

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN ALLEN JACKSON,

Defendant-Appellant.

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UNPUBLISHED

September 13, 2007

No. 271158

Oakland Circuit Court

LC No. 2005-205409-FC

Before: O’Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529, and the trial court sentenced defendant to a prison term of 12 to 40 years. Defendant appeals as of right. We affirm.

Defendant first argues that the introduction of a portion of his codefendant’s statement through the testimony of another witness violated the Confrontation Clause of the Sixth Amendment. Because defendant did not object to the admission of the codefendant’s statement at trial, this issue is unpreserved and is reviewed for plain error that affected substantial rights. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006); *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

The prosecutor does not dispute that defendant was deprived of his Sixth Amendment right to confront the witnesses against him when codefendant’s counsel cross-examined the police officer who took codefendant’s statement and elicited testimony that placed defendant in the vehicle involved in the armed robbery at the time of the robbery. *Pipes, supra* at 274-275. The codefendant did not testify and defendant never had the opportunity to cross-examine him about his statement.

But reversal is not automatically required; rather, defendant must show that the error affected his substantial rights or, stated another way, was outcome determinative. *Pipes, supra* at 298. Defendant has not met his burden. Although the challenged statement put him in the car before the robbery took place, the jury could reasonably infer from defendant’s presence in the car shortly after the robbery, his flight from police, and one of the victim’s testimony describing defendant’s clothing as that which was worn by one of the robbers, that he was one of the men who exited the car at the scene of the crime. The statement did not affect the outcome of trial,

where there was other substantial evidence that defendant was one of the perpetrators who left the vehicle. Thus, defendant has not shown that the error affected his substantial rights.

Defendant next argues that the prosecutor deliberately exploited the Confrontation Clause error to buttress the otherwise weak case against defendant, thereby committing prosecutorial misconduct. The test for prosecutorial misconduct is whether the defendant was deprived of a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct claims are reviewed on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Id.* A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

During closing argument, the prosecutor referred to codefendant's statement and used it to argue defendant's participation in the crime. Even assuming that the prosecutor's comment was improper, reversal is not warranted. A prosecutor's isolated statement, even when improper, is subject to harmless error analysis. See *People v Armentero*, 148 Mich App 120, 134; 384 NW2d 98 (1986). A defendant bears the burden of showing that the error resulted in a miscarriage of justice. *People v Hawthorne*, 474 Mich 174, 181; 713 NW2d 724 (2006). The error justifies reversal if it is more probable than not that it affected the outcome. *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005).

Defendant has not met his burden of proving that the alleged error resulted in a miscarriage of justice because it is more probable than not that he would have been convicted even without the prosecutor's improper remark. See *Hawthorne, supra* at 181; *Young, supra* at 141-142. The remark was isolated and the trial court issued a limiting instruction concerning the use of codefendant's statements against each other. In addition, the trial court instructed the jury that the attorneys' statements and questions were not evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, as discussed above, the jury could reasonably infer, from defendant's presence in the car shortly after the robbery, his flight from police, and the victim's testimony describing defendant's clothing as that which was worn by one of the robbers, that he committed the crime. The prosecutor's isolated remark did not undermine the reliability of the verdict.

Lastly, defendant argues that he did not receive effective assistance of counsel at trial because trial counsel failed to ensure that the codefendant's statement was properly redacted to omit references to defendant and because he failed to move for a mistrial when the statement was admitted and when the prosecutor used the statement in closing. Our review of this unpreserved issue is limited to mistakes apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

To establish ineffective assistance of trial counsel, defendant must show: 1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; 2) but for trial counsel's errors, there is a reasonable probability that the result of his trial would have been different; and 3) that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show

that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* at 302. Effective assistance is presumed, and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich 657, 663; 683 NW2d 761 (2004).

Defendant argues that trial counsel was ineffective because he did not ensure that the codefendant's statement was redacted to remove references to defendant. We disagree. While hindsight may demonstrate that redacting the statement would have been prudent, an attorney's behavior cannot be evaluated using hindsight when trying to determine whether he was ineffective. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). On the record before us, we cannot conclude that defendant's counsel would foresee codefendant's counsel violating defendant's constitutional right of counsel. Defendant has failed to demonstrate that defense counsel's conduct fell below the "objective standard of reasonableness under prevailing professional norms." *Toma, supra* at 302-303.

Defendant also argues that trial counsel was ineffective for failing to move for a mistrial after codefendant's counsel admitted the statement and then again when the prosecutor argued in closing that the codefendant's statement implicated defendant. A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). We first note that the codefendant's actual statement was not entered into evidence. Rather, the contents of that statement were admitted through a police witness. In addition, the witness never used defendant's name in relaying the statement. It was codefendant's counsel who named defendant when he asked the police witness a question about the statement on cross-examination. As previously discussed, the admission of the contents of the statement was not prejudicial to defendant. And, the prosecution's closing argument is not evidence. In its final instructions, the trial court instructed the jurors that the lawyers' comments, arguments and questions are not evidence. The instruction was sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Defendant was not entitled to a mistrial, and trial counsel was not ineffective for failing to make a futile motion. See *People v Moorner*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Affirmed.

/s/ Peter D. O'Connell  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald