STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK J. PARKER,

Defendant-Appellant.

UNPUBLISHED
September 21, 2004

No. 245093
Wayne Circuit Court
LC No. 01-001619-01

Before: Cavanagh, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder (premeditated), MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life in prison for the first-degree murder conviction and two years in prison for the felony-firearm conviction. We affirm.

On appeal, defendant first argues that error requiring reversal occurred when the prosecutor improperly appealed to the jurors' sense of civic duty on three separate occasions during closing and rebuttal closing arguments.[1] A claim of prosecutorial misconduct is a constitutional issue reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court must consider these issues on a case by case basis by examining the record and evaluating the remarks in context to determine if the defendant was denied a fair and impartial trial. *Id*. at 272-273. A prosecutor may not urge the jurors to convict the defendant as part of their civic duty . *Id.* at 273. Such arguments are condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence of the charges and encourage the jurors to suspend their own reasoned judgments. *Id.* Also, a prosecutor may not appeal to jury sympathy with regard to the deceased victim. *Id*.

First, defendant contends that the prosecutor's closing statement, "[W]e as a society and I as a prosecuting attorney have an interest in holding a killer, in holding a nineteen year old killer accountable," was improper. We disagree. Considering the comment in context, we find that the prosecutor did not make an improper appeal to the jury's sense of civic duty. The prosecutor's

[1] Defendant preserved this issue for appeal by objecting below.

remarks were a fair response to defendant's theory of the case: that Antoinette Webb Terrell, codefendant who hired defendant to kill her mother, victim Elizabeth Webb, should not be believed because she is culpable as the mastermind of and accomplice to the murder, and she cut a deal with the prosecutor in exchange for her testimony against defendant. *People v Jones*, 468 Mich 345, 353 n 6; 662 NW2d 376 (2003) (stating a party is entitled to fairly respond to issues raised by the other party). Additionally, the prosecutor's remarks sought to make the jurors comfortable with the idea of believing Antoinette and basing their decision to convict defendant, in part, on her testimony against him, despite the fact that they may dislike her personally and find her actions reprehensible. The prosecutor explained that sometimes, in order to punish all guilty parties, she had to make a deal with one guilty party, and the fact that Antoinette was a guilty party and received a reduced sentence did not mean she was lying about defendant's involvement.

Second, defendant objects to the following argument made by the prosecutor during her closing: "But ladies and gentlemen, ask yourself again, the focus or the interest in somebody who would be willing to do as [defendant] did for money. Do we not have an interest? He doesn't get away with murder because you don't like something about Antoinette Webb. Keep that as your focus." We believe that these statements were not an improper appeal to the jury's sense of civic duty, but rather were designed to remind the jury of arguments the prosecutor previously made during her closing. Considered in context, the "interest" the prosecutor references is the "interest" she had in gathering evidence against all guilty parties, which included, in this case, arranging for Antoinette's testimony regarding defendant's involvement. The prosecutor was permissibly urging the jurors to focus on the evidence and not their personal feelings towards Antoinette given her involvement.

Finally, defendant objects to the prosecutor's remarks during rebuttal closing argument: "Who speaks for the dead, ladies and gentlemen? You do. Please do your job." Defendant first argues that the comments are an appeal to the jury's emotions to speak for all the dead, improperly shifting the jury's focus to issues broader than defendant's guilt or innocence. Considered in context, we simply cannot agree with defendant's interpretation; the statement referred to the victim in this particular case, Elizabeth Webb.

