STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2012
v	No. 305333 Shiawassee Circuit Court
CALVIN CURTIS JOHNSON, Defendant-Appellant.	LC No. 2010-001185-FH

Before: TALBOT, P.J., and WILDER and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), second offense, MCL 333.7413(2). The trial court sentenced defendant to 34 to 480 months' imprisonment. We affirm.

On appeal, defendant first argues that the prosecutor committed misconduct during his opening statement and closing argument by improperly vouching for the prosecution's witnesses' credibility. We disagree.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Thus, reversal is not warranted unless the prejudicial effect of the prosecutor's comments could not have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

It is well established that a prosecutor may not vouch for the credibility of witnesses by implying that he has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Nor can a prosecutor place the prestige of his office behind the testimony of witnesses. *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). However, a prosecutor can argue that a witness is credible, especially when "the question of guilt depends on which witnesses the jury believes." *Thomas*, 260 Mich App at 455.

In the prosecutor's opening statement, he stated, in part:

People are hard to understand but there is enough there that a lot of it is very clear and certainly clear enough that you can tell that Guy Wright is telling you the truth and that the defendant is selling crack cocaine out of 304 North Hickory.

* * *

I think what it does, is lend credibility to the story because the reality is, if anybody is lying here or as the defense may suggest, [the police] is doing whatever they can to get their conviction, they will act inappropriately.

Certainly, if they wanted to act inappropriately, Lieutenant Wolf could have said, sure enough, with my night goggles, I could see that it was the defendant. But he doesn't do that and I think it's important to note those things that show that things were done properly and everybody is testifying honestly.

* * *

I ask you when you listen to all of the evidence presented, that you think about the big picture, use your common sense and ask yourself what really happened and I think you will certainly realize that Guy – Guy Wright is telling you the truth.

I suspect the defense is going to try to make [the police] out to be liars, that they did nothing but set the defendant up, that Guy Wright was only doing this to avoid trouble and would do whatever he could to avoid trouble.

Similarly, in the prosecutor's closing argument, he repeatedly stated that Nichols, Wright, and Lieutenant Wolf were telling the truth. For example, he stated:

I think Lt. Wolfe's [sic] testimony is another indication of truthfulness. The reality is if this was . . . a big conspiracy to set up the defendant, Lt. Wolf could have – and if he was going to lie about something he could have easily got there and said, I saw a Black male walk towards me, I recognize him and there he is. But he didn't do that because he was being honest with you in telling you what he saw on that night and I think that is important.

* * *

Why do we know Guy Wright is telling the truth? He had no reason to lie. If he lied or didn't do what he said he did he could not have got any consideration for anything he might be risking. . . . Anything that he did to lie or to jeopardize or sneak some cocaine in, which there was no evidence to suggest that other than Mr. Johnson's antics. . . . He knew he was being recorded and not only did he know it was being recorded he knew it was being transmitted and that the officers all told you they listened to things as they went down. He knew he was being watched, he knew there was surveillance.

* * *

> Why do we know that Barb Nichols is telling the truth? She was under an oath and she told you that that's important because she said that's why she came. I talked about this earlier but she liked the defendant. She still likes defendant. He is a good friend and good person in her words.

The above comments did not constitute improper vouching. The prosecutor did not imply that he had any special knowledge about the credibility of the witness but, instead, used the presented (or anticipated) evidence and inferences from that evidence to argue that his witnesses did not have a motive to lie. The prosecutor inferred from Lieutenant James Wolf's proposed testimony, that he was telling the truth because he could have just lied and said that he recognized defendant that night. This is a logical inference. A prosecutor may argue from the facts in evidence that a witness is worthy or not of belief. *Dobek*, 274 Mich App at 67.

Defendant next argues that his trial counsel was ineffective for failing to object to the alleged prosecutorial misconduct. We disagree.

Ineffective assistance of counsel claims are mixed questions of law and fact. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). This Court reviews a trial court's findings of fact, if any, for clear error, and reviews the ultimate constitutional issue arising from the ineffective assistance of counsel claim de novo. *Id.* This Court's review "is limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

"To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness, and but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Swain*, 288 Mich App at 643. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *Id*.

Defense counsel did not provide ineffective assistance of counsel by failing to object to the prosecutor's comments. Defense counsel's performance did not fall below an objectively reasonable standard because, as discussed above, the prosecutor did not commit prosecutorial misconduct. Counsel is not required to argue a meritless position or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

In defendant's standard 4 brief, he first argues that he was improperly denied his right to self-representation. We disagree.

This Court reviews a trial court's decision to deny a defendant's request to represent himself for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003). "Every defendant has the constitutional right to waive the assistance of counsel and represent himself at trial." *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). However, a defendant does not have an absolute right to self-representation. *People v Russell*, 471 Mich 182, 189; 684 NW2d 745 (2004). A defendant must elect to represent himself with the permission of the court. *Odom*, 276 Mich App at 419.

> [T]he right of self-representation and the right to counsel are mutually exclusive, a defendant must elect to conduct his own defense voluntarily and intelligently, and must be made aware of the dangers and disadvantages of self-representation in order to proceed pro se. Therefore, while the right of self-representation is a fundamental constitutional right, other interests, such as the failure to effectively waive the right to counsel or a governmental interest in ensuring the integrity and efficiency of the trial may in some instances outweigh the defendant's constitutional right to act as his own counsel. [*Russell*, 471 Mich at 189 (internal citations and quotations omitted).]

> After a defendant requests to represent himself, a trial court must determine that
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> (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business. [*Id.* at 190.]

Additionally, the trial court must follow procedures outlined in MCR 6.005(D). *Id.* The trial court must advise the defendant of the charge against him, the maximum prison sentence, any mandatory minimum sentence required by statute, the risk of self-representation, and give the defendant an opportunity to consult with a lawyer. *Id.*

In most of the incidents defendant claims he asked to represent himself, he failed to make an unequivocal declaration of his decision to waive counsel and represent himself. First, at the preliminary examination, defendant told the district court that he wanted to "dismiss [his] attorney." Defendant stated, "when I asked you when this case first started, I asked you – I wanted to represent myself." However, later defendant stated, "I wanted to change attorneys because this attorney is not doing what I asked him to do." The district court responded that defendant was welcome to hire another lawyer and that he should tell the circuit court about his dissatisfaction with his current lawyer. At a pretrial hearing on various motions in the circuit court, defendant reiterated that his purpose at the preliminary examination was to change lawyers. Therefore, defendant expressed his dissatisfaction with his lawyer, but he did not unequivocally request to represent himself.

Second, defendant again brought up the topic of representing himself at the end of defense counsel's motion to withdraw. Again, defendant did not unequivocally request that he represent himself. Instead, defendant asked the circuit court if it would consider not postponing the trial date *if* he represented himself. The circuit court replied that defendant should "think that one through before [he] make[s] any serious request to this Court of representing [himself]." The record shows that defendant did not further voice a desire to represent himself after the circuit court told him to think about self-representation.

Third, defendant indicated that he wanted to represent himself after the cross-examination of Nichols. The circuit court held a hearing at the end of the day to discuss defendant's self-representation. When asked directly if he was requesting self-representation, defendant replied

"Not at this time." Thus, once again, defendant did not make an unequivocal request for self-representation.

Fourth, defendant's request to represent himself during the third day of trial was also shown not to be unequivocal when, during the hearing held by the trial court on defendant's request, defendant admitted, "I'm not ready" and "I don't think it's best right now."

In sum, defendant never made a truly unequivocal request to represent himself, and the trial court did not err in denying his "requests" each and every time.

Defendant next argues in his standard 4 brief that the photograph identification procedure was unduly suggestive and there was no independent basis for Wright's identification of defendant. We find no basis for reversal on this issue.

"This Court will not reverse a trial court's decision to admit identification evidence unless it finds the decision clearly erroneous. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). "In order to challenge an identification on the basis of lack of due process, 'a defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification.'" *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

Here, defendant is correct that the pretrial identification was suggestive because Wright was only shown a single photograph, which was a picture of defendant. See *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). However, an in-court identification by a witness that was subject to an unduly suggestive lineup may still be allowed if there is an untainted, independent basis for the identification. *Kurylczyk*, 443 Mich at 302. Factors that can establish an independent basis include the following: prior knowledge of the defendant, opportunity for observation during the crime, accuracies and discrepancies between the complainant's pre-lineup description and the defendant's actual description, identification of another person before the lineup, failure to identify the defendant prior to lineup, the lapse of time between the crime and the lineup, and various factors relating to the state of the victim. *People v Gray*, 457 Mich 107, 116; 577 NW2d 92 (1998).

We find that the trial court did not clearly err in finding that there existed an untainted, independent basis for Wright's identification of defendant. Although Wright did not know defendant before the incident, the other factors weigh in favor of an independent basis. Wright had a short conversation with defendant in a well-lit apartment during the controlled purchase, where they were only one to two feet apart. Further, immediately after the drug transaction (before seeing any photograph), Wright provided a description to the police of the person from whom he purchased the drugs, including the person's nickname. This description matched defendant's description, and there was evidence that the nickname provided was indeed defendant's nickname. Also, there was no evidence that Wright misidentified or failed to identify defendant before the in-court identification; in fact, Wright confidently identified defendant three months later at the preliminary examination. Finally, Wright had been on other controlled buys, and therefore, knew the procedure and testified that he was not nervous. Wright

was aware that he would later be asked to identify defendant and, therefore, likely was more prepared for the need to make an accurate, future identification than most victims or witnesses of a crime. As a result, we are not left with a definite and firm conviction that the trial court erred in allowing Wright's identification testimony of defendant.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan