

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN O'NEAL SUTTLES,

Defendant-Appellant.

UNPUBLISHED

February 15, 2005

No. 251263

Wayne Circuit Court

LC No. 03-007055-01

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant appeals by right his jury convictions for first-degree home invasion, MCL 750.110a(2), assault with intent to do great bodily harm, MCL 750.84, felon in possession of a firearm, MCL 750.224f, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant first asserts that he was denied a fair trial by the prosecutor's misconduct in introducing bad acts evidence, vouching for the credibility of a witness, and appealing to the jury's civic duty. This Court reviews prosecutorial misconduct issues case by case to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Where a defendant fails to object to an alleged impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999). To avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The prosecutor asked about defendant's prior gun ownership in response to defendant's denial of any knowledge of the weapon. The question was triggered by defendant's testimony, and the prosecutor only used the information to undermine defendant's credibility, and not to attack his character for gun possession. The exchange did not affect the outcome of the case.

While a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue from the facts that a witness is credible, or that defendant or another witness is unworthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor argued from the facts that the witness knew both complainant and defendant, was not biased toward either of them, and that her testimony was believable. The prosecutor did not convey any special knowledge that the witness was credible.

The prosecutor did not appeal to the jury's civic duty. His comments were directed at the actions of complainant and a witness. The prosecutor did not appeal to the jurors to perform their civic duty by finding defendant guilty. *People v Bass*, 88 Mich App 793; 279 NW2d 551 (1979).

Defendant also argues that he was denied the effective assistance of counsel where his attorney failed to stipulate to the existence of a prior felony, failed to object to the admission of a 911 recording, did not request a missing witness instruction, and failed to object to the prosecutor's misconduct.

To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. *Id.* Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant argues that trial counsel was ineffective in failing to stipulate to a prior felony, and instead allowing evidence that defendant was convicted for insurance fraud. While counsel could have obtained such a stipulation, *People v Swint*, 225 Mich App 353; 572 NW2d 666 (1997), it would be a reasonable trial strategy to disclose the nature of the prior felony as insurance fraud, rather than allow the jury to speculate that defendant was convicted of a prior assaultive crime. There is no showing that defendant was prejudiced by this disclosure.

Counsel was not ineffective in failing to object to the admission of the 911 recording. The recording shows that the speaker believed that her husband had just been shot. The statement was properly admitted as an excited utterance. MRE 803(2). There was a startling event, and the resulting statement was made while under the excitement. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003); *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

An endorsed witness did not appear at trial. Although she was mentioned the first day, there was no further mention of her absence on the record. A missing witness instruction may be appropriate where a prosecutor fails to produce a listed witness who has not been excused. *People v Perez*, 469 Mich 415, 520; 670 NW2d 655 (2003). However, here the testimony of the missing witness was likely to be damaging to defendant, and counsel could have made the reasonable decision not to object to her absence. There is no showing that the missing witness instruction would have affected the outcome of the case, and defendant has not established actual prejudice. Where there was no merit to the claims of prosecutorial misconduct, trial counsel was not ineffective in failing to object.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen