

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT A. WESLEY,

Defendant-Appellant.

UNPUBLISHED

December 19, 1997

No. 193143

Recorder's Court

LC No. 95-004053

Before: McDonald, P.J., and Wahls and J. R. Weber*, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of attempted larceny from a motor vehicle. MCL 750.356a; MSA28.588(1).

Defendant claims the trial court erred in refusing to read his theory of the case to the jury during final instructions. Although, when the requested instruction was first presented to the trial court at the close of the prosecution's case-in-chief, the trial court correctly noted that the factual underpinnings of defendant's theory were not yet in evidence, the requisite evidentiary support did exist by the close of the defense case-in-chief, and the request for such instruction was renewed before the jury began deliberations. Generally, if supported by the evidence a defendant's theory of the case must be given. *People v Hoskins*, 403 Mich 95, 100; 267 NW2d 417 (1978); *People v Reed*, 393 Mich 342, 350; 224 NW2d 867 (1975). If the trial court was of the opinion that references in the instruction as presented to a known witness as a "fat man" were improperly pejorative, or that the instruction was in part argumentative, the better practice would have been to redact the requested instruction to eliminate these unacceptable elements while still presenting the defendant's theory to the jury. Nonetheless, this Court concludes that, on this issue, reversible error did not occur, because the jury was instructed, consistently with defendant's theory, concerning the prosecution's burden of proof and the credibility of witnesses as well as the weight of the evidence. *People v Benson*, 180 Mich App 433, 439; 447 NW2d 755 (1989), rev'd in part on other grounds 434 Mich 903 (1990); *People v Barr*, 156 Mich App 450, 462; 402 NW2d 489 (1986).

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

Defendant further contends that the prosecutor deprived him of a fair trial by cross-examining him concerning his failure to produce an alibi witness, corroboration of claimed medical injuries received as a result of police brutality during arrest, and similar types of evidence. Such cross-examination was not, however, improper. *People v Carl Fields*, 450 Mich 94, 106-107; 538 NW2d 356 (1995).

Finally, we turn to the contention that the prosecutor's questioning of defendant, during cross and re-cross-examination, concerning other offenses, deprived defendant of a fair trial. We agree. Had defendant claimed, in otherwise relevant evidence, during direct or redirect examination, that he had not been incarcerated on other charges during the pendency of this case, the prosecutor's inquiries might have been permissible on the theory that defendant had "opened the door" to such testimonial impeachment. *People v Vanover*, 200 Mich App 498; 505 NW2d 21 (1993). However, defendant gave no such testimony on direct or redirect examination. Thus, prosecutorial cross and re-cross-examination concerning other unrelated charges was not an attempt to show that defendant had made a false claim during direct or redirect examination, and was a clear violation, over repeated defense objection, of the rule established in *People v Brocato*, 17 Mich App 277, 302-303; 169 NW2d 483 (1969), barring cross-examination of a testifying defendant concerning arrests or charges of other crimes not resulting in conviction. While the trial court's subsequent curative instruction might have obviated the prejudice from the improper cross-examination, it did not purport to address the prosecutor's additional comments, and defendant was deprived of a fair trial. *People v Messinger*, 221 Mich App 171, 179 n 3; 561 NW2d 463 (1997).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald

/s/ Myron H. Wahls

/s/ John R. Weber