

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLOWAY JOHNSON,

Defendant-Appellant.

UNPUBLISHED

July 17, 2014

No. 315208

Wayne Circuit Court

LC No. 12-000962-FH

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions for felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of firearm during the commission or attempted commission of a felony, MCL 750.227b. Defendant was sentenced as a third-habitual offender, MCL 769.11, to a term of 2 to 10 years' imprisonment for felon in possession, five years' probation for carrying a concealed weapon, and two years' imprisonment for felony-firearm. Because there was no plain error in the prosecutor's arguments and defendant was not denied the effective assistance of counsel, we affirm.

On appeal, defendant first argues that the prosecution engaged in misconduct by vouching for witnesses and by disparaging defense counsel. Specifically, defendant asserts that the prosecutor improperly stated during closing arguments that police officers told the truth in their testimony and that defense counsel was hiding relevant information from the jury.

Defendant failed to make a contemporaneous objection or request a curative instruction in response to the prosecutor's remarks, meaning his claim of prosecutorial misconduct is unpreserved and reviewed for plain error. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Under this standard, defendant must show the occurrence of a clear or obvious error that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If defendant satisfies this standard, reversal is warranted only where plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Reversal is not warranted where a curative instruction could have alleviated any prejudicial effect occasioned by the prosecutor's conduct. *Id.* at 329-330.

When evaluating claims of prosecutorial misconduct, the test is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The prosecutor's remarks must be considered as a whole and in context, and the propriety of a prosecutor's remarks depends on all the facts of the case as well as arguments from defense counsel. *Brown*, 279 Mich App at 135-136. Generally, prosecutors are afforded great latitude regarding their arguments and conduct at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). However, a prosecutor may not personally attack defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Fyda*, 288 Mich App at 461. Lastly, although a prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge regarding their truthfulness, the prosecutor may argue from the facts that a witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005).

In this case, defendant maintains that the prosecutor impermissibly stated that the police were telling the truth when, for example, the prosecutor argued the officers in question were exceptional officers with no reason to lie. Contrary to defendant's arguments, there was nothing improper in the prosecutor's remarks. The record shows that the prosecutor did not claim special knowledge of the police officers' truthfulness, but instead permissibly argued that officers were worthy of belief because they had no motive for fabricating allegations against defendant. Arguments that witnesses, and in particular police witnesses, had no reason to lie are permissible. See *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Indeed, arguments regarding witnesses' credibility are especially appropriate when, as in the present case, the credibility of witnesses is an important and contested issue at trial. See *id.* Moreover, any prejudice could have been relieved by a curative instruction given in response to a timely objection. *Id.* The jury was in fact instructed that they alone must determine the credibility of witnesses and decide the case on the evidence, and that the lawyers' arguments and statements were not evidence. These instructions eliminated any potential prejudice. See *id.* at 454.

Defendant's second argument, that the prosecutor disparaged defense counsel, rests on the following statement by the prosecutor during closing arguments:

I respect [defense counsel] like anybody else. He's a very good lawyer. There's no doubt, there's no doubt that when he's asking his questions, they're fashioned in a manner to hide something from you. There's no doubt about that. He knows you can't see the police reports. He knows you're not allowed to hold that in your hand. He knows that the transcripts, those things are not available to you in that jury room. So it's pretty easy to fashion the questions without showing the officer the pages. It's pretty easy to pick and choose, after having read 41 pages of transcripts, and all [of a] sudden to ask a question on page 17 without looking at the 17 previous pages and ask a question. Is there any doubt [in] your mind that he was trying to at least get away with something? Because there shouldn't be, especially after the officer got a chance to read those transcripts.

In context, the prosecutor's argument referenced defense counsel's efforts to impeach witnesses on cross examination with specific pages of police reports and preliminary examination transcripts, which the prosecutor had countered on reexamination with questions on additional pages that attempted to place the evidence in context. To the extent the prosecutor generally

argued that defense counsel's impeachment efforts were unpersuasive, the prosecutor's remarks were permissible. However, the prosecutor's remarks may have crossed the line of permissibility by suggesting that defense counsel intentionally tried to mislead the jury by attempting to "hide" information and "get away with something." "Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality." *Fyda*, 288 Mich App at 461 (citation omitted).

However, even if some of the prosecutor's remarks were better left unsaid, in the context of the entire trial and the prosecutor's remarks as a whole, defendant has not shown the argument constituted plain error warranting reversal. The challenged remarks were isolated comments over the course of a vigorously argued two day trial that included more than 40 pages of closing arguments from the attorneys. Any prejudice could have been relieved by a curative instruction given in response to a timely objection. See *Thomas*, 260 Mich App at 455. Indeed, as noted, the jury was in fact instructed that they must decide the case on the evidence, and that the lawyer's arguments and statements were not evidence. These instructions were sufficient to eliminate any potential prejudice to defendant. See *id.* at 454. On the whole, even if the prosecutor's remarks went too far, we will not reverse "a well-tryed, vigorously argued case" on the basis of "a few isolated improper remarks that could have been corrected had an objection been lodged." *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

In the alternative, defendant argues on appeal that defense counsel rendered ineffective assistance of counsel by failing to object to the challenged prosecutorial statements. Defendant failed to preserve his ineffective assistance of counsel claim by moving for a new trial or an evidentiary hearing; accordingly, we review defendant's unpreserved claim for mistakes apparent on the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To establish that trial counsel was ineffective, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). The decision whether to object to the prosecutor's arguments is presumed to be a matter of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In this case, to the extent we have determined the prosecutor's comments and arguments were proper, defense counsel had no basis on which to object and cannot be considered ineffective for failing to make a meritless objection. *People v Heft*, 299 Mich App 69, 83; 829 NW2d 266 (2012). Insofar as the prosecutor's remarks may have gone too far, defense counsel could have requested a curative instruction. However, on the available record, defendant has not overcome the presumption that counsel's decision not to do so was a matter of trial strategy. Rather than object and potentially reinforce the implication that defense counsel had something to hide from the jury, defense counsel addressed the prosecutor's argument that defense counsel was trying to "get away with something" by arguing that he had in no way misled the jury with his impeachment examination and it was the police who were lying to the jury. Overall, on the record presented, defendant has not shown counsel's performance fell below an objective level

of reasonableness, or that, but for counsel's performance, there was a reasonable probability of a different outcome. Defendant is not entitled to relief on appeal.

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher