STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2004
v	No. 247209 Wayne Circuit Court
JOHN WESLEY WORKMAN, Defendant-Appellant.	LC No. 02-011200

Before: Fitzgerald, P.J. and Neff and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 250.227b. Defendant was sentenced to thirty to sixty years in prison for the second-degree murder conviction, two to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues on appeal that the trial court violated his constitutional rights to compulsory process and to present a complete defense by not sua sponte allowing defendant sufficient time to find Timothy Cruise, his final witness, and execute the court's bench warrant for his appearance. We disagree. Defendant never objected to the lower court's actions or decisions regarding the time frame for Cruise's appearance at trial, nor did he request a continuance or additional time to locate Cruise; therefore, he has forfeited this issue on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). This Court reviews unpreserved constitutional issues for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). For a defendant to obtain reversal of a conviction under the plain error standard, (1) the defendant must show that a plain error affecting his substantial rights has occurred, and (2) the appellate court, in its discretion, must find that the plain error either resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceeding. *Id.* at 763; *People v Rodriguez*, 251 Mich App 10, 24; 650 NW 2d 96 (2002).

The Sixth Amendment guarantees every defendant the right to compulsory process to obtain witnesses in his defense. US Const, Am VI. Michigan has a similar clause, guaranteeing the accused the right "to have compulsory process for obtaining witnesses in his . . . favor."

Const 1963, art 1, § 20. The right to offer testimony of witnesses and compel their attendance is the right to present a defense. *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). A criminal defendant's right to compulsory process, though fundamental, is not absolute. *People v McFall*, 224 Mich App 403, 408; 569 NW2d 828 (1997). It requires a showing that the witness' testimony would be both material and favorable to the defense. *Id*. Matters of compulsory process, as well as trial continuances, are decided at the discretion of the trial court. *Id*. at 411; *In re Jackson*, 199 Mich App 22, 28; 501 NW2d 182 (1993). A trial court does not err in failing to grant a continuance when there is no request. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995).

According to defendant's investigator, Cruise was a neighbor who witnessed the incident from approximately fifty yards away and across the street. On the night of the incident, Cruise heard shouting outside, prompting him to open his door. When he opened the door, he saw defendant shoot Redonte Morgan, the victim. Cruise told an investigator that at the time of the shooting, defendant was on his own porch, and Morgan was at the base of the steps, jumping up and down. Morgan was dating the daughter of defendant's fiancée, Katrina Tyson. Defendant had lived with Katrina, her mother, and her sister, Qiana Tyson, for over ten years. Defendant and Morgan were arguing and physically fighting. The dispute began when defendant ordered Katrina to return home from where she was standing across the street from her house with Morgan. At trial, the court issued a subpoena and bench warrant for Cruise in an effort to compel the witness' appearance.

Defendant urges us to follow this Court's ruling in *People v Pullins*, 145 Mich App 414, 378 NW2d 502 (1985). This case, however, is distinguishable. In *Pullins*, this Court found that the lower court erred and abused its discretion when it denied the defendant's two requests for continuances to produce an alibi witness who would have been available to testify the next day. *Id*. at 417-418. We reasoned that the defendant's right to a fair trial and compulsory process for witnesses in his favor outweighed the inconvenience of the defendant's request for a one-day continuance. *Id*. In this case, however, the trial court issued a bench warrant and gave defendant virtually the entire last day of trial to locate his witness. The record does not indicate that the trial court or the defense had any information regarding when the witness would become available, and at no time did defendant request a continuance. Further, while Cruise's testimony may have supported defendant's account of events, it is unlikely that the testimony would have established self-defense. Defendant had retreated to safety when he went into the house to get the gun; and thus, Morgan no longer presented an imminent threat. *People v Riddle*, 467 Mich 116, 119-120; 649 NW2d 30 (2002). These facts distinguish this case from *Pullins*. The trial court used appropriate discretion regarding the time it allocated to defendant to locate Cruise. *McCrady*, *supra* at 481. Accordingly, defendant has failed to establish that plain error affecting his substantial rights occurred. *Carines*, *supra* at 763-764.

Defendant's second argument on appeal is that the trial court erred when it provided him limited time to locate a res gestae witness. We disagree. As noted above, defendant failed to object below in any way regarding the time allotted him to locate Cruise; thus, he has forfeited this issue, and we review it only for plain error. *Id.*; *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996).

Michigan's present res gestae witness statute requires that the prosecuting attorney attach to the filed information a list of all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers, the prosecuting attorney disclose the names of any further res gestae witnesses as they become known, and the prosecuting attorney or investigative law enforcement agency provide, upon request, reasonable assistance to locate and serve process upon a witness. MCL 767.40a. The previous res gestae statute, amended in 1986, imposed a duty to produce all res gestae witnesses upon the prosecuting attorney. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). A res gestae witness is one who witnessed some event in the continuum of a criminal transaction and whose testimony would aid in developing a full disclosure of the facts. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001).

Defendant asks this Court to apply the rationale articulated in *People v Harris*, 127 Mich App 538; 339 NW2d 45 (1983). In *Harris*, when a res gestae witness did not appear at trial, the defense requested a due diligence hearing where it became apparent that the witness was served with a subpoena, but efforts to contact her by phone were unsuccessful. *Id*. at 541. Although, the trial court did not think that due diligence was a factor because the witness's testimony would be cumulative, this Court held the witness was pivotal to the case because her testimony would have been unique and remanded for a hearing to determine whether the prosecutor exercised due diligence to produce the res gestae witness. *Id*. at 541-542. *Harris*, however, does not apply to the facts of this case. Here, defendant makes no allegation that the prosecution failed to exercise due diligence; he claims only that the trial court allotted him insufficient time to locate the witness. Cruise was properly served with a subpoena to appear, and defendant received investigative assistance in locating Cruise. Whether Cruise was a res gestae witness or not, defendant received all that he was entitled to under the res gestae witness statute with respect to Cruise. The statute does not obligate the trial court, or the prosecuting attorney, to produce a res gestae witness at trial. *Perez, supra* at 418-419. Therefore, the time the trial court allotted him did not deny defendant his rights under the res gestae witness statute, and no error occurred which affected his substantial rights.

Defendant's third argument is that the prosecutor improperly vouched for the veracity of witnesses Katrina and Qiana during his closing argument. Defendant specifically contends that the prosecutor personally asserted that the witnesses were trustworthy and implied that he had access to information not available to the jury that supported witnesses' testimony. We disagree.

We examine claims of prosecutorial misconduct de novo to determine if defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). A reviewing court must consider claims of prosecutorial misconduct on a case by case basis by examining the record and evaluating the remarks in context and in light of the defendant's arguments. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). 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. *Id*. A prosecutor may argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may not vouch for the credibility of witnesses by implying that he has some special knowledge that they are testifying truthfully. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "But a prosecutor may comment on his own witnesses' credibility during closing argument, especially

when there is conflicting evidence and the question of defendant's guilt depends on which witnesses the jury believes." *Id*.

In *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992), the defendant argued that the prosecution's statements improperly appealed to the jury because the prosecutor and police voiced their opinions. This Court held that it was proper for the prosecution to comment on a witness' credibility during closing argument. *Id*. at 29-30. The prosecutor stated, "When [the witness, defendant's girlfriend,] first went to police, she wanted to testify for [the defendant]. *Ultimately she wound up telling the truth.*" *Id*. at 29 (emphasis added). The Court held that this statement was not an improper attempt to bolster the witness' testimony, but was "a permissible argument that she, and not defendant (who denied making the inculpatory statements to her), was telling the truth." *Id*.

Considered in context, the statements defendant highlights in this case did not imply to the jury that the prosecutor had some special knowledge of the veracity of the witnesses and did not give his personal opinion on the truthfulness of witness testimony. Recognizing that the case against defendant was largely based on witness credibility, the prosecutor argued that Katrina and Qiana were telling the truth. Defendant's theory of self-defense, that defendant believed Morgan had a gun and Morgan was on or at the base of defendant's porch when he was shot, required the jury to disbelieve these two witnesses. As was the case in *Stacy*, the prosecution permissibly argued that Katrina and Qiana were telling the truth, a fact that defendant's theory of the case sought to refute. The prosecutor's closing argument also explored the motivation each witness had to lie, concluding in a permissibly argumentative manner, that Patricia, defendant's fiancée, had more reasons to lie than did her daughters, Katrina and Qiana. See *Thomas, supra*, at 455. Further, the prosecutor informed the jury several times that it was its job, not the prosecution's, to determine witness veracity. He offered the jury a theory to adopt in performance of their fact-finding duties, as did defense counsel. The prosecutor's statements were proper and did not deny defendant a fair and impartial trial.

Defendant's last argument on appeal is that during rebuttal closing argument the prosecutor made statements that violated defendant's Fifth Amendment privilege not to testify, and these statements improperly shifted the burden of proof to defendant. We disagree.

A defendant has a right not to testify and rely on the presumption of innocence. *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). In order to effectuate this right, a prosecutor may not utilize a defendant's failure to testify as substantive evidence of his guilt. *Id*. at 108, 111. This rule, however, does not preclude prosecutor comment on the defense's failure to produce evidence on a phase of the defense upon which defendant seeks to rely as a "fair response." *People v Jones*, 468 Mich 345, 353 n 6; 662 NW2d 376 (2003); see, also, *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999), quoting *Fields, supra* at 111, in turn quoting *United States v Bright*, 630 F2d 804, 805 (CA 5, 1980). A prosecutor may argue that the evidence presented proved the defendant's guilt beyond a reasonable doubt despite the defendant's exculpatory account of events. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). Thus, a prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment. *Id*.

After reviewing the record, we conclude that the prosecutor's comments were proper "fair response" because they directly challenged the strength of defendant's claims of self-defense and his contention that Morgan had a gun. *Fields, supra* at 111, 115. In addition, even if the prosecutor's comments were improper, they were an "invited response" to defendant's arguments, and any error would be shielded from appellate relief. *Jones, supra* at 353. Under the doctrine of invited response, "the proportionality of the response, as well as the invitation, must be considered to determine whether the error which might otherwise require reversal is shielded from appellate review." *Id.* The issue is "'whether the prosecutor's 'invited response,' taken in context unfairly prejudiced the defendant.'" *Id*. at 358 (emphasis omitted), quoting *United States v Young*, 470 US 1, 12; 105 S Ct 1038; 84 L Ed 2d 1 (1985). Thus, a prosecutor's improper remarks might not require reversal if they respond to issues raised by the defense. *Callon, supra* at 330.

Defense counsel repeatedly proffered that defendant thought that Morgan had a gun. The statement that Qiana recalled, where Morgan told defendant he "wasn't the only one with a gun," is the only evidence that directly supports defendant's theory. But, Qiana gave conflicting testimony regarding when Morgan made this statement. Therefore, even if the jury believed that Morgan made the statement, it may not have caused defendant to retrieve his gun and subsequently shoot Morgan, in self-defense. Throughout the trial, the prosecutor asked several witnesses whether they saw Morgan with a gun. No one responded that he had. The prosecutor's statements, even if viewed as improper commentary on defendant's privilege not to testify, were an invited response to the validity of defendant's self-defense theory, and did not, in context, unfairly prejudice defendant. *Jones, supra* at 358.

Moreover, contrary to defendant's contention, the prosecutor's statements do not shift the burden of proof. First, the statements do not assert by their terms that defendant has to prove that he is not guilty. *People v Abraham*, 256 Mich App 265, 277; 662 NW2d 836 (2003). Second, the prosecutor affirmatively stated in his rebuttal closing argument that defendant does not have to say or do anything, and during his closing argument, he made it clear that the prosecution maintains the burden of proof beyond a reasonable doubt. Our Supreme Court, in *Fields, supra*, at 115, reasoned:

> [W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.

Thus, the prosecutor's comments on the validity of the defense's theory of self-defense did not shift the burden of proof.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Jane E. Markey