

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT C. LEWIS,

Defendant-Appellant.

UNPUBLISHED

October 2, 2001

No. 226755

Wayne Circuit Court

LC No. 99-007838

Before: Cavanagh, P.J., and Markey and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of receiving and concealing stolen property with a value greater than \$100, MCL 750.535. The trial court sentenced him as a fourth felony offender, MCL 769.12, to forty months' to five years' imprisonment. Defendant appeals as of right. We affirm.

This case involves a 1986 Cadillac DeVille that was stolen from William Abernathy and found in the possession of defendant's estranged wife. When found, it bore a license plate registered to defendant. Abernathy testified that the steering column was damaged, the seats had been changed, the sunroof was missing, and the driver's side door was different. Defendant denied that he knew the car was stolen. In her closing argument, the prosecutor remarked that the condition of the car when it was recovered, particularly the steering column, was uncontested. She also stated that it was undisputed that the seats were removed from Abernathy's car and put in a 1986 Cadillac DeVille defendant had owned. Defendant did not object.

On appeal, defendant contends that these remarks were improper and denied him a fair trial. We disagree. 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. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, in the absence of an objection, a defendant's claims of prosecutorial misconduct are reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Watson, supra; Schutte, supra* at 720-721.

Defendant first argues that it was improper for the prosecutor to remark that it was uncontested that the steering column of Abernathy's car was damaged. Although a prosecutor is precluded from arguing facts not in evidence or mischaracterizing the evidence presented, the prosecutor may argue reasonable inferences from the evidence. *Bahoda, supra* at 282; *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Here, there was no evidence that the ignition was intact on the day the car was found. Further, the jurors were instructed that the attorneys' statements are not evidence. There was no plain error and any prejudicial effect could have been cured by a timely instruction. The remark did not deny defendant a fair trial.

Defendant also argues that the prosecutor's characterization of the facts as "uncontested" and "undisputed" constituted improper burden shifting. However, a prosecutor may permissibly argue that the evidence presented is uncontradicted, even though the defendant is the only one who could have contradicted or challenged the evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Reviewing the prosecutor's comments in context, she was merely pointing out the weaknesses in defendant's case and not creating an inference that defendant had to prove something. *Id.* The comments did not shift the burden of proof or deny defendant a fair trial.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jessica R. Cooper