STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER HANEY,

Defendant-Appellant.

UNPUBLISHED
February 13, 1998

No. 196946
Ionia Circuit Court
LC No. 95-10412 FH

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of transporting and selling stolen firearms, MCL 750.535b; MSA 28.803. He was sentenced to six to twenty-five years in prison. Defendant now appeals as of right, and we affirm.

Defendant first argues that the prosecutor's improper conduct operated to deny him a fair trial. Since defendant failed to object to the prosecutor's conduct, appellate review is precluded unless the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's statements could have been cured by a timely curative instruction. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). Here, timely curative instructions could have eliminated any prejudice resulting from the prosecutor's arguments. Thus, failure to review this issue will not result in a miscarriage of justice. In any case, we conclude defendant has not shown reversible error.

Defendant's first contention, that the prosecution improperly shifted the burden of proof to the jury, is not supported by the record. The record indicates that the prosecutor did not deny the people's burden of proving beyond a reasonable doubt that defendant committed the crime. Furthermore, the jury was properly instructed as to the definition of reasonable doubt, and the judge cautioned the jurors not to consider any statement by an attorney as laying down the legal standard according to which the case was to be decided. *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995).

Defendant next argues that the prosecutor erred when, in closing argument, he commented on the actions of an accomplice who pleaded guilty to the aforementioned crimes pursuant to an agreement

with the prosecution that he would receive a sentence of probation and Holmes Youthful Trainee Status in exchange for his testimony. The prosecutor stated:

> So is Mr. Haskin going to stand alone for doing the right thing or not? That's the question you have to ask yourself based on his testimony. Is the right thing then, to punish Derek Haskin for doing the right thing and to reward somebody else for not? No, you can't let that happen. You've got to look harder at this evidence. You've got to look carefully at this evidence. You have to look carefully at the testimony of these witnesses and decide what the truth is.
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> * * *
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> I'm asking you to use your reason and common sense and to make sure that justice is done, that Derek Haskin is not punished for doing the right thing and that Chris Haney walks free because he told Detective VanderWal that he had nothing to do with it.

In *People v Crouch*, 64 Mich App 98, 100; 235 NW2d 74 (1975), a panel of this Court held that a similar prosecutorial statement constituted error requiring reversal. However, we believe that *Crouch* is distinguishable. First, in *Crouch*, the prosecutor specifically noted that the defendant had requested a jury trial while the accomplice confessed and accepted punishment. *Id.* In the current case, however, there is no mention of defendant's right to a jury trial or his Fifth Amendment right against self incrimination. Second, we do not believe the comments deprived defendant of a fair trial. While portions of the prosecutor's argument quoted above were improper, when the argument is viewed as a whole and considered in light of all the evidence, including defendant's own statement to the police, and the jury's verdict, the argument did not deny defendant a fair trial. Further, as noted above, a timely objection and curative instruction could have cured any resulting prejudice and no miscarriage of justice has been shown.

Defendant also argues that the prosecutor's argument "asked the jury to penalize Defendant for having exercised" his constitutional right to a jury trial and his right against self-incrimination. However, our reading of the statements at issue indicates that the prosecutor was not commenting on defendant's failure to testify, but rather on his express statement "that he had nothing to do with" the crime. As such, we do not believe that the statement was constitutionally impermissible. Rather, it appears that the prosecutor was merely arguing the evidence "and all reasonable inferences from the evidence." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).[1] The prosecutor correctly instructed the jury to examine the evidence and decide whether Haskin's testimony was more credible than the story which defendant related to Sergeant VanderWal. While, perhaps, the prosecutor should have worded this argument differently, we do not find that the statement caused manifest injustice or that it prejudiced the outcome of defendant's trial. *Rivera, supra*; *Nantelle, supra*.

Defendant next argues that he was denied a fair trial by the introduction of evidence concerning his purchase and use of illegal drugs and by prosecutorial statements concerning the same. Since no objection was made to the introduction of this evidence, this issue is not preserved. MRE 103; *People*

v Grant, 445 Mich 535, 546-547; 520 NW2d 123 (1994). We do not believe that "the error could have been decisive of the outcome." *Grant, supra* at 553. The prosecutor did not unduly emphasize the prejudicial aspects of the evidence of drug use, and the testimony was frequently vague as to defendant's involvement. Furthermore, defendant has not established the prejudice necessary to avoid forfeiture of this unpreserved issue. *Id.* Finally, it appears that the evidence could have been admitted based on its relevance to a motive for the crime. *People v Talaga,* 37 Mich App 100, 103; 194 NW2d 462 (1971).

Defendant's final argument on appeal is that his right to present a defense was violated when the trial court prevented him from introducing evidence to impeach the prosecution's key witness. Defendant specifically argues that the court erred in denying defendant's motion to endorse a witness to refute the testimony of the prosecution's key witness that he and defendant had stayed at a hotel on the night before the crime was committed. We review the trial court's decision to admit or exclude evidence under an abuse of discretion standard. *People v Bahoda,* 448 Mich 261, 289-290; 531 NW2d 659 (1995).

MCR 6.201(A)(1) requires that a defendant reveal to the prosecution the names of the witnesses whom he intends to call at trial. See also MCL 767.40a(1); MSA 28.980(1)(1). Generally, a court should exercise its discretion to allow or deny the late endorsement of witnesses with due regard for the defendant's right to a fair trial. *People v Cyr,* 113 Mich App 213, 223-224; 317 NW2d 857 (1982). In this case, we do not believe that defendant's right was violated. The trial court arranged for an investigation of defendant's claim and defendant was afforded an opportunity to get in the desired evidence through another witness, the investigating detective. In any event, even if the failure to endorse was erroneous, defendant has not shown any prejudice resulting from this error. *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). Defendant was acquitted of the break-in count and found guilty on the count for which evidence was presented connecting defendant to the sale of the firearms. Accordingly, we do not believe that the judge's ruling prevented defendant from presenting a defense.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Richard A. Bandstra

[1] In light of the fact that *Crouch* was decided prior to the Supreme Court's decision in *People v Bahoda, supra,* we find it highly unlikely that the decision would remain the same were the case to be decided today.