

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD LYLE HORNING,

Defendant-Appellant.

UNPUBLISHED

April 23, 1999

No. 204114

Jackson Circuit Court

LC No. 97-78818-FH

Before: Griffin, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of two felony counts of malicious destruction of property, MCL 750.377a; MSA 28.609(1), and one misdemeanor count of malicious destruction of property, MCL 750.380; MSA 28.612. The trial court sentenced defendant to four years' probation and required defendant to serve six days in jail. Defendant appeals as of right. We affirm.

Defendant first argues the trial court erred in denying defendant's motion for mistrial, which was based on statements made by the prosecution in closing argument. The grant or denial of a motion for mistrial rests within the sound discretion of the trial court. An abuse of that discretion will be found only when the trial court's denial of the motion has deprived the defendant of a fair and impartial trial. *People v Wolverson*, 227 Mich App 72, 75; 574 NW2d 703 (1997). We find no abuse of discretion.

After the jury had been excused from the courtroom, defendant objected to several remarks made by the prosecution during its closing in rebuttal. Defendant argues the prosecutor mischaracterized the reasonable doubt standard when he compared finding a reasonable doubt to using common sense in crossing a highway at night. We disagree. The prosecutor's comment was proper. Moreover, the trial court properly instructed the jury on the reasonable doubt standard and further instructed the jury that it was to follow the trial court's instructions on the law, even if an attorney's statement conflicted with the trial court's instructions on the law, curing any possible prejudice. See *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997); *People v Solak*, 146 Mich App 659, 677; 382 NW2d 495 (1985).

Next, defendant contends the prosecutor denigrated the defense during closing argument by characterizing some of defendant's closing argument as an attempt to "muddle the waters." Viewed in context, the prosecutor's comment was a proper response to defendant's closing argument. *People v Bahoda*, 448 Mich 261, 285-286; 531 NW2d 659 (1995).

Defendant also asserts the trial court should have declared a mistrial sua sponte based on a statement the prosecutor made in his closing in rebuttal regarding the caller ID unit, which, though not raised by defendant, the court stated may have improperly shifted the burden of proof. Defendant has abandoned this issue because he has failed to cite any authority that supports his position that the trial court should have sua sponte declared a mistrial. *People v Thomas*, 36 Mich App 23, 26; 193 NW2d 189 (1971). Moreover, the trial court properly instructed the jury on the burden of proof, which cured any possible prejudice.

Because none of the challenged remarks denied defendant a fair and impartial trial, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Wolverton, supra* at 75.

Next, defendant argues the trial court should have, on its own motion, declared a mistrial after pronouncing counsel in contempt before dismissing the jury. We disagree.

The trial court's statement that defense counsel was in contempt, without more extensive interjection into the proceedings, does not warrant reversal. *People v Reggie Williams*, 162 Mich App 542, 546-548; 414 NW2d 139 (1987). While it would have been better for the trial court to admonish counsel outside the presence of the jury, the trial court's statement did not deny defendant a fair and impartial trial, especially in light of the trial court's instruction to the jury to disregard any problems that had been expressed between bench and counsel. *Id.*

Moreover, before sua sponte declaring a mistrial, the trial court should make explicit findings, after a hearing on the record, that no reasonable alternative exists. *People v Ricky Williams*, 85 Mich App 258, 264-265; 271 NW2d 191 (1978). We find viable the alternative chosen by the trial court; specifically, giving a curative instruction to the jury before deliberation. Therefore, the court's decision not to declare a mistrial on its own motion was proper.

Affirmed.

/s/ Richard Allen Griffin
/s/ Gary R. McDonald
/s/ Helene N. White