

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FREDDIE ALBERT DOUGLAS,

Defendant-Appellee.

UNPUBLISHED

June 17, 1997

No. 194509

Recorder's Court

LC No. 94-900024

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Defendant, the commanding officer on the scene when a man was beaten to death by two police officers, was convicted by a district court jury of failing to uphold or enforce the law contrary to MCL 752.11; MSA 28.746(101)¹, and was sentenced to two years' probation. He appealed as of right to the Detroit Recorder's Court, and his conviction was reversed and the case was remanded for a new trial. Plaintiff appeals by leave granted. We reverse and reinstate defendant's conviction and sentence.

On appeal to the Recorder's Court, defendant argued that he was denied a fair trial because of prosecutorial misconduct. Defendant acknowledges that he failed to object to the prosecutorial remarks at issue. Appellate review of alleged prosecutorial misconduct is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Stanaway*, *supra* at 687; *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). This Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record to evaluate the remarks in context. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *McElhaney*, *supra* at 283.

The Recorder's Court, considering the statements out of context, erred in finding that the prosecutor committed misconduct during his opening statement when he suggested that the victim might be alive today if defendant had performed his duty. A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice. *Bahoda, supra* at 266; *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). It is also improper for a prosecutor to ask the jury to sympathize with a victim of a crime. *People v Wilson*, 163 Mich App 63, 65-66; 414 NW2d 150 (1987). Opening statement is, however, the appropriate time to state the facts to be proven during trial. *People v Pennington*, 113 Mich App 688, 692; 318 NW2d 542 (1982).

It was the prosecution's theory that defendant had a duty to intervene when he saw the victim being struck and kicked by other police officers. There were no allegations that defendant himself struck or kicked the victim. Moreover, this was a widely publicized case, so it was common knowledge that the victim died from his injuries. Thus, the prosecutor's statement was a fair comment as to the purpose of the law and the case that he intended to present, i.e., the victim died as a result of being beaten by police officers and defendant failed to perform his duty by not stopping the beating. When viewed in the context of the entire opening statement, the prosecutor's comments were clearly intended to highlight to the jury that there was a denial of the victim's legal rights, an element of the charged offense. The comments also constituted an obvious statement of the reason defendant was on trial.

The Recorder's Court also erred in finding that the prosecutor committed misconduct by arguing that MCL 752.11; MSA 28.746(101) was a good law and that if the police failed to enforce the laws that they were sworn to uphold, "we have gone through the road to totalitarianism and injustice." Arguments that appeal to jurors' civic duty are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Again, a prosecutor's comments must be considered in light of defense arguments, *People v Messenger*, 221 Mich App 171, 180-181; 561 NW2d 463 (1997); *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993). Remarks that might otherwise be improper may not require reversal when they address issues raised by defense counsel's argument. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

During his closing argument, defense counsel argued that defendant did the best he could under the circumstances and asked, "What more can you ask of any human being under those circumstances?" Implicit in that question was the suggestion that the law asked too much of defendant given the situation. The prosecutor's rebuttal argument was a fair response to that question and properly focused on the evidence by asking the jurors to return a verdict that was consistent with the proofs presented during the course of the five-day trial.

Moreover, curative instructions could have eliminated any prejudicial effect of the prosecutor's remarks in opening statement and the closing argument. Defendant's failure to

object to the remarks is fatal to the claim of reversible error because no miscarriage of justice occurred. *Stanaway*, *supra* at 687; *Nantelle*, *supra* at 87.

Reversed. Defendant's conviction and sentence are reinstated.

/s/ Barbara B. MacKenzie

/s/ Janet T. Neff

/s/ Jane E. Markey

¹ MCL 752.11; MSA 28.746(101) provides:

Any public official, appointed or elected, who is responsible for enforcing or upholding any law of this state and who wilfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor.