STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COLLINS DINGLE,

Defendant-Appellant.

UNPUBLISHED
November 14, 2000

No. 214697
Wayne Circuit Court
LC No. 97-008106

Before: Jansen, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). The trial court sentenced defendant to five to twenty years' imprisonment for the first-degree home invasion conviction, three to ten years' imprisonment for the assault with intent to do great bodily harm conviction, and four to ten years' imprisonment for the assault with intent to commit criminal sexual conduct involving sexual penetration conviction. The sentences run concurrently. We affirm.

Defendant raises several prosecutorial misconduct issues. Defendant did not object to the alleged misconduct at trial. We therefore examine the prosecutorial remarks in context to determine whether they constituted plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). If an error occurred, the defendant bears the burden of showing that he is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. at 774.

Defendant argues that the prosecutor committed misconduct when she misstated the amount of time that the victim actually saw defendant, and that she injected her personal opinion regarding why the victim's testimony may not have been accurate. The prosecution cannot argue facts or evidence not admitted as evidence at trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). The prosecution can, however, argue the evidence and reasonable inferences from that evidence. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The prosecution stated:

> So, she [the victim] tells you, first, she sees him. Then she says two to three minutes, which I think probably was less than a minute. I think it seemed like two or three minutes from the minute that she first saw him. Probably the whole time took a little bit less than she estimated. And, I think any of us, while something like that is going on, it would seem like it takes for ever, even if it actually happened quickly. So, she first sees him.

The victim testified that she first saw defendant for, "Oh, at least a good two minutes, two to three minutes, yes." Therefore, the prosecutor did not state a fact that was not in evidence, rather, her statement matched the victim's testimony. Defendant's argument that the prosecution modified the victim's testimony is also without merit. The victim testified that she saw defendant for two or three minutes. A reasonable inference from the testimony would be that the victim overestimated the amount of time that she looked at defendant due to the trauma of the event. Prosecutors may make reasonable inferences from the evidence presented. *Bahoda*, *supra* at 282. Further, we fail to see how a statement that the victim saw defendant for less time than she testified, given that the identification was an issue at trial, would have prejudiced defendant.

Defendant also alleges that the prosecution attempted to elicit sympathy from the jurors and appeal to their sense of civic duty:

> Well, you know when I think about this, because obviously, as you can imagine, this situation [where the witness may have been too hysterical to remember the details of a traumatic event] comes up all the time in criminal cases, and I think about it because – *I mean, I'm very, very fortunate that I have never been the victim of an assaultive type of crime, and I thank God every day for that.*
>
> But the best thing I can liken it to is, I think just about all of us have been in a car accident in one type or another. Most of them not to [sic] serious. But most of us have. *And, I want you to recall, if you can, maybe a time that, that has happened to you. Because if you think about it, that's an incredibly traumatic thing to happen,* and most car accidents happen like that. I mean, they're very, very quick. But I know for me personally, car accidents that I have been in, they are probably .05 seconds, but they seem like they go on forever. It's like a never ending process. And, even though they happen so quick, you end up remembering them incredibly well, because they were so traumatic. [Emphasis added.]

The prosecution's comments must be reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). While defendant cited only the italicized sections of the above passage, a review of the entire passage reveals that the statement was not an improper attempt to elicit sympathy from the jurors or place them in the shoes of the victim. Nor does the statement appear to us to be a civic duty argument, but rather, a comment on the reliability of the victim's testimony following a traumatic event.

Next, defendant argues that the prosecutor committed misconduct when she discussed the concept of reasonable doubt. The prosecution stated:

> And frankly, for you to say, I don't think he's guilty of this crime. I have a reasonable doubt. You really have to say, I don't think that woman knows what she is talking about. I don't think she knows who did this to her. And, I know that none of you believe that's true, because you saw her eyes when you all looked at her, and saw that she is so positive, she is so certain that that's the man who did that to her.

Prosecutors are permitted to argue the evidence and all reasonable inferences from that evidence. *Bahoda*, *supra* at 282. The only evidence of the attacker's identity was the victim's testimony. The victim said that she was one hundred percent sure that defendant was her attacker. In order for the jury to have reasonable doubt and acquit defendant, the jury would have needed to find that the victim's testimony was not credible. As the statement was a reasonable inference from the evidence, it was not improper. *Id*.

