

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORTEZ TRAWETS SCOTT,

Defendant-Appellant.

UNPUBLISHED

August 18, 1998

No. 182235

Genesee Circuit Court

LC No. 94-049997-FC

ON REMAND

Before: Jansen, P.J., and Reilly and Young, Jr., JJ.

PER CURIAM.

This case is on remand from the Supreme Court “for further proceedings.” 456 Mich 928 (1998). The Supreme Court vacated part III of this Court’s prior opinion concerning a missing portion of the trial transcript. We again affirm defendant’s convictions and sentences.

This case arises out of the shooting death of Tyrone Williams, which occurred on February 16, 1994. Defendant was subsequently convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and sentenced to the mandatory terms of life imprisonment and two years’ imprisonment, respectively. In his prior appeal, defendant raised six issues and this Court affirmed. *People v Scott*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 1997 (Docket No. 182235). Defendant then filed a delayed application for leave to appeal in the Supreme Court. The Supreme Court, in lieu of granting leave to appeal, vacated part III of the prior opinion and remanded to this Court, stating that this Court had erred in deciding the issue of the prosecutor’s misconduct without having the complete transcript of the prosecutor’s summation argument to the jury.¹ This Court was further directed to either secure the trial videotape or a completed transcript of the prosecutor’s argument to the jury, or to direct settlement of the record pursuant to MCR 7.210(B).

After again reviewing the lower court record, we found that no trial transcript or videotape of the prosecutor’s entire closing argument existed. Rather, the trial transcript omits approximately eighteen minutes of the prosecutor’s closing argument. Further, this Court was informed by the Genesee Circuit Court Clerk that no other trial transcript or videotape of the prosecutor’s closing

argument existed. In light of this fact, we issued an order on March 5, 1998 remanding the case to the trial court and directing the parties to settle the record pursuant to MCR 7.210(B)(2). A hearing was held on April 27, 1998 in the lower court and testimony was taken from the original trial prosecutor and defendant's original trial counsel. On May 4, 1998, the trial court's order was filed indicating that the prosecutor "stated on the record the closing argument that he presented to the jury during the trial."

In his original appellate brief, defendant argued that he was denied due process because the record failed to include the entire portion of the prosecutor's closing argument. Defendant argued that he was entitled to a new trial because reconstruction of the record would be futile where the original trial judge had retired and neither the prosecutor nor defense counsel would be able to recall the prosecutor's argument with any accuracy. Defendant thus contended that the missing portion of the transcript impeded his constitutional right to an appeal because the prosecutor could have made impermissible statements during closing argument.

A defendant's constitutional right to an appeal² is satisfied if the surviving record is sufficient to allow evaluation of the issues on appeal. *Elazier v Detroit Non-Profit Housing Corp*, 158 Mich App 247, 249-250; 404 NW2d 233 (1987); *People v Audison*, 126 Mich App 829, 835; 338 NW2d 235 (1983). However, the inability to obtain the transcripts of a criminal proceeding may impede a defendant's right to appeal to an extent that a new trial must be ordered. *People v Federico*, 146 Mich App 776, 799; 381 NW2d 819 (1985). Where only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of defendant's claim on appeal. *Id.* The sufficiency of the record depends on the questions that must be asked of it. *Id.*, pp 799-800; *Audison*, *supra*, p 835. Where the record is insufficient, remand for construction of a new record to allow review of the issue on appeal is permissible. *Elazier*, *supra*, p 250, citing *People v Dunn*, 50 Mich App 529; 213 NW2d 832 (1973) and *People v Drew*, 26 Mich App 337; 182 NW2d 566 (1970).

In this case, we remanded for construction of a new record (or settlement of the record) of the prosecutor's closing argument. The prosecutor testified at the evidentiary hearing that he prepared a summary of his closing argument, and he relied on those notes in reconstructing the record. The prosecutor also reviewed the trial transcripts. Defense counsel objected to the use of the prosecutor's notes in reconstructing the record because the notes did not have a case caption, were not dated, and were not signed. The trial court, however, overruled the objection because the prosecutor testified that the notes were in his handwriting and were created the day before or the day of the actual closing argument. Further, the notes had always been maintained in the prosecutor's office in the file he had entitled "People v Cortez Scott."

We have carefully reviewed the prosecutor's reconstruction of his closing argument and find that there is no indication that any prosecutorial misconduct occurred during closing argument at trial. The United States Supreme Court has held that there is a presumption of regularity, indicating that the trial court constitutionally, rather than unconstitutionally, discharged its state and federal duties. *Bute v Illinois*, 333 US 640; 68 S Ct 763; 92 L Ed 987 (1947). Doubts are to be resolved in favor of the integrity, competence, and proper performance by the trial court and the state's attorney of their official duties. *Id.* This presumption of regularity has been recognized by this Court. *People v Iacopelli*, 141

Mich App 566, 568; 367 NW2d 837 (1985); *People v Carson*, 19 Mich App 1, 7; 172 NW2d 211 (1969).

In this case, the reconstruction of the prosecutor's closing argument, coupled with the presumption of regularity, shows that the prosecutor's closing argument at trial was proper and that defendant was not denied a fair trial. See *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995).

Affirmed.

/s/ Kathleen Jansen

/s/ Maureen Pulte Reilly

/s/ Robert P. Young, Jr.

¹ In his original appellate brief, defendant argued that the prosecutor impermissibly shifted the burden of proof at closing argument. However, defendant did not point to any specific pages in the transcript where this occurred. Our review of the transcribed portions of the prosecutor's closing and rebuttal argument does not reveal any impermissible comments that could be construed as shifting the burden of proof. Moreover, there were no objections lodged to any comments made by the prosecutor. Because the Supreme Court did not vacate part II of our prior opinion, which specifically addressed this issue, we reaffirm the prior holding that the prosecutor did not impermissibly shift the burden of proof and this specific issue did not require a reconstruction of the record.

² The constitutional right to an appeal is guaranteed by 1963 Const, art 1, § 20.