Regarding the "Please do your job" remark, we agree with defendant that the prosecutor improperly broadened the issues of defendant's trial. Jurors may have understood this statement to impose upon them a duty to convict defendant regardless of the evidence presented against him. *People v Cooper*, 236 Mich App 643, 651-652; 601 NW2d 409 (1999). We conclude, however, that the error was harmless beyond a reasonable doubt. The remark was brief and isolated.[2] And the prosecutor made the remark in the context of urging the jurors to focus on the

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[2] Compare to *People v Wright (On Remand)*, 99 Mich App 801, 811; 298 NW2d 857 (1980), which held that the prosecutorial appeal to jurors' civic duty was not harmless:

> "I don't think counsel has given you any basis for reasonable doubt in this case. And with respect to his lawyer's reward-with respect to his lawyer's reward, I guess counsel indicated it is particularly refreshing when you know you

(continued…)

evidence of defendant's role in the death of Elizabeth and not to focus on issues outside the scope of his trial, unrelated to defendant's guilt or innocence, such as Antoinette's guilt. See *United States v Young*, 470 US 1, 18; 105 S Ct 1038; 84 L Ed 2d 1 (1985) (holding that the prosecutor's comments asking the jury to "do its job" did not influence the jury to become unfair and biased partially due to the context in which the comments were made). Further, any prejudice created by the prosecutor's comments was likely cured by the trial court's instructions to the jury that they must not let sympathy or prejudice influence their decision, the lawyers' statements and arguments are not evidence, and they may only consider evidence when making their decision. *Abraham, supra* at 276.

Defendant also argues that error requiring reversal occurred when the trial court, in violation of MCR 6.414(H), denied the jury's request to review testimony, responding as follows: "The testimony is unavailable. You must rely on your collective memory." Defendant, however, has waived appellate review of this issue. Waiver is the "intentional relinquishment or abandonment of a known right." *People v* Carter, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). Where a defendant's counsel affirmatively acquiesces in the court's handling of a jury's request, the defendant waives appellate review of any error. *Id*. at 216; *People v Fetterley*, 229 Mich App 511, 519-520; 583 NW2d 199 (1998) (appellate review precluded where both parties approved the trial court's response to the jury's request to review testimony, indicating to the jury that it did not have the transcript of the testimony available and could not make it available). Waiver precludes appellate review because any error has been extinguished. *Carter, supra* at 216.

Here, retained co-counsel, Dennis Mitchenor, agreed with the trial court's proposed answer to the jury's request and we find this agreement constitutes a waiver. Mitchenor was recognized by the court, and defendant, as defendant's attorney, retained to represent defendant along with previously appointed counsel, Samuel Churikian. Each of the attorneys had acted alone at various points during the trial. Although Churikian was lead counsel, both Churikian

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> are protecting an innocent man. I suggest it is also particularly refreshing when you know you are protecting the community in which you live.
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> "These defendants here, ladies and gentlemen,-these three defendants are the drug traffickers. They are those that supply the heroin to junkies in the city. And the cost of that, I think, ladies and gentlemen, is known to us all.
>
> "It's measured in the cost of the loss of personal property that these junkies have to steal in order to support their habits. It's measured by the loss of human life by people who no longer can live decent lives. That's the cost. Not just $11,000. Not just $48,000 or $46,000 that we are talking about here. The cost is much greater than that.
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> "I suggest to you, ladies and gentlemen, that there is only one verdict in accordance with fairness, justice, and honesty, and that is guilty as charged with respect to all three of these defendants." [*Id*. at 808-809.]

and Mitchenor, as attorneys and agents of defendant, had the actual and apparent authority to act on behalf of defendant. See *Uniprop v Morganroth*, 260 Mich App 442, 446-447; 678 NW2d 638 (2004). Furthermore, the second note from the jury came only a half hour after its previous note, for which Churikian was present. If the two attorneys had agreed to confer before making a decision, then Mitchenor could have phoned Churikian or requested time from the trial court to locate Churikian. Furthermore, once made aware of the trial court's erroneous answer the following day, Churikian should have immediately brought the issue to the court's attention so that it could be remedied, instead of waiting until after the court read the deadlocked jury instruction and the jury returned to deliberation. We do not allow a defendant to harbor an appellate parachute. *Id*. at 214.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Donald S. Owens