

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE ARIOUS FISHER,

Defendant-Appellant.

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UNPUBLISHED

July 29, 2014

No. 316111

Wayne Circuit Court

LC No. 12-011222-FC

Before: MARKEY, P.J., and OWENS and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 13 to 30 years for the assault conviction and 9 to 30 years for the robbery conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

The victim, Dominic French, testified that he was standing outside his work place during the early morning hours of September 2, 2012, when he saw defendant walking on the other side of the street. French was familiar with defendant because French was friends with defendant's sister. Defendant walked by French but then turned and went back toward him. When defendant was about 10 feet away, he pulled out a gun "like a revolver." French raised his hands, but defendant "just started shooting." Defendant continued to walk closer as he fired the gun. After French fell to the ground, defendant stood over him and kicked him in the head. Then defendant went through French's pockets and took \$300.

Defendant argues that improper comments the prosecutor made during opening statement and closing argument deprived him of a fair trial. Because defendant did not object to the challenged comments at trial, this issue is unpreserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Id.*

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The prosecutor's remarks must be considered in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The alleged misconduct consists of remarks the prosecutor made during her opening statement and her closing argument. “The purpose of an opening statement is to tell the jury what the advocate proposes to show.” *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (KELLY, J., concurring). The prosecutor may comment on the evidence to be presented and the reasonable inferences to be drawn therefrom if the comments are a fair introduction to the evidence. *Id.* During closing argument, the prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). But the prosecutor cannot vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness’s truthfulness. *Id.* at 276; *Bennett*, 290 Mich App at 476-477.

During her opening statement, the prosecutor stated that French “has no reason to lie.” In her closing argument, she stated that French “is not a liar.” The first statement was made in the context of asserting that the evidence would show that French was credible because he had no reason to lie, but that it was up to the jury to make that determination. A prosecutor may comment on the credibility of her own witness and argue from the facts that the witness has no reason to lie. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Thus, the prosecutor’s remark in opening statement was not improper. The second statement was made in the context of an argument in which the prosecutor reminded the jury that the jury must determine French’s credibility. The prosecutor then proceeded to argue that the jury should believe French by responding to various points defense counsel raised. Because the statement, viewed in context, was tied to the facts, it too was proper.

During closing argument, the prosecutor also stated that the police investigation constituted “great police work.” A prosecutor may not invite the jury to suspend its own critical analysis of the evidence and accept the prosecutor’s assurances of the defendant’s guilt. *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995). The prosecutor’s statement, viewed in context, was wholly unrelated to defendant’s guilt or innocence. Rather, it responded to defense counsel’s argument that the jury should have a reasonable doubt because of poor police work. The prosecutor countered the defense criticism and argued that the police acted reasonably in investigating the case and thus concluded that they had done great work. Otherwise improper remarks may not require reversal when the prosecutor is responding to defense arguments. *Thomas*, 260 Mich App at 455-456; *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Thus, there was no plain error.

Finally, the prosecutor stated that defense counsel’s closing argument was “a distraction” meant to divert the jury’s attention away from “what’s important here” and “the facts of this case.” A prosecutor may not personally attack defense counsel by suggesting to a jury that counsel is intentionally trying to mislead them. *People v Light*, 480 Mich 1198; 748 NW2d 518 (2008). “Although such conduct may not require reversal in a given case, it is still improper and unbecoming of a representative of the state.” *Id.* In this case, to the extent that the prosecutor’s remark was improper, it was not so egregious as to deny defendant a fair trial. There was no dispute that French was shot. The principal issue for the jury to resolve was whether defendant was the shooter. French, who knew defendant, identified him as the shooter at trial and in a pretrial photographic lineup, and a witness’s description of the shooter accurately described defendant. The prosecutor’s remarks were not directed at the critical issue of the shooter’s identity. Further, a timely objection and curative instruction could have alleviated any perceived

prejudice caused by the prosecutor's remark. *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008). Consequently, plain error requiring reversal did not occur. *Id.* Indeed, the trial court instructed the jury that it alone was responsible for deciding the facts of the case and which witnesses to believe, and that the lawyers' statements, arguments, and comments about the evidence are not evidence. Even without an objection, the court's instructions were sufficient to dispel any prejudice and protect defendant's substantial rights. *Bahoda*, 448 Mich at 281.

Defendant next argues that he is entitled to a new trial because trial counsel was ineffective for failing to object to the prosecutor's improper remarks. Because defendant failed to move for new trial or otherwise make a record on this claim, our review is limited to errors apparent on the record. *Rodriguez*, 251 Mich App at 38. To establish ineffective assistance of counsel, defendant must show both that defense counsel's performance fell below objective standards of reasonableness and that there is a reasonable probability that the results of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

As explained earlier, three of the four comments to which defendant takes exception were not improper, so there was no basis on which to object. Counsel is not ineffective for failing to raise a meritless or futile objection. *Unger*, 278 Mich App at 256. To the extent that defense counsel's failure to object to the comment that he had tried to distract the jury was objectively unreasonable, defendant cannot show that he was prejudiced. Even without counsel's objection, the trial court instructed the jury that it was its "job and nobody else's" to determine the facts of the case, that the jury was to base its decision "only on the evidence that was admitted during the trial," and that the lawyers' statements, arguments, and comments about the evidence are not evidence. Such "instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Id.* at 235 (citation omitted). Because the trial court's instructions were sufficient to dispel any prejudice and to protect defendant's rights, *Bahoda*, 448 Mich at 281, defendant was not prejudiced by defense counsel's failure to object. *Frazier*, 478 Mich at 243.

We affirm.

/s/ Jane E. Markey  
/s/ Donald S. Owens  
/s/ Karen M. Fort Hood