

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CHARLES POQUETTE,

Defendant-Appellant.

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UNPUBLISHED

June 7, 2002

Nos. 225291; 225292  
Menominee Circuit Court  
LC Nos. 99-002430-FH  
99-002431-FH

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on one count of first-degree home invasion, MCL 750.110(a)(2), possession of a billy or bludgeon, MCL 750.224(1), and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to two terms of nine months' to five years' imprisonment: one term for the dangerous weapon charge; the other for the carrying a concealed weapon charge. Defendant was also sentenced to three to twenty years' imprisonment on the home invasion charge. We affirm.

Defendant first argues that his convictions should be reversed because the prosecutor deliberately attacked his credibility by disclosing to the jury that he invoked his constitutional right to remain silent after being advised of his *Miranda*<sup>1</sup> rights. Defense counsel did not object to the prosecutor's rebuttal closing argument, so this issue has not been preserved on appeal; however, because prosecutorial misconduct may deny a defendant a fair and impartial trial and thus violate a defendant's constitutional rights, this issue, although unpreserved, is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-766; 597 NW2d 130 (1999). To avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *Carines, supra* at 763. No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant's constitutional right to remain silent after being advised of his *Miranda* rights was not affected by the prosecutor's comments during closing argument. Here, on direct examination, defendant testified that the statements the police said he made after being advised

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

of his *Miranda* rights and waiving them were never made by him. On cross-examination, defendant claimed that the police were lying about what he said to them. To bolster the police officer's testimony regarding what defendant told him when he waived his *Miranda* rights, the prosecutor questioned the police officer regarding whether he offered defendant an opportunity to record his statements on tape. Defense counsel did not object to this question, and the police officer testified that he made this offer to defendant but that he declined.

This Court reviews claims of prosecutorial misconduct case by case and the prosecutor's remarks are examined in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721. Prosecutors are free to argue the evidence and all reasonable inferences from it. *Id.* Additionally, comments regarding the defendant's credibility must be based on fair inferences from the evidence. *People v Roberson*, 90 Mich App 196; 282 NW2d 280 (1979).

Because defendant did not object to the alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (2000). Here, the trial court dispelled any prejudice in this regard by specifically instructing the jurors that it was their duty to determine the credibility of witnesses and that the attorneys' statements and arguments should not be considered evidence. *Schutte, supra* at 722; *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Additionally, the trial court instructed the jurors that the burden of proof lay with the prosecution and that it was the prosecution's obligation to prove its case beyond a reasonable doubt. Further, the trial court instructed the jurors, before closing arguments began, that they would not hear any more evidence in the case and that they were only going to hear arguments and instructions. The brief testimony offered and the prosecutor's comments during closing argument were to bolster the police testimony regarding what defendant told them after he waived his *Miranda* rights. This testimony and the prosecutor's comments were in regard to defendant's credibility, not his guilt or innocence; therefore, defendant's constitutional right to a fair trial was not violated because the prosecutor did not commit misconduct.

Defendant next argues that an instruction on jury unanimity and a unanimous jury verdict on whether the prosecution proved a specific intent to commit the distinct offenses of a larceny or some level of criminal sexual conduct should have been required.

Criminal defendants are entitled to a unanimous jury verdict. Const 1963, art 1, § 14; MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994). To protect a defendant's right to a unanimous verdict, the trial court has a duty to properly instruct the jury regarding the unanimity requirement. *Cooks, supra* at 511.

Here, the trial court instructed the jury regarding the elements of home invasion and instructed that the felony defendant intended to commit therein was either larceny or criminal sexual conduct; therefore, the contested issue was defendant's mens rea. The police officers testified that defendant told them he was in the victim's home to either commit a sexual assault or larceny. During his direct examination, defendant denied telling the police officers he intended to commit a felony, and on cross-examination, defendant suggested that the police were

liars. The trial court did not err in instructing the jury because the jury did not have to unanimously agree on which felony defendant intended to commit while in the victim's home. Rather, defendant's conviction was supported if each juror believed defendant entered the dwelling intending to commit a felony – regardless whether individual jurors believed defendant intended to commit CSC while others believed defendant intended to commit larceny. See, e.g., *People v Gadomski*, 232 Mich App 24; 592 NW2d 75 (1998); *People v Smielewski*, 235 Mich App 196; 596 NW2d 636 (1999).

Finally, defendant argues that defense counsel was ineffective for failing to object to the preceding two alleged errors and also for failing to object to the introduction of evidence that was not relevant and was highly prejudicial. A claim of ineffective assistance of counsel is reviewed de novo. *People v Pickens*, 446 Mich 298, 359; 521 NW2d 797 (1994).

Defense counsel's failure to object to the prosecutor's cross-examination of defendant and the prosecutor's closing argument was not ineffective because the prosecutor was free to question defendant regarding his testimony and the prosecutor was entitled to comment on the evidence and draw reasonable inferences thereon. Any objection would have been meritless, and counsel is not required to make meritless objections. *Knapp, supra* at 361; *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Likewise, defense counsel's failure to object to the jury instructions was not ineffective assistance because the trial court's instructions to the jury were proper.

Finally, defendant argues that trial counsel was ineffective for failing to object on the grounds of relevancy, MRE 402 and 403, to the introduction of defendant's statements made to the police officers. All relevant evidence is admissible and evidence that is not relevant, is not admissible. MRE 402. The credibility of a witness is a material issue and is relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), modified, remanded 450 Mich 1212; 539 NW2d 504 (1995). An intent to commit a criminal sexual conduct or larceny was one of the elements the prosecution had to prove for a jury to convict defendant of home invasion; therefore, defendant's statements were relevant to the issues and defenses in this case. Relevant evidence is excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

The trial court's decision to admit the evidence is reviewed for an abuse of discretion. An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would have concluded that there was no justification or excuse for the trial court's ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Here, no abuse of discretion exists.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Harold Hood  
/s/ David H. Sawyer