STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON EUGENE HILL,

Defendant-Appellant.

UNPUBLISHED
December 28, 1999

No. 211944
Hillsdale Circuit Court
LC Nos. 00-217825
00-217827

Before: Fitzgerald, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of entering without breaking with intent to commit larceny, MCL 750.11; MSA 28.306. He was sentenced to three years' probation, with six months to be served in the county jail, and ordered to pay restitution and costs of approximately $2,291.00. Defendant appeals as of right. We affirm.

Defendant was originally charged with ten separate theft counts, arising out of five separate cases. All five cases were tried together. The cases rested on the testimony of two witnesses, Michael Cooley and Shawn Peet, who both allegedly participated in the charged crimes with defendant. Cooley and Peet both agreed to testify against defendant pursuant to a plea agreement in which several other charges were dismissed. The trial court directed a verdict of not guilty on four of the ten charges, and the jury found defendant not guilty of four of the remaining six charges.

Defendant first argues that trial counsel was ineffective because he failed to move to sever the five separate cases pursuant to MCR 6.120(B). We disagree.

Following an evidentiary hearing, the trial court found that defense counsel's decision not to sever the various cases was based on sound strategy reasons. We agree that defendant has failed to overcome the strong presumption that defense counsel's decision constituted sound trial strategy. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996). Moreover, considering that defense counsel was successful in obtaining a directed verdict on four of the counts, and in persuading the jury to find defendant not guilty of four of the remaining counts, defendant has failed to demonstrate a reasonable probability that the outcome of the proceeding would have been different had

the various charges been severed. *People v Shively*, 230 Mich App 626, 627-628; 584 NW2d 740 (1998). Accordingly, we find that defendant was not denied the effective assistance of counsel.

Next, defendant claims that he was deprived of a fair trial because of prosecutorial misconduct. Defendant did not object to most of the instances of alleged misconduct. A claim of prosecutorial misconduct must be preserved with an appropriate objection at trial. Absent an objection, appellate relief is precluded unless the prejudicial effect could not be cured by a cautionary instruction or failure to consider the issue would result in a miscarriage of justice. *People v Warren (After Remand)*, 200 Mich App 586, 589; 504 NW2d 907 (1993).

We have examined defendant's claims in context. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). The prosecution is free to comment on the evidence and all reasonable inferences that may be drawn from the evidence as it relates to its theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Jensen*, 162 Mich App 171, 179; 412 NW2d 681 (1987). Here, it was not improper for the prosecutor to comment on defendant's idleness or to infer from defendant's parents' testimony that they perhaps had an unrealistic opinion of defendant. Both comments were supported by the evidence and reasonable inferences drawn therefrom. *People v Fredericks*, 125 Mich App 114, 118; 335 NW2d 919 (1983).

We also find that the prosecutor did not improperly vouch for the credibility of its witnesses. *Bahoda, supra* at 276. The prosecutor asked the jury to consider what it had heard and what it had seen in terms of the witnesses' demeanor and motivation. The prosecutor's remarks were no more than statements of his belief in the honesty of the witnesses, based on the evidence and the witnesses' appearence at trial. Viewed in context, the prosecutor's remarks as a whole were fair. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998); *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

We further find that the prosecutor did not improperly argue facts not in evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Police Officer Raney testified that there had been a rash of John Deere lawn mower thefts and that Cooley had come to the attention of the police after he was found walking in an area where a John Deere lawn mower had been found. The prosecutor's remark advising the jurors to keep any John Deere lawnmowers well secured, although made as an aside and perhaps unnecessary, was nevertheless made in reference to the evidence. Any prejudice stemming from this statement could have been cured by a prompt admonishment to the jury regarding its role as factfinder. *McElhaney, supra* at 284. Also, the prosecutor's remark that Jerry Sours probably stole the bolt cutters that Cooley had borrowed from him was a permissible inference drawn from the evidence, given the testimony that the stolen tools were given to Sours in exchange for illegal drugs.

We agree that it was improper for the prosecutor to question defendant about an earring in his ear. However, defense counsel immediately objected on the basis of relevancy and the objection was sustained. There is no basis for concluding that the question deprived defendant of a fair trial. *People v Rice (On Remand)*, 235 Mich App 429, 432; 597 NW2d 843 (1999); *People v Pearson*, 123 Mich App 462, 464; 332 NW2d 574 (1983).

Finally, after reviewing the record, we are not convinced that defendant was denied a fair trial on the basis that the trial court improperly assumed the role of the prosecutor or made unfairly prejudicial comments to defense counsel in the presence of the jury. The trial court's questions and comments did not rise to the level that would unjustifiably arouse suspicion in the mind of the jury concerning a witness' credibility or influence the jury to the detriment of defendant's case. Moreover, no personal bias or prejudice has been demonstrated. MCL 768.29; MSA 28.1052; *Schellenberg v Rochester Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998); *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996); *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986). Defendant has also failed to demonstrate that the fine imposed on defense counsel for arriving twenty-five minutes late for trial was an abuse of discretion.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra
/s/ Jane E. Markey