STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 6, 2009
v	No. 282230 Saginaw Circuit Court
RICHARD ALLEN SMITH, Defendant-Appellant.	LC No. 06-028141-FH

Before: Zahra, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82, and possession of a firearm during commission of a felony, MCL 750.227b. Defendant was sentenced to 36 months' probation for the assault conviction and two years' imprisonment for the felony-firearm conviction. He appeals as of right, and we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that prosecutorial misconduct violated his due process right to a fair trial. Specifically, defendant argues: (1) the prosecutor's improper cross-examination of defendant forced him to comment on the credibility of the prosecution's witnesses, (2) the prosecutor denigrated defense counsel by implying impropriety when objecting to defense counsel's question, (3) the prosecutor implied wrongdoing by defense counsel, specifically the existence of a witness not disclosed to the prosecution, (4) the prosecutor denigrated defense counsel in closing argument, and (5) the prosecutor improperly vouched for the credibility of a witness with his own personal belief. We conclude that defendant is not entitled to relief based on any of those claims.

Defendant's claims of prosecutorial misconduct were not preserved below. Unpreserved claims of prosecutorial misconduct are subject to the plain error rule. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The defendant must show (1) there was an error, (2) the error was clear or obvious, and (3) the error prejudiced the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v Olano*, 507 US 725, 734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

When looking at a claim of misconduct by the prosecutor, this Court must examine the relevant part of the record and review a prosecutor's remarks in context. *People v Bahoda*, 448

Mich 261, 266-267; 537 NW2d 659 (1995). Also, the appropriateness of a prosecutor's remarks will depend upon the particular facts of each case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

Additionally, a prosecutor's 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence. *Bahoda, supra* at 282; *Schutte, supra* at 721.

On the issue of improperly forcing defendant to comment on the credibility of all the prosecution witnesses, we find there was plain error.

A prosecutor may not ask a defendant to comment on the credibility of a prosecution witness because such opinions are not probative of the defendant's guilt and credibility determinations are in the domain of the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001).

However, even if there were error, the error can be harmless. *Buckey, supra* at 17; *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); *People v Loyer*, 169 Mich App 105, 116-118; 425 NW2d 714 (1988). The record shows that defendant adeptly dealt with the questions. When asked whether Deputy Jeffrey Kruszka was lying, defendant responded by saying the deputy did not even investigate the incident. When asked again whether Kruszka was lying about being taken to defendant's room and being shown the gun, defendant responded by saying he requested medicine. And finally, when questioned about Deputy Adrian Wise, defendant responded by saying he did not tell Wise where the gun was. Defendant handled himself in a similar way to the defendant in *Buckey*. See *Buckey, supra* at 7 n 3. Further, the record shows that on redirect examination, defendant was able to express that he believed the officers had a "different perception" as opposed to necessarily lying. Therefore, the error was harmless.

Next, defendant argues that the prosecution improperly denigrated defense counsel in a remark expressing that counsel had knowingly engaged in improper conduct. A prosecutor's personal attack on defense counsel can infringe upon the presumption of innocence and thus be improper. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 659 (1997). It is clear the prosecutor could have objected without chastising defense counsel or in implying wrongdoing by counsel in front of the jury. Thus, we conclude it was plainly improper for the prosecutor to express in the jury's presence that defense counsel knowingly engaged in improper conduct.

Once the plain error standard has been met, an appellate court may reverse only when the plain error caused a conviction of a defendant who was actually innocent or "when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' [sic] independent of the defendant's innocence." *Carines, supra* at 763, quoting *Olano, supra* at 736-737 (internal punctuation omitted).

Although plain error, defendant has failed to prove prejudice. Based on the record, it is overwhelmingly likely the jury believed the complainant, Jonathon French, when he said that defendant waved a gun at him. The jury also apparently believed Kruszka when he testified that

defendant, without being asked, volunteered that he did have an encounter with French but did not wave a gun at him. Further, Kruszka testified to defendant telling him he did not trust "the white man," paralleling French's testimony that defendant also told him he did not trust "the white man" and contradicting defendant's denial of making such a remark. French and Kruszka were just doing their jobs and had little or no reason to lie about or misrepresent the incident. The jury simply did not believe defendant's story, and it is implausible to believe the improper reference to defense counsel was a decisive factor to the jury.

Defendant next argues that the prosecutor acted improperly in asking Detective Paula Lounsbury if she was ever given notice of witnesses other than defendant or French. Defendant asserts that this improperly shifted the burden of proof. We find no plain error. The question was permissible as responding to defendant's claim that his sister, Jeannene Belton, was at the house during the incident and calling into question the credibility of such testimony by defendant and Belton in light of his failure to inform police of her presence. See *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995) ("When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory of the evidence.").

We also find no plain error in defendant's claim that the prosecutor denigrated defense counsel by stating in closing argument that "the reason we have you people on juries and not a bunch of lawyers, as you can see, half the time we don't make sense." Given that the remark could easily be taken as self-deprecating humor, it is not plain that it denigrated defense counsel.

Defendant further argues that the prosecutor improperly vouched for French's credibility by stating in closing argument, "I don't think Mr. French made that up." We disagree. In context, the prosecutor was not improperly vouching for French by asserting some special knowledge of his truthfulness, *Bahoda, supra* at 276, but was arguing from the evidence that French was credible.

Next, defendant argues that the trial court abused its discretion by ruling that proffered evidence consisting of testimony from Anne Schulte, the lawyer who represented defendant at the preliminary examination in this case, was not relevant, and by failing to grant defense counsel's motion to withdraw so that Schulte (who was defense counsel's law partner) could testify as a defense witness without conflict of interest. We find no error.

This Court reviews a trial court's decisions regarding the admission or exclusion of evidence for an abuse of discretion. *People v Aldrich,* 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs when the trial court's decision is outside of the range of reasonable and principled outcomes. *People v Young,* 276 Mich App 446, 448; 740 NW2d 347 (2007).

Relevant evidence is "evidence having *any* tendency to make the existence of any fact that is of consequence … more probable or less probable than it would be without the evidence." MRE 401 (emphasis added). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of confusion of the issues. MRE 403.

Also, "MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters [.]" *People v Spanke,* 254 Mich App 642,

644; 658 NW2d 504 (2003). Extrinsic evidence is "[e]vidence that is calculated to impeach a witness's credibility, adduced by means other than cross-examination of the witness." Black's Law Dictionary (8th ed), p 597.

The trial court based its ruling on the determination that even if the testimony proffered by defendant was relevant, the probative value would have been substantially outweighed by jury confusion over the ultimate issue, i.e., whether defendant committed felonious assault and brandished a weapon. Regardless of the soundness of this reasoning, the trial court properly excluded this evidence because it constituted extrinsic evidence offered to impeach a witness on a collateral matter. The evidence would have been relevant only to a collateral matter—the veracity of the complainant about always having advertising signs on his truck—and thus was not directly relevant to defendant's guilt or innocence, i.e., to whether defendant assaulted the complainant with a gun. The testimony would not have disputed any of French's or circumstances regarding defendant's pointing a gun at French. Therefore, the trial court properly refused to admit it.

Next, on the issue of the trial court's failure to grant defense counsel's motion to withdraw so that Schulte could testify as a defense witness, we also find no error. As discussed above, the contemplated testimony from Schulte was not even properly admissible. Further, contrary to the premise of defendant's argument, it was not necessary for defense counsel to withdraw in order for the defense to call Schulte as a witness because "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's *firm* is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." MRPC 3.7(b) (emphasis added).

MRPC 1.7 provides, "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client." Similarly, MRPC 1.9(a) provides, "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." The conflict of interest principles provided by MRPC 1.7(a) and 1.9(a) did not apply to the present circumstance. Defense counsel was incorrect in arguing that his firm had to withdraw for his colleague to testify and misapplied the concept of conflict of interest. The MRPC allowed co-counsel from the lawyer's firm to testify, and defense counsel was not disqualified from the case so long as there is no conflict of interest. MRPC 3.7(b). There was no conflict of interest in this case because Schulte would not have testified against defendant, whom she had previously represented, in an adversarial way. MRPC 1.7(a); MRPC 1.9(a).

Finally, defendant alleges ineffective assistance of counsel because defense counsel failed to give notice of an important witness, failed to object to clearly improper cross-examination, and failed to object when the prosecutor denigrated him at trial.

In the absence of a trial court motion for a new trial or an evidentiary hearing, appellate review is limited to review of the existing record. *People v Sabin (*O*n Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

There is a strong presumption that counsel has given adequate assistance of counsel "and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Ineffective assistance of

counsel is established by showing that counsel's performance was deficient and that the defendant suffered prejudice as a result. *Id.* Deficiency requires a showing that the counsel made errors so serious that he was not functioning as counsel. *Id.* Next, the defendant must show that because of the ineffective counsel he was deprived of a fair trial. *Id.*

Trial counsel's lack of objection to improper cross-examination was clearly trial strategy. Rather than objecting to the testimony and highlighting it further for the jury, it was reasonable for counsel to seek to rehabilitate defendant on re-direct examination. "There are times when it is better not to object and draw attention to an improper comment." *Bahoda, supra* at 287 n 54.

Defense counsel's failure to give proper notice of a witness (Schulte) may have constituted deficient performance. Also, trial counsel allowed himself to be denigrated by the prosecutor and should have objected. The record shows the prosecutor's conduct was distinctly inappropriate and we can perceive of no strategic reason for defense counsel's failure to object.

However, defendant fails to show he was deprived of a fair trial because of ineffective counsel. The jury clearly believed French's testimony and did not believe defendant's. Schulte's potential testimony was not directly exculpatory but would have only pointed out a minor and immaterial inconsistency in French's testimony. Further, based on the trial court's expressed rationale, it would have excluded Schulte's testimony even if timely notice had been given. And, as discussed above, it is unlikely that the prosecutor's brief improper remark about defense counsel affected the jury's verdict. Defendant was not denied the right to a fair trial.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood