STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2008
v	No. 277738 Kent Circuit Court
JUSTIN CHARLES WILLETT, Defendant-Appellant.	LC No. 06-008370 - FH

Before: Meter, P.J., and Hoekstra and Servitto, P.J.,

PER CURIAM.

Defendant appeals as of right his conviction for first-degree home invasion, MCL 750.110a(2). Because defendant's conviction is supported by sufficient evidence, the prosecutor did not engage in any misconduct, and defendant was not denied the effective assistance of counsel, we affirm.

I. Sufficiency of the Evidence

At trial, defendant admitted that he stole Sarah Schutza's purse. He claimed that he stole the purse from the stoop outside the apartment home of Paul Buttrick and Kalen Decenzo, rather than from inside the home. On appeal, defendant argues that his conviction should be vacated because the prosecutor failed to produce sufficient credible evidence from which a rational trier of fact could find that he stole Schutza's purse from the inside of the apartment home. We disagree.

In reviewing the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hardiman*, 466 Mich 417, 421; 646 NW2d 158 (2002). This Court is mindful that the fact-finder had the special opportunity to assess the credibility of witnesses, *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), and it will not interfere with the fact-finder's role in determining the credibility of the witnesses, *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). In fact, "circumstantial evidence is oftentimes stronger and more satisfactory than direct evidence." *Wolfe, supra* at 526.

Schutza testified that she left her purse on the kitchen counter of the apartment home next to the stove before she went to the basement to play ping-pong. Buttrick and Decenzo remembered seeing Schutza's purse on the counter. In addition, Courtney Schwab testified that defendant told her and a friend that he "broke into a house" to get the purse. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant took Schutza's purse from inside the apartment home. *Hardiman, supra*.

We reject defendant's argument that when one carefully looks at the various pieces of evidence and tries to integrate them, there is far from sufficient evidence to allow a rational trier of fact to find beyond a reasonable doubt that he stole the purse from inside the apartment home. Defendant points to the following: (1) there was no direct evidence, such as forensic evidence or a video surveillance tape, establishing that he took the purse from inside the apartment home; (2) he has always maintained, even when he initially told the police that he stole the purse, that he took the purse from the stoop; (3) Schutza's actions in searching the apartment home after discovering her purse was not on the counter contradicts her testimony that she was sure she had placed her purse on the kitchen counter; (4) Schutza was willing to lie because she had lied to the police about having marijuana in her purse; and (5) Schwab's testimony was ambiguous regarding whether defendant stated he had taken the purse from inside a home. Direct evidence is not necessary to establish the elements of a crime. *Plummer, supra*. Defendant's other points relate to the jury's credibility determinations regarding Schutza, Schwab, and defendant. We will not interfere with the jury's credibility determinations. *Williams, supra*. Defendant's conviction for first-degree home invasion is supported by sufficient evidence.

II. Prosecutorial Misconduct

Defendant claims that the prosecutor's actions denied him a fair trial and due process. We disagree.

Because defendant failed to object to the prosecutor's statements now challenged on appeal, we review defendant's claims for plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). If plain error exists, reversal of defendant's conviction is warranted only if defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). We will not find error requiring reversal if a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citations omitted). We review claims of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context and in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

First, defendant argues the prosecutor deliberately elicited irrelevant and highly prejudicial information by providing testimony that the reason why the police did not submit any evidence for forensic testing was because they thought they had the right person. A prosecutor's good faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Here, the challenged testimony from Detective Jamie

Chianfoni was relevant to explain to the fact-finder why no evidence had been submitted for forensic testing. The evidence was relevant particularly in light of the fact that during opening statements defense counsel told the jury it would not see evidence of fingerprints or handprints on the doorknob or the counter from which the purse was allegedly stolen. Further, the police did not just "think" defendant had stolen the purse. They knew defendant had stolen the purse because defendant had confessed to stealing it. Consequently, Chianfoni's testimony was not irrelevant nor was it unduly prejudicial. The prosecutor did not engage in misconduct when eliciting the challenged testimony from Chianfoni.[1]

Second, defendant argues that the prosecutor argued facts not in evidence when he (1) called on the women of the jury who own purses to use their own knowledge that they know where their purse is at all times; (2) said that women did not leave their purses outside when they were inside; (3) said that all witnesses recounted seeing the purse in the kitchen; and (4) stated that no one can prove facts 100 percent in a courtroom. A prosecutor may not argue facts not in evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, *supra* at 236 (citations omitted).

A review of the record establishes that the prosecutor's statements that women know where they place their purses and that women do not leave their purses outside were reminders to the jury to utilize their common sense in evaluating the evidence. A prosecutor may urge a jury to use its common sense when evaluating the evidence and deciding issues of credibility. See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992). See also *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991) ("It is well known that factfinders may and should use their common sense and everyday experience in evaluating evidence"). Accordingly, the prosecutor's statements regarding women and their purses were not improper.

The prosecutor's statement that "three witness . . . say the purse was in the kitchen" was a true statement based on the evidence presented. Schutza testified that she placed her purse on the kitchen counter, and Buttrick and Decenzo testified that they saw the purse sitting on the counter. It was merely for the jury to decide whether this testimony, along with the other evidence presented, established that defendant took the purse from the kitchen counter. The prosecutor's statement was not improper.

Regarding defendant's claim that the prosecutor argued facts not in evidence by stating that no one can prove facts 100 percent in a courtroom, defendant argues prejudice, claiming that the argument degraded the prosecutor's burden of proof. However, the "beyond a reasonable doubt" standard does not require a prosecutor to prove facts with 100 percent certainty. *People v Bowman*, 254 Mich App 142, 149-151; 656 NW2d 835 (2002), citing *Victor v Nebraska*, 511 US

[1] In addition, in questioning Chianfoni, the prosecutor did not elicit Chianfoni's opinion regarding the credibility of the witnesses. As already stated, the police knew that defendant had taken Schutza's purse because he had admitting to taking the purse.

1, 26-27; 114 S Ct 1239; 127 L Ed 2d 583 (1994) (Ginsburg, J., concurring). Thus, the prosecutor's statement was not improper.

Third, defendant argues the prosecutor improperly expressed a personal belief in the facts of the case by stating during closing arguments that "[Schwab is] telling you the truth." A prosecutor may not vouch for the credibility of a witness by implying that she has special knowledge of the witness's credibility. *Thomas, supra* at 455. However, a prosecutor may argue from the facts that a witness is credible. *Unger, supra* at 240. Considered in context, the challenged remark was proper. The context of the remark establishes that, rather than asserting her personal belief in Schwab's credibility, the prosecutor was arguing that because most of Schwab's testimony fit with the testimony of defendant, Schwab, rather than Mark Szymczak, was telling the truth.[2]

Fourth, defendant argues the prosecutor misstated the law during her opening statement by telling the jury that a reasonable doubt is not an imaginary or possible doubt. The standard jury instruction defining the reasonable doubt standard, CJI2d 3.2(3), provides that a "reasonable doubt is a fair, honest doubt growing out of the evidence . . . . It is not merely an imaginary or possible doubt . . . ." This Court has previously determined that CJI2d 3.2 presents an adequate instruction regarding the concept of reasonable doubt. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *People v Hubbard (After Remand)*, 217 Mich App 459, 486-488; 552 NW2d 493 (1996). Thus, the prosecutor's statement was correct.

Fifth, defendant argues the prosecutor, by stating that women know where their purses are and that women do not leave their purses outside when they are inside, improperly called upon the female members of the jury to use their personal knowledge and experience in assessing the credibility of Schutza. Jurors may not rely on their own specialized knowledge in determining a defendant's guilt. See *Simon, supra* at 567-568. However, we disagree that the prosecutor asked the jury to use "personal, specific knowledge and experience." Rather, as previously discussed, the prosecutor called on the jury to employ its common sense regarding women's knowledge of the location of their purses in determining the credibility of Schutza. Such a calling by the prosecutor was proper. See *Lawton, supra* at 355; *Simon, supra* at 567-568 Accordingly, the prosecutor engaged in no misconduct.[3]

III. Ineffective Assistance of Counsel

Defendant claims that he received ineffective assistance of counsel. Specifically, defendant argues that if this Court fails to rule in his favor because counsel failed to object to the prosecutor's alleged misconduct, then counsel was ineffective for failing to object to the challenged statements. We disagree.

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[2] Szymczak testified that he never saw defendant with a purse the night Schutza's purse was stolen.

[3] Even if we were to conclude that any of the prosecutor's remarks were improper, defendant has failed to establish that any resulting prejudice could not have been alleviated by a curative instruction. *Callon, supra*.

Because defendant did not move for a new trial or for a *Ginther*[4] hearing, our review of defendant's claim is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim for ineffective assistance of counsel, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

As analyzed in Issue II, *supra*, the prosecutor's statements were not improper. Therefore, any objections to the statements would have been futile. Counsel is not ineffective for failing to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). In addition, defendant has failed to prove that, had counsel made the objections, the outcome of his trial would have been different. *Toma*, *supra*. Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).