

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE HERMAN WARD,

Defendant-Appellant.

UNPUBLISHED

November 29, 2005

No. 255814

Wayne Circuit Court

LC No. 04-000545-01

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged in connection with allegations that he shot complainant during a gathering at the home of Ricky Herron. Complainant testified that he left Herron's home after engaging in a verbal confrontation with him, and that as he was standing next to defendant's vehicle, he saw a flash from the area of defendant's hands, and realized that he had been shot. Complainant admitted that initially, he lied to the police about the incident, but that eventually, he decided to tell the truth because he did not want further legal problems. Defendant's fiancée and defendant maintained that complainant was carrying a weapon, and that he was shot when he engaged in a physical confrontation with Herron.

We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20;

People v Carbin, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Defendant argues that the trial court denied him a fair trial by failing to instruct the jury that the definition of "firearm" excludes "any smooth bore rifle or handgun designed and manufactured exclusively for propelling BB's not exceeding .177 caliber by means of spring, gas, or air," MCL 8.3t; see also CJ12d 11.3, and contends that without a complete definition of the term "firearm," the jury was forced to speculate on what sort of weapon met the definition. Defendant acknowledges that trial counsel failed to object to the instruction as given by the trial court, and contends that this failure constituted ineffective assistance.

We disagree. Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review for plain error, but a party who waives a known right cannot seek appellate review of a claimed deprivation of the right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party waives review of the propriety of jury instructions when he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defense counsel stated that he had no objection to the instructions as given by the trial court, and that he approved the instructions. By expressing approving the instructions as given, defendant has waived this issue on appeal. *Id.*

Defense counsel did not render ineffective assistance by failing to object to the trial court's instruction on the definition of "firearm." No evidence was introduced at trial regarding the type of handgun with which complainant was shot. No issue was raised at trial as to whether the weapon met the definition of "firearm." The instruction as given by the trial court fairly presented the issues which the jury was required to decide, and sufficiently protected defendant's rights. *Canales, supra*. Defendant has not shown prejudice in that he has not demonstrated that but for the alleged error by counsel, it is reasonably probable that the result of the trial would have been different. *Carbin, supra*.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues that the prosecutor committed misconduct and denied him a fair trial by improperly vouching for the credibility of complainant by expressing his personal belief that complainant testified truthfully. He contends that trial counsel's failure to object to the prosecutor's argument constituted ineffective assistance.

We disagree. Defense counsel failed to object to the prosecutor's argument; therefore, review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge that the witness testified truthfully. *People v Knapp*, 244 Mich App 361, 382; 624

NW2d 227 (2001). However, a prosecutor may argue from the evidence that a witness is worthy of belief. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Here, the prosecutor acknowledged that the witnesses, including complainant and defendant, gave vastly different versions of the events that lead to complainant being shot. The prosecutor argued that given complainant's circumstances, including his prior criminal record and his wish to avoid further legal problems, it was reasonable to believe that he testified truthfully. The prosecutor did not base his argument on his own knowledge, but rather argued from the facts in evidence. Such argument is permissible. *Id.* Moreover, any prejudice created by the argument could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No plain error occurred. *Carines, supra*.

Trial counsel did not render ineffective assistance by failing to object to the prosecutor's argument. The argument was not improper. Counsel is not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello