STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2009
v	No. 284094 Oakland Circuit Court
DAVID PAUL CHARRON, Defendant-Appellant.	LC No. 2007-216561-FH

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant David Charron appeals as of right his jury conviction of one count of first-degree home invasion.[1] The trial court sentenced Charron as a fourth habitual offender,[2] to a prison term of 120 to 480 months. We affirm. We decide this appeal without oral argument.[3]

I. Basic Facts And Procedural History

The current case involves a home invasion that occurred in Timothy Bowker's home on March 29, 2007. On the day of the incident, Bowker and the rest of his family left the home at around 7:30 a.m., with Bowker returning around 4:30 p.m. At about 8:00 p.m. Bowker noticed that things were missing from the home. Bowker testified that jewelry, cash, a DVD player, and a gun had been taken from the home. The gun was a Ruger Mark 2 target pistol. Bowker indicated that the night before the incident he had taken the gun out of the locked steel cabinet where he stored it in order to put on a scope. Bowker later placed the gun on the top shelf of a closet (in its carrying case) because he was going to work on it more the next day. Bowker indicated that he only found the carrying case left in the closet and that it was in a different place from where he had left it the night before. Some of the stolen jewelry was recovered from a pawnshop, but the DVD player and gun were not recovered.

[1] MCL 750.110a(2).

[2] MCL 769.12.

[3] MCR 7.214(E).

The prosecutor referred to Charron's actions as a "robbery" twice in her rebuttal closing argument. The defense failed to raise an objection to the prosecutor's statement.

II. Due Process

A. Standard Of Review

The main matter of contention at trial was whether Charron took a gun from the victims' home, thus elevating the crime from second- to first-degree home invasion. And Charron claims that certain statements by the prosecutor during rebuttal closing argument deprived him of his due process right to a fair trial. Because Charron failed to object to the prosecutorial remarks at issue, review is only for plain error affecting Charron's substantial rights.[4]

B. Legal Standards

"Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.'"[5] Nevertheless, a prosecutor may not engage in conduct or make an argument that rises to the level of denying a defendant a fair and impartial trial.[6]

With regard to alleged improper remarks made by a prosecutor,

> the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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.[7]

C. Applying The Standards

Charron claims that the following statements by the prosecutor during rebuttal closing argument deprived him of his due process right to a fair trial: "This gun was there and then after the robbery in a break in, it wasn't. It's that simple. We know who did the robbery." Charron argues that the prosecutor's use of the word "robbery" wrongfully influenced the jury to convict him of first-degree home invasion instead of second-degree home invasion because it raised the "specter of violence."

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[4] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[5] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980) (alteration by *Bahoda* Court).

[6] *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

[7] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (internal citations omitted).

Although the prosecutor should not have used the word "robbery" because it amounted, in effect, to a misstatement of the law, the use of the word did not rise to the level of plain error meriting a reversal of Charron's conviction. The prosecutor did not argue or charge that anyone was home when Charron broke into the victims' residence, let alone that an assault had taken place.[8] Further, it is clear from the trial transcript that when the prosecutor referred to Charron's act of breaking into the home and stealing property as "robbery," it was not with the intention of trying to influence the jury to wrongfully decide the case. Rather, the prosecutor was likely trying to construct a simple deductive argument that inappropriately used robbery as a synonym for larceny; that is, because the gun was in the home before the break-in, but not after, the person who broke into the home must have taken it and was therefore guilty of first-degree home invasion.[9]

Moreover, the trial court instructed the jury that it "must take the law as I give it. If the lawyer says something different about the law, follow what I say." The trial court then correctly instructed the jury on the elements of first- and second-degree home invasion, including an appropriate use of the term "larceny."[10] Also, to the extent that the prosecutor's comments can be interpreted as implying the existence of facts constituting robbery, the trial court's instruction that "[t]he lawyers' statements and arguments are not evidence" effectively cured any possible error. "It is well established that jurors are presumed to follow their instructions."[11]

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

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[8] See CJI2d 18.1 (armed robbery) and CJI2d 18.2 (unarmed robbery).

[9] See CJI2d 25.2a.

[10] See *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (stating that "if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured").

[11] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).