

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIL DIONTE WHITAKER,

Defendant-Appellant.

UNPUBLISHED

September 11, 2008

No. 278828

Wayne Circuit Court

LC No. 07-004817-01

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Because defendant has not established that he was denied the right to compulsory process, the right to present a defense, or the right to a fair trial due to prosecutorial misconduct, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant testified at trial and presented an alibi defense, claiming he was with his fiancé, Stephanie McClung, at her residence on Roosevelt, at the time the victim was shot and approximately 3 blocks from the area where the incident occurred. On the second day of trial, defense counsel alerted the trial court that McClung, defendant's alibi witness, had not responded to a subpoena and that he intended to call her as a witness. When McClung did not answer repeated telephone calls, defense counsel requested the trial court to order the officer-in-charge to bring McClung to court. The trial court denied defendant's request, but did issue a bench warrant for McClung's arrest. McClung did not appear by the end of the day and the trial court elected to proceed without her.

Defendant first argues on appeal that he was denied the right to compulsory process, the right to present a defense, and the right to a fair trial when the trial judge refused to order the prosecutor or the officer in charge of the case to produce defendant's alibi witness. We review a trial court's decision whether to issue compulsory process to a witness for an abuse of discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996). The abuse of discretion standard recognizes that there may be no single correct outcome in certain situations. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Instead, there may be more than one reasonable and principled outcome. *Id.* When the trial court selects one of these principled outcomes, it has not abused its discretion and we will defer to the trial court's judgment. *Id.* An

abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Id.*

The compulsory process clause of the Sixth Amendment to the United States Constitution guarantees every criminal defendant the right 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. Although the right to compulsory process is fundamental, it is not absolute. *Taylor v Illinois*, 484 US 400, 410-416; 108 S Ct 646; 98 L Ed 2d 798 (1988); *People v McFall*, 224 Mich App 403, 408; 569 NW2d 828 (1997). The mere invocation of the right to compulsory process cannot automatically and invariably outweigh countervailing public interests such as the integrity of the adversary process, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process. *Taylor*, *supra* at 415-416.

The absence of a requested witness at trial does not necessarily mean that defendant has been denied the right to compulsory process. See *Taylor*, *supra* at 415-416. The trial court and the prosecution made repeated efforts to bring McClung to trial. The trial court issued a bench warrant, requested the officer-in-charge telephone McClung, and gave defendant the entire last day of proofs to locate his witness. It was not the trial court’s fault that McClung avoided testifying at trial. In addition, the prosecution volunteered at trial to continue to help secure McClung’s attendance at trial. That these efforts were ultimately unsuccessful did not amount to a violation of defendant’s constitutional rights. See *Id.* We conclude that the efforts made to assist defendant with procuring the witness including: a subpoena served, bench warrant issued, and continued efforts to contact the witness by the prosecution, were sufficient. Thus, these efforts establish that the trial court’s decision not to require the prosecution or the officer-in-charge to procure McClung for trial was a principled action and not an abuse of discretion. *Babcock*, *supra* at 269.

Defendant next argues on appeal that he was denied the right to a fair trial when the prosecutor, in his closing argument, asked the jury to adopt his personal view of why defendant was not guilty of a lesser offense and personally opined regarding why the victim was a credible witness. Absent a timely and specific defense objection, appellate review of alleged prosecutorial misconduct is precluded 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 Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant failed to object to the alleged prosecutorial misconduct; therefore, reversal is warranted only if plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 235. There is no error requiring reversal if a curative instruction could have alleviated any prejudicial effect. *Id.* Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000); *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970).

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *Id.* at 30-31. Generally, prosecutors are afforded great latitude regarding their arguments and conduct. *People*

v Bahoda, 448 Mich 261, 282; 531 NW2d 659 (1995). They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.*

Defendant contends the prosecutor improperly suggested to the jury that he had special knowledge that people who fire guns intend to murder every time when he argued that the lesser charge of assault with intent to commit great bodily harm could be thrown aside because, “I think that when someone fires a gun at someone that the intent is to murder.” However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it that demonstrates that the defendant is guilty. *Bahoda, supra* at 282. The victim testified that defendant was firing a gun at him while chasing him. In addition, because defendant was continually shooting at the victim a moving target, from a distance, it could be reasonably inferred from the victim’s testimony that defendant intended to kill the victim. Thus, the prosecutor’s argument that defendant’s actions while shooting at the victim evidenced the intent to murder was not improper and no plain error occurred.

Defendant also asserts the prosecutor improperly suggested to the jury that he had special knowledge the victim was telling the truth when he argued that the jury should not judge the victim’s credibility by his posture, dress, and argumentative nature while testifying and that to do so would be “silly.” It constitutes improper argument for a prosecutor to vouch for a witness’s credibility in order to imply that the prosecutor is privy to “special knowledge” that the witness is telling the truth. *Bahoda, supra* at 276. However, a “prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

During his closing argument, the prosecutor did not imply that he had some special knowledge of the witness’ truthfulness. Rather, the prosecutor argued that the jury should not make its determination of the victim’s credibility based on his dress, posture, or combative nature while on the witness stand. The prosecution explained to the jury that the victim was combative because he was angry with defendant for shooting him, and that the jury should consider this when assessing the victim’s credibility. Given that conflicting evidence made credibility important to the prosecutor’s burden of proof in this case, his closing argument, highlighting evidence of credibility was not improper. Further, the trial court’s instructions before and after trial that the attorney’s arguments did not constitute evidence were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). No plain error occurred in this regard.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio