

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY LEE YOUNG,

Defendant-Appellant.

UNPUBLISHED
November 3, 2000

No. 217943
Saginaw Circuit Court
LC No. 98-016097-FC

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

PER CURIAM.

Defendant appeals as of right from his jury convictions of first-degree murder on alternative theories of premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a) and first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b), assault with intent to murder, MCL 750.83; MSA 28.278, and carjacking, MCL 750.529a; MSA 28.797(a). We affirm defendant's convictions, but remand for resentencing on the assault with intent to murder and carjacking convictions.

Defendant first argues that the trial court denied him his right to present a defense in excluding an out-of-court statement by the surviving victim. The decision whether evidence is admissible is within the discretion of the trial court; this Court will not disturb the decision absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

In the present case, defense counsel attempted to admit into evidence, through a sheriff's testimony, a prior inconsistent statement of the surviving victim who had previously testified, but the trial court sustained the prosecutor's objection to this testimony. Having reviewed the record, we find that, under the circumstances, the trial court was within its discretion in prohibiting this extrinsic evidence. See *People v Parker*, 230 Mich App 677, 682-684; 584 NW2d 753 (1998). The trial court allowed defense counsel to impeach the victim with other evidence, and thus the defense was not impaired by the court's exclusion of the statement.

Next defendant argues that the prosecutor's comments during closing argument denied him a fair trial. Defendant alleges two specific errors: 1) that the prosecutor improperly vouched for the credibility of a prosecution witness, and 2) that the prosecutor attempted to shift the burden of proof to defendant. This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *Bahoda, supra* at 266-267; *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Having failed to object to the first alleged error, that the prosecutor improperly vouched for the credibility of a prosecution witness, defendant failed to preserve that issue for appellate review. Our review is precluded unless an objection could not have cured the error or the failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely curative instruction." *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully, *Bahoda, supra* at 276, or by placing the prestige of his office behind the witness, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995) (Boyle, J.). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as may relate to his theory of the case. *Bahoda, supra* at 282. Otherwise improper prosecutorial remarks may not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

In the present case, the prosecutor's remark as to the veracity of a prosecution witness's testimony was in response to defense counsel's attempt to undermine the credibility of that witness and, read in context, did not rise to the level of prosecutorial misconduct. Moreover, any error could have readily been cured with an instruction, and thus defendant's argument is without merit.

Defendant's other argument, that the prosecutor attempted to shift the burden of proof to defendant, is preserved, but is also without merit. "[A] prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, "[a] prosecutor's remark that evidence is undisputed is proper in urging the weight to be given the testimony." *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). Here, the prosecutor's remark was in response to defendant's unsupported theory explaining the evidence in closing argument and we find no error. *Id.*; see *Duncan, supra*; *Simon, supra*. Any arguable error was cured by the trial court's immediate allusion to the prosecution's burden of proof and its further explication in the jury instructions. Defendant received a fair trial.

Defendant next argues that the trial court violated the indeterminate sentencing act when sentencing defendant to terms of twenty-five years to life imprisonment on the assault with intent to murder conviction and fifteen years to life imprisonment on the carjacking conviction. The prosecution concedes that remand for resentencing on these two counts is necessary because the trial court violated

the clear language of MCL 769.9(2); MSA 28.1081(2), and thus those sentences are invalid. The act forbids the imposition of a sentence “in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence.” MCL 769.9(2); MSA 28.1081(2). Because the trial court violated this provision, we remand for resentencing solely on those two counts.

Finally, defendant argues that the trial court erred in failing to allow defense counsel an opportunity for allocution before sentencing. Pursuant to MCR 6.425(D)(2)(c), the sentencing court must allow both defendant and his counsel to address the court before sentencing is imposed. Resentencing is required where the court fails to comply with this rule. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999). Although defendant claims that his counsel was not provided an opportunity to address the court, the record reveals otherwise. There is nothing in the record to suggest that defense counsel was prevented from speaking to the circumstances surrounding the crime or to the sentence that should be imposed if he wished to do so. *People v Schluter*, 204 Mich App 60, 67 n 2; 514 NW2d 489 (1994); see also *People v Odneal*, 166 Mich App 203, 206; 420 NW2d 104 (1987); *People v Gwinn*, 111 Mich App 223, 254-255; 314 NW2d 562 (1981).

We affirm defendant’s convictions and remand to the trial court for resentencing on the assault with intent to murder and carjacking convictions. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey