

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AUTREZ POLLARD,

Defendant-Appellant.

UNPUBLISHED

April 6, 2001

No. 218917

Wayne Circuit Court

Criminal Division

LC No. 98-008853

Before: Markey, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was thereafter sentenced to consecutive terms of ten to twenty years' imprisonment for the assault conviction, and the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court violated his constitutional right of confrontation and cross-examination by limiting defense counsel's attempts to impeach the testimony of Detective-Corporal Douglas Potts, the police officer assigned to investigate the offense.

The offense occurred at about noon on July 1, 1998, in the city of Highland Park. The victim, Scott Brown, was shot in the elbow when he was stopped at a stop sign. A gun was shot by the passenger from a white Monte Carlo. Defendant proffered an alibi defense through two witnesses: Robert Walker and Charles Manson. Walker testified that defendant was at Walker's home during the early afternoon hours of July 1, 1998, and left in a black Suburban to go to the hospital to see Manson's brother, Patrick, who had been shot at about 9:00 or 10:00 that morning. Manson testified that defendant was with him at the hospital all day visiting Patrick and that they did not leave the hospital until dark.

About a week after the shooting, Potts interviewed Manson regarding the shooting of his brother Patrick. During the course of the interview, Manson informed Potts of the shooting involving Scott Brown. According to Potts, he did not write down Manson's statement because it did not conform with his investigation and he, therefore, disregarded Manson's statement.

Manson's statement was essentially the same as his trial testimony. It was not until August 1, 1998, when Potts obtained a statement from defendant, also denying his involvement in the shooting of Scott Brown.

In an effort to impeach Potts' rebuttal testimony, defense counsel sought to ask Potts about the contents of the written statement given by defendant. Defense counsel's stated goal was to attack Potts' credibility by showing that Potts did not perform a thorough investigation and that Potts' statement that Manson's information was inconsistent with other information obtained during the course of the investigation was not correct. Although defense counsel argued that he was not seeking to use defendant's police statement to prove the truth of the matter asserted, but to attack Potts' credibility, the trial court ruled that the police statement could not be offered by defendant because it was hearsay.

Although it appears that defense counsel was not attempting to introduce defendant's exculpatory police statement to prove the truth of the statement, but to attack Potts' credibility, we affirm the trial court's decision to not allow introduction of the exculpatory police statement for the alternative reason argued by the prosecutor. Impeachment by utilizing the exculpatory police statement would have been improper because it was obtained about three weeks *after* Manson's interview. Here, defense counsel argued that defendant's police statement, which was consistent with Manson's version, showed that Potts incorrectly testified that Manson's statement was not consistent with other information that Potts had obtained during his investigation. However, defendant's police statement was obtained several weeks after Manson's statement, therefore, defendant's statement could not possibly be used to impeach Potts on this point. Potts disregarded Manson's statement based on information obtained at the time of Manson's statement.

Consequently, Potts' testimony was not subject to impeachment by defendant's police statement because defendant's statement was taken about three weeks after Manson's statement. The use of defendant's statement was not relevant to defense counsel's proffered reason of impeaching Potts' testimony. Accordingly, the trial court did not abuse its discretion in limiting defendant's impeachment of Potts on this matter. *People v Weatherspoon*, 193 Mich App 115, 122; 483 NW2d 924 (1992).

II

Defendant next contends that he is entitled to a new trial as a result of two instances of prosecutorial misconduct during closing argument. Issues of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995).

Defendant first challenges the following remarks made by the prosecutor during closing argument as improper denigration of defense counsel:

From time to time I see Discovery. Watch Discovery with my nephew. I was watching a special about how *the octopus when it's attacked was throwing out*

this ink. So that when its attacker comes to get it, he can't find it. So you have here the octopus defense.

* * *

There is nothing there, ladies and gentlemen. It's all ink. Ink brought in for you. Call it what it is. Call it what it is and think. Well, in evaluating this case using your common sense and it's reasonable doubt that is my burden. Reasonable doubt. [Emphasis added.]

On appeal, defendant concedes that no objection to these remarks was made below. Appellate review of unpreserved allegations of prosecutorial misconduct is foreclosed unless a curative instruction could not have removed any undue prejudice to defendant or manifest injustice would result from a failure to review the alleged misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We do not find that the above comments denigrated defense counsel. A prosecutor may disparage the defense presented based on the evidence adduced at trial, *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), and need not use the blandest possible terms to do so, *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant next argues that he was deprived of a fair trial when the prosecutor argued in his closing remarks to the jury that the victim's testimony had been "bolstered by his honesty with you." Defendant asserts that this argument constituted improper vouching for the victim's credibility by the prosecutor. Although a prosecutor may not vouch for the credibility of a witness to the effect that the prosecutor has some special knowledge concerning the witness' truthfulness, *Bahoda, supra*, p 276, the prosecutor may argue from the evidence that the defendant or another witness is not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Here, we do not believe that the prosecutor improperly vouched for the credibility of the victim. The challenged statement is not an example of the prosecutor bolstering the victim's credibility by placing the prestige of the prosecutor's office behind the victim's testimony or by asserting the prosecutor's personal knowledge of the truthfulness of the victim. Rather, the prosecutor's remark constituted an appeal to the jury to pay close attention to the victim's testimony and to find the victim worthy of belief because he lacked a motive to wrongly accuse defendant of the shooting. This is proper argument that is merely intended to help the jury to decide between the version of events related at trial by the victim and the version related by the defense witnesses.

Accordingly, defendant was not denied a fair trial because of the prosecutor's challenged remarks at closing argument.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Brian K. Zahra