

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 17, 2013

v

WILLIAM THOMAS,
Defendant-Appellant.

No. 307136
Macomb Circuit Court
LC No. 2011-002194-FH

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of resisting or obstructing a police officer, MCL 750.81d(1). Because defendant was not denied the effective assistance of counsel and the prosecutor did not commit misconduct, we affirm.

This case arises out of an incident that occurred at the home of defendant's mother, Ekaterine Thomas. City of Fraser Public Safety Officer Scott Eovaldi responded to Thomas's home based on information that defendant, who was present at the home, had threatened suicide. When Eovaldi arrived, Thomas was standing in the doorway. Eovaldi observed defendant emerge from the house and push Thomas, causing her to fall. Defendant then took a telephone away from Thomas. Eovaldi commanded defendant to stop, but he disregarded the command and retreated back into the house. Eovaldi followed defendant into the house, and defendant continued to disregard Eovaldi's commands to stop. Defendant walked toward the kitchen, and Eovaldi saw a butcher block with knives on the counter. Fearing for the safety of defendant, Thomas, and himself, Eovaldi subdued defendant with a taser gun. At trial, Thomas denied that defendant had pushed her and testified that she had instructed defendant to go back into the house.

Defendant first argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue in the trial court and this Court denied his motion to remand for a *Ginther*¹ hearing, our review is limited to errors apparent on the record. *People v Jordan*, 275

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

Mich App 659, 667; 739 NW2d 706 (2007). To establish ineffective assistance of counsel, the defendant must demonstrate that trial counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, a reasonable probability exists that the outcome of the trial would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "The defendant must overcome the presumption that counsel's actions were based on reasonable trial strategy." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007).

Defendant contends that defense counsel rendered ineffective assistance by failing to call defendant to testify in his own defense. The failure to call a witness to testify may constitute ineffective assistance of counsel if it deprives the defendant a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted). A defendant's decision whether to testify is a strategic decision best left to a defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). This Court will not second-guess counsel on matters of trial strategy, nor will it "assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant asserts that his testimony was necessary to show that he did not knowingly disobey Eovaldi's commands, a necessary element of resisting or obstructing a police officer. See MCL 750.81d(7)(a). Defendant argues that he would have testified that he heard Eovaldi's command to "get on the ground" but that he did not comprehend the order because of his distraught mental state. Defendant has failed to overcome the presumption that defense counsel's decision not to call him to testify constituted reasonable trial strategy. Defendant maintains that his trial attorney did not call him to testify because he would have admitted that he heard Eovaldi tell him to "get on the ground." Although defendant argues that he did not understand the command because of his mental state, it was reasonable trial strategy not to admit to the jury that he had heard it. Further, such testimony would have corroborated Eovaldi's testimony that because of defendant's apparent confusion and distraught behavior, it was necessary to subdue him with a taser to prevent him from hurting himself or others. Thus, defense counsel's decision not to call defendant to testify was not objectively unreasonable, and defendant has failed to overcome the presumption that counsel's decision constituted reasonable trial strategy.

Defendant also argues that defense counsel rendered ineffective assistance by failing to provide a Greek language interpreter to help the jury understand Thomas's testimony that defendant did not knowingly disobey Eovaldi's commands. The record does not support defendant's claim that Thomas had difficulty with the English language to the extent that she required an interpreter. Thomas was 74 years old at the time of trial and had lived in the United States for 51 years. Although she spoke with grammatically incorrect sentence structure, she was able to respond to questions and convey her version of the events. She was able to communicate that defendant had touched her arm and asked her what Eovaldi had said. Further, Thomas communicated with a police dispatcher and with another caller regarding defendant's mental state on the night of the incident, and there was no suggestion that a language barrier hindered those communications. Accordingly, there is no basis to conclude that defense counsel's failure to request an interpreter was objectively unreasonable. Moreover, even with

the aid of an interpreter, Thomas would not have been able to offer testimony regarding defendant's subjective perception of the situation. Thus, defendant has failed to establish that there exists a reasonable probability of a different result but for counsel's alleged error.

Defendant also contends that defense counsel was ineffective for failing to cross-examine Eovaldi regarding his motivation to falsify his testimony to justify his unreasonable use of the taser. Decisions regarding the questioning of witnesses are presumptively matters of strategy. *People v Petri*, 279 Mich App 407, 413; 760 NW2d 882 (2008). Defendant has failed to overcome that presumption. Eovaldi testified on direct-examination regarding his decision to use his taser. He explained that the decision was based on several factors, including defendant's reported suicidal statements, the request that the police conduct a "welfare check" for defendant's safety, Eovaldi's observation of defendant's assault against his mother, defendant's failure to obey Eovaldi's commands, and Eovaldi's concern for the safety of himself, defendant, and Thomas as he saw defendant approaching a set of knives in the kitchen. There is no indication that Eovaldi would have testified differently on cross-examination and his testimony likely would have merely confirmed his version of the events. Moreover, defendant fails to indicate which part of Eovaldi's testimony was allegedly false and asserts that Eovaldi falsified his testimony only because of lawsuits involving the purportedly excessive use of tasers in other, unrelated cases and because defendant had contacted the police department to complain about the use of the taser in this case. Under these circumstances, defendant has failed to overcome the presumption that counsel's decision not to question Eovaldi about his use of the taser was sound trial strategy, and defendant has failed to establish a reasonable probability of a different result but for counsel's alleged error.

Defendant next argues that the prosecutor committed misconduct during her closing and rebuttal arguments, denying him a fair trial. Because defendant did not preserve his claim of error for our review by objecting to the prosecutor's challenged remarks below, our review is limited to plain error affecting his substantial rights. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). "[W]here a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant contends that the prosecutor improperly argued facts not in evidence. A prosecutor may not make a factual statement to the jury that the evidence does not support. *Id.* at 450. The record shows that the prosecutor made a misstatement of fact when she argued that Thomas had admitted urging the police to come to her house quickly. Although Eovaldi testified that the dispatcher had told him that Thomas had requested that the police come quickly, Thomas did not admit making that statement. The prosecutor's misstatement involved a minor detail and any perceived prejudice could have been corrected by a curative instruction had defendant timely objected. Even without an objection, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence" and that the jury "should only accept things the lawyers say that are supported by the evidence[.]" The court's instructions were sufficient to protect defendant's rights. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.")

Defendant also argues that the prosecutor falsely stated that Thomas had told Eovaldi that defendant “was acting erratic and crazy.” Defendant contends that Thomas did not testify to making such a statement and that she replied “no” when asked if she remembered telling Eovaldi that defendant was acting erratic and crazy. Thomas’s testimony that she did not remember making the statement, however, does not necessarily mean that she did not make the statement. Thus, defendant has failed to establish plain error affecting his substantial rights.

Defendant also contends that the prosecutor falsely asserted that Thomas had admitted that defendant took the telephone from her. Viewed in context, however, the prosecutor was merely explaining that the lack of damage to the phone did not prove that defendant did not take the phone from her. To the extent that the prosecutor’s remarks could have been interpreted differently, the trial court’s instructions were sufficient to protect defendant’s rights. See *Abraham*, 256 Mich App at 279.

Finally, defendant argues that the prosecutor improperly commented that she did not believe Thomas’s testimony and urged the jury to conclude that Thomas was not credible as well. A prosecutor may not suggest that she has special knowledge concerning a witness’s credibility, but she may argue from the evidence that a witness is or is not credible or worthy of belief. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). Here, the prosecutor did not suggest that she had special knowledge regarding Thomas’s credibility and argued based on the evidence that Thomas was not credible. Although the prosecutor stated “if you believe mom, th[e]n I’ve got a bridge in Brooklyn I would like to sell you,” a prosecutor need not confine her argument to the blandest possible terms. See *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Accordingly, defendant has failed to establish plain error affecting his substantial rights.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto