

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID BROWN,

Defendant-Appellant.

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UNPUBLISHED

November 17, 2000

No. 212884

Wayne Circuit Court

Criminal Division

LC No. 97-007429

Before: Hoekstra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b(1); MSA 28.424(2)(1). He was sentenced to life imprisonment without the possibility of parole for the murder conviction and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant was charged with shooting the victim to death in a dispute over a drug-related debt. The prosecutor acknowledged that the only evidence linking defendant with the crime was the testimony of Harold Cole. Cole testified that he accompanied defendant and three other men to an apartment, looking for the victim. According to Cole, some of the men he accompanied, including defendant, stripped the victim nude, beat him, and dragged him outside. Cole claimed that he tried to get the men to stop the altercation, but that defendant shot the victim anyway. No physical evidence linked defendant to the murder, and no other witness beside Cole identified defendant as being present during the crime.

Defendant first argues that despite the fact that defendant failed to request a cautionary instruction regarding accomplice testimony, the trial court erred in failing to instruct the jury sua sponte that it should examine Cole's testimony more cautiously because he was an accomplice. We disagree.

Accomplice testimony is inherently dangerous because "it is fraught with weakness due to the effect of fear, threats, hostility, motives or the hope of leniency." *People v McCoy*, 392 Mich 231, 236; 220 NW2d 456 (1974), quoting 30 Am Jur 2d, Evidence, § 1148, p 323. Therefore, the trial court must, upon request, give a cautionary instruction regarding accomplice

testimony. *Id.* at 240. Additionally, “if the issue is *closely drawn*, it *may* be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge.” *Id.* (emphasis supplied). An example of such an instruction is found in CJI2d 5.6, which provides in part, “In general, you should consider an accomplice’s testimony more cautiously than you would that of an ordinary witness.”

The prosecutor argues that a cautionary instruction was not required because Cole was not an accomplice. See *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). However, there was evidence from which the jury could have concluded that Cole was an accomplice. *People v Smith*, 158 Mich App 220, 229; 405 NW2d 156 (1987). A witness is an accomplice where the witness “knowingly and willingly helps or cooperates with someone else in committing a crime . . . .” *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5. In this case, the evidence indicated that Cole accompanied four men to look for the victim. One witness claimed that it was Cole who was demanding money from the victim. Moreover, although Cole claimed to have tried to stop the murder, another witness testified that he saw four men dragging the victim outside while a fifth held the door open for them. From this evidence, the jury could have concluded that Cole knowingly helped someone commit the crime, and thus was an accomplice.

Additionally, we find that this case was “closely drawn” because the trial was “essentially a credibility contest between the defendant and the accomplice.” *People v Jensen*, 162 Mich App 171, 188; 412 NW2d 681 (1987). Only Cole’s testimony indicated that defendant was the perpetrator of the crime. Other witnesses corroborated some details of Cole’s account, but this testimony only demonstrates that Cole was, in fact, present during the crime. Those witnesses contradicted other details of Cole’s account. Defendant testified at trial, claiming that he did not shoot the victim. The jury was presented with a choice—believe defendant and acquit, or believe Cole and convict. Because this case involved a credibility contest between defendant and Cole, we conclude that the case was closely drawn.

Although Cole was an accomplice and the case was closely drawn, we conclude that the trial court did not commit reversible error in failing to sua sponte give the cautionary instruction in this case. Even though reversal *may* be appropriate under *McCoy* in a closely drawn case, it is not *required*. *People v Reed*, 453 Mich 685, 692; 556 NW2d 858 (1996). The need for a cautionary instruction is lessened where defense counsel has “thoroughly explored the witness’ motivations” to lie. *Id.* Thus, “*McCoy* stands for the proposition that a judge should give a cautionary instruction on accomplice testimony sua sponte when potential problems with an accomplice’s credibility have not been plainly presented to the jury.” *Id.* at 692-693.

In the present case, defendant’s trial counsel thoroughly explored Cole’s motivation to lie. Defense counsel questioned Cole about his relationship with the men who helped drag the victim out of the building, eliciting that Cole had stolen drugs from them. Defense counsel elicited from Cole that Cole had used crack cocaine one to two hours before the victim’s death. Defense counsel elicited from Cole that Cole initially was arrested as a homicide suspect in connection with the death of the victim. Cole was on parole at the time and any further crime or involvement in any criminal activity would result in his return to prison. Moreover, conflicting testimony brought into issue Cole’s credibility. Contrary to Cole’s testimony, one witness

testified that Cole, not defendant, was the one who demanded money from the victim. Cole testified that defendant struck the victim “upside the head” more than once with a pistol; however, the medical examiner testified that one would expect multiple hits to the head with a gun to produce some blunt force trauma, but he found no evidence of being struck on the victim’s head or face. In addition, defendant testified that he had experienced problems with Cole in the past, and that defendant had even shot Cole in the leg in 1996. Further, defense counsel vigorously attacked Cole’s credibility during closing argument, reminding the jury that Cole was initially a suspect in the murder and therefore had a motive to blame someone else. In this case, as in *Reed*, “the problems with [the witness’s] credibility were plainly apparent to the jury.” *Id.* at 693. Thus, the trial court was not required to give a cautionary instruction on accomplice testimony sua sponte.<sup>1</sup>

