STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWIGHT MORROW HENLEY,

Defendant-Appellant.

UNPUBLISHED
October 23, 1998

No. 193348
Detroit Recorder's Court
LC No. 95-003455

Before: White, P.J., and Hood and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree felony-murder. MCL 750.316; MSA 28.548. He was sentenced to life imprisonment. We affirm.

First, defendant argues that the trial court erred by denying his motion for mistrial, which was brought on the basis that the prosecution improperly elicited evidence of, and interjected references to, the fact that the prosecution's principal witness had been subjected to polygraph testing. The witness was an admitted accomplice in the shooting and stabbing death of the victim. We find no error requiring reversal.

The trial court's ruling on a motion for mistrial is reviewed for an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* Evidence that a polygraph test was conducted and the results of the test are inadmissible at trial. *People v Triplett*, 163 Mich App 339, 343; 413 NW2d 791 (1987), remanded on other grounds 432 Mich 568 (1989), citing *People v Barbara*, 400 Mich 352, 357; 255 NW2d 171 (1977); *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). Error requiring reversal may occur even where the results themselves are not admitted. *Rocha*, *supra*, citing *People v Frechette*, 380 Mich 64; 155 NW2d 830 (1968). The inadmissibility of such evidence is premised on the lack of trustworthiness of the accuracy of polygraph examinations. *Triplett*, *supra*. A mistrial is not required where a witness merely mentions a polygraph. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989).

> A reference to a polygraph examination may be a matter of defense strategy, the result of a nonresponsive answer, or otherwise brief, inadvertent and isolated. Thus, in prior cases, this Court has analyzed a number of factors to determine whether reversal is mandated. This Court should consider: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Rocha, supra* at 8-9; citations omitted.]

Here, the challenged remarks and references referred to "testing" and the "investigation." While we caution the experienced prosecutor regarding his use of the word "testing," we conclude that viewed in context, the references did not directly suggest that the witness underwent a polygraph examination. The references were ambiguous and did not prejudice defendant. The trial court did not abuse its discretion in denying defendant's motion for mistrial.

Next, defendant claims that he was denied a fair trial because of prosecutorial misconduct. His motion for a new trial on this basis was denied by the trial court. We find no error requiring reversal.

This Court reviews the trial court's ruling on a motion for a new trial for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997). Review of this issue requires an examination of the pertinent portion of the record and consideration of the prosecutor's remarks in context to determine whether the remarks denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995).

First, defendant argues that the prosecutor improperly suggested/asserted in opening statement that defendant was involved in a violent drug-related underworld and that this suggestion was not supported by the evidence. If the prosecutor acts in good faith in stating that evidence will be submitted to the jury, reversal is not warranted where such evidence is not presented. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Here, the facts demonstrated that the murder stemmed from the victim's relationship with defendant and defendant's accomplice, a relationship based on drug trafficking. The prosecutor's comment did not deny defendant a fair and impartial trial.

Next, defendant argues that the prosecutor improperly interjected his opinion regarding the credibility of the witnesses. In particular, defendant refers to the prosecutor's closing remarks regarding Meyers and the prosecutor's use of "we know" in his argument.

The prosecutor is given great latitude regarding its arguments and conduct. *Bahoda, supra* at 282. Prosecutors are permitted to argue the evidence and all reasonable inferences drawn from the evidence to the extent that it relates to their theory of the case. *Id*. However, it is improper for the prosecutor to vouch for a witness' credibility to the effect that there is a suggestion that the prosecutor possesses special knowledge of the witness' truthfulness. *Id*. at 276. The prosecutor is also prohibited from invoking the prestige of the office. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). However, the prosecutor is permitted to argue that a witness is telling the truth. *People v Stacy*, 193

Mich App 19, 29; 484 NW2d 675 (1992). Whether the prosecutor's remarks were improper depends on whether the prosecutor was, in fact, attempting to vouch for the defendant's guilt. *Reed, supra* at 399.

Here, the challenged comments did not involve statements in which the prosecutor vouched for the witness' credibility. Rather, the prosecutor set forth the circumstances under which the witness' statement was made and asserted that these circumstances showed that the witness gave a truthful statement and truthful testimony. The prosecutor's argument was based on the evidence. The prosecutor did cross the line when he spoke of his own involvement in the procedure, and expressed his personal view that he did not think the witness was a criminal brain who had fooled everyone. However, in context, these were isolated statements that did not deny defendant a fair trial. Moreover, defense counsel had previously attacked the witness' credibility, and the prosecutor's argument was a response to that attack.

We also reject defendant's argument that the prosecutor improperly used "we know" in his closing argument. As the Court in *Reed* explained: "The propriety of the prosecutor's comments 'does not turn on whether or not any magic words are used.' The crucial inquiry is not whether the prosecutor said 'We know' or 'I know' or 'I believe,' but rather whether the prosecutor was attempting to vouch for the defendant's guilt." *Reed, supra* at 399. It is clear that the prosecutor simply used this expression to sum up the evidence and did not vouch for the witness' credibility.

The prosecutor's argument regarding another witness, in which the prosecutor stated that the witness "had such a number done on him," was not improper when viewed in context. There was evidence that defendant had called the witness after he gave grand jury testimony and asked if he needed a lawyer. The prosecutor argued his theory of the case and used the witness' testimony to demonstrate the persuasive ability that defendant had over various persons and that there was a reason the witnesses did not immediately reveal their knowledge of this case to the authorities.

Defendant next complains that the prosecutor made a blatant appeal to the jury's fear of crime, violence and drugs. "[P]rosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members . . . ." *Bahoda, supra* at 261. While the prosecutor's references to police and their role was unnecessary and irrelevant, the remainder of the challenged comments, viewed in context, were not improper, but were based on the evidence and the prosecutor's theory of the case. We find no error requiring reversal.

Defendant also argues prosecutorial misconduct based on the prosecutor's denigration of defense counsel. The prosecution may not attack defense counsel or suggest to the jury that defense counsel intentionally sought to mislead the jury. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609. "Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality." *Id*., quoting *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).

While the prosecutor attacked defense counsel's theory of the case, he sought to demonstrate that defense counsel's explanation was not supported by the facts. The statements were made in

response to defense counsel's argument. The prosecutor did not suggest that defense counsel lied or acted deceptively. He merely suggested that he had fashioned a far-fetched theory. The challenged statements made by the prosecutor were not such that they denied defendant a fair trial.

Defendant next argues that the trial court erred in instructing the jury on an aiding and abetting theory and, after giving that instruction, in failing to instruct the jury that it must unanimously find defendant guilty as either a principal or an aider and abettor. We disagree.

While defendant properly preserved his challenge to the aiding and abetting instruction, he failed to request an instruction on unanimity. Therefore, the latter claim is not preserved for appeal. MCR 2.516(C); *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Jury instructions are reviewed in their entirety to determine whether there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). In the absence of a request for a jury instruction, this Court's review is limited to determining whether relief is necessary to avoid a miscarriage of justice. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997).

Because an aiding and abetting theory is supported by the evidence, the trial court properly gave that instruction, as requested by the prosecutor. *People v Lemons*, 454 Mich 234, 250; 562 NW2d 447 (1997); *People v Head*, 211 Mich App 205, 211; 535 NW2d 563 (1995). Moreover, as discussed in *People v Espinosa*, 142 Mich App 99, 105; 369 NW2d 265 (1985), under MCL 767.39; MSA 28.979, there is no distinction between a principal and an aider and abettor. Because there was evidence that the charged offense was committed by a person who was either a coprincipal or aided and abetted in the killing, the failure to instruct the jury regarding unanimity as to whether defendant was the principal or aider and abettor did not constitute reversible error. See *People v Burgess*, 67 Mich App 214, 219-222; 240 NW2d 485 (1976), which is distinguished from *People v Ewing (On Remand)*, 102 Mich App 81, 300 NW2d 742 (1980), where the jury could have found that the alleged accomplice played no part in the crime.

We reject defendant's argument that he was deprived of a fair trial because the aiding and abetting instruction introduced a new theory of criminal liability at the end of the trial. As defendant concedes, the prosecution argued that defendant participated in the actual killing. The aiding and abetting instruction was appropriate because there was evidence that defendant shot the victim and Meyers then stabbed him while he was still alive. The prosecution never urged the jury to convict defendant on the basis that he aided and abetted the murder by providing the weapon, even if he was not present at the murder scene.

Lastly, defendant argues in a supplemental brief filed in propria persona that the prosecution improperly referred to the grand jury indictment as substantive evidence.[1] Because defendant did not timely object,[2] our review is precluded unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant's theory of the case was that Michael Meyers had lied to the police about defendant having helped him kill Gould. The prosecutor addressed the investigation that took place after Meyers

told the police who helped him kill Gould, including that there had been a grand jury investigation, but did not argue that it was substantive evidence of guilt.

We note that defense counsel raised the issue of the grand jury during his cross-examination of Meyers, whose testimony came before the questioning defendant challenges as improperly referring to the grand jury. Moreover, the trial court during voir dire and during trial, following defense counsel's eventual objection, stated to the jury that a criminal indictment is not evidence. Under these circumstances, we find no miscarriage of justice.

Affirmed.

/s/ Helene N. White
/s/ Harold Hood
/s/ Hilda R. Gage

[1] The remaining issues raised in defendant's supplemental brief filed in propria persona are duplicative of arguments raised in his original brief, and we do not separately address them.

[2] Defense counsel raised the issue of the grand jury in his cross-examination of Meyers, which occurred before the questioning by the prosecutor that defendant challenges. Further, defendant did not object when the subject of the grand jury subsequently came up in a question to Meyers. After Meyers testified, Sergeant Gazarek testified.