This Court finds defendant's remaining prosecutorial misconduct claims to have some merit. Defendant argues that the prosecutor committed misconduct in resorting to a civic duty argument and appealing to the jurors' fears when she discussed the amount of crime in today's society and referred to a drug dealer who was shot. In *Bahoda*, *supra* at 282-283, the Supreme Court reviewed a similar prosecutorial misconduct issue, saying:

> Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." Nevertheless, prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinions of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks. Such comments during closing argument will be reviewed in context to determine whether they constitute error requiring reversal. [Citations omitted.]

In *Bahoda,* the prosecution referred to the size of a particular drug organization and the pervasive nature of the drug problem. *Id*. at 283-284. This Court found these references to be permissible where the comments were reasonable inferences from the evidence presented at trial, given that Bahoda was facing drug charges and there was testimony regarding the drug trade. *Id*.

This Court recently examined the issue of prosecutorial misconduct based on a civic duty argument in *People v Cooper,* 236 Mich App 643, 650-652; 601 NW2d 409 (1999). In *Cooper,* this Court found the prosecution's statement that the case was "another senseless shooting in the City of Detroit and almost another dead young black man, but it didn't happen that way," to be improper as the statement "may have suggested to the jury that sending a message of disapproval of gun related violence in Detroit was a factor favoring conviction." *Id*. at 650-651. However, the *Cooper* Court found that a cautionary instruction could have cured the improper comment, and did not require reversal. *Id*. at 652.

In the present case, the prosecution made the following statement at the beginning of its closing argument:

> You know, when I went home last night I was thinking a lot about this case as I'm sure all of you have. And, I'm sure you expect this, because I'm sure everybody reads the newspaper, and watches television, and we know that it's great we live in a democracy, but we also live in a nation that has a lot of crime. A lot of crime that we don't see, of course, though you read about it. Okay.
>
> You saw where this drug dealer knocked off another drug dealer. And, you know it's upsetting to read about that. We don't like to see that. But, we think, well, you know, that's not going to happen to me, because I'm never going to be out on the street corner dealing drugs at 3:00 o'clock in the morning when they just - - somebody just got knocked off by somebody. So, that's upsetting, but I don't have to worry about that. That could never happen to me. So, it doesn't scare us, you know. It doesn't cause us to shake in our boots.
>
> The case that you just saw presented, when we think about crime, and then we think about things that affect us. And, we think about what really gives us nightmares, you know, what really scares the living heck out of us. It's this case, isn't it? It's the prospect of being in your home, and sleeping with your young children at 5:00 o'clock in the morning, and having an assailant break into your home and assault you, try to rape you, and try to kill you, and beat you, savagely, savagely with a gun like this. That is what is extremely scary. And that is what you heard presented over the course of the last few days.

Unlike in *Bahoda*, the comments here regarding crime in society and the death of a drug dealer were not at all related to the evidence presented at trial. There was no testimony regarding drug dealers or other crime. This argument was an appeal to the fears and prejudices of the jurors and was therefore technically improper. *Bahoda*, *supra* at 282.

Defendant also argues that the following comment was inappropriate:

> But does [reasonable doubt] mean that, well, now I can't convict even though you have this eye witness who has pointed this guy out, and knows it's him. Because, you know, it would be nice to have prints off the gun. We don't. It's just not good enough reason to find reasonable doubt, to place doubt in your mind as to whether or not that man is the one who committed the assault.
>
> And I would ask you all, ladies and gentleman, I mean, just think about that for a minute. I hate to do this, but God forbid, think about it if this happened to you. And, you know the person that did this to you. I mean, you're looking at him, and you can point to him and say, well, it's him. I am totally positive. I'm a hundred percent sure it's him. And yeah, it's obvious he did it.
>
> And, it's very confusing, you know, because you have the defense attorney asking all kinds of complicated questions, to be like, well, yeah, this, and yeah that, and there are a lot of different factors. And, you can say, well, it was this amount of time, it was this amount of distance, and to everything [sic] he can

> bring up. But none of that changes one essential thing, and that is [the victim] knows the man that assaulted her.

