

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY R. JACKSON,

Defendant-Appellant.

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UNPUBLISHED

March 19, 2002

No. 228546

Wayne Circuit Court

LC No. 99-006002

Before: Hood, P.J., and Gage and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction and eighteen to forty years' imprisonment for the second-degree murder conviction. Defendant appeals as of right, and we affirm.

Yenta Johnson, a neighbor of the decedent, overheard him arguing with defendant. The men began pushing and shoving. Defendant left the scene in a vehicle. He returned a short time later with a gun and shot the decedent. The decedent ran from defendant, obtained his own weapon, then shot at defendant, who fumbled his weapon. The decedent ran across the street as he fired his weapon. Defendant got back in the vehicle and pursued the decedent to an area outside the view of Johnson. Johnson heard additional gunshots and proceeded to the area. When she arrived there, police had taped off the scene.

Defendant first argues that the prosecutor committed misconduct based on several statements made during closing arguments. We disagree. A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We decide issues of prosecutorial misconduct on a case by case basis, reviewing the pertinent portion of the record and examining the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). While the prosecutor may not make a statement of fact unsupported by the evidence, the prosecutor may argue the evidence and all reasonable inferences arising from the evidence as related to the theory of the case. *People v Schultz*, 246

Mich App 695, 710; 635 NW2d 491 (2001). While defendant challenges six different statements made by the prosecutor in closing and rebuttal arguments, defendant objected to only one statement. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Watson, supra*. To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *Id.* Error requiring reversal will not be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.*

Following de novo review of the record, we conclude that defendant was not denied a fair and impartial trial. *Watson, supra*. Defendant alleges that four of the comments by the prosecutor were designed to improperly bolster the credibility of Johnson. However, defendant's theory of the case was that Johnson was biased against him and fabricated defendant's involvement in the shooting. In light of defendant's arguments and theory of the case, defendant was not denied a fair and impartial trial. *Watson, supra*; *Schutte, supra*. Furthermore, the prosecutor's statement regarding the lack of evidence found at Burt Street was made in response to arguments by defense counsel. While defendant alleged that the lack of shell casings at the Burt Street location demonstrated that Johnson fabricated her testimony, there was no questioning by either counsel to establish any investigation of the Burt street location by police. Furthermore, Johnson, who testified that she witnessed the entire argument and shooting until the men turned the corner, was not interviewed by police until the day after the shooting. The prosecutor's argument was in response to defendant's argument. *Schutte, supra*. Finally, the prosecutor's argument that the decedent attempted to defend himself was a reasonable inference from the evidence based on Johnson's testimony. *Schultz, supra*.

Defendant next argues that he was denied due process and a fair trial when the trial court failed to instruct the jury regarding involuntary manslaughter and failed to reiterate the manslaughter instruction when responding to the jury's request, during deliberations, for the second-degree murder instruction. Defendant waived this issue when counsel expressed satisfaction with the trial court's instructions and supplemental instruction to the jury. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues that trial counsel was ineffective for failing to object to the prosecutor's improper closing and rebuttal arguments and the trial court's instructions. We disagree. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and, but for the errors of counsel, there is a reasonable probability that the outcome would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). As previously stated, we cannot conclude that the statements of the prosecutor were improper in light of defendant's theory of the case, the evidence presented, and the reasonable inferences that arise from the evidence. Defense counsel is not obligated to register a meritless objection. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). Regarding the claim of instructional error, even assuming that there was error, defendant has failed to meet the outcome determinative burden. Review of the record reveals that the jury sent three notes to the trial court, requesting all evidence, the evidence diagram of the scene, and an "explanation" of second-degree murder. The trial court complied with the jury's request by providing the instruction for second-degree murder, but did not sua sponte provide the instruction for voluntary manslaughter. There is no indication that the jury required additional

instruction regarding manslaughter or that the jury was confused as a result of the instruction. Defendant failed to meet his burden. *Carbin, supra*.

Affirmed.

/s/ Harold Hood

/s/ Hilda R. Gage

/s/ Christopher M. Murray