

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL J. CANTRELL,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 203973
Oakland Circuit Court
LC No. 95-142516 FH

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manslaughter with a motor vehicle, MCL 750.321; MSA 28.553, and OUIL resulting in death, MCL 257.625(4); MSA 9.2325(4). He was sentenced to concurrent terms of three and one-half to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by prosecutorial misconduct. However, defendant only objected to one of the prosecutor's comments that he alleges were improper. Appellate review of improper prosecutorial remarks is precluded absent objection by counsel, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Where a defendant objected to the prosecutor's comment, the test of misconduct by the prosecutor is whether a the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Defendant claims that the prosecutor improperly vouched for the credibility of witness John Kane by stating during closing argument that he was an honest man. Because a prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), the prosecutor's comment was improper. However, the trial court and prosecutor immediately cured the prejudicial effect of the comment by telling the jury that they should disregard the prosecutor's evaluation of Kane's honesty because it was solely within its province to determine, based on the evidence, whether Kane was honest. Therefore, we conclude that defendant was not denied a fair trial by the prosecutor's improper remark. Because defendant did not object to the other instances of

alleged misconduct by the prosecutor, we decline to fully review those comments because we do not believe that withholding our review will result in a miscarriage of justice.

Defendant next argues that the trial court erred in refusing to suppress a statement he made to Deputy Nick Glavan that he was driving the car at the time of the accident, because those statements were made while he was in custody without being given *Miranda*¹ warnings. In reviewing suppression hearing findings, we defer to the trial court's findings of historical fact, absent clear error. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). A finding of historical fact is clearly erroneous if, after a review of the entire record, we are definitely and firmly convinced that a mistake has been made. *Id.* Whether a person was in custody for purposes of *Miranda* warnings is a mixed question of fact and law, which we answer independently after review de novo of the record. *Id.*

The federal and state constitutions provide that no person can be compelled to be a witness against himself in a criminal trial. *Id.* *Miranda* warnings are required when the police interrogate a person while in police custody or otherwise deprived of freedom of action in any significant manner by the police. *Id.* To determine whether a defendant was in custody at the time of the interrogation, we examine the totality of the circumstances, asking whether the defendant reasonably believed that he was not free to leave. *Id.* at 382-383.

We conclude that defendant was not in custody at the time he told Deputy Glavan that he was the driver of the vehicle. Defendant claims that he reasonably believed that he was not free to leave because he was an eighteen-year-old, strapped to a backboard, being questioned by law enforcement officers following a serious accident. However, defendant was not arrested at the time he was questioned by Deputy Glavan, nor was there any formal restraint placed on his freedom of movement by the deputy. Further, Deputy Glavan testified that he did not indicate to defendant that he was under arrest, and that his conversation with defendant lasted for only ten minutes. Although defendant may have been confined to a gurney or backboard at the time of questioning, there is no indication that Deputy Glavan created an environment in which defendant felt compelled to answer his questions or in which he felt confined by Deputy Glavan. Accordingly, the trial court properly determined that defendant was not in custody, and therefore, the deputy was not required to provide *Miranda* warnings.

Finally, defendant argues that he was entitled to receive credit against his sentence for time served while he was confined to his home on a tether program. However, because defendant did not raise the issue below, it is not preserved for appellate review. *People v Connor*, 209 Mich App 419, 429; 531 NW2d 734 (1995). Moreover, we note that confinement under a tether program is not equivalent to time served in jail. *People v Reynolds*, 195 Mich App 182, 183; 489 NW2d 128 (1992); *People v Smith*, 195 Mich App 147, 151-152; 489 NW2d 135 (1992). Therefore, the argument has no merit.

Affirmed.

/s/ Michael J. Kelly
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).