STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

DESMOND MARTIN SHAW,

Defendant-Appellant.

UNPUBLISHED
June 28, 2007

No. 269864
Wayne Circuit Court
LC No. 05-011365-01

Before: Whitbeck, C.J., and Wilder, and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 20 to 45 years' imprisonment for the second-degree murder conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. For the reasons set forth below, we affirm the convictions and sentences of defendant.

Defendant's convictions stem from the shooting death of Michael Jordan in front of the home of Morris Guthridge, on the evening of January 21, 2004. Jordan was driven to Guthridge's house by Jordan's wife, Kimberly Jordan, who waited for Jordan inside her car, which was parked on the street in front of Guthridge's house. The purpose of Jordan's visit was to ask Guthridge to check in with Guthridge's neighbor regarding money that the neighbor owed Jordan. While Guthridge and Jordan were in Guthridge's living room, defendant, known by Guthridge as "black," arrived at Guthridge's house. At the time of the incident, Guthridge was dog-sitting defendant's four dogs at Guthridge's house. Upon defendant's arrival, defendant and Jordan, who grew up in the same neighborhood and had been acquainted for years, began a "heated" discussion. Following this "heated" exchange, defendant left the house. Jordan then took off his coat and jewelry and told Guthridge to go and retrieve Jordan's money from Guthridge's neighbor. Guthridge then left his house and headed toward his neighbor's house. When Guthridge went outside, he saw defendant on Guthridge's walkway, told defendant to forget about the matter, and proceeded to his neighbor's house. A few minutes later, Guthridge, who was outside his neighbor's front door, saw Jordan exit Guthridge's house, approach defendant, who was still on Guthridge's walkway, and begin a conversation. Guthridge saw Jordan preparing to throw a punch at defendant. When Guthridge looked away for a moment in

order to continue knocking on his neighbor's door, he heard "a shot or two or three." Guthridge looked back at the men and saw Jordan on the ground and defendant walking away from him.

Defendant's first issue on appeal is that the trial court improperly admitted hearsay testimony of defendant telling the victim's brother Scott that he was "tired of [Jordan's] shit" and when defendant saw Jordan, defendant will be "popping [Jordan's] ass." Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, this Court reviews defendant's unpreserved claim of evidentiary error for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected the defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *Carines, supra* at 762-763.

Hearsay is a statement offered by someone other than the declarant to prove the truth of the matter asserted; it is generally inadmissible unless subject to an enumerated exception. *People v McGhee*, 268 Mich App 600, 639; 709 NW2d 595 (2005); MRE 801(c); MRE 802. Pursuant to MRE 801(d)(2)(A), a statement is non-hearsay and admissible if it is "offered against a party and is (A) the party's own statement . . . ." *People v Kowalak (On Remand)*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996).

In the instant case it was alleged that defendant shot and killed the victim, Michael Jordan, outside the house of a mutual friend, Morris Guthridge. Defendant alleges that the testimony of Jordan's brother, Scott Jordan, is impermissible hearsay. Scott's testimony is as follows:

> [Defendant] told me over the phone he was tired of Michael's shit, right, when he see him, right, he didn't want to talk no more, right, he was just tired of Micky's shit and when he seen [sic] 'em he was popping his ass.

The above testimony is non-hearsay, pursuant to MRE 801(d)(2)(A). Defendant's statement, as testified to by Scott, meets the criteria set out by MRE 801(d)(2)(A) because it was "offered against a party," and is "the party's own statement." *Kowalak, supra* at 556-557. Consequently, the trial court did not err in admitting Scott's testimony.

Defendant next contends that his counsel was ineffective for failing to object to Scott's alleged hearsay testimony. We disagree for the simple reason that because the statement was not hearsay, there was no obligation on the part of defense counsel to make an objection. Counsel is not required to make a frivolous objection, or advocate a meritless position. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Accordingly, defendant failed to establish his ineffective assistance of counsel claim.

Defendant alleges that the prosecutor engaged in misconduct that deprived him of his right to a fair trial. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, this Court reviews defendant's unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *Carines, supra* at 762-763. Even where such error is shown, reversal of a conviction is warranted only when the

established plain error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763-764.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), rev'd in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

First, defendant argues that the prosecutor's rebuttal closing argument remark, that "the [defense] approach is fairly slick," as well as his insinuation that defense counsel was trying to mislead the jury, constituted prosecutorial misconduct. Read in context, it is apparent that the prosecutor did not engage in misconduct. In his closing argument, defense counsel asserted that defendant did not commit the shooting and the prosecution's eyewitnesses were not credible. Counsel further indicated that in the event the jury determined that defendant did shoot Jordan, there were mitigating circumstances that should reduce the crime to manslaughter, namely, Jordan was high at the time of incident, "acting crazy," often carried a handgun and was likely armed with a handgun at the time of the shooting, and had a reputation for being violent. In his rebuttal closing argument, the prosecutor stated:

> *Understand that the approach is fairly slick and it's no disrespect intended to [defense counsel]*. He can only do what he can do with what he has. He's up here arguing after his client said somebody else did the shooting. They're mutually exclusive, the testimony before the last witness is mutually exclusive to what the last witness testified to. He can't have it both ways. He can't somehow say, oh, these were four stray bullets that hit this fellow, Mr. Jordan, and it just so happens in the context of all the other stuff, you know, going on there.
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> The function of our being here is determined and was determined on the 21st of January by the Defendant. I am not trying to insult anyone's intelligence and I'm not trying to get personal with [defense counsel]. Listen to what he says and decide based on what he says whether or not it has any merit. Listen to the arguments. It's nothing personal. His doesn't hold weight in a variety of fashions.

A prosecutor is not permitted to personally attack defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Here, however, the word "slick" was used to describe the defense's attempt to discredit the prosecution's witnesses and portray defendant as an innocent bystander, and was not a personal attack on defense counsel. The prosecutor took care to point out that he was not personally attacking defense counsel, but rather, was pointing out that defendant presented various theories regarding why he was not guilty and none of them

were supported by the evidence in light of Kimberly Jordan's testimony that she saw defendant shoot Jordan. The prosecutor's remarks were a permissible commentary on the evidence. *Knapp*, *supra* at 381 (prosecutors are accorded great latitude regarding their arguments and conduct and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case).

Even assuming the prosecutor's remarks were improper, an otherwise improper remark may not amount to an error requiring reversal when the prosecutor's remark is made in response to the defense counsel's argument. *Kennebrew*, *supra* at 608. Here, the prosecutor's rebuttal closing was in direct response to defense counsel's arguments. Furthermore, the jury was instructed that the arguments of counsel were not evidence. Accordingly, defendant was not denied a fair and impartial trial by the above remarks.

Second, defendant claims that the prosecution's use of the word "liar" to describe defendant constitutes misconduct. In the prosecutor's rebuttal closing argument, he stated:

> *Next he says to you that that last liar that he called should be given credit for having courage.* To come in here and swear to tell the truth and tell what he said is courageous? He posits to you he could have claimed that Mr. Jordan had a gun. What, and it evaporated? That's not consistent with any physical evidence that we have.

The above remark was made in rebuttal to defense counsel's closing argument, in which defense counsel argued that defendant was not lying when he testified that he did not shoot Jordan and defendant was courageous for testifying in light of his right to abstain from testifying. Defendant testified that he was standing by his truck when Jordan exited Guthridge's house and started to walk toward him. Defendant maintained that gunshots were fired at Jordan, but defendant had no idea where they came from. This testimony was at odds with the testimony of eyewitnesses Kimberly and Guthridge. Kimberly Jordan, the victim's wife, testified that she saw defendant shoot Jordan. Guthridge testified that although he did not witness the shooting, he saw defendant standing close to Jordan moments after the shots were fired.

A prosecutor may argue the evidence and all reasonable inferences arising from the evidence that relate to the theory of the case. *Knapp*, *supra* at 381. Additionally, a prosecutor is not required to argue in the blandest of all possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Prosecutors may use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996); *People v Rosengren*, 159 Mich App 492, 504; 407 NW2d 391 (1987) (the prosecutor calling the defendant's testimony "horse manure" was proper when pointing out the incredibility of the defendant's testimony). "A prosecuting attorney has the right to comment upon the testimony in a case, to argue upon the facts and evidence that a witness is not worthy of belief and to contend that a defendant is lying." *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982). Upon review of the record, the prosecutor's remark constituted a proper argument that the evidence tended to show that defendant was not credible when he denied shooting Jordan and instead pointed the finger at a hidden, unknown gunmen.

Finally, defendant argues that the prosecutor engaged in misconduct by introducing facts not in evidence when presenting his theory of a possible motive for the killing. The prosecutor

opined that one possible reason for defendant wanting to shoot Jordan was his jealousy of Jordan. There was testimony that Jordan drove fancy cars, wore a mink coat and jewelry, went to cabarets hosted by his employers, and defendant had animosity toward Jordan. On the day of the shooting, Jordan was wearing a mink coat and jewelry and had a bottle of champagne in each hand upon arriving at Guthridge's house. Based on the evidence, the jealousy theory was a possibility supported by the evidence. Further, the prosecution's argument that defendant might have been unconcerned by Guthridge witnessing the shooting because, in defendant's eyes, Guthridge's testimony could be discredited, was proper. The prosecution's assertion was supported by the evidence and in direct response to defendant making considerable attempts to portray Guthridge as a law-breaking, drug-using witness whose eyewitness testimony is unworthy of belief. Consequently, the prosecutor did not argue facts not in evidence.

Defendant also argues that the cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller (On Remand)*, 211 Mich App 30, 34; 535 NW2d 518 (1995). In order to reverse on the grounds of cumulative error, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial. *Knapp, supra* at 388. To the extent that the prosecutor's remarks could be considered errors, we conclude that they are not of a magnitude as to be seriously prejudicial. Excluding the challenged remarks, there was ample evidence against defendant. Kimberly's uncontroverted testimony established that defendant was the shooter. To the extent that the prosecutor's remarks could be considered improper, the error was harmless given the evidence against defendant. *People v Smith*, 243 Mich App 657, 690; 625 NW2d 46 (2000).

Affirmed.

/s/ William C. Whitbeck, C.J.
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello