

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELZIE ERNEST RUSSELL,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 183320

Kalkaska Circuit Court

LC No. 94-001364 FH

Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of causing death while operating a motor vehicle under the influence of intoxicating liquor, MCL 257.625(4); MSA 9.2325(4). The court sentenced defendant to a term of probation of sixty months, with the first eleven and one-half months to be served in the county jail. We affirm.¹

Defendant argues that the trial court erroneously dismissed a juror based on the juror's 1968 felony conviction. We disagree. MCR 2.511(D)(2) provides that a party may challenge a juror for cause if the juror has been convicted of a felony. In a criminal case, a court must excuse a juror when a juror is challenged for cause on a ground that clearly falls within one of those enumerated in MCR 2.511(D).² *People v Lamar*, 153 Mich App 127, 134; 395 NW2d 262 (1986). Hence, the trial court properly dismissed the juror under MCR 2.511(D)(2).

Defendant next argues that the trial court's conduct denied him a fair trial. We disagree. MRE 611(a) directs trial courts to exercise reasonable control over the questioning of witnesses and the presentation of evidence so as to ascertain the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment. The test to determine whether this Court should reverse a defendant's conviction based on the trial court's comments is not whether the trial court's comments were "sharper than necessary," but whether the court's participation denied the defendant a

* Circuit judge, sitting on the Court of Appeals by assignment.

fair and impartial trial by unduly influencing the jury. *People v Wigfall*, 160 Mich App 765, 774; 408 NW2d 551 (1987).

The record shows that the trial court's comments merely were attempts to insure that it admitted only relevant evidence at trial. The remarks did not unduly influence the jury. Defendant was not denied a fair trial because of the court's comments.

Finally, defendant argues that the trial court abused its discretion by allowing the prosecutor to present rebuttal evidence. Rebuttal evidence is evidence that tends to contradict, repel, explain, or disprove evidence produced by the opposing party and directly tends to weaken or disprove the same. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985). The decision to admit rebuttal evidence is within the trial court's discretion. *People v Winchell*, 171 Mich App 662, 665; 430 NW2d 812 (1988).

The test to determine whether the court properly admitted rebuttal evidence is not whether the prosecution could have offered the evidence in its case-in-chief, but whether the evidence properly is responsive to evidence introduced by, or a theory developed by, the defendant. *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Evidence properly may be classified as rebuttal evidence if it is responsive to material presented by the defense even if it overlaps evidence admitted in the prosecutor's case-in-chief. *Id.*

The trial court properly admitted Deputy Koronka's testimony to rebut testimony elicited from defense witnesses that defendant drank only two cans of beer before the accident. Therefore, the court did not abuse its discretion in admitting the evidence.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Jane E. Markey

/s/ Donald A. Teeple

¹ At oral argument, defendant conceded that MCL 257.625(4); MSA 9.2325(4) was upheld as constitutional by the Supreme Court in *People v Lardie* and *People v Hudick*, 452 Mich 231, 266; 551 NW2d 656 (1996). Thus, his argument challenging the statute's constitutionality is moot.

² Defendant's reliance on *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 133; 523 NW2d 849 (1994) is misplaced as that case involved a civil jury. Even the *Froede* panel recognized that in a *criminal* case, a trial court is required to excuse a juror for cause under any of the grounds listed under MCR 2.511(D). *Id.*