STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED September 22, 2000
v	No. 203029 Oakland Circuit Court
ADIL TOMA, Defendant-Appellee/Cross-Appellant.	LC No. 94-134322-FC ON REMAND

Before: Neff, P.J., and O'Connell and Talbot, JJ.

PER CURIAM.

This case returns to us on remand from our Supreme Court. In *People v Toma*, __ Mich __; __ NW2d __ (Docket No. 112528, issued June 28, 2000), slip op at 32-33, a majority of the Supreme Court found harmless any error that occurred in allowing a forensic psychologist to testify to statements that defendant made to him during an examination. The opinion also determined that this panel erred in ruling that defendant's attorney denied him effective assistance of counsel. The Court remanded for our consideration of the remaining issues in this case. We reverse the trial court's order granting defendant a new trial and affirm his conviction.

The facts of this case are set forth in detail in the Supreme Court's opinion, and we do not reiterate them here. We first address the issue whether the trial court abused its discretion when it excluded the hearsay testimony of defense witness Frank Raymore. Hearsay is defined as a statement, other than one of the declarant made while testifying at trial, that is offered as evidence to prove the truth of the matter asserted in the statement. MRE 801(c). Generally, hearsay is inadmissible. MRE 802. Defense counsel intended for Raymore to testify that McPherson, according to her out-of-court assertions, needed defendant's money and his car keys, and demanded these items from him. We agree with the trial court's assessment that McPherson's out-of-court statements were offered through Raymore solely to prove the truth of the matter asserted – defendant sought to prove that McPherson wanted defendant's money and car keys, and this is precisely what Raymore would have testified to. Therefore, the trial court did not abuse its discretion in excluding Raymore's testimony based on the prosecutor's hearsay objections.

Defendant further argues that even if Raymore's testimony was hearsay, it was admissible pursuant to MRE 803(3), an exception that allows trial courts to admit "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health) . . . ." Defendant contends that Raymore's testimony was admissible under MRE 803(3) because the excluded statement would have established McPherson's intent or plan "to shake Defendant down for money and property, and this was the catalyst that led to the events at bar."

We do not agree. McPherson's statements indicated that she needed money and a car and sought these items from defendant. However, these statements revealed nothing about McPherson's plan, if any, to extort valuables from defendant, and did not otherwise concern her then-existing state of mind. The trial court did not abuse its discretion in excluding Raymore's testimony.

Defendant also contends that the prosecutor repeatedly engaged in misconduct and denied him a fair trial. To preserve his arguments of prosecutorial misconduct, defendant was required to object to each instance of alleged prosecutorial misconduct. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant did not object to any of the alleged instances of misconduct. Consequently, our review of each asserted instance of misconduct is for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We should reverse only if the defendant was actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

The test of prosecutorial misconduct is whether the prosecution denied defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court reviews claims of prosecutorial misconduct on a case-by-case basis. We examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We analyze prosecutorial comments in light of defense counsel's arguments and the relationship they bore to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

Defendant first argues that the following statements that the prosecutor made during closing argument denied him a fair trial because they impermissibly appealed to the jury's sympathies for the victim:

> It's said that every picture tells a story. This picture is no exception. It tells the story of Steven Burge, a 29 year old man, who would not live to see his 30th birthday. It tells the story of a man, beloved son, a boyfriend, a victim. An unfortunate victim of a horrifying fate, who died in that living room on Mear Street, for all practical purposes, terrified, covered with blood and gasoline and in an agonizing manner. The bullet hole, already affecting [sic] it's [sic] grisly toll.
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> That grisly picture, ladies and gentlemen of the jury, is the handiwork of the man in that chair. It's horrifying, isn't it? He took a living, breathing human being and

changed that individual into a lifeless corpse. Another number at the Wayne County Morgue.

Now we know in that in [sic] 1993, Steven Burge became a number. It's horrifying, isn't it? And yet it's nothing compared to the horror suffered by Steven Burge in the last moments of his life. The moments he spent looking at this terrifying Halloween mask as he struggled for his life. The horror he felt as he was shot in the head at close range. Nothing compared to the terror he suffered as he lay bleeding on that living room floor, as Danny Parenteau struggled with and ultimately, unmasked that gunman.

