

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY DEWAYNE HARDRICK,

Defendant-Appellant.

UNPUBLISHED

January 28, 2000

No. 211575

Jackson Circuit Court

LC No. 97-082608-FH

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

A jury convicted defendant Terry DeWayne Hardrick of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), MSA 14.15(7401)(2)(a)(iv). The trial court sentenced Hardrick as a fourth habitual offender, MCL 769.12; MSA 28.1084, to eight to sixteen years' imprisonment. Hardrick appeals as of right. We affirm.

I. Basic Facts And Procedural History

On October 28, 1997, at approximately 5:30 p.m., undercover police officer Kenneth Rochell met with confidential informant Ray Glenn. Glenn had arranged a meeting with Hardrick at 6:00 p.m. in the city of Jackson at the King Center so Rochell could purchase drugs. Rochell and Glenn arrived at the King Center a few minutes after 5:30 p.m. and waited approximately ten minutes, but Hardrick did not appear. Rochell and Glenn then left the King Center and drove around the area looking for Hardrick before driving to Hardrick's home.

When Rochell and Glen arrived at Hardrick's home at approximately 6:00 p.m. Rochell parked in front of the house and Glenn went inside for a minute or two before returning to the car with Hardrick. At Hardrick's suggestion, Rochell drove the two other men around the block for two or three minutes and, as they were driving, Rochell purchased eight rocks of crack cocaine from Hardrick. Rochell let Hardrick out of the car at the intersection of Martin and Moore Streets in Jackson at approximately 6:03 p.m.

At trial, the defense presented three witnesses; however, only the testimony of two of these witnesses—Hardrick and Robert Knapp—is germane to this appeal. Knapp, defendant's employer, testified that, during the week of October 25, 1997, Hardrick was working for him at the Central Wesleyan Church installing a new roof. Knapp explained that the crew at the Church would work on the roof until dark, around 5:15 p.m. or 5:20 p.m., when the pastor arrived to lock the church. At that time, ordinarily, the men would clean up and talk with one another or with the pastor for about ten or fifteen minutes before leaving the job site between 5:30 p.m. and 6:00 p.m. Knapp noted that Hardrick's house was approximately ten to fifteen minutes away from the job site. He did not know when Hardrick left the job site on October 28, 1997 or what Hardrick did after he left work that day.

Hardrick testified that he worked at the church during the week of October 25, 1997. However, contrary to Knapp's recollection, Hardrick said that he worked on the roof until approximately 5:30 p.m. every night and then, after he cleaned up and talked with Knapp or the church pastor, he left the job site after 6:00 p.m. Further, with respect to October 28, 1997, Hardrick specifically stated that he did not leave the job site until well past 6:00 p.m. Then he went home, immediately changed his clothes, and visited a friend at her home that evening; it took him approximately ten to twenty minutes to get home from the church.

During his closing argument, the prosecutor discussed the testimony delivered by the defense witnesses. He stated:

What did we generally learn, through, from the testimony that was presented today by the individuals that the defense brought in? We have Mr. Knapp who stated that they generally quit sometime between 5:15 and 5:30. If you remember correctly, he said the pastor usually wandered out about 5:15 to make sure the church was locked up.

Now all of a sudden defense counsel wants to stand up here in closing and inform you that gosh, they must have gone on until 6:00 or 6:30 at night, but that's not what Mr. Knapp said. If you go back in your minds and review the testimony that he gave, he generally stated that they were beginning to wrap up around 5:15 or 5:30.

Secondly, you have the defendant and his sister, they both take the stand. Neither one of them can remember October 28 specifically. I don't know what to say about that. Mr. Engle [defense counsel] wants you to feel sorry for the fact that they can't remember October 28 specifically. I don't know whether you can or not, and I don't think that really matters.

* * *

So I don't know what to say on the people on why they can't remember what happened on October 28, 1997. I do know that when you go back to the jury room, you have that burden as jurors to think about the witness's credibility, the sister of the defendant, the defendant, what they have to say, what they do and don't remember.

Subsequently, the jury convicted Hardrick and the trial court sentenced him. The only issue on appeal is whether the prosecutor committed misconduct in his closing arguments.

II. Preservation And Standard Of Review

Ordinarily, to review allegations of prosecutorial misconduct “this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial.” *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). However, “[a]ppellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Hardrick's trial counsel did not object to any of the prosecutor's closing arguments. Accordingly, we would be obligated to address this challenge only if failure to consider it would result in a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1997). Nevertheless, we *choose* to address Hardrick's arguments, *Paschke v Retool Industries (On Rehearing)*, 198 Mich App 702, 705; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994), while keeping in mind that even if we conclude that the prosecutor did commit misconduct we will not find a miscarriage of justice if a timely curative instruction could have eliminated any prejudicial effect of the remarks, *id.* at 651-652; *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). Furthermore, a nonconstitutional error is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error determined the outcome. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

III. Prosecutorial Misconduct

A. The Characterization Of Knapp's Testimony

Hardrick first argues that prosecutor committed misconduct during closing arguments by mischaracterizing Knapp's testimony. He contends that prosecutor incorrectly stated that Knapp testified that he and Hardrick usually stopped working at 5:15 p.m., which suggested to the jury that Hardrick could have arrived home in time to commit the crime for which he was convicted.

In his closing argument, the prosecutor argued that Knapp testified that he and his employees “generally quit sometime between 5:15 and 5:30” and that they began “to wrap up around 5:15 or 5:30.” The prosecutor also argued that Knapp's testimony did not parallel defense counsel's argument that “they must have gone on until 6:00 or 6:30 at night.” Both remarks correctly restated Knapp's testimony that he and his employees usually worked on the church's roof until dark, which was about 5:15 or 5:20 p.m. At that time, Knapp and his employees cleaned up and chatted before leaving the job site between 5:30 p.m. and 6:00 p.m.

In view of this testimony in the record, it is clear that the prosecutor did not misstate or mischaracterize Knapp's trial testimony. Rather the prosecutor was arguing the evidence, as was

proper. *People v Bahoda*, 448 Mich. 261, 282; 531 NW2d 659 (1995). As a result, Hardrick is not entitled to relief on this basis.

B. The Characterization Of Hardrick's Testimony

Hardrick also argues that the prosecutor committed misconduct when he incorrectly stated that Hardrick did not recall the events of October 28, 1997, the date the crime was committed. Hardrick argues that his testimony clearly shows that he remembered the events of that day and that the prosecutor's misstatement on this issue denied him due process of law.

The record clearly indicates that the prosecutor misstated Hardrick's testimony to the jury. Hardrick testified at trial that he remembered that he did not leave the job site on October 28 until after 6:00 p.m. and that he remembered going to a friend's house after he arrived home that night. It is well settled that a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Stanaway, supra* at 686. Hardrick's counsel, however, never objected to any of the prosecutor's remarks during closing argument. In this case, the prosecutor's misstatement and any prejudicial effect could have been cured by a timely instruction from the trial court reminding the jury of Hardrick's testimony. Thus, although the prosecutor's comments were improper, Hardrick has not shown that a miscarriage of justice resulted, warranting reversal of his conviction in this case. *Rivera, supra* at 651-652.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens