

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID VERNARD WETZEL,

Defendant-Appellant.

UNPUBLISHED
September 23, 2014

No. 316200
Macomb Circuit Court
LC No. 2012-004267-FH

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals by right his jury-based convictions on two counts: Count One, assault with intent to do great bodily harm less than murder, MCL 750.84, and Count Three, larceny of property less than \$1,000, MCL 750.356(4)(a). The trial court sentenced defendant to 30 months' to 10 years' imprisonment for the assault conviction and to time served (178 days) for the larceny conviction. We affirm defendant's convictions, but remand for the ministerial task of correcting the judgment of sentence to reflect defendant's acquittal on Count Two, interfering with a crime report, MCL 750.483a.

I. WITHDRAWAL OF PLEA

On the date originally scheduled for trial, defendant pleaded nolo contendere to interfering with a crime report, larceny of property less than \$1,000, and a reduced charge of aggravated assault, MCL 750.81a, in exchange for dismissal of the more serious charge of assault with intent to do great bodily harm less than murder. At the sentencing hearing on the plea, the plea was withdrawn. Defendant contends that he did not consent to withdrawal of the plea, and that the trial court erred by withdrawing the plea without his consent. We review a trial court's decision on withdrawal of a guilty plea for an abuse of discretion. *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012).

Withdrawal of a plea is governed by MCR 6.310. Defendant's appeal turns on the application of subsection (B)(1) of the rule, which at the time of defendant's plea was as follows:

(B) Withdrawal After Acceptance but Before Sentence. After acceptance but before sentence,

(1) a plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. . . .

Contrary to defendant's contention on appeal, the record demonstrates that defendant consented to withdrawal of the plea. At the outset of the sentencing hearing on the plea, defense counsel made clear that defendant was considering withdrawal of the plea. Defense counsel stated, "it's an under advisement plea. We'd ask the court to inform us as to what the sentenced jail time will be. That would influence [defendant's] decision whether or not to go ahead with the plea."

The court then allowed the complainant to describe the charged crimes, after which defense counsel again indicated that defendant was considering withdrawal of the plea:

Defense counsel. . . . [w]e're, simply we're asking, Your Honor, if you're going to give him credit for time served, or if there is going to be some other sentence?

Trial court. There is going to be another sentence. He's not just doing one year probation.

. . . And he's going to do all, every single one of the 180 days that they're recommending.

Defense counsel. And so you, knowing that, do you wish to proceed (inaudible) the plea

Defendant. Can I say anything before you instate [sic] that?

Trial court. Sure.

The trial court then allowed defendant to begin describing his version of the charged crimes. The trial court interrupted to ask defendant whether he wanted to proceed to trial: "Sir, do you want a trial? If you want a trial, we'll have a trial. I'm not here to decide who is telling the truth or not, I'm here to sentence you."

Defendant then opted to withdraw his plea:

Defendant. Your Honor, it's I never really, okay, I never planned on taking even the one-year misdemeanor. I wanted a trial initially, but I wanted also to get out of here as soon as possible.

Trial court. Do you want a trial?

Defendant. So the sentencing would be 180 days and what?

Defense counsel. Probation and terms and conditions.

Defendant. Would I know how far off the trial date is?

Trial court. We can start it tomorrow if you want. The Prosecutor's ready, we start it tomorrow, we can start tomorrow.

[Discussion among counsel about calendar availability]

Trial court. So you tell me, when do you want to start your trial, Mr. [defense counsel]? I'm ready.

Defendant. I was informed by my attorney that I should take the 180. Well, I'm not taking it in that, I'm not doing that.

Defense counsel. It's your choice, it's your choice to take it or not take it. If you ask my opinion, that was my opinion. But it's your choice.

Trial court. And you know what, it's up to me, too. So we're going to have a trial, because you know what, I don't feel comfortable. I want to make sure you get every one of your Constitutional rights, okay?

Defendant. Thank You, Your Honor. [Emphasis added.]

The context of the exchange, and the italicized response of defendant as quoted, *supra*, verify that defendant not only consented to withdrawal of his plea, but requested the withdrawal. An exchange at the close of the hearing further confirms that defendant understood that his plea was withdrawn:

Prosecutor. And the defendant is aware that the misdemeanor now goes away? He's withdrawn his plea, so we're now back at square one?

Trial court. Yes.

Defendant. Thank You, Your Honor.

Defendant contends that his statements at the hearing were insufficient to demonstrate that he consented to having his plea set aside. In support, defendant cites *People v Strong*, 213 Mich App 107; 539 NW2d 736 (1995). The *Strong* decision does not support defendant's argument. In *Strong*, this Court reversed a trial court's decision vacating a defendant's plea where the defendant professed his innocence at sentencing, but proclaimed his intent to stand by his plea. In contrast, in this case defendant unambiguously stated that, contrary to the recommendation of his attorney, he was "not taking [the 180 days], I'm not doing that." Accordingly, the trial court was within its discretion to withdraw defendant's guilty plea.

II. THE PROSECUTOR'S CONDUCT

Defendant next argues that improper remarks by the prosecutor during opening statement and closing argument denied him a fair trial. Because defendant did not object to the challenged remarks at trial, we review this issue for plain error affecting defendant's substantial rights.

People v Brown, 279 Mich App 116, 134; 755 NW2d 664 (2008). When reviewing claims of prosecutorial misconduct, we examine the record and evaluate a prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010).

In his opening statement, the prosecutor stated:

In the United States one out of every four women unfortunately experiences some type of assault during her lifetime. [The complainant] is one out of four. And she is a statistic because of the actions of this man seated right here, writing, the defendant David Wetzel.

During his closing argument, the prosecutor stated:

[I]t's because of David Wetzel that [the complainant] is a statistic, they [sic] very statistic that I told you about in my opening. One in every four women will unfortunately go through an assault type crime in her lifetime.

[The complainant] is one of those four. And she's one of those four because of the actions of Mr. Wetzel. And it's because Mr. Wetzel made her a statistic is the very reason why I'm asking you collectively to find him guilty on all three counts.

The prosecutor's opening statement and closing argument were improper to the extent that he referenced unsupported statistical information. However, both references were brief and, contrary to defendant's contention, the prosecutor did not urge the jury to convict defendant as part of a broader duty to end violence against women. Immediately after the statistical reference in opening statement, the prosecutor summarized the evidence he intended to present at trial and expressed his view that the evidence would leave no doubt that defendant was guilty. Similarly, immediately after the reference in closing argument, the prosecutor discussed the burden of proving each element of the charged offenses beyond a reasonable doubt, discussed the applicable elements, and summarized how the evidence presented at trial established defendant's guilt.

Reversal is not required when a prosecutor's comments are isolated and not blatantly inflammatory. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Although a prosecutor may not argue that jurors should convict a defendant as part of their civic duty, *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005), reversal is not required unless the argument was so egregious that the prejudice could not be cured by a jury instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

In this case, the prosecutor did not argue that the jury had a civic duty to convict defendant. Further, defendant's substantial rights were protected by the trial court's jury instructions. The court instructed the jury that in deciding on a verdict, "you may only consider the evidence that has been properly admitted in this case," and that "[t]he lawyers' statements and arguments are not evidence." Because the prosecutor's remarks were isolated and did not blatantly urge the jury to convict defendant as part of a broader civic duty, reversal is not required.

We also reject defendant's related ineffective assistance of counsel argument. Even if defense counsel should have objected to the remarks, defendant was not prejudiced by defense counsel's failure to object. Accordingly, defendant's ineffective assistance of counsel argument cannot succeed. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

III. MINISTERIAL REMAND

Defendant was tried on three counts: Count One, assault with intent to do great bodily harm less than murder, MCL 750.84; Count Two, interfering with a crime report, MCL 750.483a; and Count Three, larceny of property less than \$1,000, MCL 750.356(4)(a). The jury found defendant guilty of Counts One and Three, but not guilty of Count Two.

The judgment of sentence, however, indicates that defendant was convicted on all three counts. There is no sentence entered on Count Two, but the conviction nonetheless appears on the judgment of sentence. The judgment of sentence must be corrected to show that defendant was acquitted on Count Two.

IV. CONCLUSION

Affirmed and remanded to the sentencing court for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Peter D. O'Connell