

Court of Appeals, State of Michigan

ORDER

People of MI v Jomonte Kenyatta Simpson

Docket No. 320939

LC No. 13-008026-01-FH

Kathleen Jansen
Presiding Judge

David H. Sawyer

Karen M. Fort Hood
Judges

The Court orders that the opinion issued in this case is hereby AMENDED to correct a clerical error. The opinion is corrected to read June 16, 2015 as the date of the opinion.

In all other respects, the opinion remains unchanged.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUN 29 2015

Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 16, 2016

v

JOMONTE KENYATTA SIMPSON,
Defendant-Appellant.

No. 320939
Wayne Circuit Court
LC No. 13-008026-FH

Before: JANSEN, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of a firearm by a person convicted of a felony (felon-in-possession), MCL 750.224f, carrying a concealed weapon, MCL 750.227(2), and possession of a firearm during the commission of a felony (felony-firearm) (second offense), MCL 750.227b. Defendant was sentenced to three years' probation for the felon-in-possession and carrying a concealed weapon convictions, and five years' imprisonment for the felony-firearm (second offense) conviction. We affirm.

This case arises from a disturbance in the parking lot of Déjà Vu, a strip club in Highland Park, Michigan. Defendant and the rest of his group had to pass through a metal detector and submit to a pat-down by security staff upon entry to the club. Defendant's sole witness at trial, Teeya Wells, testified that no weapons were found on defendant as a result of either of these procedures and that she did not see him with a weapon at all that night. Sometime later, while still in the club, defendant and his friends became involved in a verbal altercation with another group, and security asked both groups to leave. The argument continued in the parking lot, and the Highland Park Police eventually arrived to investigate the disturbance. As both groups dispersed, Highland Park Police Officer Darren Johnson watched defendant walk to a nearby car and lean down to enter the passenger side of the car. As defendant leaned down, Officer Johnson heard the sound of something made of metal falling to the ground. He approached the car that defendant had gotten into and discovered a black .40-caliber Smith and Wesson gun on the ground where defendant had leaned down. No one other than defendant was near the passenger side of the vehicle.

I. PROSECUTORIAL ERROR

Defendant first contends that comments made by the prosecutor during closing and rebuttal arguments improperly bolstered Officer Johnson's testimony and thus constituted prosecutorial error. We disagree.

A defendant must "contemporaneously object and request a curative instruction" to preserve an issue of prosecutorial misconduct for appellate review. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defense counsel did not object to the comments or request a curative instruction from the trial court. Therefore, the issue is unpreserved.

This Court reviews unpreserved claims of prosecutorial error for plain error affecting substantial rights. *People v Gaines*, 306 Mich App 289, 308; 856 NW2d 222 (2014). To show plain error, a defendant must establish that "1) error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error affects the defendant's substantial rights if it prejudiced the defendant by affecting the outcome of the trial. *Id.* Even if a defendant can satisfy all three requirements, appellate reversal "is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence." *Id.* at 763 (citations omitted; alteration in original).

In determining whether a prosecutor's comments were improper, this Court "evaluate[s] the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship of these comments to the admitted evidence." *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). "[A]n 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) (citation omitted; alteration in original). "A prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully." *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). "A prosecutor may, however, argue from the facts and testimony that the witnesses are credible or worthy of belief." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). During her closing argument, a prosecutor may comment on the credibility of a prosecution witness "especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Seals*, 285 Mich App at 22.

In this case, defendant argues that several comments made by the prosecutor during her closing and rebuttal arguments constituted error. During her closing argument, the prosecutor said, "Officer Johnson said—he testified very honestly—he didn't add anything. If he'd wanted to add something, he could have said, I saw the gun on him, he was waving it around. He didn't. He testified very honestly." The prosecutor also said that Officer Johnson "was very honest" when he testified that he did not see the gun on defendant and testified that an unoccupied car between defendant and Officer Johnson partially obstructed his view. During rebuttal argument, the prosecutor again stated that Officer Johnson "was very honest on the stand."

Both the prosecutor and defense counsel remarked in their opening statements that the lack of physical evidence and the paucity of witnesses meant that Officer Johnson's credibility

would be of critical importance to the jury. Thus, it was clear from the trial's outset that defense counsel would try to impugn that credibility. In his closing argument, defense counsel implicitly attacked Officer Johnson's credibility by saying:

[Defendant] dropped that gun and [Officer Johnson] was able to hear a metal sound from where he was with everything else that was going on in that parking lot.

I submit to you that's not reasonable. And it's more—you have more than reason to doubt that that's what happened.

The prosecutor's comments were a direct response to defense counsel's attempts throughout the trial to convince the jury that Officer Johnson was not a credible witness. See *Seals*, 285 Mich App at 22; *Watson*, 245 Mich App at 593. On numerous occasions, the prosecutor suggested that Officer Johnson's testimony had been honest precisely *because* of the lack of physical evidence and suggested that Officer Johnson could have added more inculpatory details had he wished to testify dishonestly. Thus, considering the trial context and the clear defense strategy to argue that Officer Johnson's testimony was not credible, the prosecutor's comments were proper. See *Seals*, 285 Mich App at 22.

Furthermore, the prosecutor did not personally vouch for Officer Johnson's credibility by suggesting that she had special knowledge that he was testifying truthfully. See *Rodriguez*, 251 Mich App at 31. She presented her opinion that Officer Johnson's testimony was "very honest," but that opinion was based on the facts and testimony, not on special knowledge. The prosecution may argue that that a witness is credible or worthy of belief on such grounds. See *Dobek*, 274 Mich App at 66.

The prosecutor's comments were also proper because of the conflicting evidence and the fact that the trial was a credibility contest. See *Thomas*, 260 Mich App at 455. Officer Johnson's testimony was inconsistent with Wells's testimony regarding whether defendant had a gun, and the jury's finding that Officer Johnson was credible was crucial to resolving the conflict. The prosecutor did not improperly interfere with the jury's decision regarding witness credibility. See *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008) (noting that "[t]his Court will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses").

Finally, although defense counsel did not request a curative instruction, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence." The court also noted that it was the jurors' job to decide which witnesses to believe, that the jury was responsible for deciding what testimony to accept in the event of conflicting testimony, and that the jury was to evaluate a police officer's testimony by the same standards as the testimony of any other witness. The court further cautioned the jurors that they "should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." A jury is presumed to follow the trial court's instructions. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, even if the prosecutor's comments were improper, the court's instruction would have cured the error. See *Seals*, 285 Mich App at 22.

Accordingly, the prosecution did not commit error by commenting on Officer Johnson's testimony. See *id.*; *Thomas*, 260 Mich App at 455; *Rodriguez*, 251 Mich App at 31.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense counsel's failure to object to the prosecutor's comments constituted ineffective assistance of counsel. We disagree.

To preserve a claim of ineffective assistance of trial counsel for appellate review, a defendant must move for a new trial or for a *Ginther*¹ hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014). Defendant did not move for a new trial or a *Ginther* hearing. Therefore, this issue is unpreserved.

"A claim of ineffective assistance of counsel presents a mixed question of law and fact." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011). "This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *Id.* A finding is clearly erroneous if " 'the reviewing court is left with a definite and firm conviction that a mistake has been made.' " *Lopez*, 305 Mich App at 693 (citation omitted). " 'Where claims of ineffective assistance of counsel have not been preserved, [this Court's] review is limited to errors apparent on the record.' " *Id.* (citation omitted).

"To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms; and (2) that he was prejudiced by the deficient performance." *People v Walker*, 497 Mich 894, 895; 855 NW2d 744 (2014). Defense counsel, however, is not required to make a meritless objection. *People v Chelmicki*, 305 Mich App 58, 69; 850 NW2d 612 (2014).

As discussed above, the prosecutor's comments during closing and rebuttal arguments were proper and did not rise to the level of prosecutorial error. Defense counsel thus had no basis for objecting to them and was not required to make a meritless objection. See *Chelmicki*, 305 Mich App at 69. Defendant has otherwise failed to show that his trial counsel's performance was objectively unreasonable. See *Walker*, 497 Mich at 895. Therefore, defense counsel did not render ineffective assistance. See *Lopez*, 305 Mich App at 693.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).