

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VALERIE DENISE YOUNG,

Defendant-Appellant.

UNPUBLISHED

April 27, 2006

No. 259438

Macomb Circuit Court

LC No. 04-000098-FH

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

FITZGERALD, J. (*concurring in part and dissenting in part*).

Defendant's conviction arises from events occurring on December 27, 2003. Dennis Bradish, the victim and defendant's boyfriend for sixteen years, came home from work at approximately 2:30 p.m. to the trailer home he shared with defendant. Bradish testified that when he arrived home, defendant had been drinking and was a "little bit out of it." Defendant testified that she had begun drinking vodka prior to 12:00 p.m. on December 27, 2003. She was "not happy" with Bradish for failing to pay the electricity bill.

Later in the day on December 27, 2003, defendant and Bradish got into an argument. Defendant insisted that Bradish had hit her in the face on December 25, 2003, giving defendant a black eye. Bradish testified that he did not strike defendant and that her black eye was a result of a "fight" between defendant and defendant's sister, Lydia, that occurred on December 25, 2003, after Christmas dinner. Arthur Young, defendant's father, similarly testified that defendant had received a black eye after defendant "drank too much" and got into a fight with Lydia on December 25. Bradish testified that a bruise formed underneath defendant's eye on December 26, and that defendant's black eye was evident on December 27.

Following the argument regarding who gave defendant a black eye, Bradish encouraged defendant to go lie down in the bedroom. Defendant went into the bedroom and stayed there for 20 to 30 minutes. Bradish testified that when defendant came out from the bedroom she was holding something in her hand down by her waist. Bradish asked defendant what she had in her hand, but defendant did not respond. Bradish approached defendant and determined that she was holding a "steak knife." Defendant complied with Bradish's request to hand him the knife. Bradish placed the knife on the furnace in the living room. Bradish then told defendant to sit down on the couch in the living room so they could "talk it out."

Bradish sat down on the couch in the living room and defendant sat to his right, facing him and sitting “pretty close.” Bradish testified that defendant then told him that he “owed her” \$600 for the electricity bill. Bradish responded that he owed \$600 to the electric company and not to defendant. Defendant then reached for a second “steak knife” that was located on the living room table next to the couch. Bradish testified that he thought defendant was reaching for her cigarettes that were lying on the table next to the knife. Defendant then moved toward Bradish with the knife in her right hand. Bradish testified that he tried to grab the knife from defendant, but that defendant stabbed him in the left shoulder. Bradish then pulled the knife from his shoulder and “tossed” it away. Bradish testified that defendant did not say anything before or after she stabbed him.

Bradish remained in the house for ten minutes following the stabbing but was unable to stop his shoulder from bleeding. Bradish then left to get help from a neighbor. The neighbor was not there, so Bradish returned home. When he arrived back at his residence, defendant was standing in the doorway wielding a “pot.” Bradish testified that he did not reenter the house because he did not want to encounter defendant. Instead, Bradish drove himself to Oakland General Hospital where he received two stitches for the puncture wound to his left shoulder. Bradish was admitted overnight. Bradish testified that he did not call the police after the incident because he “did not want defendant to go to jail again.” However, an unidentified employee of the hospital notified the Warren Police Department on December 28, 2003, regarding Bradish’s injury.

Warren Police Officer Michael Lake interviewed Bradish on December 28, 2003. Lake took a statement from Bradish regarding the events of December 27, 2003, and determined from Bradish where defendant was located. Lake then notified his “supervisory unit” regarding the stabbing. That same day Warren Police Officer Robert Horlocker responded to a call that there had been a stabbing at defendant’s residence. Horlocker drove to defendant’s residence and knocked on the door. Defendant opened the door and allowed Horlocker to enter the house and interview her. Horlocker testified that defendant was “uncooperative” and “hostile” during the interview. Defendant told Horlocker that she was reading the newspaper on the evening of December 27, 2003, when Bradish approached her and slapped her. Upon further questioning by Horlocker regarding the stabbing, defendant stated that she could not “remember anything” subsequent to Bradish slapping her. Additionally, Horlocker testified that defendant did not mention a knife during the interview. After a brief search of the house, Horlocker recovered a bloody steak knife from the floor of the residence. Horlocker questioned defendant about the knife, but defendant did not respond. Defendant was then placed under arrest.

On December 29, 2003, Detective Kevin Woods interviewed defendant while she was in custody. Woods testified that defendant stated that she got into an argument with Bradish over who had given her a black eye on December 25, 2003. Defendant then stated that she grabbed the knife from the living room table and moved toward Bradish. Bradish grabbed the “blade-end” resulting in a “tug-of-war” for the knife. Defendant stated that Bradish cut his “fingers” on the knife after she let go.

Defendant testified in her own defense. She indicated that Bradish had given her a black eye on December 25, 2003, and threatened to “give her another black eye” when he came home on the afternoon of December 27, 2003. Defendant testified that when she picked the knife up from the table, she “intended to threaten” Bradish. Defendant testified that when Bradish

grabbed the blade of the knife, she let go of the handle, resulting in Bradish cutting his fingers and stabbing himself in the shoulder. Defendant was subsequently convicted of assault with intent to do great bodily harm.

Defendant contends that the prosecutor committed misconduct on three separate occasions. Because defendant failed to timely and specifically object to the allegedly improper conduct by the prosecutor, *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), this Court's review is for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court will reverse the defendant's conviction if it is determined that, although defendant was actually innocent, the plain error caused her to be convicted, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of her innocence. *Carines, supra* at 763; *People v Thomas*, 260 Mich App 450, 458; 678 NW2d 631 (2004).

I agree with the majority that the prosecutor's argument that defense counsel's strategy was "tricks," "magic," and "smoke and mirrors" does not amount to prosecutorial misconduct. *People v Rodriguez*, 251 Mich App 10, 40; 650 NW2d 96 (2002).

I disagree with the majority's finding, however, that the prosecutor's questions to Officer Lake regarding Bradish's prior consistent statements improperly bolstered Bradish's credibility. Issues of prosecutorial misconduct are considered on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments. *Thomas, supra* at 454. The prosecutor may attempt to introduce evidence that she legitimately believes will be accepted by the trial court, as long as that attempt does not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Defendant mischaracterizes Lake's testimony as an attempt by the prosecutor to elicit inadmissible prior consistent statements to bolster Bradish's credibility. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). However, "an utterance or a writing may be admitted to show the effect on the hearer or reader when this effect is relevant." *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995). A review of the record reveals that Lake's testimony was not offered to bolster Bradish's credibility, i.e., to prove the truth of the statements made by Bradish. Lake's testimony was offered by the prosecutor to provide a foundation and motivation for the continued investigation by the police regarding the alleged stabbing of Bradish by defendant. Accordingly, because Bradish's statements to Lake were admissible for a non-hearsay purpose, the prosecutor properly questioned Lake regarding the statements. *Noble, supra* at 660-661.

I also disagree with the majority's finding that the prosecutor committed misconduct by eliciting testimony from Lake that Bradish was the victim and defendant was the aggressor. Prosecutors should not "express their personal opinions of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble, supra* at 260.

Here, a review of the transcript reveals that Lake did not testify to the ultimate issue in the case, defendant's guilt or innocence of the charge of assault with intent to do great bodily

harm. Lake only testified to the investigation completed by the Warren Police Department. Moreover, even if Lake's testimony did go directly to issue of defendant's guilt or innocence of assault with intent to murder, that would not make his testimony objectionable. *People v Dewald*, 267 Mich App 365, 377; 705 NW2d 167 (2005), citing MRE 704. Under MRE 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Defense counsel was able to cross-examine Lake concerning his testimony, and the jury was free to accept or reject Lake's version of events. *Dewald, supra* at 377.

Additionally, I disagree with the majority's finding that defendant was denied the effective assistance of counsel. First, Lake's testimony was admissible and, therefore, counsel was not ineffective for failing to object to it. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Second, because the prosecutor's closing argument was proper, counsel was not ineffective for failing to raise an objection to the argument. Defense counsel is not required to advocate a meritless position or raise a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Third, I agree with the majority's finding that defendant has failed to overcome the presumption that defense counsel's questions regarding her prior conviction were trial strategy.

Finally, since I conclude that defendant has failed to establish error, there can be no cumulative effect requiring reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

I would affirm.

/s/ E. Thomas Fitzgerald