The prosecution cannot ask the jurors to place themselves in the victim's position. *Cooper*, *supra* at 653; *People v Leverette*, 112 Mich App 142, 151; 315 NW2d 876 (1982), overruled on other grounds *People v Wakeford*, 418 Mich 95, 110-113; 341 NW2d 68 (1983). In *Leverette*, the prosecution committed misconduct in asking the jurors to consider whether, if they were the victim, the fact that they were the only witness to the crime would preclude conviction. *Id*. at 150. The *Leverette* Court found that this argument was improper because the argument "implied that the jury should convict out of sympathy to the victim." *Id.* at 151.

As the present comments are indistinguishable from *Leverette*, *supra*, the prosecution's comments were also improper. Unlike in *Cooper*, the prosecution was not explaining the victim's testimony or her reason for testifying in a certain way. Here, the prosecution asked the jurors to place themselves in the victim's shoes and convict solely on her testimony.

Defendant next argues that the prosecution invoked sympathy for the victim and argued facts that were not in evidence. The prosecution stated:

> And, [the victim] said, "I will never forget that man." It's in her nightmares every single night. I bet she can't get it out of her mind, I bet if she tried, and she went to hypnosis to make her forget Collins Dingle's face. I bet she couldn't do it, because it was so upsetting, and so traumatic that she will never be able to forget the face of that man because he so violently assaulted her.

As noted, the prosecution cannot ask the jury to convict out of sympathy for the victim, *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988), and cannot argue facts that were not presented as evidence in the trial, *Stanaway*, *supra* at 686. In this case, the victim testified that, "I can never forget [defendant's] face." However, the victim did not testify that she had nightmares or that she sought hypnotic treatment. The statements appeared to be calculated to elicit sympathy for the victim. Therefore, the comments were improper. *Swartz*, *supra* at 372.

This Court has determined that some of the statements of the prosecution were improper. As any errors were unpreserved defendant is required to affirmatively show that he is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Carines*, *supra* at 774. In our view, defendant has not done so. The victim picked defendant out of a lineup and testified that she was one hundred percent sure that defendant was her attacker and that she had ample opportunity to look at defendant. The only evidence that called the testimony into question was the victim's testimony that she bit her attacker's hand as hard as she could and Investigator Jenkins' testimony that he found no bite mark on defendant. Based on the forgoing, this Court cannot say that defendant is actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id*. at 774. Therefore, these errors are not grounds for reversal. *Id*.

Defendant also argues that the trial court abused its discretion when it dismissed a juror after both sides had rested their cases. We disagree. MCL 768.18; MSA 28.1041 authorizes trial courts to impanel a jury of fourteen, rather than twelve jurors:

> Any judge of a court of record in this state about to try a felony case which is likely to be protracted, may order a jury impaneled of not to exceed 14 members, who shall have the same qualifications and shall be impaneled in the same manner as is, or may be, provided by law for impaneling juries in such courts. All of those jurors shall sit and hear the cause. *Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors impaneled from further service, he may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.* In the event that more than 12 jurors are left on the jury after the charge of the court, the clerk of the court in the presence of the trial judge shall place the names of all of the jurors on slips, folded so as to conceal the names thereon, in a suitable box provided for that purpose, and shall draw therefrom the names of a sufficient number to reduce the jury to 12 members who shall then proceed to determine the issue presented in the manner provided by the law. [Emphasis added.]

We review a trial court's decision to reduce the jury for an abuse of discretion. *People v Harvey*, 167 Mich App 734, 744; 423 NW2d 335 (1988). After both parties had rested their cases, but before the court instructed the jury, the trial court received a note from a juror stating:

> Judge, I have a problem with the case. I do not know if I can be 100% objective for the following reason: I have been falsely accused before and it is bothering me that it may be the case here. I am an objective open minded person but it (being wrongfully accused) is not always easy to forget. I wanted to advise you so my conscience would be clear that I told you. Thank you. [Signature omitted.]

The trial judge and the parties discussed the matter off the record and then the trial court made a record of the prior discussion and his decision. The court determined that the juror should have brought the problem up in response to voir dire questioning and that, because the omission was material, the juror would be dismissed over defendant's objection.

"The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). Here, the jury, including the juror in question, was asked "is there any reason at all that any one of the 14 of you can now think of, any reason at all as to whether you cannot sit in this case, listen to all the evidence, and render a verdict fair to both sides? Anyone?" The juror did not respond. The trial court did not abuse its discretion when it dismissed the juror. The juror failed to disclose that the false accusations would prevent him

from rendering a fair verdict as he could not be one hundred percent objective.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell