STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG LEROY ATKINS,

Defendant-Appellant.

UNPUBLISHED
July 8, 1997

No. 194842
Oakland Circuit Court
LC No. 88-086374

Before: Gribbs, PJ., and Sawyer and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to twenty-five to eighty years' imprisonment. After two deficient and untimely attempts to appeal his conviction to this Court, defendant filed a motion for relief from judgment pursuant to MCR 6.502 in the trial court. The trial court denied defendant's motion. Defendant filed an application for leave to appeal to this Court, which this Court denied. This Court also denied defendant's motion for rehearing. Defendant then filed an application for leave to appeal to the Michigan Supreme Court. In lieu of granting leave, the Michigan Supreme Court remanded the matter to this Court for consideration as on leave granted.[1] We affirm.

Defendant has the burden of establishing that he is entitled to relief from judgment. MCR 6.508(D). Relief is not available on grounds that could have been raised in defendant's previous motions or appeals unless good cause and actual prejudice are shown. Defendant concedes that he could have raised all of the issues he raised in this motion in a prior appeal, but contends that this Court should excuse his failure to do so because his prior appellate counsel provided ineffective assistance by failing to properly perfect his appeal. Even assuming that defendant can meet the good cause requirement of MCR 6.508 by demonstrating that he received ineffective assistance of appellate counsel, *People v Reed*, 449 Mich 375, 378; 535 NW2d 436 (1995), he still must demonstrate that the alleged errors that occurred at his trial resulted in actual prejudice. MCR 6.508(D)(3)(b). In order to determine whether defendant has met this requirement, we will review defendant's substantive claims.

Defendant first argues that he was denied a fair trial because the prosecution improperly introduced the testimony of two FBI agents as rebuttal evidence. The Michigan Supreme Court recently held that "the test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). In *Figgures*, the Court explained that if "evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.*

We find that the testimony of the FBI agents meets this test. On direct examination, defendant explained his version of the events on the night of the murder. The agents testified that defendant stated to them that the murder was done in self-defense. Therefore, the testimony of the FBI agents described another version of the events told by defendant. This was responsive to evidence presented by defendant because until defendant testified, there had been no evidence of his version of the events.

Moreover, we find that the prosecutor did not employ the improper technique of eliciting a denial on cross-examination in order to "facilitate the admission of new evidence." *Id.* at 401. It appears that the prosecutor questioned defendant about the statement on cross-examination in order to meet the requirements of establishing a foundation pursuant to MRE 613. The agents' testimony would have been responsive to defendant's proofs regardless of whether the prosecutor had asked about the statement in cross-examination. Therefore, we find that the trial court did not abuse its discretion by allowing the prosecution to present this rebuttal evidence. *Id.* at 398.

Even if the trial court abused its discretion in allowing the agents to testify in rebuttal, reversal would not be warranted because it does not appear that defendant was prejudiced. Defendant asserts that if the testimony had been properly introduced in the prosecution's case in chief, he would have been able to call witnesses and introduce other evidence to refute the agents' testimony rather than being left with only his own denials. However, it is unclear to us what type of evidence could have been brought other than defendant's own denial because, at the time the statement was alleged to have been made, only defendant and the two agents were present. In light of the strong evidence against defendant and the eyewitness testimony, we do not believe that the relatively weak testimony of the agents had an effect on the jury. Therefore, any error from the admission of the testimony as rebuttal evidence was harmless. *People v Humphreys*, ___ Mich App ___; ___ NW2d ___ (Docket No. 184583, rel'd 2/11/97), slip opinion at 2-3, citing *People v Mateo*, 453 Mich 203, 218-221; 551 NW2d 891 (1996).

Defendant also argues that it was improper for the prosecutor to refuse to disclose the contents of defendant's statement outside of the presence of the jury. At the time of defendant's trial, MRE 613 provided, in pertinent part:

> (a) Examining a witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, if written the statement must be shown to the witness and if oral, its substance and the time, place, and person to whom the statement was made must be disclosed to the witness, and on request must be

shown or disclosed to opposing counsel. [*People v Barnett*, 165 Mich App 311, 315; 418 Mich 445 (1987).]

The rule did not require the prosecutor to first make inquiry about a prior inconsistent statement out of the presence of the jury. *People v Santana*, 139 Mich App 484, 491 n 2; 363 NW2d 702 (1984). Although it was improper for the prosecutor not to disclose the substance of the statement when defense counsel made the request out of the presence of the jury, any prejudice to defendant from their testimony was dispelled for the reasons discussed above. Therefore, reversal on this basis is not warranted.

Next, defendant argues that it was improper for the prosecutor to argue that his statement to the FBI agents should be used by the jury as substantive evidence of his guilt. Defense counsel's failure to object to the prosecutor's allegedly improper argument waives appellate review of this issue. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, any prejudice due to improper argument could have been eliminated by a curative instruction. *People v Johnson*, 100 Mich App 594, 599; 300 NW2d 332 (1980). We also reject defendant's contention that automatic reversal is required based on the trial court's failure to *sua sponte* instruct the jury that the statement could not be used as substantive evidence. Recent cases clearly indicate that a defendant's failure to request an omitted instruction waives appellate review absent manifest injustice. *People v Paquette*, 214 Mich App 336, 338-339; 543 NW2d 342 (1995). Manifest injustice is not present in this case.

Defendant next argues that the prosecutor improperly cross-examined his character witness by referring to defendant's prior arrests. The prosecutor's question was proper in light of the witness' testimony on redirect examination regarding defendant's general good character. *People v Roupe*, 150 Mich App 469, 478; 389 NW2d 449 (1986). Moreover, even if the question was improper, any prejudice was eliminated when the trial court instructed the jury that it was only proper to consider this evidence in evaluating the credibility of the character witness and that it was not to consider it substantive evidence of defendant's guilt. *Id.* The form of the prosecutor's question was also proper. Although the prosecutor initially misspoke, the question which was directed at the witness did not suggest that "the former misconduct [was] a fact." *People v Fields*, 93 Mich App 702, 709; 287 NW2d 325 (1979). Defendant also argues that the trial court should have inquired into the charges before allowing the prosecutor to cross-examine the witness on this matter, citing *People v Dorrikas*, 354 Mich 303; 92 NW2d 305 (1958) and *People v Whitfield*, 425 Mich 116, 133; 388 NW2d 206 (1986). *Dorrikas* is distinguishable from this case because, there, the jury was not instructed on the proper use of the evidence. *Dorrikas*, *supra* at 326-327. Moreover, the rule of *Whitfield*, *supra* at 133, is inapposite because, in this case, defendant did not request the trial court to determine the scope of cross-examination.

Defendant next argues that the prosecutor committed misconduct which denied him a fair trial. Defendant failed to object to any of the alleged instances of prosecutorial misconduct at trial, but argues that the prejudice from the prosecutor's conduct was so great that it could not have been eliminated by a curative instruction to the jury. We disagree.

Defendant first asserts that the prosecutor improperly argued facts not in evidence during rebuttal when he stated to the jury that fingerprints are generally not discovered at a crime scene due to their fragility. The prosecution concedes that this was not supported by any evidence at trial. However, we find that any prejudice was eliminated when the trial court instructed the jury that the arguments of attorneys were not evidence and that it should disregard anything said by an attorney which was not supported by the evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant also contends that the prosecutor argued facts not in evidence by arguing that the FBI agents did not have a duty to include defendant's statement in their report. We believe that defendant mischaracterizes the prosecutor's remarks. The prosecutor did not indicate that the agents were not required to include the statement in their report, in fact he suggested that they should have included it. When viewed in context, it is apparent that the challenged remarks were proper comments on the agents' testimony at trial. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

Defendant next asserts that the prosecutor made an improper argument of facts not in evidence when he commented during closing argument that defendant "went on an extensive escapade." Defendant contends that there was no evidence that he went on an "escapade" after the crime. We disagree. We read the prosecutor's statement as referring to the evidence at trial that defendant left the scene of the crime without assisting the victim and, shortly thereafter, fled to California. Defendant further argues that this remark was prejudicial because when coupled with the prosecutor's reference to his prior arrests during cross-examination of defendant's character witness, it suggested that he left the state and "went on a crime escapade" resulting in the thirty-six arrests. We find no such suggestion in the prosecutor's argument.

Defendant argues that the prosecutor improperly suggested to the jury that he was a "bad man" capable of committing the murder. Defendant first asserts that the prosecutor suggested this when questioning Detective Bovee about a telephone conversation he had with defendant after defendant had fled the jurisdiction. The prosecutor elicited testimony from Detective Bovee that he recognized defendant's voice because he had talked to him several times over a period of years. We find that these questions were proper to lay a foundation for the detective's testimony that defendant made certain statements to him during the conversation. Moreover, the prosecutor's later reference to this testimony merely reminded the jury that the detective recognized defendant's voice. Although it is possible that the jury inferred from this testimony that defendant had been previously arrested, the prosecutor did not ask the jury to make this inference and did not make an improper propensity argument.

Defendant also contends that the prosecutor's remark that "if you prosecute the devil, you have to go to hell for your witnesses" suggested to the jury that he was a "bad man." The remark was part of a discussion which focused on the prosecution's witnesses, not defendant. Moreover, any possible prejudice from this remark was eliminated when the jury was later properly instructed that the comments and arguments of the attorneys were not evidence. *Bahoda, supra* at 281.

Next, defendant argues that the trial court erred by admitting highly prejudicial hearsay testimony over his objection. We do not agree. In any case, even assuming *arguendo* that the

challenged statements were improperly admitted, any error was harmless because the testimony was cumulative to other properly admitted evidence. *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Finally, defendant asserts in his pro se supplemental brief that the prosecutor's use of perjured testimony at trial violated his right to due process. We find that defendant has failed to establish that the FBI agents perjured themselves at trial; therefore, he has not met the threshold test of establishing a due process violation. *United States v Lochmondy*, 890 F2d 817, 822 (CA 6, 1989). Moreover, defendant's alternative argument that his conviction should be reversed because the testimony of the agents was used to "mislead the jury into believing that [he] had admitted to the killing" is without merit.[2] Although defendant's statement was not a confession in the sense that the agents did not testify that defendant stated "I killed the victim in self-defense," the statement could be interpreted to be an admission of guilt. Therefore, it was not misleading for the prosecutor to argue that the jury could interpret the statement in this way.[3]

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.

[1] 451 Mich 875 (1996).

[2] We have already addressed defendant's argument that it was improper for the prosecutor to argue that the statement should be used as substantive evidence of his guilt. We interpret this argument as raising the separate issue of whether the prosecutor mischaracterized the agents' testimony.

[3] We need not address the other issue raised in defendant's pro se supplemental brief that the intentional nature of the prosecutor's misconduct should bar retrial, because we have found no prosecutorial misconduct and are not reversing defendant's conviction.