

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK PUTNAM,

Defendant-Appellant.

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UNPUBLISHED

May 25, 2001

No. 222829

Oakland Circuit Court

LC No. 96-146067-FH

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), carrying a concealed weapon, MCL 750.227; MSA 28.424, and malicious use of a service provided by a communications carrier, MCL 750.540e(1)(a); MSA 28.808(5)(1)(a). Defendant was sentenced to concurrent terms of one to twenty years' imprisonment for the possession of cocaine conviction, one year of probation for the CCW conviction and 90 days for the malicious use of a telephone conviction, to run consecutively to the mandatory two-year prison term for felony-firearm. We affirm.

Defendant first alleges three instances of prosecutorial misconduct. Claims of prosecutorial misconduct are reviewed case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). When reviewing alleged instances of prosecutorial misconduct, we examine the pertinent portions of the record and evaluate the prosecutor's remarks and conduct in context. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). The guiding inquiry is whether the prosecutor's conduct and remarks ultimately denied defendant of a fair trial. *People v McAllister*, 241 Mich App 466, 475; 616 NW2d 203 (2000).

Defendant first asserts that the prosecutor improperly elicited evidence that defendant had physically assaulted his wife. A hotly contested issue at trial was whether defendant intended to distribute the cocaine discovered by the police in his vehicle. Throughout trial, defendant maintained that he intended to reserve the cocaine for personal use. During direct examination by the prosecutor, defendant's wife testified that defendant used scales retrieved by the police in

his vehicle to weigh cocaine. During cross-examination however, defendant's wife recanted this testimony, stating that defendant used the scales to weigh gunpowder.

Attempting to clarify this inconsistency, during redirect examination the prosecutor inquired whether defendant's wife feared telling the truth. Defendant's wife explained that she was reluctant to see defendant in trouble because of her fear that he might come after her. After the prosecutor asked her if defendant had hurt her in the past, defendant's wife answered in the affirmative.

Viewing the prosecutor's questioning of the witness in context, we are not persuaded that her conduct was improper. Our review of the record leads us to conclude that the prosecutor was properly attempting to discover the reasons for the witness' inconsistent testimony. Further, there is no indication in the record that the prosecutor's attempt to garner information about why the witness' testimony was inconsistent was motivated by bad faith. See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (admission of evidence by prosecutor does not amount to misconduct where there is no evidence of bad faith).

Defendant next contends that the prosecutor improperly attacked defense counsel's character during closing argument. During rebuttal, the prosecutor commented that defense attorneys often accuse the police of subterfuge in an attempt to discredit the prosecution's case. On appeal, defendant maintains that this was an attack on defense counsel's character that undermined his right to a fair trial.

We recognize that a prosecutor's direct and personal attack on a defense attorney's character may infringe on the presumption of innocence and improperly shift the jury's focus from the evidence to defense counsel's personality. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Vital to our analysis is a review of the prosecutor's comments in context, because otherwise questionable remarks may not rise to error requiring reversal where they are responsive to defense counsel's arguments. *Kennebrew*, *supra* at 608; *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). During closing argument, defense counsel alleged that the police tampered with evidence discovered in defendant's vehicle. Because the prosecutor's comments about defense tactics were clearly responsive to defense counsel's allegations, we are satisfied that defendant was not denied a fair trial under these circumstances. Further, any prejudice that may have inured to defendant was alleviated by the trial court's subsequent instruction to the jurors that the lawyers' comments were not evidence. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant also argues that the prosecutor improperly referred to defendant's history of past violence towards his wife during the course of an objection. Because defendant failed to raise a timely objection at trial, we review for plain error affecting defendant's substantial rights. *Schutte*, *supra* at 721. During redirect examination, defense counsel questioned defendant about the frequency and extent of arguments that occurred between defendant and his wife. Objecting to this line of questioning, the prosecutor made reference to defendant's past physical assaults of his wife.

In our view, this isolated remark did not undermine defendant's right to a fair trial. Had defendant timely objected to this remark, "a prompt, curative instruction could have removed any

taint the prosecutor's brief comment may have caused." *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Further, our review of the record demonstrates that the trial court twice instructed the jurors that the lawyers' statements and comments were not evidence. Consequently, we are satisfied that reversal is not warranted. *Id.* at 382-383.

Defendant also asserts that the trial court erred by failing to properly credit him for time served before trial. According to defendant, the credit for the 90 days he spent in jail awaiting trial should have been applied to his felony sentences, rather than to his sentence for malicious use of a telephone. Defendant's challenge implicates MCL 769.116b; MSA 28.1083(2), which provides:

Whenever any person is hereafter convicted of any crime within this state and has served time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

In our opinion, the trial court erred in not crediting the 90 days against defendant's sentence for felony-firearm, because defendant's remaining sentences ran consecutively to the mandatory two-year prison term. This Court has repeatedly observed that where consecutive sentences are imposed, any credit for time served should be applied against the first sentence. *People v Alexander (After Remand)*, 207 Mich App 227, 229; 523 NW2d 653 (1994); *People v Johnson*, 205 Mich App 144, 146-147; 517 NW2d 273 (1994); *People v Watts*, 186 Mich App 686, 687; 464 NW2d 715 (1991); *People v Cantu*, 117 Mich App 399, 403; 323 NW2d 719 (1982). However, defendant's challenge has been rendered moot because he has served the two-year term for felony-firearm, and the one-year minimum term for the possession conviction. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994); *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Peter D. O'Connell  
/s/ Jessica R. Cooper