

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS DELANO MCQUEEN,

Defendant-Appellant.

UNPUBLISHED

December 23, 2008

No. 281862

Wayne Circuit Court

LC No. 07-008928-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and carjacking, MCL 750.529a, but acquitted of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 5 to 15 years each. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the prosecutor misrepresented the evidence in his closing argument, and that this misconduct denied him a fair trial. This issue is not preserved because defendant did not object to the prosecutor's conduct at trial. Therefore, relief is precluded unless defendant establishes a plain error that affected the outcome of the trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "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 reviewing court must examine the prosecutor's remarks in context. *Id.* at 272-273.

A prosecutor may not make a statement of fact to the jury that is not supported by evidence and may not argue the effect of testimony that was not entered into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the prosecutor may argue the evidence and all reasonable inferences that may arise from the evidence and from common experience as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Ackerman, supra* at 450.

The victim was lured to the home of a young woman named Shanae. Once there, defendant's cousin, Jerry McQueen, appeared with a gun and, together with Shanae and defendant, relieved the victim of his possessions, drove to an ATM to try to access the victim's bank account with his debit card, and took his car. In his closing argument, the prosecutor suggested that Shanae had been talking to defendant in a back bedroom just before McQueen came to the door. While it is reasonable to infer from the facts that such a conversation may have taken place, even if we were to conclude otherwise, this one remark was not so prejudicial as to deny defendant a fair trial. Whether or not defendant helped plan the robbery, it was undisputed that he accompanied McQueen and Shanae to the gas station, that he went inside after McQueen came out, and that he was found with the victim's debit card in his pocket. The only issue for the jury to determine was whether defendant participated in the crimes as the victim had testified, or whether defendant was coerced into going along and simply made the best of a bad situation as he had testified. Whether Shanae spoke to defendant before the episode began was not germane. Further, the trial court's final instructions that "the lawyers' statements and arguments are not evidence" and that the jury "should only accept things the lawyers say that are supported by the evidence, or by your own common sense and general knowledge" was sufficient to dispel any prejudice that may have arisen. *People v Schutte*, 240 Mich App 713, 721-722; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant alternatively argues that trial counsel was ineffective for failing to object to the allegedly improper statement. Because defendant failed to raise this claim below in a motion for a new trial or request for an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "To establish his claim, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy." *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008) (citations omitted).

The decision whether to object to the prosecutor's closing argument is a "quintessential example of trial strategy." *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995). Here, trial counsel's failure to object was not objectively unreasonable. Counsel may have believed that pointing out the error himself, as he did in his own closing argument, would help persuade the jury to accept defendant's version of events. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Further, for the reasons explained previously, defendant cannot show that but for counsel's failure to object to this isolated misstatement of fact, the outcome of trial likely would have been different.

Defendant also argues that the trial court improperly denied the jury's request to have certain testimony read back. Because trial counsel expressly approved the trial court's response, any error has been waived. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000). Defendant alternatively argues that trial counsel was ineffective for agreeing to the court's instruction.

MCR 6.414(J) provides that when a jury makes a request to review testimony or evidence, “the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.”

The victim and the defendant were the two principal witnesses at trial. The jury asked to have their testimony read back after less than a full day of deliberations. The court responded:

The usual way to have that done is to that [sic] our court reporter reads that. That would take approximately two hours, both of the testimonies together. That is why the court allows you to take notes and to work with twelve people together.

It’s anticipated that you use your collective memories to recall the testimony during the trial. If you should need a certain answer to something that was testified to in court, if you can be more specific, then something could be read back. But to read two hours of testimony, we can’t to [sic] that right now.

We are about to start another trial. During a break we may answer any questions that you have, but please be very specific as to what you need.

We cannot conclude that counsel made a serious error by approving the court’s instruction because it was not improper. The court found that the request was unreasonable at the time because of the scope of the request, which it was unable to accommodate at the time, and because the jurors had their notes to aid their collective memories. Further, the court did not foreclose the possibility of rehearing the testimony later; the court only stated that the testimony could not be read back in full “right now” and added that it would read back any specific portions necessary to resolve a particular issue of fact. Because the response did not constitute an abuse of discretion by the court, trial counsel was not ineffective for approving it.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen

/s/ Patrick M. Meter