

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH PAYNE,

Defendant-Appellant.

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UNPUBLISHED

March 24, 2000

No. 208792

Recorder's Court

LC No. 97-002541

Before: Neff, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to four to twenty years' imprisonment. We affirm.

Defendant first argues that he was denied a fair and impartial trial due to the prosecution's misconduct in denigrating defense counsel during its closing rebuttal argument. We disagree.

This Court's review of prosecutorial remarks is precluded absent objection by counsel, except in circumstances where a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant did not object to the prosecution's rebuttal closing argument, review of the rebuttal closing argument is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Id.*

This Court examines prosecutorial remarks in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Generally, prosecutors are accorded great latitude regarding their conduct and arguments. *Id.*, 282. However, a prosecutor may not personally attack the credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 606; 560 NW2d 354 (1996). A prosecutor may, however, argue from the facts that the defendant or another witness is not worthy of belief, and a prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as they relate to his theory of the case. *Bahoda*,

*supra*, 448 Mich 282; *People v Launsbury*, 217 Mich App 358, 360; 551 NW2d 460 (1996). Otherwise improper remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Although the prosecution, in addressing defendant's closing argument, referred to defense counsel by name, the prosecution was merely commenting on the evidence presented and the credibility of defendant's testimony. None of the alleged denigration of defense counsel were attacks on defense counsel personally; rather, they were attacks on defendant's theory of the case as communicated through his closing argument. We conclude that the comments of the prosecution were proper and did not denigrate defense counsel. Defendant was not denied a fair and impartial trial.

Defendant next argues that he was denied a fair trial because the trial court's comments during jury instructions, regarding defense counsel's advocacy, prejudiced defendant. We disagree.

A criminal defendant is entitled to a neutral and detached magistrate. The test is whether partiality could have influenced the jury to the detriment of the defendant's case. *People v McIntire*, 232 Mich App 71, 104-105; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality. *McIntire, supra*, 232 Mich App 105.

After a review of the statement which defendant claims was prejudicial, this Court concludes that the statement was not partial because there was nothing in the statement that specifically referred to either attorney, or inferred that one attorney was more or less guilty of making the tricky arguments, that the trial court was concerned the jury would consider as evidence. There was nothing apparent from the record which reflected that defense counsel was the attorney that the trial court was warning the jury about. Instead, the trial court was very complimentary of both attorneys and warned the jury on an impartial basis that they were to consider facts in evidence and not the arguments or questions of the two attorneys. As such, the comments appear to be an expansion of the standard jury instructions (CJI2d 2.3, 2.5, 2.7) and were not improper.

Moreover, the trial court instructed the jury that its comments and instructions were not evidence and they were not to be taken as an indication of the trial court's opinion. The trial court also instructed the jury to disregard any belief that the trial court was telling them how to decide the case. The trial court gave these instructions directly before the comments of which defendant complains.

We conclude that the trial court's comments were not partial and could not have influenced the jury to the detriment of defendant. The trial court, therefore, did not engage in judicial misconduct and defendant was not denied a fair trial on this ground.

Finally, defendant argues that the cumulative effect of the prosecutorial misconduct and judicial misconduct denied him a fair trial. We disagree. Only actual errors are aggregated to determine their cumulative effect. *Bahoda, supra*, 448 Mich 292 n 64. Because there was no actual error, there is no error to aggregate. Defendant was not denied a fair trial.

Affirmed.

/s/ Janet T. Neff

/s/ David H. Sawyer

/s/ Henry W. Saad