

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY L. BAKER,

Defendant-Appellant.

UNPUBLISHED

November 12, 1996

No. 175707

LC No. 93-127270

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529; MSA 28.797. Defendant subsequently pleaded guilty of being a third-offense habitual offender, MCL 769.11; MSA 28.1083, and was sentenced to ten to thirty years' imprisonment. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court abused its discretion when it denied his motion for a mistrial on the basis of a police officer's reference to his having a parole agent. We disagree.

While the reference to defendant's parole agent was improper, *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978), it was not the product of improper behavior on behalf of the prosecutor. *People v Lugo*, 214 Mich App 699, 704-705; 542 NW2d 921 (1995); *People v O'Brien*, 113 Mich App 183, 209-210; 317 NW2d 570 (1982). Further, the officer did not reveal the reasons for defendant's parole status. *Lugo, supra* at 705; *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Finally, the trial court gave a strong instruction that cured the error. *Lugo, supra* at 705; *People v Haisha*, 111 Mich App 165, 169; 314 NW2d 465 (1981). We are satisfied that the error was not so egregious as to deny defendant a fair trial. *Haywood, supra* at 228; *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). Accordingly, the trial court did not abuse its discretion when it refused to grant a mistrial. *Haywood, supra* at 228.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next contends that the lower court erred in denying his motion for a directed verdict on the armed robbery charge, claiming the evidence was insufficient to show that he was the assailant. We disagree.

When ruling on a motion for a directed verdict, the trial court must consider the evidence presented up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). When reviewing a trial court's ruling on a motion for directed verdict, this Court uses the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992). Although there were discrepancies in the complainant's initial description of defendant, the complainant positively identified defendant in a photographic lineup several hours after the incident occurred and during the preliminary examination. *People v Kurylczyk*, 443 Mich 289, 309; 505 NW2d 528 (1993). Furthermore, there was independent evidence suggesting defendant was the assailant, including his possession of the car that sped away from the police, the gun matching the complainant's description found in the car, and his flight from the police. *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993). There was evidence that defendant pointed a gun at the complainant and stole money from her. Thus, there was sufficient evidence to support his conviction of armed robbery, *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995), and the trial court did not err when it denied defendant's request for a directed verdict. *Jolly*, *supra* at 466.

Defendant also argues that he was denied his right to a fair trial due to several instances of improper prosecutorial argument. Defendant specifically argues that the prosecutor made an improper civic-duty argument, a plea to the jury's sympathy, and vouched for the police's work in the case. We find no error requiring reversal.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995). 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. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case and must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Assuming, there was some impropriety in the challenged remarks, we are satisfied that the judge's instruction that the arguments of counsel are not evidence dispelled any prejudice. *Id.* at 281; *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Although a prosecutor may not appeal to the jury to sympathize with the victim, *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988), the prosecutor here was not giving the jury any new information when he discussed the complainant's illness and death. Instead, he was responding to defense counsel's argument that the complainant was too ill and blind to identify defendant at the both the lineup and the preliminary hearing. This was not an improper plea for sympathy. *Bahoda, supra* at 282-283; *People v Sharbnaw*, 174 Mich App 94, 100; 435 NW2d 772 (1989). We further note there was no objection to this argument, foreclosing appellate review unless failure to review the issue will result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). It will not. Assuming, some impropriety in this argument, the judge's instruction that the arguments of counsel are not evidence dispelled any prejudice. *Bahoda, supra* at 281.

A prosecutor may not vouch for the credibility of a witness, *Bahoda, supra* at 276, or ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of his office or that of the police. *People v Ignofa*, 315 Mich 626, 631-636; 24 NW2d 514 (1946). The prosecutor here argued that, through good police work and a thorough investigation, "they got the right man." There was no objection to this argument, foreclosing appellate review unless failure to review the issue would result in a miscarriage of justice. *Stanaway, supra*. It will not. In any event, we find no impropriety in this remark, which was made in response to defense counsel's arguments concerning the reliability of the victim's identification of defendant. Read in context, the prosecutor's argument was asserting that the evidence showed defendant had been properly identified as the assailant. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995).

Defendant further contends that the identification procedures used here were unduly suggestive and that he was denied his right to effective assistance of counsel because his attorney failed to move to suppress the identification testimony. We disagree.

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous. *Kurylczuk, supra* at 303. Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Id.* at 303. After reviewing the record, we are satisfied that the various lineups and identification procedures were not unduly suggestive or improper. *Id.* at 304-305, 309. Neither physical differences in the subjects of the photographs, a witness's initial inability to identify, nor a tentative false identification, necessarily invalidate a photo showup. *Id.* Because the identification testimony was properly admitted, defendant's claim of ineffective assistance of counsel is without merit. Furthermore, counsel used the discrepancies with the complainant's identification of defendant to support a mistaken identity defense. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). That a strategy does not work does not render counsel's assistance ineffective. *Id.*

Defendant also argues that the trial court coerced a verdict from the jurors when it submitted the case to them at 3:15 p.m. and informed them that they would have problems parking the next day if they had to return. We disagree.

Claims of coerced verdicts are reviewed on a case-by-case basis. All of the facts and circumstances, as well as the particular language used by the court, must be considered to determine whether the defendant was denied a fair trial. *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995). The trial court's conduct and comments here did not coerce a verdict from the jury. The comments were courteous and informative and mainly expressed concern for the jurors' comfort.

Lastly, defendant argues that his ten to thirty year prison sentence was disproportionate. We disagree.

A sentence must be proportionate to the seriousness of the offense and the conduct of the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). It is inappropriate to review defendant's habitual offender sentence by referring to the sentencing guidelines for the underlying offense. *People v Gatewood*, 451 Mich 1025; __ NW2d __ (1996). Taking into consideration the violent nature of the instant offense, the fact that defendant had four prior felony convictions, including convictions for armed robbery and attempted armed robbery, and that he fled from the scene and remained a fugitive for seven years, defendant's sentence was proportionate to both the offense and the offender. *Milbourn, supra* at 635-636; *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Affirmed.

/s/ Clifford W. Taylor

/s/ Jane E. Markey

/s/ Nick O. Holowka