

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
October 23, 2014

v

JOHN RAYMOND BIFFLE,  
  
Defendant-Appellant.

No. 316789  
Wayne Circuit Court  
LC No. 12-011398-FC

---

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm by a person convicted of a felony (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 180 to 360 months' imprisonment for the armed robbery conviction, 40 to 120 months' imprisonment for the assault with intent to do great bodily harm less than murder conviction, 12 to 60 months' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I

This case arises from a shooting that occurred at a gas station. Christopher Graves and David Burke went to the gas station in a pick-up truck. Graves parked at a gas pump “kitty-corner” to the store and went inside to pay for the gas. Graves left the store after paying and briefly spoke with a female acquaintance. As they were talking, a man he did not recognize, but later identified as defendant, walked up to him from the side of the gas station. Defendant pointed a black gun at Graves and stated, “Give me everything.” Burke heard the shooter say, “Give me those glasses.” Graves looked at defendant for approximately three seconds and ran away. Defendant stated, “Do you think I am playing,” and began shooting at Graves—more than five times.<sup>1</sup> Graves ran toward his pick-up truck and was shot in the back. He crawled approximately four feet and hid under his truck. Burke also hid under the truck. Graves and

---

<sup>1</sup> Police recovered three shell casings at the scene.

another witness saw defendant run away, but there was some conflict in their testimony regarding the direction in which defendant ran.

There was also conflicting testimony at trial from witnesses of the shooting regarding the shooter's appearance. Graves testified: (1) defendant had a dark complexion, big eyes, and facial hair, (2) his hairstyle was a close crop to the head, and (3) he was wearing a white T-shirt, and a jacket or sweater was hanging off him. A gas station attendant thought the shooter had a dark complexion and testified that he was wearing a gray hoodie. Burke testified: (1) the shooter had a dark complexion, (2) his hair was in a "wild" ponytail, (3) he was wearing a hoodie, a long-sleeve white T-shirt, blue jeans, and (4) he was tall.

Graves saw defendant twice several months after the shooting. On one occasion, defendant followed Graves out of a store, and on another, defendant pointed at Graves. Sometime after the shooting, another witness of the shooting told Graves where defendant lived. He provided that information to the police, who confirmed defendant was a registered occupant. Graves later identified defendant as the shooter in a photographic lineup and at trial.

During closing arguments, the prosecutor stated, while summarizing Graves's testimony, "Defendant was firing that weapon as he was trying to chase him down and shoot him like a dog with a weapon designed for one thing when aimed at a humanbeing [sic], for killing." The prosecutor also stated, while paraphrasing Graves's testimony, "This Defendant is the person who tried to rob me, shot me in the back like a dog, trying to kill me for my property." Defense counsel did not object to either statement.

## II

Defendant argues that the prosecutor's statements at trial regarding defendant shooting Graves "like a dog" constituted prosecutor error. Defendant contends that the prosecutor's comments were unreasonable because they raised unwarranted sympathy for Graves and did not prove an element of the crime. We disagree.

A defendant must raise the issue of prosecutor error at the trial court level in order to preserve the issue for appellate review. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003). Defendant did not raise the issue of prosecutor error at the trial court level. Thus, this Court reviews defendant's unpreserved claim of prosecutor error for plain error affecting substantial rights. *Id.* "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Reversal is not required if a jury instruction could have cured the error. *Id.* at 449.

This Court examines a claim of prosecutor error to determine whether defendant was denied a fair and impartial trial. *Abraham*, 256 Mich App at 272. Prosecutors are given latitude with regard to their arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may use "hard language" or "[e]motional language" if the language does not interfere with the defendant's right to a fair trial and is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). This Court has clarified that even when the

prosecutor does make an improper remark, “a well-tryed, vigorously argued case ought not be overturned because of isolated improper remarks that could have been cured had an objection been lodged.” *Id.* Thus, this Court finds prosecutor error only where a jury instruction would not have cured the prejudicial effect of the prosecutorial misconduct, or where a miscarriage of justice would result. *Id.*

Defendant has failed to show that the prosecutor’s statements about defendant shooting Graves “like a dog” constituted prosecutor error that amounted to plain error affecting his substantial rights. See *Abraham*, 256 Mich App at 274. The prosecutor’s statements constituted emotional or hard language that did not result in an unfair or partial trial. See *Ullah*, 216 Mich App at 678. The prosecutor made the statements in the context of summarizing and paraphrasing Graves’s testimony regarding the hostile manner in which he was shot. This context makes it less likely that the statements led to an unfair or partial trial because the jury would be less likely to accept what the prosecutor stated as fact and more likely to view the prosecutor’s statements as a summary of Graves’s testimony. See *id.*

Furthermore, the prosecutor’s description was supported by the evidence presented at trial. Graves testified that defendant pointed a gun at Graves and demanded his possessions. When Graves ran away, defendant stated, “Do you think I am playing,” and fired repeated at Graves, hitting him in the back. The comparison of the shooting to the shooting of a dog was not improper in light of this testimony that defendant shot Graves without any regard. The prosecutor used hard or emotional language, but he did so while summarizing and paraphrasing Graves’s description of the violent way in which he was shot.

Finally, defendant’s claim that the prosecutor’s statements were prejudicial because they created sympathy for Graves also fails. While Graves’s description of the shooter differed in some respects from that of the other witnesses of the shooting, the prosecutor’s allegedly erroneous statements were unrelated to that inconsistency. Moreover, the trial court instructed the jury that “[t]he lawyers statements and arguments are not evidence” and that the jury “must not let sympathy or prejudice influence [its] decision.” Because the jury was presumed to follow its instructions, these instructions cured any error. *Abraham*, 256 Mich App at 279.<sup>2</sup>

Defendant’s prosecutor error claim fails.

### III

Next, defendant argues that he was denied his Sixth Amendment right to the effective assistance of counsel when trial counsel failed to object to the prosecutor’s statements regarding defendant shooting Graves “like a dog.” We disagree.

---

<sup>2</sup> Defendant argues that *United States v DeLoach*, 164 US App DC 116; 504 F2d 185, 193 (1974), supports his position that the statement shot “like a dog” constituted prosecutor error, but that case is not binding on this Court. *People v Holtzman*, 234 Mich App 166, 178; 593 NW2d 617 (1999) (federal cases are not binding on this Court).

In order to preserve a claim of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*<sup>3</sup> hearing in the trial court. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). Defendant did not move for a new trial or a *Ginther* hearing at the trial court level. Therefore, this Court reviews defendant's unpreserved claim for errors apparent on the record. *Id.* "A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *Id.*

"To prove that counsel has been ineffective, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). There is a strong presumption that trial counsel's conduct was effective. *Petri*, 279 Mich App at 411. This Court will not use hindsight to determine whether counsel's conduct was deficient, and it will not overturn decisions regarding trial strategy. *Id.* "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Because we conclude that the prosecutor's statements regarding defendant shooting Graves "like a dog" did not amount to prosecutor error, defense counsel's failure to object to those statements did not constitute deficient performance. Any objection would have been futile. See *Matuszak*, 263 Mich App at 58 (holding that an attorney was not ineffective for failing to object to statements by the prosecutor that were not erroneous). Accordingly, defendant's ineffective assistance of counsel claim fails.

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Kurtis T. Wilder  
/s/ Donald S. Owens

---

<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).