STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2002
v	No. 232098 Monroe Circuit Court
WILLIAM DEAN PFEIFFER, Defendant-Appellant.	LC No. 99-030002-FC

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of conspiracy to commit bank robbery, MCL 750.531; MCL 750.157a, and his jury trial convictions on retrial of bank robbery, MCL 750.531, possession of a firearm during the commission of a felony, MCL 750.227b, and possession of a firearm by a felon. The trial court sentenced defendant to two hundred months to forty years in prison for the bank robbery conviction, seventy-six months to forty years in prison for the conspiracy to commit bank robbery conviction, two years in prison for the felony-firearm conviction, and forty to sixty months in prison for the possession of a firearm by a felon conviction. We affirm.

At trial, several employees and one customer of Monroe Bank and Trust testified regarding a robbery that occurred at about 12:16 p.m. on January 7, 1999. The witnesses testified that two men, one of whom carried a gun, robbed the bank. Both men wore caps that covered their faces. None of the witnesses were able to identify the robbers. Two of the witnesses described a dark-red or burgundy car, one said it was a Buick Skylark or Skyhawk.

The only witness linking defendant to the robbery was Jamie Stine. She testified that defendant, with whom she had a sexual relationship, asked her to help him rob a bank. She testified concerning the procurement of a gun, the stealing of a red car, and a discussion regarding which bank to rob. Stine testified that defendant and Dewaine Dale drove by the bank and that when they returned Stine told them that she did not want to be involved anymore. Nevertheless, defendant and Dale headed towards the bank and Stine drove up and down the street. When she saw the two running out of the woods, she stopped and they jumped in her car. They were wearing coveralls and ski masks. Stine also testified that they went to a hotel and counted the money.

The police initially contacted Stine about the murder of her friend, to whom she had given some money. Stine then told police about the robbery. She was initially charged with bank robbery, but accepted a plea agreement that included her testifying against defendant and a reduced charge of larceny from a person. Stine was impeached at trial with her prior inconsistent statements to police. She also admitted that she was angry because defendant was seeing his ex-girlfriend. In the first trial, defendant was also permitted to question Stine regarding an incident that occurred when she was fifteen or sixteen years old. She was asked whether she was fired from Marco's Pizza for stealing. The court permitted the questioning under MRE 608(b) over the prosecutor's objection. Stine testified that she did not steal, but was covering for somebody else, and she was never charged with stealing.

During deliberations at the first trial, the jury asked to rehear Stine's testimony, opening statements, closing arguments, the reasonable doubt instruction, and to see the surveillance tape. The court reinstructed on reasonable doubt and permitted the court reporter to play back opening, closing and Stine's testimony outside the presence of the court, the attorneys and defendant. The first trial ended with a conviction of conspiracy to commit armed robbery, and a hung jury on the remaining charges. Upon retrial, defendant was convicted of the remaining charges. At the second trial, defendant was not permitted to ask Stine about the incident at Marco's Pizza.

I

Defendant argues that, in the first trial, the trial court erred in denying his request for CJI2d 5.8. This Court reviews claims of instructional error de novo. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). Pursuant to MCL 768.29, the trial court must instruct the jury on the law applicable to the case. This Court reviews jury instructions in their entirety to determine whether reversible error occurred. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998).

CJI2d 5.8 provides, in relevant part:

> (1) You have heard evidence about the character of [*name witness*] for truthfulness. You may consider this evidence, together with all the other evidence in the case, in deciding whether you believe the testimony of [*name witness*] and in deciding how much weight to give that testimony.

Having determined to admit the evidence under MRE 608, it is unclear why the trial court denied the request. Nevertheless, we find no reversible error. The requested instruction would have only told the jury that the evidence could be considered along with all the other evidence in the case in deciding whether to believe Stine and how much weight to give her testimony. There is no reason to believe that without the instruction the jury did not know that it could consider the evidence along with all the other evidence in considering whether and to what extent to believe Stine. Additionally, the jury was given several other instructions regarding Stine's testimony, including the accomplice instruction and the prior inconsistent statement instruction. Further, defense counsel called the incident to the jury's attention in closing argument, stating that it should be considered in deciding whether Stine was telling the truth at trial. In short, although Stine's testimony was clearly central to defendant's conviction, the instruction at issue was

peripheral to the jury's assessment of her credibility. We are satisfied that the denial of the instruction did not affect the outcome of the trial. *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000).

II

Defendant next argues that, in the second trial, the trial court erred in precluding cross examination of Stine regarding her having been fired from Marco's Pizza for theft. We disagree. The decision to admit evidence is within the trial court's discretion and should only be reversed if there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Reversal is not required for a preserved, nonconstitutional error unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

At the second trial, the court acknowledged that it was being inconsistent, since it had allowed the questioning in the first trial, but determined that the evidence was collateral and so remote that it lacked probative value, since the incident happened when Stine was fifteen or sixteen and she was twenty-two[1] at the time of the second trial. We find no abuse of discretion in the court's ruling.

III

Defendant next argues that, in the first trial, the trial court committed reversible error in permitting the jury to rehear opening statements, closing arguments, and Stine's testimony. We disagree.

The decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000); MCR 6.414(H). MCR 6.414(H) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Allowing the court reporter to read back testimony is not improper. *Carter, supra*, 462 Mich at 214. Here the court allowed the court reporter to play the tape back to the jury outside the presence of the court, the attorneys and defendant. In *People v White*, 144 Mich App 698, 704-705; 376 NW2d 184 (1985), this Court addressed the issue, also raised by defendant here,

[1] At the first trial, Stine testified that she would be twenty-two in October. She may not have turned twenty-two by the time of trial, October 9 and 10, but was within weeks of her twenty-second birthday.

that the tapes were played outside the presence of the judge, defendant, and defense counsel. This Court noted that it is well established that a defendant has the right to be present at all stages of the trial where his substantial rights may be affected. *Id.* at 704. However, this Court did not determine that the defendant's rights were violated because it found that the defendant affirmatively waived objection. *Id.* at 705.

Here, when the court announced that the jury had sent a note requesting the opening and closing statements, Stine's testimony, the bank tape, which had not been admitted, and the reasonable doubt instruction, defense counsel agreed with the prosecutor that opening and closing statements were not evidence and should not be given to the jury. The court then inquired about Stine's testimony and the reasonable doubt instruction. Defense counsel then said that if the court was going to let the jury have Stine's testimony, then counsel would like the jury to hear her closing argument again to put Stine's testimony in perspective. The court then discussed the logistics, stating that it could bring the jury into the courtroom, tell them that all the instructions are important, that the openings, closings and Stine's testimony would be played for them, and reinstruct on reasonable doubt. The court explained that usually that would be done in the courtroom, but if everyone agreed, the court could tell the reporter and the jury not to discuss the case, and the reporter could play back the tapes in the jury room. Defense counsel responded that she objected to the court doing anything more than reinstructing on reasonable doubt. The prosecutor again objected to opening and closing being played.

The court stated that it would allow the court reporter to play opening and closing statements and Stine's testimony, it would reinstruct on reasonable doubt, and it would instruct that the statements were not evidence, and that all the evidence and instructions must be considered. The court said it would let the reporter play the tapes in the jury room, and asked whether the attorneys objected to the method proposed by the court. Defense counsel responded that she did not object to the method, but to the material being played.

We conclude that while defendant preserved his objection to the material being played, he waived his objection to the method employed, i.e., the court reporter playing the tapes in the jury room in the absence of defendant, counsel and the judge. Further, defendant did not assert that the tapes were inaccurate in any way, and may not challenge their accuracy on appeal.

Regarding the opening statements and closing arguments, we conclude that defendant has not shown that he was prejudiced where the statements and arguments of both sides were read, and the jury was instructed that the opening statements and closing arguments are not evidence and are only intended to assist in understanding the evidence and each side's theory of the case.

Defendant next argues that the prosecutor engaged in misconduct by bolstering Stine's testimony and appealing to the jurors' sympathy for the victims. We disagree.

A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). This Court examines the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Claims of prosecutorial misconduct are decided on a case by case basis. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *Id.* The propriety of

the prosecutor's remarks depends on all the facts of the case. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted. *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000).

In the first trial, the prosecutor's arguments were permissible comment on the plea agreement. In the second trial, Detective Davison's testimony was directed to the question whether Stine was told that she had to incriminate a particular person or persons:

Q. Okay. Did you ever – did you ever threaten or coerce or in any way, make it clear to Jamie – Jamie Stine, now Jamie Ciccotte, that she had to – that she had to name somebody or not name somebody? Do you understand my question?

A. I understand what you're saying

MS. HILLS: Your Honor, I object, I think that's been asked and answered on direct exam.

The trial court overruled the objection. The prosecutor then proceeded:

Q. Did you do that? Did you tell her that she had to name or not name any individual?

MS. HILLS: Same objection, your Honor.

MR. SIMMS: Okay.

THE COURT: I'll let you take the answer, and then I'm sustaining the objection.

MR. SIMMS: I understand, thanks.

THE WITNESS: I told her she needed to tell me the truth.

Defendant was not denied a fair trial by this testimony. Detective Davison did not testify that, in his opinion, Stine was telling the truth. In response to a question whether he told her to name a particular person, he testified that he told her to tell the truth.

Defendant next argues that the prosecutor improperly evoked the sympathy of the jury. Although a prosecutor may argue that a witness should be believed, he may not appeal to the jury to sympathize with the victim. *Watson, supra,* 245 Mich App 591; *People v Dalessandro,* 165 Mich App 569, 581; 419 NW2d 609 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). When the prosecutor's remarks are read in context, it is apparent that the prosecutor was not appealing to the jurors' sympathies, but rather, was arguing that the persons present during the bank robbery were distracted by the dangerous situation around them and, for that reason, could not provide more accurate identification of the robber. Therefore, the prosecutor was not improperly appealing to the jurors to have sympathy for the victims, but rather, was properly arguing based on the evidence.

Defendant finally argues that, in the second trial, the court erred in granting the prosecution's request to elicit testimony from Stine that, prior to the plea agreement, she faced bank robbery charges that carried a possible sentence of life in prison. Defendant argues that this testimony was inadmissible pursuant to the rule that the jury should not be informed of the possible penalty faced by the defendant if convicted. *People v Holliday*, 144 Mich App 560; 376 NW2d 154 (1985). Defendant argues that the exception to this rule, that permits the defendant to question the witness about his knowledge of the penalty he avoided by entering a plea agreement, did not apply in this case because defendant did not want the information presented to the jury. *People v Mumford*, 183 Mich App 149; 455 NW2d 51 (1990).

However, defendant argued for the admissibility of the information. A party in whose favor the trial court entered the order is not an aggrieved party entitled to an appeal. *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999). Therefore, this Court does not have jurisdiction over this issue. Even if defendant was aggrieved by the admission of this testimony, error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Helene N. White