

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHAN FORD,

Defendant-Appellant.

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UNPUBLISHED

June 25, 2002

No. 228537

Wayne Circuit Court

LC No. 98-012138

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 200 to 480 months for the armed robbery convictions and a consecutive two-year term for the felony-firearm conviction. He appeals as of right, and we affirm.

Defendant first argues that he was improperly convicted of two counts of armed robbery, either because the two convictions violate the guarantee against double jeopardy, or because there was insufficient evidence to support the second conviction. We disagree. The guarantee against double jeopardy protects against multiple punishments for the same offense. *People v Wilson*, 454 Mich 421, 427; 563 NW2d 44 (1997). In this case, a McDonald's manager and an employee were both ordered back inside the restaurant and held at gunpoint. The manager was forced to open the safe, and defendant and co-defendant took the money that was inside.

On appeal, the prosecutor initially conceded that one of the armed robbery convictions should be vacated on double jeopardy grounds, *People v Wakeford*, 418 Mich 95, 111; 341 NW2d 68 (1983), and argued that a conviction for assault with intent to rob while armed should be entered in its stead. The prosecutor subsequently filed a supplemental brief withdrawing that concession based on *People v Rodgers*, 248 Mich App 702; \_\_\_ NW2d \_\_\_ (2001), and *People v Davis*, \_\_\_ Mich App \_\_; \_\_\_ NW2d \_\_ (Docket No. 229130, issued 4/9/02). We agree that *Rodgers* is controlling. In *Rodgers*, the Court found no double jeopardy violation where the defendant was convicted of three counts of armed robbery based on evidence that he assaulted three employees of a muffler shop with a shotgun and took money from the cash drawer, which

the store manager opened.<sup>1</sup> The *Rodgers* Court upheld the three convictions based on the single taking, concluding that the defendant's right to possess the money was not superior to the victims', and that the money was taken from the presence of all three victims. The instant case presents similar circumstances; under *Rodgers* there was sufficient evidence to sustain the conviction with respect to the employee as well as the manager, and there is no double jeopardy violation.

Defendant also argues that he was denied a fair trial because of several instances of prosecutorial misconduct. Prosecutorial issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers allegations of prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Where no objection is raised below, we review the issue for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte*, *supra* at 721.

First, defendant argues that the prosecutor deliberately elicited testimony that defendant initially refused to make a statement to the police. Defendant moved for a mistrial on this basis. The prosecutor explained that he did not intend to argue that defendant's guilt could be inferred from his refusal to give a statement; rather, he brought out that rights had been given, but no statement had been made because defense counsel had informed him that she intended to bring out the fact that defendant was asked for a statement three times, but only gave one statement. The trial court agreed that the prosecutor made a "poor choice of words" in questioning the witness, but denied defendant's motion for a mistrial. In closing, defense counsel presented argument regarding the circumstances under which defendant gave his statement, including that three attempts were made by police to obtain a statement. The prosecutor responded, acknowledging defendant's right to talk or not talk as he pleased, and arguing that the circumstances did not undermine the reliability of the statement. Defendant again moved for a mistrial. The court noted that it could have "told the jury to strike" the prosecutor's comments if defendant had raised a timely objection and denied defendant's motion.

Although we agree that the prosecutor's question and comments may have been inartful, we note that defendant did not testify, and there was no attempt to use defendant's prior silence for impeachment purposes. *People v Dennis*, 464 Mich 567, 577-578; 628 NW2d 502 (2001). Any prejudice was dispelled by the trial court's instruction that the arguments of the attorneys are not evidence. Moreover, defendant made clear that he did not want a curative instruction, only a mistrial. We conclude that a curative instruction could have cured any prejudice. Further, it is clear from the record that the jury's attention was not focused on any inference of guilt to be drawn from defendant's initial refusal to make a statement, but on the credibility of the statement ultimately made, given the timing and circumstances of the statement. We find no reversible error.

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<sup>1</sup> The defendant attempted to obtain money from all three men directly, but the two employees had no money. The opinion makes clear that the convictions were based on the defendant's taking money from the cash drawer.

Defendant also argues that he was denied a fair trial because the prosecutor elicited testimony that the police followed the sound of gunshots when they arrived on the scene. An officer testified that he heard someone “jumping a fence” and then heard six gunshots. The police followed the sound to a vacant house. They were then approached by someone who gave them information. They then went to the house where defendant was arrested and evidence of the crime was found. We agree that the testimony concerning the gunshots was unnecessary. However, no evidence was admitted to link defendant to the gunshots, and the prosecutor did not attempt to introduce the evidence to establish guilt, but rather to explain how the police ended up at the house. Further, as the trial court noted, any prejudice caused by the testimony was “cleared . . . up” by defense counsel’s cross-examination of the witness, and the trial court also offered a curative instruction. Defendant was not denied a fair and impartial trial on this basis. *Reid, supra*.

Defendant further contends that the trial court abused its discretion in denying his motion for a mistrial based on the evidence that a police officer pursued the sound of gunshots. This Court will find an abuse of discretion only where the trial court’s denial of the motion deprived defendant of a fair and impartial trial. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). Defendant asserts that the prosecutor promised not to introduce evidence that gunshots were fired without giving defendant an opportunity to challenge admission of the testimony. The record establishes that the prosecutor told the court that he intended to introduce the evidence that shots were fired but would not introduce evidence that they were fired at the police officers, and that he would not mention the evidence in opening. The prosecutor should have alerted the court when he reached the point that he intended to ask about the gun shots. On the other hand, defendant should have objected immediately when the testimony was elicited. In all events, because the evidence did not deprive defendant of a fair and impartial trial, the court did not abuse its discretion in denying defendant’s request for a mistrial. *Id.*

Defendant also asserts that the prosecutor made numerous improper arguments during rebuttal. None of the challenged remarks were objected to below. The prosecutor is not required to use the “blandest possible terms” to state his inferences and conclusions. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, in light of the eyewitness identification and defendant’s confession, we are not convinced that the challenged comments, considered in context, require reversal. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). We find no plain error affecting defendant’s substantial rights. *Carines, supra*.

Finally, defendant argues that he was denied a fair trial because of the cumulative effect of the alleged errors. Because no errors have been found with regard to any of defendant’s challenges, there can be no cumulative effect. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Helene N. White