

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LAMAR JENKINS,

Defendant-Appellant.

UNPUBLISHED

February 7, 1997

No. 199680

Recorder's Court

LC No. 93-011759

ON REMAND

Before: Cavanagh, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

This case is before us for the second time. In our previous opinion, we reversed defendant's conviction and remanded for a new trial. *People v Jenkins*, unpublished opinion per curiam of the Court of Appeals, issued July 23, 1996 (Docket No. 177859). The Supreme Court has remanded the case to us for reconsideration in light of its decision in *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995). We now affirm.

I

Defendant claims that he was denied a fair trial because the prosecutor improperly shifted the burden of proof during rebuttal argument by arguing that in order to acquit the jury had to find that three particular witnesses were all lying. The propriety of a prosecutor's conduct depends on all the facts and circumstances of a case and must be evaluated in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

We conclude that the prosecutor did not impermissibly shift the burden of proof during rebuttal argument. Arguments regarding the weight and credibility of the witnesses and evidence do not shift the burden to the defendant to prove his innocence, but rather question the reliability of the testimony and evidence presented. *Fields, supra* at 107. The prosecutor did not require defendant to disprove an element of the charged offense. See *id.* at 113. Accordingly there was no error requiring reversal.

II

Defendant also contends that he is entitled to a new trial because the trial court improperly allowed the prosecutor to impeach defendant's alibi witnesses by cross-examining the witnesses about why they did not immediately inform the police of defendant's alibi when they first learned of defendant's arrest. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

The prosecution may not discredit an alibi witness by insinuating that he did not act as a good citizen would have acted when he failed to report knowledge regarding a defendant. *People v Martinez*, 190 Mich App 442, 446; 476 NW2d 641 (1991). However, the credibility of an alibi witness may be attacked by showing that it would have been natural for the witness to speak or act if the facts accorded with the witness' testimony and that the witness failed to speak or act. *Id.*; see *People v Phillips*, 217 Mich App 489, 494; 552 NW2d 487 (1996). Thus, the trial court did not abuse its discretion in allowing the prosecutor to inquire why the witnesses did not immediately come forward with the exculpatory information.

Likewise, it was not improper for the prosecutor to argue in his closing argument that the alibi witnesses' failure to come forward immediately was grounds for questioning their credibility. A prosecutor may argue that the defendant or another witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

Furthermore, the trial court did not err in failing to instruct the jury that neither defendant nor his witnesses were required to prove that defendant was somewhere else at the time of the crime, and that defendant was legally required to and did give the prosecutor timely notice of his alibi defense. Viewing the instructions in their entirety, we conclude that they fairly represented to the jury that defendant was not required to prove anything at trial. Reversal is therefore not required. See *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995).

III

In his final issue, defendant argues that the trial court used a legally deficient definition of "reasonable doubt" when it instructed the jury. We disagree. The trial court read CJI2d 3.2(3), which does not include "moral certainty" language favored by defendant. However, instructions that do not include such "moral certainty" language are adequate if they sufficiently apprise the jury that reasonable doubt is an honest doubt based upon reason. We find that the trial court's instruction adequately and fairly conveyed the concept of reasonable doubt to the

jury. See *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991), lv den 439 Mich 938, cert den 505 US 1213 (1992)..

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ Michael R. Smolenski