

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP JAMES SKIEF,

Defendant-Appellant.

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UNPUBLISHED

September 20, 2002

No. 232892

Ingham Circuit Court

LC No. 00-075891-FH

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion. MCL 750.110a(2). He was sentenced to six years, three months to twenty years in prison. He now appeals and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant and the complainant had been romantically involved for several years. On the night in question, defendant entered the complainant's apartment while she was away and he was there when she returned. While still in the apartment after her return, defendant assaulted her. Defendant's defense was that he had permission to enter the apartment, even in the complainant's absence, and that he did not assault her.

Defendant's only argument on appeal is that he was denied effective assistance of counsel by counsel's failure to object to the prosecutor's questioning of defendant during cross-examination regarding whether defendant believed that the investigating detective was lying regarding the statement defendant made to the police. Specifically, defendant complains of the following lines of questioning by the prosecutor:

Q [by the prosecutor]. Okay. Now, you were here when Detective Gomez testified; is that correct, sir?

A. Yes.

Q. And you heard Detective Gomez say that you told him your full-time residence was somewhere else. Did you hear that?

A. Yes, I did.

Q. And it's your testimony to this jury that Detective Gomez, an eleven-year police veteran, is lying. Is that what your testimony is?

A. I have no idea what he's doing. I know what I said, and I'm only stating what I said.

And a short while later the following exchange took place:

Q. You told Detective Gomez, sir, that you went over to the house because you were, quote, pissed because Brandy [the complainant] had not called you; isn't that correct?

A. No. And it's not written that way in the thing. It shouldn't be, anyway. That's not what I said.

Q. Are you denying that you said that to Detective Gomez?

A. Yes, I am.

Q. Are you denying that you told Detective Gomez that you saw Brandy and Derek [complainant's new boyfriend] come home that night? Are you denying that?

A. Yes, I am.

Q. Is it your testimony that this eleven-year police veteran for the Lansing Police Department is lying about this? Is that what you're telling us?

A. I have no idea what he's doing. All I know is what I said. Whether he's lying or not, you'd have to ask him.

Defendant also complains of the following comments by the prosecutor during closing argument:

Detective Gomez has no motivation in this case to do anything but investigate it and tell the facts that were presented to him. He's an eleven-year veteran with the police force. Why would he tell anything to this jury that was not completely in accordance with what the defendant had admitted to him?

Amazingly the defendant when he took the stand testified he never said any of these things. He didn't say anything. He said he didn't live at 816 Cawood. He said Detective Gomez is effectively making this up for whatever reason. That defies comprehension.

It's important to understand when we're looking at the credibility of witnesses that the defendant testified completely differently, completely inconsistently with what he admitted to Detective Gomez. That, ladies and gentlemen, is indicative of the fact that the defendant is not being truthful in his testimony.

Defendant, conceding that the issue of prosecutorial misconduct was not properly preserved for appellate review due to a lack of objection, limits his argument on appeal to a claim of ineffective assistance of counsel. In turn, the prosecutor on appeal admits that defense counsel erred at trial by not objecting, thus tacitly admitting the questions and argument at trial were improper. The prosecutor, however, argues that the error was harmless and, therefore, defendant is not entitled to a new trial based upon ineffective assistance of counsel.

The parties agree that the applicable standard for ineffective assistance of counsel claims is that set forth by the Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001):

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The Supreme Court, in *People v Buckey*, 424 Mich 1; 378 NW2d 432 (1985), recognized that it is improper for the prosecutor to ask the defendant to comment on the credibility of prosecution witnesses as the defendant’s opinion on the witnesses’ credibility is not probative. *Id.* at 17. However, the Court also found the error in that case to be harmless because the defendant “dealt rather well with the questions.” *Id.*

Although defendant argues that he did not deal well with the questions in the case at bar, we disagree. In fact, we think defendant dealt with the questions very well. The prosecutor attempted to bait defendant into stating that detective Gomez was lying and defendant refrained from taking the bait. Rather, defendant stated that he had “no idea what [Gomez is] doing” and that whether Gomez was “lying or not, you’d have to ask him.” For defendant’s testimony to be accurate, Gomez had to have either been lying or been mistaken. Defendant declined the prosecutor’s invitation to characterize it one way or the other. Rather, defendant merely reiterated that all he knew was that his own testimony was accurate.

If anything, defendant in the case at bar handled the questioning better than did the defendant in *Buckey*. Accordingly, if the error was harmless in *Buckey*, then it was certainly

harmless in the case at bar. Therefore, we are not persuaded that defense counsel's failure to object at trial affected the outcome of the case. As a result, defendant has not met his burden of demonstrating prejudice as a result of counsel's error.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad