

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN VICTOR RAMOS,

Defendant-Appellant.

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UNPUBLISHED

August 21, 2008

No. 278831

Saginaw Circuit Court

LC No. 06-028190-FC

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, felon in possession of a firearm, MCL 750.224f, larceny of a firearm, MCL 750.357b, carrying a firearm with unlawful intentions, MCL 750.226, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

The prosecutor's theory of the case was that on the night of September 19, 2006, defendant and another, both armed with guns, entered a party store in Saginaw and announced a robbery. The assailants ordered the employees to the floor, and then departed with the money from the cash registers and two firearms that one of the workers had brought to the premises.

Defendant testified that he was in Detroit at the time in question, with his then-girlfriend.

Defendant's argument on appeal is the prosecutor engaged in misconduct by inviting different testimony from a witness when not satisfied with the original answer. In particular, on direct examination of one of the employee-victims, the following exchange took place:

*Q:* The man that was hitting you and kicking you—

*A:* Yes, sir.

*Q:* —did he ever say anything to the other man that came into the store?

A: Because when I—when he pushed me on the floor, he make me head down, I no see him, but I hear this is—for after a few minute, five minute, and always called by his name, come on—come on Anthony, come Anthony, three times to him, coming out.

Q: Okay, What did he call him?

A: Anthony.

Q: Okay. He didn't call him Juan?

A: Juan, yeah, the same. Juan, yeah, that's what the name, exactly, the name Ramos, Juan, yeah.

Q: Okay. Did he call him by the full name or just his first name?

A: Just the first name.

Q: Okay. And the first name that you heard was Juan?

A: Juan.

Q: Okay.

A: Yes, sir.

Q: And how many times did you hear this?

A: Three time.

Defendant additionally argues that defense counsel's failure to object in the matter deprived him of effective assistance of counsel.

## II. Prosecutorial Misconduct

An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007). Even where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We agree with defendant's characterization of the prosecuting attorney having suggested defendant's name to a witness who had repeatedly put forward a different one as leading that witness. "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." MRE 611(c)(1). Defendant suggests that the witness firmly believed that the name he had heard on the occasion in question was "Anthony," but that the prosecuting attorney then coached the witness into putting forward defendant's name. However, we think it at least as likely that the prosecuting attorney detected

simple inadvertence, and led the witness only as necessary to correct it, and so do not regard this minor irregularity as plain error.

We further note that defense counsel cross-examined that witness over his initial use of a different name, effectively emphasizing to the jury that the witness has equivocated in this regard. For this reason, we reject the argument that the exchange in question resulted in conviction of an innocent man, or in a fundamentally flawed proceeding. *Carines, supra*. To the extent that the witness in question might have allowed his testimony to be inflected by prosecutorial leading, in light of defense counsel's response, that minor flaw in the proceedings did not throw their integrity into doubt. A criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

### III. Assistance of Counsel

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

A defendant pressing a claim of ineffective assistance of counsel must overcome a strong presumption that counsel's tactics were matters of sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). In this case, had defense counsel successfully objected to the prosecutorial leading in question, that tactic would have limited counsel's ability to make capital of the witness' inconsistent testimony on cross-examination. There was thus a strategic reason for eschewing such procedural remedies as a favorable ruling or curative instruction in favor of leaving the matter in evidence as ammunition for cross-examination.

Because defendant fails to overcome the strong presumption that defense counsel's response to the prosecuting attorney having briefly led his witness was sound strategy, we must reject defendant's claim of ineffective assistance.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly