S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 12, 2005
v	No. 254803 Macomb Circuit Court
DARRYL OTTO LEWIS, Defendant-Appellant.	LC No. 2003-002173-FC

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for carjacking, MCL 750.529a, unarmed robbery, MCL 750.530, third-degree fleeing and evading, MCL 257.602a, kidnapping, MCL 750.349, and reckless driving, MCL 257.626. We affirm.

Defendant argues that in-court identification testimony by the victim and an eyewitness should not have been permitted because it was tainted by an unduly suggestive pretrial identification. We disagree. A trial court's decision to admit identification evidence will not be reversed unless the decision was clearly erroneous. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

To establish that a pretrial identification procedure denied him due process, a defendant must show that it was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id*. at 542. Here, the eyewitness was not involved in any pretrial identification procedure so this argument is baseless. The victim identified defendant at the preliminary examination, on her own accord, when she pointed to him and said that he was the perpetrator before she even testified. That defendant was the only obvious suspect in the courtroom at the time does not render the identification unduly suggestive. See *People v Hampton*, 138 Mich App 235, 238; 361 NW2d 3 (1984). This is not a case where the police told the victim that they had the "right man" before she made her identification. See *People v Solomon*, 47 Mich App 208, 214; 209 NW2d 257 (1973). Accordingly, we cannot conclude that the decision to admit the testimony was clearly erroneous.

Next, defendant argues that the prosecution presented insufficient evidence of forcible confinement kidnapping because the asportation of the victim was incidental to the crimes of carjacking and unarmed robbery. See *People v Wesley*, 421 Mich 375, 388; 365 NW2d 692 (1984). After de novo review, considering the evidence in a light most favorable to the

prosecution to determine whether a rational trier of fact could find the elements proven beyond a reasonable doubt, we disagree. See *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The crimes of carjacking and unarmed robbery do not require asportation for their accomplishment; thus, the jury could find that the victim's asportation was not merely incidental.

Next, defendant argues that the trial court erred in reading CJI2d 19.2 to the jury instead of CJI2d 19.1. After de novo review, we disagree. See *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). Defendant claims that the trial court erred in reading CJI2d 19.2 because it does not inform the jury that the asportation of the victim may not merely be incidental to the carjacking or unarmed robbery. However, the asportation of the victim was not incidental to the crimes of unarmed robbery or carjacking; therefore, the trial court was correct in instructing the jury with CJI2d 19.2.

Defendant finally argues that the prosecutor committed misconduct. We disagree. Because defendant failed to preserve his claims of misconduct by timely objection, our review is for plain error that affected his substantial rights. See *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

First, defendant claims that the prosecutor committed misconduct during his closing statement when he told the jury that "the defendant is lying." A prosecutor may argue from the facts of the case that a witness, including the defendant, is not worthy of belief. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the prosecutor simply argued from the facts of the case that, because defendant lived in Southfield, he lied when he told police that he was in Harper Woods to jog. Second, defendant claims that the prosecutor committed misconduct when he analogized defendant's attack on the eighty-two-year-old victim to an African lion attacking a wounded gazelle. But, a prosecutor is not required to state inferences and conclusions in the blandest language possible, *id*.; instead, he can use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Moreover, a prosecutor is free to 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).

Third, defendant claims that the prosecutor committed misconduct by referring to defense counsel's closing statement as "entertaining" and "nothing but a bunch of gas." A prosecutor's comments must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In his closing argument, defense counsel argued that defendant was charged on the basis of his race, not credible evidence. The prosecutor told the jury in his rebuttal that defense counsel's argument regarding defendant's race was "entertaining" and "nothing but a bunch of gas" and that the evidence proved defendant's guilt beyond a reasonable doubt. The prosecutor did not denigrate defense counsel, as defendant argues, but merely responded to his argument that defendant was charged on basis of race, not credible evidence. Thus, the issue is without merit.

Defendant finally argues that the prosecution committed prosecutorial misconduct by appealing to jury sympathy when he asked the court to take judicial notice that the victim had

identified defendant in two prior court proceedings. Nothing in that request could be reasonably interpreted as an appeal to jury sympathy. Further, the prosecutor did not appeal to jury sympathy by asking the victim how she felt when defendant pushed her inside the vehicle because her feelings were relevant to the crime of carjacking, which takes into consideration whether the defendant's actions put the victim in fear. See MCL 750.529a. The victim testified that she "felt like [her] life was going to end" when defendant pushed her into the car. Finally, the prosecutor did not appeal to jury sympathy by asking the victim about the injuries she sustained or referring to her during his opening statement as "a Macomb County resident, mother of three, grandmother of four." This Court will not reverse where the prosecutor's conduct is isolated and where the appeal to jury sympathy is not blatant or inflammatory. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, the comments merely stated the facts and were neither an inflammatory or blatant appeal to jury sympathy.

In sum, defendant has failed to establish that he was denied a fair and impartial trial as a consequence of prosecutorial misconduct. Therefore, he has not established plain error warranting relief.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin