

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEVIE WILLIAMS, JR.,

Defendant-Appellant.

UNPUBLISHED

November 24, 1998

No. 200579

Recorder's Court

LC No. 96-002162

Before: Gage, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), two counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), two counts of armed robbery, MCL 750.529; MSA 28.797, assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant's sentences for his first-degree premeditated murder convictions and armed robbery convictions were merged into the felony murder sentences. The trial court sentenced defendant to concurrent terms of natural life for his first-degree felony murder convictions and twenty to thirty years for the assault with intent to murder conviction, all to be served consecutively to the two-year sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his conviction was against the great weight of the evidence. However, defendant did not file a timely motion for new trial, and thus has failed to preserve this issue for our review. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Furthermore, when reviewing a motion for new trial based on the great weight of the evidence, this Court will not attempt to resolve credibility issues anew, as defendant urges us to do in the instant case. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998).

Defendant next argues that the trial court improperly denied his request for new counsel. The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Appointment of substitute counsel is warranted only on a showing of

good cause and where substitution will not unreasonably disrupt the judicial process. *Id.* Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.*

The trial court held two pretrial hearings addressing defendant's motions for new counsel. At the May 1996 hearing, defendant complained that defense counsel had failed to provide him with a fingerprint report. Defense counsel indicated that he had not yet received this report, but that he would forward it to defendant when he obtained it. The September 1996 hearing revealed defendant's concern that the prosecutor was withholding evidence, and that defense counsel had done nothing about it. Defense counsel indicated that he understood defendant's position, but that he believed he would have to prove this evidence suppression at trial, and did not know what else he could do before then. These hearings do not establish a difference of opinion between defendant and defense counsel regarding a fundamental trial tactic. *Id.* Additionally, assigning defendant new counsel at the September 19, 1996 hearing would have disrupted the judicial process, as defendant's trial was set to begin on October 9, 1996. Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's motions for new counsel.

Next, defendant claims that several instances of prosecutorial misconduct denied him a fair trial. Defendant failed to object below to any of the prosecutor's allegedly improper remarks. Appellate review of improper prosecutorial remarks is generally precluded absent an objection because it deprives the court of an opportunity to cure the error. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). However, an appellate court will still reverse if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *Id.* The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997).

Defendant claims that the prosecutor improperly appealed to the sympathy of the jury by pointing out photographs of a child that were found lying next to one of the victims. Defendant correctly asserts that it is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). However, a prosecutor is free to argue the evidence in the case, *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996), and it is undisputed that the photographs to which the prosecutor referred during closing argument had been introduced into evidence at trial. Furthermore, in light of defense counsel's subsequent, responsive admonition to the jury that sympathy could play no role in its decision regarding defendant's guilt or innocence, we cannot conclude that the prosecutor's remarks deprived defendant of a fair trial.

Defendant next alleges that the prosecutor improperly gave his personal opinion on the credibility of defendant's mother and brother, his alibi witnesses. The prosecutor stated regarding defendant's mother, whose testimony did not firmly establish an alibi, that his "evaluation of her is that she is a good and honest person. And . . . she would not and did not lie for [defendant]." The prosecutor commented of defendant's brother, whose testimony did tend to establish an alibi for defendant, that his testimony was preposterous and unbelievable. Neither of these remarks was improper. A prosecutor may argue from the facts that a witness is not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), but may not convey a message to the jury that the prosecutor has some special knowledge or facts indicating the witness' truthfulness.

People v Bahoda, 448 Mich 261, 277; 531 NW2d 659 (1995). The prosecutor's remarks represented proper credibility evaluations. Although the prosecutor stated that he believed defendant's mother, he gave no indication to the jury that he possessed any special knowledge regarding her veracity. We also note that the trial court's instructions that the jury was the ultimate finder of fact and judge of credibility removed any prejudicial effect the prosecutor's statements may have had. Therefore, we conclude that the prosecutor's credibility-related remarks did not deprive defendant of a fair and impartial trial.

Defendant additionally suggests that, when his brother had testified that he did not speak with defendant or defendant's lawyer to aid in preparing his trial testimony, the prosecutor's statement that "[i]t's preposterous for [defendant's brother] to have said that he didn't talk to anybody, not his brother, not his brother's lawyer," improperly argued facts not in evidence. Although no testimony did establish that defendant's brother rehearsed testimony with defendant or defense counsel, the prosecutor's remarks merely conveyed the permissible argument that defendant's brother was not worthy of belief. *Launsbury, supra*. We note again that any prejudice resulting from this remark was cured by the trial court's instructions that it was the jury's responsibility to decide which witnesses to believe.

Defendant also contends that the prosecutor improperly urged the jury to draw negative inferences against defendant because he was represented by counsel. However, the prosecutor simply expressed his disbelief of defendant's brother's statement that he did not rehearse his testimony with defense counsel. Because no remark by the prosecutor suggested that the jury should penalize defendant for exercising a constitutional right, we conclude that defendant's argument is without merit.

Defendant further claims that the cumulative effect of the four instances of prosecutorial misconduct denied defendant a fair trial. However, in light of our conclusions that none of defendant's four allegations amounts to prosecutorial misconduct, we additionally reject as meritless defendant's argument regarding their cumulative effect.

Finally, defendant argues that the police and the prosecutor suppressed evidence, thus violating his due process rights. Although this constitutional issue was not raised below, we will review it to determine whether the alleged misconduct was decisive of the outcome. *People v Shively*, 230 Mich App 626, 629; ___ NW2d ___ (1998). Defendant's argument that the prosecutor and police suppressed a February 17, 1996 statement by the only surviving victim ignores trial testimony by the victim and police that no such statement existed. However, even accepting defendant's arguments that both the statement and a telephone from the home where defendant murdered his victims were improperly destroyed, defendant completely fails to connect these destructions with any specific, resulting prejudice. Therefore, we conclude that these alleged acts of evidence suppression were in no way decisive to the outcome of defendant's trial, and we decline to review defendant's arguments further. *Id.*

Affirmed.

/s/ Hilda R. Gage
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra