The evidence overwhelmingly showed that defendant misappropriated more than \$200,000. The prosecutor specifically referenced testimony that tended to establish defendant's guilt, such as testimony that defendant did not have permission to use a company credit card and that defendant in fact used the credit card at a casino. Contrary to defendant's argument, the prosecutor did not improperly express her personal opinion regarding defendant's guilt.

Defendant also challenges the following remarks, quoted here in context:

[Defendant] was good. She hid her tracks, sanitized her home. She hid her tracks, and it was evident. When she took the stand, it was evident by her testimony yesterday. She was detailed.

She was – told you she was taking notes. She knew account numbers. She knew times. She knew where people were standing.

[Defendant] told you everybody is a liar but me. You know why? *Because she is a con artist. She's a professional con artist.* Look at the way she operated at work. The only – she, she didn't give anybody access to her work. And the only time she couldn't hide her tracks was when her hands were away from her desk. Only time she couldn't hide her tracks.

What you saw yesterday, ladies and gentleman, *is just a continuation of the con. A perfectly planned act, a continuation of her scheme.*

To her the game was not over. She is a professional con artist and her crime only ended yesterday.

[Defendant] had the opportunity, all the right means, control, unfettered authority, unauthorized to steal from the company who trusted her most. To steal from the *families, the single mother[s] and the children that literally these companies were feeding.*

Again, the prosecutor's remarks properly commented on the evidence and the reasonable inferences arising from it. *Id.* Moreover, the prosecutor did not improperly appeal to the jury's sympathies. Defendant worked as a financial assistant/senior financial services assistant for TWW & Associates (TWW), Angel Land Child Care and Parent Institute (Angel Land), and Angelic Care. Although defendant primarily worked for TWW, the companies shared common ownership. TWW assists people who are transitioning from welfare to the work force in finding job placements. It also provides educational services and operates Angel Land, a nonprofit child care center formed to assist single parents who are transitioning from welfare to the workforce, or looking for employment through TWW. The evidence established that defendant engaged in and profited from unauthorized transactions on accounts belonging to TWW and Angel Land totaling \$204,361.51. Thus, the prosecutor's argument properly commented on the evidence and the reasonable inferences arising therefrom. *Id.*

Defendant also contends that the prosecutor's rebuttal argument improperly denigrated the defense. She challenges the following italicized remarks, quoted here in context:

You know what this reminds me of literally? *Perfect stage performance with smoke[] and mirrors trying to divert your attentions from the counts, from the elements, from the issues that actually matter, and puff smoke[] and mirrors as to things that have nothing to do with this.*

He's [i.e., defense counsel] astonished. He's astonished that Ms. Terrie Henderson [the entities' owner and president] wears nice clothes. Mother Teresa has diamonds blinging. Smoke.

What does that have to do with the over \$200,000 that he didn't even address. That's what he was attacking.

* * *

Everything he told you was something other than the actual charges that matter in this case.

* * *

I just wanna [sic] go over some of the things that I heard, in all due respect to [defense counsel], mention in this case. He want to [sic] talk to you about parking, about playgrounds. Puffs of smoke. Puffs of smoke. What does that have to do with anything that I just talked about? What does it have to do with getting paid almost \$7,000 in one month? What does it have to do with getting paid over for an entire month's paycheck in just one day, 24 hours?

He didn't address any of that because he couldn't. And then he couldn't get his stories straight. First he says, you know, yeah, she got paid and Ms. Terrie Henderson signs those checks. We know she admitted to them. She can't get away from the fact that they were endorsed by her.

Then he said, well, how do we know somebody didn't manipulate them? She admitted she signed them. Which story do you want to stick with?

Ladies and gentlemen, [defendant], she has fooled people for way, way, way too long. Don't let her fool you, too.

The prosecutor's argument did not improperly denigrate defendant or defense counsel and properly responded to defense counsel's closing argument. A prosecutor is free to respond to defense counsel's closing argument. *Dobek*, 274 Mich App at 67. Accordingly, the comments did not constitute plain error.

Finally, defendant argues that the prosecutor improperly shifted the burden of proof by questioning, during her rebuttal argument, why defendant did not present video surveillance footage of the casino ATM machine.¹ Generally, a prosecutor may not imply that the defendant must prove something and may not comment on the defendant's failure to present evidence because such an argument tends to shift the burden of proof. *Fyda*, 288 Mich App at 463-464. In this case, however, the prosecutor's comment properly responded to the following closing argument by defense counsel:

¹ The prosecutor stated:

Oh, where is the ATM video? You know this is not Law & Order. She took the stand. Why didn't she bring it.

How hard is it to get someone from the casino to corroborate ATM machine video. We've all seen those videos of the casino with the police. You know they exist.

You can't even scratch your head without the casino looking at you. Can't be on your cell phone. At least in Vegas. I don't know about here. But in any event you don't hear anything.

They keep saying she withdrew money with this card. They don't have – they haven't presented a doggone thing to you to corroborate that.

“An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.” *Watson*, 245 Mich App at 593 (quotation marks, citation, and brackets omitted). Accordingly, even if arguably improper, the prosecutor's argument does not require reversal because it was made in response to defense counsel's argument.

Defendant also argues that defense counsel's failure to object to the alleged instances of prosecutorial misconduct denied her the effective assistance of counsel. Because all of defendant's claims of prosecutorial misconduct lack merit, however, her ineffective assistance of counsel claim necessarily fails as well. “Counsel is not ineffective for failing to make a futile objection.” *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008).

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens