STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 1999
v	No. 202910 Recorder's Court
STEPHON L. MARSHALL, Defendant-Appellant.	LC No. 96-000829

Before: Markman, P.J., and Jansen and J. B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), arising from the shooting death of Anthony Cunningham in Detroit. The victim was an innocent bystander who was caught in gunfire directed at a nearby house. Defendant was tried jointly with codefendant Turron Sherrod, who also was convicted of second-degree murder and felony-firearm (see Docket No. 201872). Defendant was sentenced to twenty to fifty years' imprisonment for the second-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

On appeal, defendant argues that he was denied a fair trial when the prosecutor made an improper appeal "to the jurors' emotions and sense of civic, community, moral and religious duty" in rebuttal closing argument. We disagree. Prosecutorial misconduct issues are decided on a case-by-case basis and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

A prosecutor may not urge the jurors to convict the defendant as part of their civic duty, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), or introduce extraneous religious matters into

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a trial, *People v Rohn*, 98 Mich App 593, 597; 296 NW2d 315 (1980). "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

We do not believe that the prosecutor's reference to the victim being in the "Lord's hands" improperly injected an extraneous religious matter into the trial. The prosecutor's brief allusion to this matter was made in reference to the testimony of a witness, who stated that the issue of defendant's guilt was "in the Lord's hands." Under the circumstances, the prosecutor sought to remind the jurors that, while the victim was in "the Lord's hands," the determination of defendant's guilt or innocence was in "their hands." A review of the remarks in context does not reveal that the prosecutor was attempting to ask the jurors to convict defendant because it was their religious duty to do so, see *Rohn, supra*, but rather, because the evidence established that the decedent was killed by defendant and his codefendant.

Nor do we believe that defendant was denied a fair trial because the prosecutor asked the jury to "make sure that justice [is done] and justice dictates in this case that those two defendants, Mr. Marshall and Mr. Sherrod, be found guilty as charged on second degree murder and felony firearm." In *People v Bass (On Rehearing)*, 223 Mich App 241, 251-52; 565 NW2d 897 (1997), this Court considered a "civic-duty" argument in which the prosecutor urged the jury "to do the right thing" and "do justice" through the following remarks:

> Ladies and gentlemen, when you're deciding this case, you're not supposed to decide upon whether you like this man, whether you feel sorry for this man or whether you hate this man. It has nothing to do with this case. *This case is about doing the right thing. About looking at the evidence. About deciding what evidence to believe. About trying to do justice. About trying to do justice*. [Emphasis in original].

This Court observed that prosecutors are generally "accorded great latitude regarding their arguments," and concluded that the remarks did not deny the defendant a fair and impartial trial:

> The remarks "do justice" and "do the right thing" occurred at the end of a lengthy discussion of the evidence and were followed by further comments on the evidence. The remarks were isolated, and the prosecutor's argument was otherwise proper. Moreover, an objection and curative instruction could have eliminated any prejudicial effect.

Similarly, the prosecutor's invocation here that "justice dictates" that the jury convict defendant occurred at the end of a lengthy discussion of the evidence. Although the remark was not followed by further discussion of the evidence, it was isolated and the remainder of the prosecutor's remarks were proper. Further, the trial court provided a curative instruction that sufficiently eliminated any conceivable prejudice caused by the remarks.

Defendant did not object at trial to the remaining alleged instances of prosecutorial misconduct. Because we conclude that the prejudicial effect, if any, of the challenged remarks could have been cured by a timely instruction, and that appellate review is not necessary to avoid manifest injustice, we decline review of these issues. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rivera*, 216 Mich App 648, 651-52; 550 NW2d 593 (1996). We note, however, that we find no support in the record for defendant's claim that the prosecutor was personally attacking the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or denigrated counsel or counsel for codefendant in front of the jury, *People v Phillips*, 217 Mich App 489; 552 NW2d 487 (1996), or improperly shifted the burden of proof in closing argument.

Next, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a separate trial. *People v Hana*, 447 Mich 325; 524 NW2d 682 (1994). MCR 6.121 provides in pertinent part:

> (C) Right of Severance; Related Offenses. On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.
>
> (D) Discretionary Severance. On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of witnesses, and the parties' readiness for trial.

In *Hana*, *supra* at 346, the Court observed:

> Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.

Severance is required where the defenses are mutually exclusive or irreconcilable, not merely where they are inconsistent. *Hana*, *supra* at 349; see also *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995).

In this case, defendant failed to show that his substantial rights would be prejudiced and that severance was the necessary means of rectifying the potential prejudice. The trial court properly recognized that defendant and codefendant Sherrod's defenses were not mutually exclusive or irreconcilable. At trial, defendant and codefendant Sherrod both denied participating in the charged

offenses and neither one claimed that the other committed the killing. The trial court did not err in denying defendant's motion for severance under MCR 6.121(C) or (D).

Next, we conclude that the trial court did not err in denying defendant's motion to suppress the evidence of bullets, casings, and photographs that were confiscated by the police from defendant's fire-damaged home. A trial court's decision to grant or deny a motion to suppress evidence will not be reversed unless it is clearly erroneous. *People v Bloxson*, 205 Mich App 236, 239-240; 517 NW2d 563 (1994). A ruling is clearly erroneous when the reviewing court is firmly convinced that a mistake has been made. *People v Grimmett*, 97 Mich App 212, 214; 293 NW2d 768 (1980).

Here, the trial court determined that defendant's house had been abandoned for purposes of the Fourth Amendment. In view of the testimony describing the extent of the fire damage to the house and the fact that the property had not been secured, the trial court did not clearly err in finding that defendant relinquished any expectation of privacy with regard to the items in the house and, therefore, did not have standing to challenge the introduction of the discovered evidence. *People v Mamon*, 435 Mich 1, 5-6; 457 NW2d 623 (1990).

Finally, we reject defendant's claim that his twenty to fifty year sentence for second-degree murder is disproportionate under *People v Milbourn*, 435 Mich 630, 635-36; 461 NW2d 1 (1990). The sentencing guidelines' recommended minimum sentence range was eight to twenty-five years. The trial court sentenced defendant within this range and defendant has failed to present any mitigating factors to overcome the presumption of proportionality. *People v Eberhardt*, 205 Mich App 587; 518 NW2d 511 (1994).

Affirmed.

/s/ Stephen J. Markman
/s/ Kathleen Jansen
/s/ Joseph B. Sullivan