

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALTHON C. VANN,

Defendant-Appellant.

UNPUBLISHED

December 28, 2001

No. 224949

Wayne Circuit Court

Criminal Division

LC No. 99-004596

Before: Saad, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to twenty-five to forty years' imprisonment for the assault conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that misconduct by the prosecutor deprived him of a fair trial. We review allegations of prosecutorial misconduct de novo by evaluating the challenged conduct in context to determine if the defendant was denied a fair and impartial trial. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Defendant first argues that the prosecutor committed misconduct by repeatedly attempting to elicit hearsay testimony from the treating physician and a police officer concerning the identity of the shooter. We disagree. The record shows that the trial court sustained defense counsel's objections to the proffered testimony and, therefore, neither the treating physician nor the police officer were permitted to testify with regard to the victim's identification of the shooter. Each time the court sustained defense counsel's objection, the prosecutor obeyed the court's ruling and attempted to have the evidence placed before the jury in a permissible fashion. The mere fact that the prosecutor attempted to place this evidence before the jury does not constitute misconduct. The prosecutor is permitted to act zealously as long as he does not do so for illegitimate reasons. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). "In order to warrant reversal, 'it is necessary to show some prejudice or pattern of eliciting inadmissible testimony.'" *People v Watson*, 245 Mich App 572, 578; 629 NW2d 411 (2001). Here, the challenged line of questioning, which did not result in the objectionable testimony being presented to the jury, did not deny defendant a fair trial.

Second, defendant argues that the prosecutor improperly appealed to the jurors' civic duty in his opening statement. Because defendant did not raise this specific objection at trial, this issue is not preserved. MRE 103(a)(1); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Therefore, we review this issue for plain error affecting defendant's substantial rights (i.e., affecting the outcome of the trial). *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Prosecutors "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members." *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). A civic duty argument is one that injects issues broader than the guilt or innocence of the defendant or encourages the jurors to suspend their powers of judgment. *People v Truong (After Remand)*, 218 Mich App 325, 340; 553 NW2d 692 (1996). We agree with defendant that the prosecutor's statement, "Heaven forbid that individuals can get away with things of this nature of this type of case like this in broad daylight," can be characterized as an improper civic duty argument. However, as in *Cooper*, the remark was "brief and added little to the obvious conclusion that the shooting at issue was a horrible incident." The prejudicial effect, if any, could have been eliminated by an appropriate curative instruction upon proper request. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Defendant has failed to demonstrate that, but for this remark, the result of the trial would have been different. *Carines, supra*.

Third, defendant argues that the prosecutor mischaracterized the eyewitness identification evidence. Defendant's failure to object to the prosecutor's remarks requires that he demonstrate a plain error that affected the outcome of the trial. *Carines, supra*. A prosecutor may not argue facts not in evidence, but is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Here, a comparison of the prosecutor's statements and the witness' identification testimony reveals that the prosecutor was properly arguing the evidence and reasonable inferences that could be drawn from the evidence. The remarks were not improper.

Fourth, defendant argues that the prosecutor improperly used the prestige of his office to bolster witness credibility when describing a witness as a "nice man" who "almost hurt" if he had to "say something bad about an individual," and then referred to himself as a "God-fearing man." Defendant did not object to these remarks at trial. Therefore, we review this issue for plain error that affected the outcome of the trial. *Carines, supra*.

A prosecutor may not vouch for the credibility of a witness by suggesting that the government has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), or place the prestige of his office behind the witness, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). Nor may a prosecutor suggest that he possesses extrajudicial information on which the defendant should be convicted. *Id.* at 399. However, the mere statement of the prosecutor's belief in the honesty of the complainant's testimony is not error requiring reversal where, as a whole, the remarks are fair.

Viewed as a whole, the prosecutor's remarks did not amount to impermissible vouching for the credibility of a witness or improper use of the prestige of the prosecutor's office. The prosecutor's reference to a witness as a "nice man" did not constitute improper vouching. Nor did the prosecutor improperly inject religion into the proceeding, see MCL 600.1436, when

referring to himself as a “God-fearing man” as a follow-up to his previous statement that he was not a Biblical scholar. See *People v Vasher*, 449 Mich 494, 499-500; 537 NW2d 168 (1995). Defendant has not demonstrated plain error that affected the outcome of the trial.

Defendant next claims that he was denied a fair trial because of references that he had been in and out of jail and had stolen from the victim in the past. He also asserts that he was further prejudiced when the victim described himself as a hardworking man with a wife and children. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). “A jury should not be allowed to consider the defendant’s guilt of the crime before it on the basis of evidence of his propensity for crime.” *People v Allen*, 429 Mich 558, 568; 420 NW2d 499 (1988). However, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, “an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.” *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Here, the victim’s statements referring to defendant as having been in jail before and as having stolen from him in the past were both given as unresponsive, volunteered answers to proper questions by the prosecutor. *Griffin, supra*. The court’s curative instruction was sufficient to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant did not object to the victim’s testimony describing himself as a hard-working family man, and we are satisfied that this remark did not affect the outcome of the trial. Accordingly, this unpreserved issue does not warrant appellate relief. *Carines, supra*.

Finally, we conclude that defendant was not denied a fair trial because of the cumulative effect of several errors. *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989); *Griffin, supra* at 46; *Cooper, supra* at 659-660.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Peter D. O’Connell