STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2006
v	No. 246110 Washtenaw Circuit Court
JAMES ERIC LULOW, Defendant-Appellant.	LC No. 96-006723-FC

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and sentenced to life imprisonment without the possibility of parole. Defendant appeals as of right. We affirm.

Defendant was arrested for the murder of Wallace Snyder in July 1996, but was not tried for the homicide until January 2002. The five-and-one-half-year delay between defendant's arrest and trial was the result of defendant having undergone numerous competency evaluations and the withdrawal of six attorneys from their representation of defendant. Many of the attorneys withdrew because of defendant's strict adherence to his belief that he was the victim of a complex conspiracy, of which Snyder was believed by defendant to have been a part, and which defendant insisted be central to his defense.

On appeal, defendant argues that the trial court, knowing of his mental disorders, denied him a fair trial when it failed to sua sponte petition the probate court for appointment of a guardian to make informed decisions on his behalf. Defendant also argues that he was denied the effective assistance of counsel when defense counsel failed to seek the appointment of a guardian for such purpose. We find neither argument sufficient to provide a basis to disturb defendant's conviction.

Defendant is correct that the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, allows a person interested in the welfare of an incapacitated individual to petition the probate court for appointment of a guardian for the incapacitated individual. See MCL 700.5303(1). However, defendant concedes that there is no authority from which it can be concluded that the guardianship provisions of the EPIC were intended to be, or should otherwise be construed as, applicable to criminal proceedings. Moreover, defendant has failed to provide any argument or authority to persuade us that a criminal defendant who suffers from a mental or

personality disorder but has been found competent to stand trial is unable to make intelligent and informed decisions on his own behalf. In the absence of any such argument or authority, we are not inclined to extend the provisions of the EPIC to criminal proceedings, or to otherwise hold that a defendant found competent to stand trial is entitled to the appointment of a guardian. See *People v Whyte*, 165 Mich App 409, 414; 418 NW2d 484 (1988) (declining "to engraft such a device on a criminal proceeding"). Thus, we reject defendant's argument that he was deprived of a fair trial as a result of the trial court's failure to sua sponte seek appointment of a guardian.

For these same reasons, we also reject defendant's claim that his trial counsel was ineffective for himself failing to seek such an appointment. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, a defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for counsel's defective performance, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must also overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Moreover, counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Because defendant has failed to demonstrate that the EPIC applies to criminal proceedings, or that a defendant who suffers from a mental or personality disorder, but has been found competent to stand trial is unable to make intelligent and informed decisions on his own behalf, he has failed to establish that a request by counsel for the appointment of a guardian would not have been futile. *Id*. In other words, defendant has not shown that had counsel sought the appointment of a guardian, one would have been appointed. Thus, defendant has failed to show that his counsel's performance was deficient. *Pickens, supra*.

Defendant also argues on appeal that the prosecutor, in his closing argument, improperly commented on defendant's credibility and denigrated defendant and his defense theory. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We will not reverse a conviction based on prosecutorial misconduct if the prejudicial effect of the prosecutor's comments could have been cured with a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, examining the prosecutor's remarks in context, to determine whether the defendant was denied a fair trial. *Id*. It is the exclusive province of the jury to assess the credibility of witnesses. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). Thus, a prosecutor may not inject his own personal opinion as to the truthfulness of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may argue from the facts that the defendant is not credible, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), and is free to argue all reasonable inferences from the evidence as it relates to his theory of the case, *Matuszak*, *supra* at 53. Additionally, a prosecutor is not required to state inferences or conclusions in the blandest terms possible, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), and may even use "hard language" when it is supported by the evidence, *People v Ullah*, 216 Mich App

669, 678; 550 NW2d 568 (1996). In fact, a prosecutor may characterize the defendant as a liar if the comment is based on evidence presented at trial. *Howard*, *supra*.

We agree that the prosecutor improperly injected his opinion as to defendant's credibility when he told the jury that he believed that defendant "lies . . . just for the sake of lying" and would continue to do so in the future. However, we do not conclude that these improper comments require reversal of defendant's conviction. The trial court instructed the jury that it must decide the case only on the evidence presented and that the arguments made by counsel were not evidence. These instructions effectively cured any prejudice suffered by defendant. *Watson*, *supra*.

We have additionally reviewed the other comments made by the prosecutor that are now challenged on appeal. The challenged remarks were in all aspects proper. Using the evidence presented at trial, the prosecutor argued that defendant was not credible and that his chronicle of the events that occurred at the duck blind where Snyder was killed was not reasonable. *Matuszak*, *supra*; *Howard*, *supra*.

Finally, we hold that defendant was not denied effective assistance of counsel when his trial counsel failed to object to the prosecutor's comments. First, as noted above, the majority of the comments challenged by defendant on appeal were proper, and any objection by counsel to the prosecutor's proper comments would thus have been futile. *Fike*, *supra*. Second, defendant has failed to overcome the presumption that counsel's failure to object to the improper comments concerning his belief as to defendant's credibility was sound trial strategy. Although defendant asserts that counsel had no valid strategic reason for failing to object to these comments, our Supreme Court has noted that "there are times when it is better not to object and draw attention to an improper comment." *Bahoda*, *supra* at 287 n 54. Here, the prosecutor's improper comments were brief and, therefore, counsel may have reasonably determined that objecting to the comments would have brought undue attention to the improper comments. Defendant has failed to overcome the strong presumption that counsel's failure to object was sound trial strategy. *Matuszak*, *supra* at 58.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio