

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN LEE CHURCH,

Defendant-Appellant.

UNPUBLISHED

July 13, 1999

No. 204627

Kent Circuit Court

LC No. 96-013935 FC

Before: Griffin, P.J., and Wilder and Danhof,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to ten to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in allowing plaintiff to amend the information to expand the time frame during which the injury leading to the infant's death could have occurred. We disagree.

As a general rule, "[t]he trial court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76; MSA 28.1016; *People v Stewart (On Remand)*, 219 Mich App 38, 44; 555 NW2d 716 (1996). A trial court's ruling permitting amendment of an information will not be reversed on appeal unless it is shown that the defendant was prejudiced in his defense or that a failure of justice resulted from the amendment. *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982).

We are not convinced that defendant was prejudiced in his defense or that a failure of justice resulted from amendment of the information. The trial court permitted the prosecutor to amend the information as to the date the injury occurred from October 28, 1996, to "on or about the 28th through the 29th" of October, 1996, reasoning that time was not of the essence in the trial, and neither party

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

disputed that the fatal injury occurred between 9:00 p.m. on October 28, 1996, and 6:00 a.m. on October 29, 1996. Thus, the amendment did not charge defendant with a new crime; rather, the information was amended to conform to the evidence presented at trial. Nor was defendant deprived of an opportunity to defend against the crime. Defendant's theory of the case was that the baby's mother inflicted the fatal injury before she dropped him off at defendant's house. The record shows that defendant maintained this defense even after the court ruled that the prosecutor could amend the date on the information, and there is nothing in the record to support defendant's argument that he would have presented a different defense if the information had originally listed October 29, 1996, as the date of the offense. See *People v Stricklin*, 162 Mich App 623, 633-634; 413 NW2d 457 (1987). Moreover, both parties were well aware of the sequence of timing, and defendant certainly knew at the commencement of trial that the prosecutor intended to prove that the injury occurred after the infant was dropped off at defendant's home. On this record, defendant has failed to show that he was prejudiced by the amendment. Accordingly, the trial court did not err in allowing the prosecutor to amend the information.

Defendant next argues that he was denied a fair trial as a result of prosecutorial misconduct. Specifically, defendant claims that, during closing arguments, the prosecutor improperly referenced a lie detector test taken by defendant. Defendant failed to object to the prosecutor's comment at trial that he now claims was improper. Appellate review of prosecutorial remarks is generally precluded absent an objection because the trial court was deprived of an opportunity to cure the error. *People v Messenger*, 221 Mich App 171, 179; 561 NW2d 463 (1997). In the absence of an objection, an appellate court will only reverse if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id.*

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 propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

During his closing argument, defense counsel made the following remarks:

Okay, so who's lying to us. You saw Diana Green up here. You saw her demeanor when we brought out the fact of her throwing up the baby, the fact that she was giving him some sort of red medicine to make it sleep. Her head dropped. She never looked at you again. She never raised her head up again. **You decide whether she's passed your lie detector test.** We went through all those little procedures that we all use in everyday life. Everyone has a way of doing that. **Did she pass that lie detector test.** [Emphasis added.]

During her rebuttal argument, in response to defense counsel's comments, the prosecutor stated:

He goes on and asks you again to look at who's lying to you. He says, "Does Diana pass your lie detector test." Ladies and Gentlemen, we don't go into lie detector tests. **Mr. Church does not want anyone to talk about lie detector tests in this case.**" [Emphasis added.]

The prosecutor's comment is error which attempts to skirt the clear prohibition under Michigan law against the admission of evidence at trial concerning polygraph examinations or their results. *People v Ray*, 431 Mich 260, 265; 430 NW2d 626 (1988). However, this Court has previously held that reversible error does not exist where the reference to a polygraph examination is not solicited by the prosecutor, no mention is made of its results, and where the court gives a complete cautionary instruction. *People v Ranes*, 63 Mich App 498, 502; 234 NW2d 673 (1975). Here, while the prosecutor's polygraph reference was not inadvertent, it was made in direct response to defendant's closing argument, see *People v Bahoda*, 448 Mich 261, 286-287, 291-292; 531 NW2d 659 (1995), and the comment did not explicitly disclose that defendant was administered, and failed, a polygraph test. Moreover, we believe that a curative instruction given by the trial court could have eliminated any prejudicial effect of the remarks had defendant lodged a timely objection to the prosecutor's comment. Therefore, although we find the prosecutor's reference to the polygraph test during rebuttal argument improper, in light of defendant's failure to object to the comment at trial and because we believe that a curative instruction would have remedied any potential prejudice arising from the improper reference, we find no miscarriage of justice to defendant.

Lastly, defendant argues that he is entitled to a new trial because the jury verdict was against the great weight of the evidence. Defendant failed to move for a new trial on this basis below.¹ Thus, because this issue has not been properly preserved for appellate review, we decline to address it. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

Affirmed.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

/s/ Robert J. Danhof

¹ Defendant filed a postconviction motion for new trial; however, he only challenged the exclusion of expert testimony, the amendment of the information, and the propriety of the prosecutor's reference to the lie detector test during rebuttal argument. Defendant did not argue that the verdict was against the great weight of the evidence, or otherwise challenge the sufficiency of the evidence, in his motion for new trial.