The man seated in this chair, truly a nightmare come to life. His bone chilling savagery is so macabre, it's so overwhelming that it defies comprehension. It's futile to try to understand the why's of Steven Burge's death. You can only understand the how's. Terrified, covered in blood and gas on a cold floor in an agonizing manner. A fatal and brutal attack by a savage, sadistic, brutal murderer, who goes by the name of Adil Toma. And by now, ladies and gentlemen of the jury, you should be shuddering because you should realize that for the last week you have been seated in the same room with a brutal, sadistic murderer.

A timely requested curative instruction may ameliorate the prejudicial effect of an appeal to the jury's sympathy for the victim. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). In the context of this lengthy trial and in light of the graphic evidence that the prosecution submitted against defendant, in our view a curative instruction could have countered the minimally prejudicial effect of the prosecutor's appeal to the jury's sympathies. Moreover, to the extent that the prosecutor characterized Burge's murderer as "sadistic," "brutal," and "horrifying," the evidence presented at trial adequately supported these descriptions. Further, we note that defense counsel himself acknowledged that Steven Burge's murder was indeed "an absolute tragedy." Reversal on the basis of the prosecutor's statements is not warranted.

Next, defendant argues that the prosecutor impermissibly appealed to the jury's fears, emotions, and sense of civic duty when he stated, "F. Scott Fitzgerald once wrote that in every society, no matter how lofty, there remains the jungle. The defendant is living proof of that," and, "[Defendant] turned that house at 394 West Mear into a house of horrors. I ask you for the verdict that in your hearts, in your minds, and in your souls you know to be the true one because the defendant knew, too." We do not deem these comments to be grounds for reversal. A prosecutor may not appeal to the jury's sense of civic duty to obtain a conviction, nor play on their broader societal fears, because such tactics inject issues that are broader than a defendant's guilt or innocence, and because they encourage jurors to suspend their own powers of judgment. See *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). In this case, however, the prosecutor did not explicitly appeal to the jury's sense of civic duty to punish defendant for his violent acts. The prosecutor stated that the jurors' verdict should be the one they knew to be true in their minds, as well as in their souls and hearts. Thus, the prosecutor did not ask the jurors to suspend their powers of reason in reaching a verdict. Because the

prejudicial effect of these comments was minimal, and in light of the overwhelming evidence presented against defendant, a timely requested curative instruction could have addressed any of their adverse effects. *Id.*

Next, defendant argues that the prosecutor engaged in misconduct when, in arguing defendant's guilt with reference to evidence presented at trial, she called defendant, "truly a nightmare come to life," "a savage, sadistic, brutal murderer," and a "spiller of innocent blood" who had demonstrated "bone chilling savagery." Defendant argues that these comments were grounds for reversal because they impermissibly denigrated and dehumanized him, and were calculated to inflame the passions of the jury against him. See *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

While the prosecutor should have avoided repeated use of such strong language to characterize defendant and his crime, we do not agree that the prosecutor's use of this language requires reversal. The evidence clearly showed that Steven Burge's murder, and his murderer, were savage, sadistic, and brutal. The evidence suggested that the murderer intended not only to shoot Burge, but also to set him on fire. Moreover, because the prosecutor submitted compelling evidence of defendant's guilt, and because these statements constituted a permissible, albeit strong, characterization of the evidence, there is little indication that a timely requested curative instruction could not have cured any prejudice resulting from the prosecutor's comments.

Next, defendant asserts that the prosecution engaged in misconduct when it made the following statements in her closing and rebuttal arguments: "I'd submit to you, it doesn't get much better than this. It's a[s] strong of a case that can be imagined," and, "In no way, no shape, no form is this a second degree murder," and, "Ladies and gentlemen of the jury, the defendant is guilty in this matter of an unspeakable crime." Defendant correctly argues that the prosecutor may not ask a jury to convict defendant on the basis of her knowledge of his guilt. *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163 (1995). However, we do not read these comments as assertions of the prosecutor's personal knowledge or opinion of defendant's guilt. Instead, they were permissible comments on the strength of the evidence and the prosecutor's case. Because we see nothing clearly objectionable about these comments, reversal of defendant's convictions is not warranted.

Defendant next argues that the prosecutor impermissibly denigrated defense counsel and defendant's theory of innocence in making the following statements during her rebuttal in response to defense counsel's argument that McPherson had attempted to "shakedown" defendant for money on the night of Burge's murder:

> The only shakedown going on here is the shakedown of you, as jurors. Counsel has repeatedly referred [to] this as a tragedy. Well, ladies and gentlemen, I submit to you that when a small child dies of cancer, that's a tragedy. When thousands of people die in an earthquake, that is a tragedy. When a human being takes a gun and deliberately points it at an individuals [sic] head and pulls the trigger, that is not a tragedy. That is a crime. And the crime is called first degree murder.

We do not view these comments to be grounds for reversal of defendant's convictions. True, a prosecutor may not attack the credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, otherwise improper remarks may not require reversal if they address defense counsel's issues. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Here, the prosecution was merely responding to defense counsel's main argument that Burge was killed when a scuffle ensued after McPherson, the Parenteaus, and others attempted to "shakedown" money from defendant on the night of the murder. The prosecutor was not attempting to impugn defense counsel's credibility, but instead intended to address the weaknesses in defendant's account of the events of the night in question. In light of defense counsel's argument, the prosecutor was free to characterize defendant's account of the crime as untrue.

Next, defendant argues that the prosecutor engaged in misconduct in urging the jury to speculate about other crimes of which defendant may have been guilty. The prosecutor stated:

> . . . When [Margo McPherson] got a boyfriend, [defendant] couldn't stand it. So he plotted death.
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> Death for Steven Burge and presumably, Margo because there is only one reason to come into a house in the manner he did and to bring gasoline into a house like that is because you want to burn something. A home, it's [sic] occupants and but, for the grace of God, and the quick reaction and intervention of Steven Burge, there could have been three more victims here. Margo [McPherson] and her two children.

Generally, suggesting that a defendant may be guilty of other crimes where no evidence supports the contention is prosecutorial misconduct. See *People v Thangavelu*, 96 Mich App 442, 451; 292 NW2d 227 (1980). However, in this case defendant's argument that the jury would have interpreted the prosecutor's comments to mean that he actually was guilty of crimes toward Margo McPherson and her children is unconvincing. The prosecutor expressly stated that there "could have been three more victims here," not that there were three more victims. Moreover, these statements were related to the prosecutor's theory that the evidence showed that defendant had committed attempted arson, a crime on which two of his charges of felony-murder had been predicated. In essence, the prosecutor was arguing that defendant had a motive to commit arson, i.e., to punish McPherson and her family for McPherson's refusal to reciprocate to his advances and her involvement in a romantic relationship with Burge. It does not appear that the prosecutor engaged in misconduct in making this argument to the jury. In any event, a timely requested curative instruction could have alleviated any resulting prejudice.

Further, we view as lacking merit defendant's contention that his attorney's failure to object to the foregoing allegations of prosecutorial misconduct constituted ineffective assistance of counsel. In light of the minimally prejudicial nature of the prosecutorial comments and the compelling evidence of defendant's guilt presented at trial, no reasonable probability existed that the outcome of the case would have been different. See *People v Pickens*, 446 Mich 298, 302-303, 327; 521 NW2d 797 (1999); *Strickland v Washington*, 466 US 668, 692-696; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

We next address the prosecutor's contention that the trial court erred in determining that defendant's trial attorney denied him effective assistance of counsel in failing to impeach the testimony of McPherson and Talarico, who were two of the prosecution's witnesses. Defendant argued before the trial court that his trial counsel should have impeached McPherson with evidence of her prior conviction of receiving and concealing stolen property over $100, and cross-examined Talarico regarding the fact that he was incarcerated on an unrelated criminal sexual conduct charge at the time of defendant's trial. The trial court agreed and granted defendant's motion for new trial. We agree with the prosecutor that the trial court's ruling was in error.