Defendant also argues that he was denied the effective assistance of counsel because trial counsel failed to request a cautionary instruction regarding accomplice testimony. Having determined that the problems with Cole’s credibility were plainly apparent to the jury, we cannot conclude that defendant received ineffective assistance of counsel for failing to request an accomplice instruction. See *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996) (Effective assistance of counsel is presumed, and the defendant’s burden to prove otherwise is a heavy one).

Next, defendant contends that he was denied a fair trial by the prosecutor’s improper bolstering of Cole’s credibility through references to Cole’s prior consistent statements. Where defendant objected to the prosecutor’s improper questioning of Cole, this issue is preserved. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). However, defendant did not object to the prosecutor’s comments during closing argument, and any issue regarding those comments is not preserved for appellate review. *Id.*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, “this Court will only review defendant’s claim for plain error.” *Schutte, supra*, citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). According to *Carines*, three requirements must be met to avoid forfeiture under the plain error rule: “1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.” *Id.* at 763 (citation omitted). Where the defendant did not object at trial to the alleged prosecutorial misconduct, appellate review is precluded unless “a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice.” *Stanaway, supra* at 687; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999).

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<sup>1</sup> Defendant brought a motion for new trial based on the failure to give the cautionary instruction. The trial court denied the motion stating, *inter alia*, that “. . . the jury was pretty mindful of the character of this witness, Harold Cole, and/or the lack of character,” and that “I think that that was really the distinguishing facts [sic] in this case, was that Mr. Cole was brought in here, his character was put on the record, the jurors paid attention to that and they were sitting paying close attention to his evidence.”

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). “As a general rule, neither a prosecutor nor anyone else is permitted to bolster a witness’ testimony by referring to prior consistent statements of that witness.” *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). Improper bolstering of the credibility of prosecution witnesses may constitute prosecutorial misconduct. *People v Malone*, 180 Mich App 347, 361; 447 NW2d 157 (1989). However, prosecutors are free to argue the evidence and all reasonable inferences arising from the evidence as they relate to the theory of the case.” *Schutte, supra* at 721. “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.” *Id.*

In the present case, one aspect of defendant’s misconduct argument is that the prosecutor attempted to elicit evidence of prior consistent statements. Defendant objected to such testimony and the trial court properly sustained defendant’s objection. Consequently, defendant’s misconduct claim is not supported by anything that occurred during the examination of witnesses.

More appropriately, defendant claims misconduct stemming from the prosecutor’s argument to the jury that alluded to prior consistent statements of defendant. In his closing, the prosecutor referred to Cole’s prior testimony in this case and two other cases, noting that on cross-examination defense counsel did not bring forth any evidence of major inconsistencies between what Cole testified to at the instant trial and what he testified to before. Defendant made no objection. We find no error in the prosecutor’s comments. The prosecutor did not present to the jury evidence that was not admitted at trial. Rather, the prosecutor merely noted to the jury what it could consider when determining credibility. Because defense counsel used the witness’ prior testimony to attempt to impeach the witness during cross-examination, but only addressed peripheral or incidental information, the prosecutor was entitled to highlight in closing argument the absence of inconsistencies on significant issues in the witness’ prior testimony. The prosecutor was free to argue the evidence and all reasonable inferences arising from the evidence, including the overall impact of the absence of fundamental inconsistencies in the witness’ prior testimony. In sum, we find no prosecutorial misconduct.

Nonetheless, even if error had occurred, there is no basis to reverse because any prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction. *Stanaway, supra*; *Schutte, supra* at 720-721. Moreover, absent an objection, any unfair prejudice produced by the challenged comments was dispelled by the trial court’s instructions to the jury that it was required to decide the case on the properly admitted evidence and that the lawyer’s statements and arguments were not evidence. *Schutte, supra* at 721-722, citing *Bahoda, supra* at 281.

Having found no error, we conclude that defendant's claim that the cumulative effect of the alleged errors denied him a fair trial is without merit.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Mark J. Cavanagh  
/s/ Helene N. White