

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YASHICA NICOLE COOPER,

Defendant-Appellant.

UNPUBLISHED

October 9, 2001

No. 216180

Genesee Circuit Court

LC No. 98-002307-FC

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of armed robbery, MCL 750.529, and one count of assault with intent to rob while armed, MCL 750.89. The convictions stem from her alleged involvement in a bank robbery in Flint on September 22, 1997. She was sentenced to three concurrent prison terms of fifteen to thirty years for each conviction. She appeals as of right. We affirm.

Defendant first argues that she was denied a fair trial by improper prosecutorial argument. We review the challenged comments in context to determine whether defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, defendant failed to object to some of the challenged comments. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Upon review of the entire record, we conclude that defendant was not denied a fair trial by prosecutorial misconduct.

Defendant argues that the prosecutor improperly suggested to the jury that she was a passenger in a stolen vehicle at the time of her arrest. Apparently, when the police arrested defendant and her boyfriend, Dexter Cooper,¹ Dexter was driving a vehicle that had been car-jacked. The prosecutor asked Dexter about the vehicle, and Dexter denied knowing anything about it. During closing argument, the prosecutor argued that Dexter's denial impeached the

¹ Defendant and Dexter were accused of committing the bank robbery together, and were tried jointly.

credibility of his additional denial of ever having owned a motorcycle, which was the getaway vehicle for the bank robbery. Viewed in context, the prosecutor's comments never insinuated that the vehicle was stolen. Rather, the prosecutor was simply impeaching Dexter's credibility. It is appropriate for the prosecutor to argue from the evidence that a witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Next, defendant argues that the prosecutor, during his rebuttal argument, commented on the failure of the defense to call a witness to rebut certain allegations. Although the trial court denied defendant's motion for a mistrial, the court gave a curative instruction to the jury, stressing that defendants had no obligation to produce witnesses and the prosecutor bore the full burden of proving each element of the charged offenses beyond a reasonable doubt. "The goal of a defense objection to improper remarks by the prosecutor is a curative instruction." *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Here, that goal was accomplished. The trial court's curative instruction removed any prejudice that resulted from the prosecutor's comment.

Defendant also argues that the prosecutor improperly commented that he had called more witnesses than defendant did. Because defendant failed to object to this comment, we review for plain error affecting her substantial rights. *Carines, supra* at 763. Had defendant objected, the trial court could have granted a curative instruction. In any event, the trial court's standard instructions stressed to the jury that the quantity of witnesses was irrelevant. In the absence of an objection and the opportunity for a curative instruction, the trial court's standard instruction on the quantity of witnesses sufficed to remove any prejudice from the prosecutor's comments. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). We find no plain error warranting reversal.

Next, defendant argues that the prosecutor improperly denigrated defense counsel by calling his argument amusing. Defendant failed to object to this comment, and in order to prevail, she must show plain error affecting her substantial rights. *Carines, supra*. In the first place, the challenged comments were not directed at defense counsel, but rather, at counsel for the codefendant. Further, the comments were directed at the flaws in codefendant's counsel's closing argument. The prosecutor's comments did not personally attack defendant or defense counsel, nor did they shift the jury's focus from the evidence to defense counsel's personality. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). Defendant has not shown plain error.

Defendant also argues that the prosecutor improperly elicited sympathy for a key prosecution witness by arguing that she was not tough and that she cried on the stand. Defendant also claims that the prosecutor stated that the witness was not given any favors in return for her testimony. To the contrary, we see nothing improper in the prosecutor's comments. A prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Finally, defendant argues that the trial court violated MCR 6.414(F) by instructing the jury before the parties made their closing arguments. Defendant failed to object, so we review this issue for plain error affecting substantial rights. *Carines, supra* at 763. Under MCR 6.414(F), the trial court must instruct the jury after closing arguments are made. However, the

rule also provides for an exception: “with the parties’ consent, the court may instruct the jury before the parties make closing arguments.” MCR 6.414(F). Here, the trial court instructed the jury before closing arguments, but the court did not obtain the consent of the parties on the record.² Therefore, the court appears to have violated the court rule.

However, reversal is not required because defendant has not shown that she was prejudiced by this procedure. Defendant argues that she was prejudiced because the jury began its deliberations with the prosecutor’s contentious rebuttal argument fresh in its memory. Defendant claims that, in light of the complexity of the case and the heated tone of the arguments, this would have diverted the jury from calmly evaluating the evidence. We are not persuaded. It is just as likely that defendant benefited from the trial court’s procedure. Before the contentious closing arguments were made, the trial court instructed the jury that the arguments of counsel are not evidence and those arguments should be accepted only to the extent that they are supported by the jury’s common-sense understanding of the evidence. Thus, when the jury heard the prosecutor’s argument, it was hearing it through the “filter” of the court’s instructions. In the absence of any objection, which would have allowed the trial court to avoid or correct the error, we conclude that defendant has not shown any prejudice.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra

² Although a bench conference was held immediately before the court proceeded with jury instructions, we decline to infer consent from an off-the-record bench conference. If counsel for the parties consented, the trial court should have placed that consent on the record.