STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2002
v MICHAEL WALKER, Defendant-Appellant.	No. 230191 Wayne Circuit Court LC No. 99-011351

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v KEITH JAMES WALKER, Defendant-Appellant.	No. 230192 Wayne Circuit Court LC No. 00-000324

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

PER CURIAM.

After a jury trial, Michael Walker was convicted of kidnapping, MCL 750.349, and possession of a firearm during the commission of a felony, MCL 750.227b, and Keith James Walker, Michael's brother, was convicted of kidnapping, MCL 750.349. Michael Walker was sentenced to a term of seven to twenty-five years for the kidnapping conviction, to run consecutive to a term of two years for the felony-firearm conviction. Keith James Walker was sentenced, as a third habitual offender, MCL 769.11, to a term of eighteen to forty years for the kidnapping conviction. Defendants, Michael Walker and Keith James Walker, appeal as of right[1]. We affirm.

[1] A third brother, Victor Walker, was tried with Michael and Keith James, but his conviction is not part of this appeal.

I

Defendants first argue that three different statements made by the prosecutor during rebuttal closing argument shifted the burden of proof, thus depriving them of a fair trial. We disagree.

A prosecutor's responsive arguments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). It is improper for the prosecutor to suggest that a defendant must prove something because this would tend to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, where a defendant testifies at trial or advances, either explicitly or implicitly, an alternative theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. *Id*.

We have carefully reviewed the prosecutor's rebuttal argument and find that it was a proper response to the closing arguments of the defense attorneys. The prosecutor was not commenting on defendants' failure to present evidence in this case, but was contesting the theories presented by defendants' closing arguments and the argument that the prosecutor failed to produce corroborating witnesses. *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999). Further, we find that it is unlikely that the jury was affected by complained-of portions of the prosecutor's rebuttal. First, in objecting, the defense expressly made it clear that the burden of proof was on the prosecutor, and not on defendants. Second, the jury had been extensively subjected to explanations regarding the proper burden of proof in the case. Third, although a curative instruction was not requested, defendants were not denied a fair trial because the court adequately instructed the jury on the proper burden of proof. Furthermore, the prosecutor repeatedly explained to the jury that defense counsel had failed to support their contentions with the evidence available to them at trial. The challenged comments were proper because they were responsive to defendants' closing arguments.

II

Defendants next argue that the trial court abused its discretion when it admitted into evidence as an excited utterance a police officer's testimony that the complainant said that he had been kidnapped and pistol-whipped. Specifically, defendants argue that the 1½ hours between the time of the complainant's alleged escape and his report to the police afforded him enough time to fabricate the statement. We disagree.

The complainant testified that he was abducted on a city street by a man brandishing a gun. He was taken at gunpoint to a nearby house where two other armed men, one of them defendant Michael Walker, were present. The victim's shirt, money and jewelry were removed, he was pistol whipped about the head and face and a cocked shotgun was placed in his mouth. He was injured and bleeding when he was taken to the basement where his hands and head were taped with black electrical tape and his ankles were chained to a bed. Over the next three days the victim was confined to the basement where he was brutalized by the men who then included defendant, Keith James Walker, and was kept without food, water or toilet facilities. On the

third day he was able to free himself and escape. He went to a nearby friend's home where he washed up, changed clothes, and then took a cab to the police station where he tried to tell his story. The officers testified that the victim was injured, tired, dizzy and emotional, at times crying and disoriented.

The decision whether to admit evidence is left to the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id*.

Under MRE 803(2), a hearsay statement is admissible if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2);). In *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), the Court held that there are two primary requirements for an excited utterance: (1) a startling event, and (2) a resulting statement was made while the declarant was under the excitement caused by that event. There is no express time limit for excited utterances. *Id*., p 551. The lack of capacity to fabricate, rather than the lack of time to fabricate, is the focus. *Id*. Although the amount of time that passes between the event and the statement is an important factor to consider in determining whether the declarant was still under the stress of the event when the statement was made, it is not dispositive. *Id*. Whether a statement made in response to questioning should be admitted under MRE 803(2) depends on the circumstances of the questioning and whether it appears that the statement was the result of reflective thought. *Id*., p 553.

Here, all of the circumstances support a finding that complainant's statements were the result of a startling event and constituted an excited utterance. There is nothing to suggest that the interval between the victim's escape and his arrival at the police station gave rise to reflective fabrication. Accordingly, the trial court properly admitted this testimony into evidence under MRE 803(2).

III

Defendants finally argue that they were denied a fair trial due to the prosecutor's improper injection of inadmissible evidence of prior bad acts. We disagree. This Court reviews for an abuse of discretion the trial court's denial of a motion for mistrial. *Messenger, supra,* p 175.

Generally, an unresponsive, volunteered answer that injects improper evidence into a trial is not grounds for a mistrial unless the prosecutor knows in advance that the witness will give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). However, police witnesses have a special obligation not to venture into forbidden areas. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

Here, the officer in charge of the case, Investigator Granger, testified that, in order to secure defendants' arrest, he worked with "an officer that was very familiar with the individuals' names in this incident," and that he had received some computer information about defendants. Investigator Granger did not testify that defendants had committed prior bad acts, prior arrests,

prior charges, or prior incidents of kidnapping or assault. However, it could be inferred that defendants had had a record with the law enforcement agency because their names were known to at least another officer and their names were included in the police computer system.

However, we find that even if the testimony was improper, it is unlikely that it was given undue weight by the jury. Importantly, as the trial court noted, the complainant's testimony showed that the purpose for his abduction was because the Walker brothers wanted to know the whereabouts of the complainant's friend who allegedly was involved in shooting Victor Walker. Presumably, the jury could infer that Victor Walker's name, at least, would have been known to the police regarding that incident. Moreover, Granger's remark was the only reference to defendants' prior contact with police made during the course of the seven-day trial. There was testimony indicating that the complainant, himself, was not unknown to the police. The complainant admitted that he had a juvenile record and that there was an outstanding warrant against him. The complainant's testimony of his three days of confinement during which defendants were armed, and the police officers' testimony of the complainant's mental and physical conditions when he made his police statement, likely carried more weight with the jury than the isolated reference to defendants' prior contact with police. *Holly*, *supra*, p 416. Defendants were not denied a fair trial as a result of Granger's unresponsive answer.

Defendants further assert that the prosecutor deliberately elicited the testimony. Here, there is nothing to indicate that the prosecutor intended to elicit the testimony because the prosecutor immediately recognized the witness' error, and followed the defense's objection with a motion to strike the answer and a statement that offered the jury a plausible explanation for what the prosecutor was attempting to ask Granger without repeating the offending answer or drawing further attention to it.

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White