

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR JEFFERSON,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 233566

Monroe Circuit Court

LC No. 00-030721-FH

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

PER CURIAM.

Defendant appeals as of right from a jury conviction of larceny under \$20,000, MCL 750.356(3)(a), for which he was sentenced as an habitual offender, third offense, MCL 769.11, to two to ten years in prison. We affirm.

Defendant first contends that he was denied his right of confrontation under *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968). A codefendant, Andre Ponder, pled guilty before defendant's trial and testified against defendant. Ponder testified about statements made by the victim and statements made by defendant. The issue has not been preserved because defendant failed to object below on the same ground asserted on appeal.¹ *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992). Therefore, review is precluded unless the defendant demonstrates plain error that affected the outcome of the lower court proceedings, and this Court determines that the error resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In *Bruton*, "the Court held that a defendant is deprived of his . . . right of confrontation when the facially incriminating unredacted confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." *People v Banks*, 438 Mich 408, 415; 475 NW2d 769 (1991). "The ruling in *Bruton* has subsequently been limited to situations in which facially incriminating statements made by nontestifying codefendants are used at trial." *People v Frazier (After Remand)*, 446

¹ At trial defendant objected on general hearsay grounds while on appeal he claims violation of the right to confrontation.

Mich 539, 546; 521 NW2d 291 (1994). *Bruton* is in no way implicated here. The victim was not a codefendant and his statements, as recounted by Ponder, did not implicate defendant. Ponder, a codefendant, did implicate defendant. However, he testified as to his own conversations with defendant and was subject to cross-examination. The statements implicating defendant were his own and were admissible under MRE 801(d)(2)(A).

Defendant next contends that the prosecutor improperly vouched for a witness during closing argument. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Defendant failed to preserve this issue by objecting below and thus review is precluded unless defendant establishes plain error that affected the outcome of the trial. *Id.*

The prosecutor cannot vouch for the credibility of a witness or suggest that he has some special knowledge concerning a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). This rule is not violated by evidence that a witness is testifying pursuant to a plea bargain requiring him to give truthful testimony, *id.*, unless the prosecutor uses it to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988);

Because Ponder testified that the plea agreement required him to testify truthfully and the prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to his theory of the case, *Bahoda*, *supra* at 282, it was not improper for the prosecutor to say that Ponder had been asked to testify truthfully. The prosecutor's remark that Ponder "testified against a good friend because the facts were true" was arguably improper. However, the statement was made in response to defense counsel's argument and an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Moreover, the prosecutor did not suggest that she had special knowledge which led her to believe that Ponder had been truthful, and "[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). Additionally, the court instructed the jury that it was their duty to determine the credibility of the witnesses and that the lawyers' statements and arguments were not evidence. Under these circumstances, the one isolated remark does not warrant reversal. *Id.*

Affirmed.

/s/ Helene N. White
/s/ Janet T. Neff
/s/ Kathleen Jansen