

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENDERSON GARRIS,

Defendant-Appellant.

UNPUBLISHED

April 27, 2004

No. 245793

Muskegon Circuit Court

LC No. 02-047208-FC

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of two counts of armed robbery, MCL 750.529. We affirm.

The instant case arises out of the armed robbery of Anthony and Vanessa Davis at their clothing store, operated out of the basement of their home, by defendant and codefendant Darshawn Larkin. Defendant admitted participating in the robbery, but asserted the affirmative defense of duress.

Defendant first argues that there was insufficient evidence presented by the prosecution to sustain a guilty verdict, where he committed the crimes under duress, and the prosecution did not meet its burden of disproving that defense beyond a reasonable doubt. When determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

At trial, defendant raised the affirmative defense of duress, which “excuses the defendant from criminal responsibility for an otherwise criminal act because the defendant was compelled to commit the act.” *People v Luther*, 394 Mich 619, 622; 232 NW2d 184 (1975). In order to properly raise the affirmative defense of duress, “the defendant has the burden of producing ‘some evidence from which the jury can conclude that the essential elements of duress are present.’” *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997), quoting CJI2d 7.6. A defendant successfully carries the burden of production where the defendant introduces some evidence from which a jury could conclude that:

- A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
- B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
- C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
- D) The defendant committed the act to avoid the threatened harm.” [*Id.*, 247, quoting *Luther, supra*, 623.]

The threatening conduct or act of compulsion must be present, imminent, and impending. A threat of future injury is not enough. *Lemons, supra*, 247, quoting *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920). Where a defendant produces enough evidence to put an affirmative defense into controversy, the prosecution bears the burden of disproving the affirmative defense beyond a reasonable doubt. *People v Thompson*, 117 Mich App 522, 528; 324 NW2d 22 (1982).

Assuming that defendant met his initial burden of producing evidence from which the jury could conclude that the essential elements of duress were present, the prosecution presented sufficient evidence to disprove the defense beyond a reasonable doubt. Anthony and Vanessa Davis refuted defendant’s claim of being an unwilling participant in the robbery. Anthony Davis testified that defendant struck him in the back of the head, that both defendant and Larkin went through his pockets looking for his wallet, and that defendant left the store with armfuls of clothing at least three times. Further, Anthony Davis testified that defendant did not appear to be scared or timid during the robbery. Vanessa Davis testified that when she came downstairs and her husband told her to go back upstairs, defendant told her that she could not do so. Additionally, Vanessa Davis testified that defendant was the person who asked her where the money was located, and that defendant did not appear to be timid, nervous, or cautious during the robbery.

Defendant next argues that there was insufficient evidence to sustain a guilty verdict of armed robbery regarding complainant Vanessa Davis, because there was no evidence that he took store merchandise in her presence, as required to sustain a conviction under MCL 750.529. We disagree. Vanessa Davis testified that when she came downstairs, defendant “started grabbing down clothes,” and “asked [her] as he was grabbing clothes down ‘where was the stash[?]’” Further, defendant himself conceded that he took clothing in Vanessa Davis’ presence. Thus, there was sufficient evidence from which a jury could find that every element of the crime of armed robbery was proven beyond a reasonable doubt.

Defendant next argues that he was denied the right to a fair trial where the prosecutor questioned him concerning his failure to mention the defense of duress during his interview with

Detective Trejo, because although he waived his *Miranda*¹ rights, he did not have any discussion with Detective Trejo before invoking his right to remain silent and asking for an attorney.

It is well settled that “when a defendant chooses to exercise his right to remain silent, that silence may not be used against him at trial.” *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999), citing *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). However, “where a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant’s failure to assert a defense subsequently claimed at trial.” *Avant, supra*, 509.

In *People v Davis*, 191 Mich App 29, 31-32; 477 NW2d 438 (1991), the defendant made postarrest, post-*Miranda* statements concerning a murder, but failed to assert the claim of self-defense. This Court framed the issue as: “where a defendant knowingly and voluntarily makes postarrest, post-*Miranda* warning statements but does not at that time make an exculpatory statement about any claim of self-defense and does not claim at trial to have made such an exculpatory statement, may the prosecutor question witnesses regarding the defendant’s ‘silence’ with respect to the claim of self-defense and comment about that ‘silence’?” *Id.*, 34-35. This Court held that “in such a situation, the defendant has not remained silent and that a prosecutor may properly question and comment about the defendant’s failure to assert the claim of self-defense to police at any time before trial.” *Id.*, 35.

This Court distinguished the situation from one where the defendant had not said anything following his *Miranda* warnings:

Had defendant here made no statements to police after he was advised of his *Miranda* rights, there is no question that the prosecutor’s questions and comments regarding defendant’s silence would have been improper. However, defendant here made postarrest, post-*Miranda* warning statements to the police. The fact that defendant chose to speak without indicating that he was relying on his right to remain silent compels the result that we reach today. [*Davis, supra*, 35.]

This Court then concluded:

Defendant here did not choose to remain silent. He chose to speak. Defendant cannot have it both ways – he cannot choose to speak and at the same time retain his right to remain silent. Absent an affirmative and unequivocal invocation of his right to remain silent following a postarrest, post-*Miranda* warning statement to the police, defendant cannot claim that his right to remain silent was infringed by the prosecutor’s questions and comments about his failure to assert his claim of self-defense before trial. [*Id.*, 36.]

Although defendant maintains that he did not discuss the armed robbery with Detective Trejo at all, Detective Trejo’s police report and trial testimony refute defendant’s assertions. The

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

trial court apparently accepted Trejo's testimony and rejected defendant's. Threshold questions of credibility are for the trier of fact and this Court will not disturb such findings. *People v Givans*, 227 Mich App 113; 575 NW2d 84 (1997). Therefore, as in *Davis*, defendant did not remain silent and the prosecutor properly questioned him concerning his failure to assert the claim of duress during the interview.

Defendant next argues that the prosecutor engaged in misconduct by improperly vouching for the credibility of witnesses, denigrating defendant, defense counsel, and the defense, and misrepresenting the applicable law. "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant failed to object to the alleged errors in the instant case; therefore, the issue is unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.*

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). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

During closing argument, the prosecutor argued that Anthony and Vanessa Davis were credible witnesses who had no reason to lie, and that their version of events should be believed over defendant's version of events. The prosecutor argued that Officer Luker and Officer Gust also had no motivation to lie about defendant's attempt to hide his identity. The prosecutor summarized:

And ultimately those are the witnesses for the prosecution. I would suggest to you that they are all credible. The Davises – their credibility is impeccable, the officers' credibility as well. All these witnesses, as you play them together in terms of how they connect --- they all connect perfectly. It's a sign of truthfulness. It's when things don't make sense that we can be concerned that someone is not being truthful.

While it is true that a "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," it is well settled that "the prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of the witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983) (internal citations omitted). Here, "the challenged remarks regarding defendant were made in reference to the testimony and evidence presented at trial." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor did not argue that he had some special knowledge concerning the witnesses' truthfulness, but rather argued from the facts and evidence that the prosecution witnesses were credible, whereas defendant was

not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Therefore, we conclude that the remarks were not improper.

Defendant next argues that the prosecutor engaged in misconduct by denigrating defendant, defense counsel, and the defense. A prosecutor's comments must be considered in light of defense counsel's comments; "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Watson, supra*, 592-593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In the instant case, the prosecutor's comments were made directly in response to defense counsel's suggestion during closing argument that the prosecution should have had codefendant Larkin testify, and that the prosecution should have spent more time refuting the duress defense. It was not improper for the prosecutor to respond to defense counsel's argument, and defendant was not denied a fair trial by the prosecutor's comments.

Finally, defendant argues that the prosecutor "offered a misstatement or half-truth explanation of the law of armed robbery" when he stated:

In fact, you might be interested to know that the law would suggest that if a reasonable person would believe it, going into a store with your finger positioned like a gun could be armed robbery even if it's just a finger. We certainly have more than a finger here.

In the present case, the testimony was quite clear that an actual visible article was held to Anthony Davis' head. Thus, the prosecutor's comment was gratuitous. A review of the prosecutor's remarks in context demonstrates no error affecting defendant's substantial rights.

Affirmed.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens