

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROSE IRENE HIGDON,

Defendant-Appellant.

UNPUBLISHED

March 16, 2001

No. 222984

Calhoun Circuit Court

LC No. 99-001538-FH

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five out of ten charged counts of animal cruelty, MCL 750.50b; MSA 28.245(2). She was sentenced to five years' probation, with the first year served in the county jail. She appeals as of right. We affirm.

Defendant contends that the prosecutor made statements during rebuttal closing argument that improperly shifted the burden of proof. Specifically, defendant contends that the prosecution shifted the burden of proof by commenting on defendant's failure to call her veterinarian as a corroborating witness. We review prosecutorial misconduct issues on a case by case basis, examining the pertinent portion of the record and the prosecutor's remarks in context, to determine whether the defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

It is axiomatic that every defendant in a criminal matter is clothed with a presumption of innocence, and that the prosecution bears the burden of proof. However, where a defendant advances an exonerating defense theory, prosecutorial commentary on the validity of that defense theory does not shift the burden of proof onto the defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999). Along the same lines, if the defendant presents a defense theory, the prosecution is permitted to argue on the inferences created by the theory. *Fields, supra* at 115.

In the instant matter, defendant's closing argument referred to her veterinarian several times. For example, defendant argued that she would not have taken her dogs to the veterinarian if she was planning to starve them to death. In fact, defense counsel noted that this was circumstantial evidence that the dogs did not starve to death. Similarly, defendant noted that the

prosecution's expert veterinarians did not know the treatment that she had always given her dogs. Thus, the defense theory relied at least in part on her dealings with her veterinarian.

Moreover, each of the witnesses presented by defendant was either a friend or family member. In addition, defendant testified on her own behalf. Accordingly, we believe that the prosecutor's comment on defendant's failure to present the testimony of a presumably disinterested and unbiased witness—her veterinarian—was a fair commentary on a weakness in defendant's defense theory. We conclude that the prosecution's comment could fairly be construed as responsive to both the defense theory and defense counsel's closing argument and therefore did not deprive defendant of a fair trial. Therefore, the challenged statements did not rise to a level of prosecutorial misconduct.

Defendant further argues that the comment was improper because it denigrated the defense, injected issues broader than defendant's guilt or innocence, and misled the jury. We note, however, that defendant did not raise these arguments below, confining her objection solely to the purported shifting of the burden of proof. An objection on one ground at trial does not preserve appellate challenge on different grounds. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Thus, defendant's alternate grounds have not been preserved for appeal. Nevertheless, we will review an unpreserved issue of prosecutorial misconduct if "a curative instruction could not have remedied the prejudicial effect of the prosecutor's comments or if the failure to consider the issue would result in a miscarriage of justice." *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). In the instant matter, any possible prejudice could have been cured by an instruction had defendant objected. Therefore, because our failure to further review the issue will not result in a miscarriage of justice, we decline to consider the merits of the new grounds for objection raised on appeal.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Helene N. White