

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT RYAN SAMUEL,

Defendant-Appellant.

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UNPUBLISHED

July 7, 2000

No. 211260

Macomb Circuit Court

LC No. 97-003374 FC

Before: McDonald, P.J., and Gage and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, for stabbing the victim several times during an altercation. The trial court sentenced defendant to 30 to 120 months' imprisonment. Defendant appeals as of right, and we affirm.

Defendant contends that he was denied a fair trial because the prosecutor made inappropriate comments during his rebuttal closing argument. Defendant did not object to any comments made by the prosecutor during his rebuttal argument, and thus failed to properly preserve this claim for appellate review. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). Therefore, relief pursuant to this claim is precluded unless "a curative instruction could not have eliminated the prejudicial effect [of the challenged remark] or where failure to consider the issue would result in a miscarriage of justice." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court considers issues of prosecutorial misconduct on a case by case basis by examining the record and evaluating the allegedly improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant asserts that the prosecutor denied him a fair trial when the prosecutor in his rebuttal closing argument characterized a defense witness' testimony as "incredible. Totally without foundation. Totally incredible." The defense witness to whom the prosecutor referred had testified that defendant and the victim fought near the kitchen, and that defendant there picked up a kitchen knife with which to defend himself from the victim's attack. Our review of the record reveals that this defense witness represented the only witness who testified that the fight occurred at the kitchen. Several other witnesses

testified that the fight occurred elsewhere inside and outside the apartment. The prosecutor properly argued to the jury that because the defense witness' explanation of the fight's location was inconsistent with photographs presented at trial and the other witnesses' testimony, the defense witness' testimony had no basis in fact. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999) ("A prosecutor may argue from the facts that a witness is not worthy of belief."). Because the prosecutor did not otherwise imply that he had some special knowledge or personal opinion that the defense witness lied, we find no impropriety in the prosecutor's remarks. *People v Bahoda*, 448 Mich 261, 286-287; 531 NW2d 659 (1995).

Defendant next argues that the following remarks of the prosecutor denied him a fair and impartial trial:

And if [defendant] was assaulted, as counsel would have you believe, then ask yourselves this question. Why did he flee before the police got there? Why did he flee? And even if he did leave for some good reason, I heard no testimony, and I don't think you did that he later made a police report and said, gee, I got assaulted at that party by [the victim]. And I went to the police to get in there and investigate that because I was assaulted. No. That didn't happen. Didn't happen at all.

According to defendant, these remarks "effectively told the jury that [defendant] had failed to take the stand," and thus "denied [him] his Fifth Amendment right to remain silent."

A review of the record clarifies, however, that contrary to defendant's argument the prosecutor did not specifically refer to defendant's failure to take the stand. Rather, the argument highlights defendant's silence in failing to contact the police to report the alleged attack by the victim. Because the prosecutor's remarks concerning defendant's silence refer to a period prior to his arrest, the remarks did not infringe on defendant's right to remain silent. *People v Collier*, 426 Mich 23, 30-31, 34-36, 39; 393 NW2d 346 (1986) ("The prosecutor did not ask the jury to make an inference of guilt because defendant did not contact the police, but instead urged that defendant's testimony was unbelievable in light of his subsequent conduct.").

Furthermore, we observe that prosecutorial arguments also must be considered in light of defense arguments. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Defense counsel addressed at length in his closing argument the issue of self-defense, and specifically referred to the victim as the aggressor. In light of defense counsel's assertion of self-defense during his closing argument, the prosecutor's rebuttal closing argument questioning the validity of defendant's claim, on the basis of the record evidence or lack thereof, constituted an entirely proper response. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995); *People v Fisher*, 220 Mich App 133, 159; 559 NW2d 318 (1996).

Affirmed.

/s/ Gary R. McDonald

/s/ Hilda R. Gage

/s/ Michael J. Talbot