

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAWAN WILLIAM SMITH,

Defendant-Appellant.

UNPUBLISHED

June 8, 2004

No. 246809

Wayne Circuit Court

LC No. 02-008997

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DYANNA EILEEN MCDADE,

Defendant-Appellant.

No. 249423

Wayne Circuit Court

LC No. 02-006260-01

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Following a joint jury trial, defendant Dawan Smith was convicted by a jury of first-degree felony murder, MCL 750.316(b), assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227(b). Defendant Smith was sentenced to concurrent terms of life, eighteen and three-quarters to thirty years, and ten to thirty years' imprisonment, along with a two year consecutive term for felony-firearm. Defendant Dyanna McDade was convicted by a jury of first-degree murder, MCL 750.316, and assault with intent to commit murder. Defendant McDade was sentenced to concurrent terms of life, and eighteen and three-quarters to forty years' imprisonment. Both defendants appeal as of right and their cases have been consolidated.

First, in Docket No. 246809, defendant Smith argues, and the prosecution agrees, that defendant Smith was improperly convicted and sentenced for both felony-murder and the predicate offense of armed robbery. *People v Bigelow*, 229 Mich App 218, 221-222; 581 NW2d 744 (1998). Therefore, we vacate defendant Smith's conviction and sentence for armed robbery and remand for clerical correction of defendant Smith's judgment of sentence.

Defendant Smith also argues that he was denied a fair trial because of prosecutorial misconduct. Defendant alleges that the prosecutor impermissibly vouched for a witness and argued facts not in evidence. Prosecutorial issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers alleged prosecutorial misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Where, as here, defendant fails to raise a specific and timely objection at trial, this Court will only review the defendant's claim for plain error. *Id.*; citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In the present case, prosecution witness Dalayna McDade testified that both her sister, defendant McDade, and her sister's boyfriend, defendant Smith, told her about their involvement in the robbery. Defendant McDade, however, testified at trial that defendant Smith was not present at the scene of the crime. A prosecutor may draw inferences from the testimony and may argue that a witness, including the defendant, is not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). On the evidence presented at trial, the prosecutor was entitled to argue that Dalayna McDade was speaking the truth, and that defendant Dyanna McDade was presenting a fabrication.

Defendant Smith also argues that the prosecutor argued facts not in evidence, specifically during his rebuttal to defendant's argument regarding a search of defendants' house. As noted previously, defendant Smith failed to preserve this issue. A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Even improper remarks do not require reversal where, as here, they are of a responsive nature. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). We find no plain error requiring reversal. *Carines, supra*.

Finally, defendant Smith argues that he was not able to effectively present his misidentification defense because the trial court denied his request for a special jury instruction on the inherent unreliability of eyewitness identification testimony. This Court has previously considered and rejected the claim raised here, *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999), and we decline to address it anew.

In Docket No. 249423, defendant McDade asserts that trial counsel was ineffective. To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* First, defendant argues that counsel should have requested a severance. Defendant McDade argues that severance was required to protect her from defendant Smith's statements. Defendant Smith told the police that he and defendant McDade were at the restaurant earlier on the day of the shooting, but that he was at home and asleep by the time the crime was committed. Defendant Smith told defendant McDade's sister that defendant McDade had not done any shooting, and that he was the more culpable of the two. For severance to be required, the defendants' defenses must be mutually exclusive or irreconcilable. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). Here, where defendant McDade testified that she was present during the robbery, none of the challenged statements were inconsistent with her defense, and severance was not mandated. Defense counsel is not required to make futile motions. *People v Darden*, 230 Mich

App 597, 605; 585 NW2d 27 (1998). In addition, the jury was instructed not to consider defendant Smith's statements as evidence against defendant McDade, and a jury is presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant McDade also argues that counsel should have objected to statements she made to her sister while her sister was allegedly acting as a police agent, and to statements defendant McDade made to police following her arrest for a different crime. Again, in light of defendant McDade's testimony that she was present during the robbery, counsel's failure to object to cumulative evidence was not prejudicial. Defendant McDade has not overcome the presumption that counsel's actions were reasonable or shown that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

In Docket No. 246809, defendant Smith's conviction and sentence for armed robbery are vacated and this matter is remanded for clerical correction of the record. In all other respects, defendant Smith's convictions and sentences are affirmed.

In Docket No. 249423, defendant McDade's convictions and sentences are affirmed.

Affirmed in part, vacated in part and remanded. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello