

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHANNON FRENCH,

Defendant-Appellant.

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UNPUBLISHED  
February 16, 2010

No. 288798  
Washtenaw Circuit Court  
LC No. 08-000492-FC

Before: K.F. Kelly, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of two counts of armed robbery, MCL 750.529. He was sentenced to 11-1/2 to 25 years' imprisonment for each count; the sentences are to run concurrently. Defendant appeals as of right. We affirm.

**I. Basic Facts**

At approximately 9:00 p.m. on February 22, 2008, Ronald Rhodes and Derrick Coleman were working at the Jamaican Jerk Pit, a restaurant in Ann Arbor that Rhodes owned and Coleman managed. There were no customers at the time, and Rhodes and Coleman were watching television in a back dining room when two men entered and robbed the restaurant. One man, whom Coleman identified as defendant, took money from the cash register while the other held Rhodes and Coleman at gunpoint. The men then left through the back exit of the restaurant with \$200 cash. Coleman identified defendant as the foster brother of a former employee, Quinton McNealy, and defendant was arrested four weeks later.

**II. Appointment of Expert Witness**

Defendant first argues that the trial court improperly denied his motion for appointment of an expert witness to testify about eyewitness and voice identification. He claims that the expert would have explained to the jury how the factors and circumstances of the robbery impacted Coleman's ability to accurately identify the defendant.

**A. Standard of Review**

We review a trial court's decision to deny an indigent defendant's request for expert funds for abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003);

MCL 775.15. An abuse of discretion exists if the trial court's decision falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

### B. Analysis

"MCL 775.15 authorizes payment for an expert witness, provided that an indigent defendant is able to show 'that there is a material witness in his . . . favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to trial. . . .'" *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). To show that he "cannot safely proceed to trial," "an indignant defendant must demonstrate a 'nexus between the facts of the case and the need for an expert.'" *Tanner*, 469 Mich at 443 (citation omitted). "It is not enough for the defendant to show a mere possibility of assistance from the requested expert. Without an indication that the expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness." *Carnicom*, 616 Mich App at 617 (citations omitted).

Here, Coleman knew defendant and identified him. He recognized defendant's voice and a scar on defendant's cheek. Coleman also, however, testified there was a gun aimed at his face when he first identified defendant. He was never closer than 15 feet to defendant, and he was under stress at the time. Further, defendant undisputedly wore a hood and a bandana over his face during the robbery. Accordingly, the trial court properly recognized that Coleman's identification was open to a credibility attack, and defendant could safely proceed to trial without an expert. Defendant has failed to explain why an expert was necessary to cast more doubt on Coleman's identification. We find no abuse of discretion.

## III.

Defendant next argues the trial court erred when it accepted the prosecutor's late endorsement of Calvin Clark, a man who testified that he heard defendant, McNealy and another man discuss robbing the restaurant approximately one month before the event.

### A. Standard of Review

We review a decision to allow a late endorsement for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998) (citation omitted). An abuse of discretion exists if the trial court's decision falls outside the principled range of outcomes. *Babcock*, 469 Mich at 269.

### B. Analysis

MCL 767.40a(1) requires a prosecutor to attach to the trial information a list of all known witnesses. MCL 767.40a(4) allows the prosecutor to add or delete persons from the list upon a showing of good cause. Late discovery or identification of a witness can constitute good cause. See *People v Burwick*, 450 Mich 281, 284-285, 289; 537 NW2d 813 (1995); *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

Here, despite its investigation, and through no fault of its own, the prosecution first learned of Clark on the Friday before trial. This was sufficient good cause to allow the

endorsement. *Burwick*, 450 Mich at 284-285; *Canter*, 197 Mich App at 563. The prosecutor's investigator interviewed Clark that Friday, and defense counsel received a copy of the investigator's report that day. Defense counsel and his investigator were able to interview Clark two days later. Defense counsel was clearly not surprised by or unprepared for Clark's testimony. Accordingly, we find no abuse of discretion. *Canter*, 197 Mich App at 563; *People v Herndon*, 246 Mich App 371, 403; 633 NW2d 376 (2001).

#### IV. Prosecutorial Misconduct

Defendant next argues that two statements in the prosecutor's closing argument amounted to prosecutorial misconduct.

##### A. Standard of Review

Defendant failed to timely object to the statements and request a curative instruction; thus, we review for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Plain error occurs at the trial court level if: (1) error occurred, (2) that was clear or obvious, and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (citation omitted). This Court ultimately "will reverse only if [it] determine[s] that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *Thomas*, 260 Mich App at 454, citing *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Further, this Court "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-230; 662 NW2d 501 (2003). We review claims of prosecutorial misconduct on a case-by-case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

##### B. Analysis

"[Prosecutors] are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). "The propriety of the prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002), remanded on other grounds 477 Mich 902 (2006). The thrust of a prosecutorial misconduct analysis is to determine whether defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005).

In the first statement at issue, the prosecutor said in his closing argument that defendant, Clark, McNealy and another man specifically talked about the back door of the Jamaican Jerk Pit when they discussed the robbery. He then said that Clark told this to the prosecutor's investigator. We agree that the record does not support either of these statements. They do not amount to prosecutorial misconduct, however, because they were isolated and brief remarks and did not likely deflect the jury's attention from the evidence. *Unger*, 278 Mich App at 237, 239. Furthermore, the trial court instructed the jury that the statements of the lawyers were not to be considered as evidence, and this instruction dispelled any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Jurors are presumed to follow instructions. *People v Graves*,

458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, we find that while the record did not support the statements, they were not so significant as to deny defendant a fair trial. *Wilson*, 265 Mich App at 393.

In the second statement at issue, the prosecutor merely said that he did want Clark to testify, and defense counsel did not. We find the comment was justified as a response to defense counsel's cross-examination of Clark, wherein he implied that Clark disobeyed defense counsel's instruction and subpoena to testify on the first day of trial. Further, while it is true that a prosecutor may not question the veracity of defense counsel during closing argument by suggesting he is trying to mislead the jury, *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984), that did not happen here. Accordingly, we find no error, and, thus, no prosecutorial misconduct.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Kathleen Jansen

/s/ Brian K. Zahra