

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY STEWART,

Defendant-Appellant.

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UNPUBLISHED

June 26, 1998

No. 210654

Calhoun Circuit Court

LC No. 94-001248

ON REMAND

Before: Corrigan, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529; MSA 28.797, first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to twenty-five to sixty years' imprisonment for the armed robbery conviction, to be served concurrently with a sentence of forty to sixty years' imprisonment for the first-degree criminal sexual conduct conviction; those two sentences were consecutive to two concurrent sentences of two years' imprisonment on the two felony-firearm convictions. This Court previously reversed defendant's convictions and remanded for a new trial. *People v Stewart*, unpublished opinion per curiam of the Court of Appeals, issued 10/21/97 (Docket No. 182698). In lieu of granting leave to appeal, our Supreme Court peremptorily reversed this Court's judgment and remanded for consideration of the issues raised by defendant and not addressed by this Court in its previous opinion. 456 Mich 942 (1998). We affirm.

Defendant argues that he was denied a fair trial because of repeated instances of prosecutorial conduct. We disagree. Because defendant failed to object to the alleged instances of prosecutorial misconduct, appellate review is precluded, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

Defendant first claims that the prosecutor improperly vouched for his case by stating: “I, too, would feel more comfortable in this case if there were more evidence.” Defendant’s argument is without merit. In examining the prosecutor’s comment in context, *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994), this statement by the prosecutor was in response to defense counsel’s closing argument that there was a lack of hard evidence. Moreover, in making this statement, the prosecutor was not vouching for his case or his witnesses, *People v Smith*, 158 Mich App 220, 231-232; 405 NW2d 156 (1987), nor was the prosecutor arguing facts not in the record, *Stanaway, supra* at 686, as argued by defendant. When examining the statement in context, *Legrone, supra*, it appears that the prosecutor was addressing the fact that, although the evidence may not have presented a perfect case, there was sufficient evidence to prove defendant’s guilt beyond a reasonable doubt. In effect, the prosecutor’s comment probably was to defendant’s benefit because it was a tacit admission that the case against him was less than perfect.

Defendant also asserts that the prosecutor made comments that defendant’s presence at trial provided him with the opportunity to fabricate his testimony. In this case, the evidence supported the inference that defendant’s presence at trial gave him the opportunity to fabricate his testimony. Thus, the prosecutor’s statements regarding whether defendant’s testimony was believable were “perfectly proper comment on credibility.” *People v Buckey*, 424 Mich 1, 16; 378 NW2d 432 (1985); see, also, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor’s comments did not constitute harmful error, and no manifest injustice will result in this Court’s decision to decline further review.

Defendant claims that he was denied a fair trial because the prosecutor misstated the law by suggesting that defendant could argue that the state had to prove the case against him perfectly. We disagree. Even assuming that the comments were a misstatement of the law and that they somehow prejudiced defendant, any prejudice could have been cured by an instruction. *Stanaway, supra* at 687. Further, any confusion that may have resulted was likely cured by the prosecutor’s subsequent statements and the trial court’s instructions concerning “beyond a reasonable doubt” standard. Further, the court properly instructed the jury to follow the law as given by the judge rather than as presented by the attorneys.

Next, defendant asserts that he was denied the effective assistance of counsel because his counsel failed to object to the alleged instances of prosecutorial misconduct set forth in the previous issue. Because defendant failed to request a new trial or an evidentiary hearing, our review is limited to the lower court record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). In reviewing the record, there is nothing to indicate that trial counsel acted in a manner that was deficient under the prevailing professional norms and there is no reasonable probability that the result of the proceeding would have been different had counsel objected to the prosecutor’s comments. *Stanaway, supra* at 687-688. Further, as previously noted, none of the challenged statements by the prosecutor constituted harmful error.

Defendant argues that the trial court’s failure to explore his dissatisfaction with his counsel and its failure to sua sponte appoint substitute counsel denied him the effective assistance of counsel at sentencing. We disagree. Defendant has failed to preserve this issue by making a testimonial record

below in connection with an evidentiary hearing. See *Ginther, supra*. Further, defendant did not request below that substitute counsel be appointed. Although defendant now asserts that the trial court should have sua sponte appointed substitute counsel, defendant cites no authority for this proposition. This Court will not search for authority to sustain a party's position. *People v Carlin*, 225 Mich App 480, 489; 571 NW2d 742 (1997). Moreover, in reviewing defendant's statements made at the sentencing hearing, which he now claims were assertions of ineffective assistance, the record indicates that defendant was just making general complaints because he lost his case. Defendant also fails to state how he was prejudiced by his attorney's alleged conflict of interest. Defendant has failed to show that trial counsel was deficient or that he was prejudiced. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

We affirm.

/s/ Maura D. Corrigan  
/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra