

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE PROVIENCE,

Defendant-Appellant.

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UNPUBLISHED  
December 6, 2002

No. 233758  
Wayne Circuit Court  
LC No. 00-008068

Before: Meter, P.J., and Saad and R.B. Burns\*, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to consecutive terms of thirty to sixty years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the prosecutor committed four instances of misconduct requiring reversal. However, defendant did not object below to the comments he challenges on appeal. Accordingly, we review defendant's claims for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief under the plain error doctrine, a defendant must demonstrate the existence of a plain, i.e., clear or obvious, error that affected the outcome of the trial. *Id.*; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if a defendant satisfies this initial burden, reversal is appropriate only if the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763; *Schutte, supra* at 720. Moreover, "[n]o 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.

We review claims of prosecutorial misconduct on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). We must examine the prosecutor's remarks in context to decide if the comments deprived the defendant of a fair and impartial trial. *Id.* Moreover, "[a] prosecutor's comments must be considered in light of the defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

improper remarks may not require reversal if the remarks were made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant first contends that the prosecutor made an improper civic duty argument by stating that (1) drug dealers “don’t have the same value systems that we have,” (2) “It’s uncontroverted that this man is a dope pusher,” and (3) “[defendant] destroys communities” and “destroys lives for a living.” Defendant objects to these statements as well as to the following remarks: “Maybe some of you have been touched by [defendant’s] treachery. I don’t know. But I know they don’t care.”

A prosecutor may not urge jurors to convict a defendant as part of their civic duty. See *People v Bahoda*, 448 Mich 261, 283-285; 531 NW2d 659 (1995). Such civic duty arguments are condemned because they inject issues into the trial that are broader than the defendant’s guilt or innocence and also “because they encourage the jurors to suspend their own powers of judgment.” *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

Here, no evidence disputed the testimony by Larry Wiley, an eyewitness, that defendant was a drug dealer and that he had seen defendant carry a gun almost every day for 1½ years. Accordingly, the prosecutor did not err by stating, “It’s uncontroverted that this man is a dope pusher.” Indeed, a prosecutor’s remark that evidence is undisputed is proper in urging the weight to be given the testimony. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). However, the prosecutor’s additional remarks touched on social issues and tended to inject issues broader than defendant’s guilt or innocence into the case. See, generally, *People v Cooper*, 236 Mich App 643, 650-651; 601 NW2d 409 (1999).

Nevertheless, “[a]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *Kennebrew, supra* at 608. Here, the prosecutor was responding to defense counsel’s assertion that defendant was a “pretty ordinary person” and that defendant’s “daily life is not one that involves violence.” Furthermore, the trial court instructed the jury, after the closing and rebuttal arguments, that the attorneys’ statements were not evidence and that the jury should consider only admissible evidence in their deliberations regarding defendant’s guilt or innocence. The trial court also instructed the jury that the evidence relating to defendant’s drug dealing was admissible only for the limited purposes of demonstrating the relationship between the eyewitness and defendant and not to show defendant’s bad character. We conclude that these instructions cured any undue prejudice from the prosecutor’s statements.<sup>1</sup> See *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). Moreover, any prejudicial effect of the prosecutor’s comments also could have been cured by a contemporaneous curative instruction. *Schutte, supra* at 721.

Under the circumstances, we discern no clear or obvious error with respect to the comments. *Carines, supra* at 763. Moreover, in light of the evidence of defendant’s guilt introduced at trial, the comments did not likely affect the outcome of the case. *Id.* Appellate relief is unwarranted.

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<sup>1</sup> We note that jurors are presumed to follow the instructions of the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next contends that the prosecutor erred by stating in his closing argument that he knew before trial what the testimony was going to be because “I know what the truth is.” A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor’s personal knowledge or the prestige of his office. *Bahoda, supra* at 277, 286-287. Defendant claims that the prosecutor’s statements constituted an improper injection of the prosecutor’s personal belief in defendant’s guilt into the case. We conclude that the prosecutor’s statements did indeed skirt the bounds of propriety. A prosecutor must not intimate that he has special knowledge about the truth. *Id.* at 277.

Nevertheless, we cannot conclude that the remarks in question warrant reversal in this case. Indeed, as noted earlier, otherwise improper remarks may not require reversal if the remarks are made in response to defense counsel’s arguments. *Kennebrew, supra* at 608. The prosecutor, in making the challenged statements, was specifically responding to defense counsel’s remark in his opening statement that the prosecutor had chosen to “get out on a limb . . . and try to tell you what the witnesses are going to tell you later.” Moreover, the trial court’s instructions made clear that the attorney’s statements could not be used to decide defendant’s guilt or innocence, see *Long, supra* at 588, and any prejudicial effect of the prosecutor’s comments also could have been cured by a contemporaneous curative instruction. *Schutte, supra* at 721. We thus discern no *clear* or *obvious* error with respect to the comments, and we also conclude, in light of the evidence introduced at trial, that the comments did not affect the outcome of the case. *Carines, supra* at 763. Once again, relief is unwarranted.

Third, defendant contends that the prosecutor erred by vouching for the credibility of witness Wiley. Defendant specifically objects to the prosecutor’s statements during rebuttal that Wiley was “a man trying to salvage his soul,” that “part of that salvation is coming here and telling the truth,” and that “[h]e told . . . the honest to God truth.”

“[A] prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness’ truthfulness.” *Bahoda, supra* at 276. Once again, however, the prosecutor was responding to defense counsel’s arguments. Indeed, defense counsel argued in closing that the jury should not believe “that crack[-]addicted lying burglar Larry Wiley.” Moreover, the prosecutor’s statement, when read in context, see *McElhaney, supra* at 283, did not amount to improper vouching. The prosecutor simply referred to the witness’ testimony and demeanor and argued that the witness was credible despite his history of drug use. No clear or obvious error is apparent, and reversal is thus unwarranted. *Carines, supra* at 763.

Defendant lastly contends that the prosecutor argued facts not in evidence by stating that Wiley testified despite being scared that defendant would kill him for doing so. Defendant contends that the prosecutor’s statements were made in bad faith because the trial court disallowed any mention of an alleged gunshot fired at Wiley before trial.<sup>2</sup> However, in light of Wiley’s testimony, the prosecutor did not argue facts not in evidence in making the challenged statement. Indeed, Wiley testified that defendant carried a gun and that after witnessing the

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<sup>2</sup> The court stated that, because there was no evidence linking this separate episode of an alleged shooting to defendant or his agents, this information could not be introduced as evidence at trial.

murder he “was scared” and “was trying to get away” because he “didn’t want them to see me.” Wiley also testified that “I’d probably been dead, too, they know I was there.” The statements that defendant now challenges were merely reasonable inferences from this testimony. See *Bahoda, supra* at 282. Accordingly, no clear or obvious error is apparent, and reversal is once again unwarranted. *Carines, supra* at 763.

We reiterate that prosecutor skirted the bounds of propriety in this case by making improper civic duty arguments and intimating that his office had special knowledge about the truth. Nevertheless, we cannot conclude under the specific circumstances of this case that the comments in question amounted to a clear or obvious error that affected the outcome of the case. *Id.* Moreover, we do not believe that the comments in question resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763; *Schutte, supra* at 720. We thus affirm defendant’s convictions and sentences.

Affirmed.

/s/ Patrick M. Meter  
/s/ Henry William Saad  
/s/ Robert B. Burns