Regarding Talarico's criminal sexual conduct offense, even if we were to conclude that defense counsel was constitutionally deficient in failing to present evidence of Talarico's pending charge, defendant has not shown that his attorney's omission prejudiced him. Evidence of a pending charge generally cannot be used to impeach the credibility of a witness. MRE 609; *People v Hall*, 174 Mich App 686, 690; 436 NW2d 446 (1989). However, the fact that a prosecution witness has charges pending against him is relevant to the issue of the witness' interest in testifying and may be admitted for this purpose. *Id.* at 690-691. Here, however, the jury's knowledge of Talarico's pending criminal charges would not have significantly affected its assessment of his credibility as a witness. Talarico was charged with criminal sexual conduct on December 5, 1994. However, Talarico identified defendant as the shooter at a lineup approximately one year before he was charged with criminal sexual conduct, and also at defendant's preliminary examination, which was conducted on August 16, 1994. Thus, had defense counsel raised the issue of Talarico's potential interest in cooperating with the police, the prosecutor could have soundly rebutted any negative inference arising from the fact of Talarico's pending criminal charge. Because Talarico's pending charge was minimally probative on the issue of his interest and bias, and because the evidence of defendant's guilt was overwhelming, defense counsel's failure to cross-examine Talarico concerning his pending charge did not prejudice defendant, or otherwise render the result of his trial untrustworthy. To the extent that the trial court found otherwise, it abused its discretion.

Defendant also argues that his trial attorney's performance was deficient because he failed to impeach McPherson with evidence of her prior conviction for receiving and concealing stolen property over $100. Unlike Talarico's pending criminal charge, defendant could have used McPherson's prior conviction to impeach her credibility as a witness, as it involved a significant element of dishonesty. MRE 609(a)(1). Notwithstanding defense counsel's failure to introduce evidence of this conviction, defense counsel impugned McPherson's credibility as a witness by cross-examining her regarding her recurring drug dependency problems and the fact that she had been accused of stealing defendant's checkbook. Moreover, as the prosecutor correctly points out, McPherson was unable to identify defendant as the gunman. Even if the jury had not believed her on the basis that she had been previously convicted of receiving and concealing stolen property, her testimony was only relevant to the prosecutor's attempt to establish defendant's motive. In light of the overwhelming eyewitness testimony identifying defendant as the gunman, as well as the scientific and circumstantial evidence of his guilt, we see no basis on which to conclude that defense counsel's failure to impeach McPherson with her prior conviction prejudiced defendant. The trial court erred in finding to the contrary.

Defendant finally argues that the trial court denied him a fair and impartial trial when it elicited from the jury foreman the numerical division between the deadlocked jurors. Defendant also contends that the trial court erred in deviating from the standard deadlocked jury instruction. According to defendant, the court's eliciting of the numerical division of the jury, threatening to keep them in deliberations for an entire week, and repeating that the jury had a legal duty to reach a decision in this matter, placed immense pressure on the holdout juror to comply with the other jurors' decision to convict. Defendant also asserts that the trial court erred in not warning the jurors against surrendering their honest beliefs in reaching a verdict.

Failure to object to a jury instruction on the grounds that it was unduly coercive waives consideration of the error on appeal. MCR 2.516(C); *People v Pollick*, 448 Mich 376, 386-388; 531 NW2d 159 (1995). Defendant failed to object to the alleged error. Therefore, this issue has been waived for appellate review. *Id.* Moreover, after careful review of the disputed instruction, we are satisfied that the instruction was not unduly coercive. See *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984); *Goldsmith*, *supra* at 561. Consequently, we also reject defendant's argument that he was denied effective assistance of counsel when his attorney failed to object to the alleged errors. *See Pollick*, *supra* at 388 n 16.

The trial court's order granting defendant a new trial is reversed and his conviction is affirmed. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot

I concur in the result only.

/s/ Janet T. Neff