

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUINTUS SMITH,

Defendant-Appellant.

UNPUBLISHED
December 5, 2000

No. 214586
Wayne Circuit Court
LC No. 96-503623

Before: Markey, P.J., and Murphy and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83; MSA 28.278, armed robbery, MCL 750.529; MSA 28.797, carjacking MCL 750.529a; MSA 28.797(a), and possession of a firearm during the commission of a felony MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to fifty to seventy-five years' imprisonment, to be served consecutive to the mandatory two-year sentence for the felony-firearm conviction. We affirm.

Defendant argues first that the prosecution violated a pretrial discovery order by failing to produce a composite sketch, or composite sketches, created with the assistance of the victim and a witness, and to notify the defense that the victim's girlfriend also identified defendant from a group of photographs. Defendant contends that the prosecution's violation of its continuing duty to disclose information to defendant denied defendant his right to due process. This Court reviews the question of intentional misconduct on the part of the prosecution as a mixed question of law and fact. *People v Tracey*, 221 Mich App 321, 323-324; 561 NW2d 133 (1997). Factual findings are reviewed for clear error, while questions of law are reviewed de novo. *Id.*

Discovery in a criminal case is governed by MCR 6.201(B), which provides as follows:

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

Further, in *Tracey, supra*, this Court reviewed the three situations in which a defendant's due process rights to discovery may be implicated:

(1) where a prosecutor allows false testimony to stand uncorrected; (2) where the defendant served a timely request on the prosecution and material evidence favorable to the accused is suppressed; or (3) where the defendant made only a general request for exculpatory information or no request and exculpatory evidence is suppressed. [*Id.* at 324, citing *People v Canter*, 197 Mich App 550, 568-569, 596 NW2d 336 (1992).]

None of the situations in which a defendant's due process rights to discovery might be violated existed in this case. The composite sketch or sketches never came into evidence. The prosecutor asserted that he did not find out about them until the middle of trial and that any such sketches were not used in the prosecution's investigations. Moreover, there was no indication that the sketch or sketches themselves were exculpatory in nature or that they were favorable to defendant. The victim and one witness testified that they participated in creating composite sketches, but there was no evidence that any composites were viewed by others who identified defendant as the assailant at trial.

Because the photo identification of defendant by the victim's girlfriend was not documented in a police report, it was not discoverable under MCR 6.201(B). A police officer testified at trial that the victim's girlfriend's identification of defendant from a group of photographs was inadvertent; she did not participate in a formal photo lineup. Further, her identification of defendant in a photo was not presented by the prosecution, but was elicited by defense counsel on cross-examination. Finally, while defendant claims prejudice on the basis that defense counsel, unaware that more than one person could identify defendant, asserted during opening statements that only one person could identify defendant as the victim's assailant, the record shows that defendant was aware that there were a number of witnesses present at the scene of the carjacking who might be able to identify defendant. We find no prejudice.

Because the complained of evidence was not exculpatory and not contained in any police report concerning the case, the trial court did not err in concluding that the prosecutor's failure to inform the defendant of its existence was not misconduct.

Defendant argues next that the trial court erred in allowing the prosecution to present evidence that defendant refused to participate in a corporeal lineup. We disagree. A suspect has a right to be represented by counsel at a police lineup, but does not have a right to assert a privilege against self-incrimination under the Fifth Amendment. *People v Benson*, 180 Mich

App 433, 437; 447 NW2d 755 (1989), rev'd on other grounds 434 Mich 903 (1990). "The Fifth Amendment is not implicated by appearance in a lineup; thus, evidence of the refusal to appear does not violate defendant's right against self-incrimination." *Id.*

Here, defendant was represented by a lineup attorney, but asserted that his retained attorney advised him to refuse to stand for the lineup. Defendant concedes that retained counsel's reasoning for allegedly advising defendant not to stand for the lineup is not of record, but contends that it was possibly due to impermissible state action. Because defendant offers no evidence that the lineup in which he was asked to participate was impermissibly suggestive or constitutionally infirm in any other respect, we conclude that his allegations of impermissible state action are baseless. Further, because defendant does not have a right to assert a privilege against self-incrimination under the Fifth Amendment as it pertains to lineup proceedings, the trial court did not abuse its discretion in allowing the testimony of defendant's refusal to stand for the lineup. *Benson, supra.*

Defendant's final argument on appeal is that he was denied a fair trial because the prosecutor made several statements in his closing argument that were based on his own knowledge and beliefs. Again, we disagree. Defendant did not object to any of the prosecutor's allegedly improper comments. Appellate review of improper prosecutorial remarks is generally precluded absent an objection unless a curative instruction could not have eliminated possible prejudice or the failure to consider the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

This Court reviews the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Prosecutorial comments are to be evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

After careful review of the prosecutor's comments in context, we find that each of the alleged instances of misconduct was a proper comment on the evidence, a reasonable inference that could be drawn from the evidence, or a response to an issue raised by defense counsel. Otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel. *Schutte, supra.* Moreover, had defendant objected at trial to the comments challenged on appeal, any error could have been cured by a timely instruction. *Kelly, supra.* In any event, any prejudice was dispelled by the court's general instruction that the lawyers' statements and arguments are not evidence. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Defendant was not denied a fair trial.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Jeffrey G. Collins