STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2007
v	No. 269034 Oakland Circuit Court
THOMAS JOSEPH BEDFORD, Defendant-Appellant.	LC No. 2005-203818-FH

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of felonious assault, MCL 750.82. He was sentenced to one year of probation. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Kenneth Wilson went to the home of a friend, John Davis. Davis lived in an apartment complex where defendant was apparently employed as a maintenance man. Defendant allegedly made an offensive or harassing remark to Davis's daughter, so Davis went to confront him. Wilson followed, and found Davis arguing with defendant near the pool. Another man was holding Davis back from defendant, and defendant was holding a metal pipe. Wilson tried to move Davis out of the area. Defendant appeared to be intoxicated, and used a racial slur in reference to Wilson. Defendant then hit Wilson with the pipe. Wilson knocked defendant to the ground and kicked him.

Witnesses Brandon Ekins and Christopher Ekins, residents of the apartment complex, confirmed that defendant struck Wilson with a metal pipe. The witnesses also indicated that defendant repeatedly used a racial slur when referring to Wilson.

Defendant testified that he was in the pool area when Davis came running toward him making threatening remarks. Defendant acknowledged that when Wilson approached, he used a racial slur and told Wilson to leave the area. Defendant indicated that he felt threatened. He acknowledged that he swung a metal pipe at Wilson, but contended that he did so because he felt threatened, and that he did not intend to injure Wilson. Defendant confirmed that Wilson then knocked him to the ground and kicked him.

During closing argument, the prosecutor noted that defendant repeatedly used a racial slur when referring to Wilson, and asserted that defendant's claim that he felt threatened was not

persuasive in light of the evidence that he could have left the area by walking to the other side of the pool. Defendant did not object to this argument.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. Counsel is presumed to have rendered effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that the prosecutor committed misconduct and denied him a fair trial by repeatedly eliciting testimony from the witnesses that he used a racial slur during the confrontation with Wilson, and by emphasizing that fact during closing argument. Defendant acknowledges that his counsel did not object to the prosecutor's conduct, and contends that defense counsel rendered ineffective assistance by failing to object. We disagree with both assertions.

Defendant failed to object to the conduct about which he now complains; therefore, our review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The evidence showed that defendant began using a racial slur as soon as Wilson appeared in the pool area, and continued to use the slur thereafter. The fact that many persons would be offended at the use of the racial slur did not make the evidence inadmissible. We fully recognize that a prosecutor must not inject issues broader than the defendant's guilt or innocence of the charged offense. See *People v Cooper*, 236 Mich App 643, 650-651; 601 NW2d 409 (1999). Moreover, a prosecutor must avoid introducing racial or ethnic remarks at trial because such comments may enflame a jury's biases and passions. *Id*.; see also *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). However, unlike the racial or ethnic comments in *Bahoda* and *Cooper*, the racial slur in the present case was not an improper comment made by the prosecutor. Instead, although it may have been pointed out by way of the prosecutor's questions, defendant himself made the racial slur, in reference to the victim of his assault. Moreover, the prosecutor did not argue that defendant was guilty because he used the racial slur. Instead, the prosecutor asserted

that defendant attacked Wilson without provocation, and pointed to defendant's use of the racial slur as some evidence of defendant's state of mind. This evidence was relevant in the context of the prosecutor's theory of the case. MRE 401. The prosecutor's argument, viewed in this context, was not improper. *Schutte*, *supra* at 721. Furthermore, any prejudice created by the prosecutor's argument could have been cured by a timely jury instruction, explaining that the prosecutor's argument did not constitute evidence. *Leshaj*, *supra* at 419. Defendant has not shown that plain error resulted from the prosecutor's actions or comments. *Carines*, *supra* at 763-764.

Furthermore, defendant has not shown that defense counsel rendered ineffective assistance by failing to object to the prosecutor's elicitation of testimony concerning the racial slur, or by failing to object to the prosecutor's argument pointing out defendant's use of the slur. Defendant testified and acknowledged that he used the racial slur. It is likely that defense counsel determined that objecting to the prosecutor's argument would simply place even more emphasis on unfavorable testimony. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The fact that a trial strategy fails does not render counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Moreover, the evidence plainly indicated that defendant struck Wilson with the metal pipe. This evidence, as accepted by the jury, clearly established the elements of felonious assault.[1] See *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Therefore, defendant has not shown that but for counsel's alleged error, it is reasonably probable that the result of the trial would have been different. *Carbin*, *supra* at 600.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello

[1] We note that defendant's assertion that he acted in self-defense turned almost exclusively on defendant's credibility. Accordingly, the jury was entitled to reject defendant's assertion. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).