STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL DAMAUNE TROTTER,

Defendant-Appellant.

UNPUBLISHED
December 10, 1996

No. 185825
LC No. 95-018583-FC

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

A jury convicted defendant Samuel Damaune Trotter of armed robbery, MCL 750.529; MSA 28.797. Thereafter, defendant pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. The trial court sentenced defendant to three to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant argues that the trial court improperly instructed the jury that anyone who renders assistance to someone who he knows has committed armed robbery before that person has reached a place of temporary safety is guilty of armed robbery. *People v Turner*, 120 Mich App 23, 28-29; 328 NW2d 5 (1982). We disagree.

Defendant's failure to object to the jury instruction waives any error unless relief is necessary to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Cross*, 202 Mich App 138, 148; 508 NW2d 144 (1993). After reviewing de novo the jury instructions, we find no manifest injustice as the instructions fairly presented the issues to be tried and adequately protected defendant's rights. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). The challenged instruction on armed robbery[1] was taken directly from *Turner*, *supra* at 28: "[R]obbery is also a continuous offense: it is not complete until the perpetrators reach temporary safety." See also *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989).[2] Defendant

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

acknowledges that *Turner* represents the current state of the law on this topic in Michigan, but he argues that it should not apply here because the continuing offense doctrine should only apply to furthering the commission of a robbery by helping the principal carry away the stolen property from the scene. Otherwise, the rule permits conviction of individuals as aiders and abettors where they should only be convicted as accessories after the fact. Because defendant failed to provide any binding authority in support of this proposition, we are not persuaded that we should abandon the rule of law set forth in *Turner, supra*. See *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994) ("[w]e will not search for authority to sustain a party's argument"). Thus, we find no manifest injustice in the absence of appellate review. *Van Dorsten, supra.*

II

Defendant further argues that the prosecutor engaged in conduct requiring reversal when he expressed a personal opinion of defendant's guilt. We disagree. Because defense counsel failed to object to any of the alleged improprieties at trial, we will not review this issue on appeal absent a miscarriage of justice, which will not be found if the prejudicial effect of the prosecutor's comments could have been countered by a timely curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rivera*, 216 Mich App 648; 651-652; 550 NW2d 593 (1996). After reviewing the facts and the record in order to evaluate the prosecutor's statements in the context of defense arguments and the evidence admitted at trial, we do not believe that the prosecutor's comments denied defendant a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994); *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

Defendant argues that the following comments by the prosecutor constituted an expression of the prosecutor's personal opinion of defendant's guilt:

> In other words, you don't have to show that they knew before they walked in the store that there was going to be a gun used, although I think they all knew.
>
> * * *
>
> If he wasn't looking out the window to help, which we certainly think he was . . . .
>
> * * *
>
> For those reasons and many others, Mr. Ford, Mr. Cornelius, Mr. Trotter are guilty of the crime charged of armed robbery. I believe that all of them committed the armed robbery together, they did it in a unit, as one unit, basically. And as I indicated, I am not interested in a lesser verdict because that is not what happened. They committed an armed robbery, and I would ask you to find each guilty of such.

We conclude that no miscarriage of justice will result from our refusal to review the impact of these statements that did not elicit an objection from defense counsel because a cautionary instruction could have cured any impropriety. *People v Ullah*, 216 Mich App 669, 679, 682; 550 NW2d 568 (1996). While a prosecutor is not allowed to vouch for the credibility of a witness or to suggest that the government has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), the prosecutor is free to argue that the evidence demonstrates that the defendant is guilty. *People v Erb*, 48 Mich App 622, 632; 211 NW2d 51 (1973). As we noted in *Erb, supra*, citing *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973):

> "The argument that the prosecutor improperly expressed an opinion on the question of guilt is frequently urged on appeal. We emphasize that this question does not turn on whether or not any magic words are used. If the prosecutor says 'I believe' rather than 'the evidence shows,' this in and of itself does not constitute reversible error. * * * The question is not whether the jury would conclude that the prosecutor believes that the defendant is guilty, a conclusion they would reach in any event, but rather, whether the prosecutor has attempted to vouch for the defendant's guilt. The prosecutor may not attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty, but he may argue that the evidence shows that the defendant is guilty."

Indeed, while it would have been better for the prosecutor to say "the evidence shows" instead of "I believe," we believe it is clear from the context that the prosecutor intended to convey the former during his closing remarks. Thus, we find no miscarriage of justice. *Rivera, supra*.

III

Finally, defendant argues that the trial court abused its discretion in denying defendant's motion to sever his trial from that of his codefendants. Defendant contends that he was entitled to a separate trial because codefendant Ford testified to exculpate himself in a manner that inculpated defendant. We disagree.

A trial court's decision regarding separate trials is reviewed for abuse of discretion. *People v McCray*, 210 Mich App 9, 12; 533 NW2d 359 (1995). Severance is mandated only when a defendant demonstrates that his substantial rights will be prejudiced and that severance is necessary to rectify potential prejudice, i.e., where defenses are mutually exclusive or irreconcilable, not simply inconsistent. *Id.* We find no abuse of discretion as the testimony that defendant cites in support of this argument is not his codefendant's testimony but that of Detective Raha concerning what codefendant Ford told him during an interview, specifically that defendant was present on the scene and standing close to Ford when Ford learned about the intent to use the gun during the robbery. According to defendant, this testimony gave rise to the inference that defendant saw what Ford had seen and knew what Ford knew, which prejudiced defendant.

Defendant's argument must fail. First, defendant is entitled to a trial separate from a *codefendant* "who it appears may testify to exculpate himself and incriminate the defendant seeking a separate trial." *People v Hurst*, 396 Mich 1, 4; 238 NW2d 6 (1976). The testimony defendant refers to, however, is not Ford's testimony, but rather Detective Raha's testimony. Additionally, we do not agree with defendant that the testimony inculpated defendant and exculpated codefendant Ford. Furthermore, the court expressly instructed the jury before the testimony was presented and again during jury instructions that testimony concerning what one of the defendants allegedly said during an interview may be used only against that particular defendant and not against the other defendants. Thus, whatever Ford allegedly said to Detective Raha during the interview could be used only against Ford and not against defendant. We therefore find no abuse of discretion, and reversal is not warranted. *McCray, supra.*

Affirmed.

/s/ Jane E. Markey
/s/ Michael J. Kelly
/s/ Michael J. Talbot

[1] The instruction read as follows:

> Armed robbery is a continuous offense. In other words, it is not completed until the perpetrators reach temporary safety. A person who knowingly aids, abetts [sic] or renders assistance to someone who he knows has committed an armed robbery before they [sic] reach temporary safety is as guilty of the offense of armed robbery as is the actual perpetrator.

[2] Finding that robbery is a continuous offense, this Court in *Tinsley, supra*, held that, "[h]ence, the use of force or intimidation in retaining the property taken or in attempting to escape rather than in taking the property itself is sufficient to supply the element of force or coercion essential to the offense of robbery."