

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK DAVID WEST,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 231960

Ingham Circuit Court

LC No. 00-075977-FH

Before: Murray, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of breaking and entering a building, MCL 750.110, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged in connection with a breaking and entering at a high school. Evidence produced at trial placed defendant on the school grounds and inside the building at the time of the incident.

Brad Bushard testified that he pleaded guilty of breaking and entering in connection with the break-in, and he received nothing in exchange for his testimony. He indicated he entered the school, but he was unsure as to whether defendant did so. In response to questions from the prosecutor Bushard admitted that he recalled making prior statements in which he said that defendant also broke into the building and assisted him in attempting to steal computer equipment, but contended that he lied when he made those statements.

Bushard testified he could not identify defendant as one of two persons depicted on a security video made at the school, and denied he identified defendant after viewing the video on a previous occasion. Bushard denied stating on a previous occasion that he was concerned for his safety if he testified against defendant. During closing argument the prosecutor noted that Bushard had given inconsistent statements, and suggested that Bushard changed his story because he feared for his safety. The jury found defendant guilty as charged.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The reviewing court must examine the pertinent portions of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A claim

of prosecutorial misconduct is reviewed de novo. The trial court's findings of fact are reviewed for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues he was denied a fair trial by the prosecutor's improper testimonial questioning of Bushard. We disagree and affirm defendant's conviction. Defendant did not object to the prosecutor's allegedly improper questions. Unpreserved issues are reviewed for plain error. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The exchanges between the prosecutor and Bushard established that Bushard's testimony at trial was inconsistent with his previous statements.

At trial, Bushard denied that defendant participated in the break-in, and maintained he was lying when he told the prosecutor and his probation officer that defendant entered the school and assisted in placing computer equipment in a duffel bag. The prosecutor was entitled to attack Bushard's credibility, MRE 607, and did so after laying a proper foundation for the prior inconsistent statements. *People v Rodriguez*, 251 Mich App __; __ NW2d __ (Docket Nos. 208845, 210561, issued April 26, 2002 at 9:05 a.m.), slip op at 11-12. The prosecutor's remarks were made in good faith in response to Bushard's inconsistent testimony. Furthermore, given the existence of other evidence establishing defendant's guilt, especially that placing defendant inside the building, we conclude the prosecutor's remarks did not result in prejudice. No plain error occurred. *Carines*, *supra*.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Brian K. Zahra