

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODERICK GUNN,

Defendant-Appellant.

UNPUBLISHED

March 30, 2004

No. 244921

Wayne Circuit Court

LC No. 01-010439-01

Before: Zahra, P.J., and Saad and Schuette, JJ.

MEMORANDUM.

Defendant appeals as of right his convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm.

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). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues that he was denied a fair trial by the prosecutor's improper comment during defense counsel's closing argument. We disagree and affirm defendant's convictions. Defendant failed to object to the prosecutor's comment; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). During closing argument defense counsel pointed out complainant's absence from the proceedings. The prosecutor interrupted to explain that complainant was attending his grandmother's funeral. A prosecutor may not appeal to the jury to sympathize with the victim. *Watson, supra*, 591. The prosecutor's comment, while not made in the context of a formal objection or rebuttal argument, was prompted by defense counsel's implication that complainant was deliberately absenting himself from the proceedings. Viewed in context, the prosecutor's comment was not improper. *Noble, supra*; *Schutte, supra*. Any prejudice created by the comment could have been cured by a

timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No plain error occurred. *Carines, supra*.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette