

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS A. OCASIO-SOSA,

Defendant-Appellant.

UNPUBLISHED

April 4, 1997

No. 188275

Oakland Circuit Court

LC No. 95-137470

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

The jury convicted defendant of assault with intent to commit great bodily harm, MCL 750.84; MSA 28.279. Thereafter, defendant pleaded guilty to the charge of habitual offender, second offense, MCL 769.10; MSA 28.1082. The court sentenced defendant to five to ten years' imprisonment; however, the court vacated this sentence and instead sentenced defendant to five to ten years' imprisonment for the habitual offender conviction. Defendant now appeals and we affirm in part and remand in part for the limited purpose of correcting a sentencing error.

I

Defendant first argues that he was denied a fair and impartial trial, due to prosecutorial misconduct. We disagree. We review claims of prosecutorial misconduct on a case-by-case basis. *People v Legrone*, 205 Mich App 77; 517 NW2d 270 (1994). This Court examines the record from the trial court and evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Legrone*, 205 Mich App at 82-83.

Defendant asserts that the prosecutor's rebuttal statement, "[d]on't excuse what these animals did because the police lost some evidence" denied him a fair and impartial trial. Defendant claims that even though the trial court gave a curative instruction, he was prejudiced and the only way to cure the

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

prejudice was to grant his motion for a mistrial. We disagree. Examined in context, the prosecutor referred to defendant as an animal one time. The jury was cautioned that the prosecutor's comment was improper and they should not consider it in any way. We believe that the trial court's instructions eliminated any prejudicial effect that the prosecutor's isolated reference to defendant as an animal may have had. See *People v King*, 215 Mich App 301, 306-307; 544 NW2d 765 (1996). Accordingly, because defendant was not denied a fair and impartial trial, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant also claims that the prosecutor's rebuttal comment regarding the victim's coat was improper because he argued facts not in evidence and improperly bolstered his case. We disagree. We initially note that the prosecutor's rebuttal comment was a proper response to argument of defense counsel who referred to the fact there was no evidence to link defendant to the crime because the coat was lost. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Furthermore, because the coat was described on the record, the prosecutor did not make his statement based upon his own personal viewing of the coat, but rather his remarks were based upon the evidence. *Bahoda*, 448 Mich at 282. Furthermore, a prosecutor may also comment on the strength of his case. *People v Jerry Smith*, 122 Mich App 106, 112; 332 NW2d 428 (1982), rev'd on other grounds 417 Mich 428; 338 NW2d 890 (1983). Because the prosecutor's comments here were based upon the evidence and because he permissibly commented on the strength of his case, this portion of his rebuttal comment was proper. Therefore, the trial court properly denied defendant's motion for a mistrial.

II

Next, defendant contends that he is entitled to a new trial because the trial court erroneously held that the prosecution had exercised due diligence in attempting to locate David Valez, a res gestae witness, and as a result, improperly declined to give the missing witness instruction. We disagree. Although the prosecution listed Valez as a witness, the prosecution was not obliged to produce Valez because he was an accomplice. Where the witness is an accomplice to the crime, the prosecutor is not required to produce or call the accomplice as a witness, even if the accomplice is listed as a witness. *People v Lytal*, 415 Mich 603, 611-612; 329 NW2d 738 (1982). Therefore, regardless of whether the prosecution exercised due diligence in locating Valez, defendant was not entitled to the missing witness instruction.

III

Finally, defendant argues that he is entitled to a correction of the judgment of sentence. We agree. Although the court sentenced defendant to five to ten years' imprisonment, the judgment of sentence indicates that defendant was sentenced to five to twenty years' imprisonment as an habitual offender. Accordingly, we remand for the limited purpose of correcting the judgment of sentence to reflect a sentence of five to ten years on the habitual offender conviction.

Affirmed in part and remanded in part. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry