

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Apellee,

v

JOSEPH EARL ROBINSON, a/k/a JASUN
DUGAN,

Defendant-Appellant.

UNPUBLISHED

June 10, 2004

No. 246708

Wayne Circuit Court

LC No. 02-001497

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The convictions arose out of a shooting in a Detroit “crack house.” Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prisons terms of fifty to one hundred years for the murder conviction, and two to five years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that, during closing argument, the trial court “circumscribed” his “right of confrontation and due process” by precluding defense counsel from using evidence elicited during her cross-examination of defendant’s cousin, Jonathan Taylor, to argue that Taylor had a motive to lie about defendant. We disagree.

At trial, Taylor testified that defendant told him “not to go home,” and that he “shot someone for trying to rob him.” During defense counsel’s cross-examination of Taylor, counsel elicited testimony that Taylor and defendant were “not on good terms,” that defendant did not “like” Taylor “beating up on his sister,” and that defendant had threatened Taylor. Later, during closing argument, defense counsel stated:

We also, ladies and gentlemen, know something else about Jonathan Taylor. He admitted to you that he had an *assaultive history*. Remember he admitted to you that he had assaulted - - (emphasis added).

The prosecutor objected, noting that the argument was “inappropriate.” The trial court sustained the objection. Outside the presence of the jury, the trial court concluded that defense counsel sought to make an improper MRE 404(b) argument, and that the evidence was not admitted for that purpose. The court noted that “the evidence came in during a discussion with the witness about any possible bias or motive that Mr. Taylor may have had to lie on his cousin,” but that defense counsel was not allowed “to make the argument that because [Taylor] has an assaultive history that somehow makes him more of a person that assaults someone else or words to that effect:”

That’s a propensity argument which is inappropriate. That’s precisely what the rules do not allow anyone to do.

The purpose of closing argument is to allow the attorneys to comment on the evidence and to argue their theories of the law to the jury. *People v Finley*, 161 Mich App 1, 9; 410 NW2d 282 (1987). The trial court has broad power and wide discretion to control closing arguments, *People v Green*, 34 Mich App 149, 152; 190 NW2d 686 (1971), and a duty to limit the arguments of counsel to relevant and proper matters, see MCL 768.29 and MCR 6.414(A).

We agree with the trial court that defense counsel attempted to use evidence that was admissible to show bias to make, instead, an improper MRE 404(b) argument. Although defendant argues on appeal that the precluded argument would have demonstrated Taylor’s motive to lie, nothing in the challenged portion of defense counsel’s argument inferred Taylor’s motive or intent to lie because of the “bad blood” between defendant and Taylor. To the contrary, the only inference the “assaultive history” argument would have suggested is that Taylor had a propensity for assaulting women and acted in conformity with his character in murdering the victim. Because use of other acts evidence for the purpose of suggesting a propensity for similar conduct is prohibited, MRE 404(b), the trial court did not abuse its discretion in precluding defense counsel from making the argument.

Furthermore, the record indicates that defense counsel was not precluded from arguing that Taylor was biased or had a motive to lie. In fact, defense counsel, without interference, fully explained her theory that Taylor was unbelievable. As such, contrary to defendant’s claim, the trial court’s ruling did not preclude defense counsel from arguing that Taylor was biased or had a motive to lie.

Defendant also argues that he was denied a fair trial by the prosecutor’s “repeated vouching” for Taylor’s credibility during rebuttal argument. We disagree.

This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, 282; 531 NW2d 659 (1995). A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant’s guilt. *Id.*; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

Defendant claims that the prosecutor impermissibly vouched for Taylor’s credibility when he stated: “He’s told the truth and said what the Defendant told him.” Although defense counsel objected to the prosecutor’s remark, she failed to request a ruling from the trial court, a

curative instruction, or any other action by the trial court. Furthermore, although the prosecutor's remark may have been improper, the remark was fleeting, involved only a brief portion of the argument, and was not so inflammatory that defendant was prejudiced. Moreover, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence. The court's instructions were sufficient to dispel any perceived prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), citing *Bahoda, supra* at 281. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

Defendant also claims that the prosecutor impermissibly vouched for Taylor's credibility when he stated: "This is about the Defendant attempting to frame an innocent man, Jonathan Taylor." Viewed in context, the challenged remark was plainly focused on refuting defense counsel's assertions made during closing argument that Taylor was not credible, that he "point[ed] the finger at someone else 'cause he's the prime suspect," that he blamed defendant because there was "bad blood between them," that he "pointed the finger at his own cousin" "out of anger, out of spite," and that Taylor's story was "farfetched." Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Furthermore, in addition to the challenged remark, the prosecutor cited evidence admitted at trial that supported defendant's guilt, and urged the jurors to evaluate and judge the evidence using their common sense. He also asserted that, although defense counsel suggested that Taylor was the "real killer," there were several reasons to conclude that he was credible. The prosecutor discussed Taylor's demeanor and attitude during his testimony, his relationship with defendant and the content of his testimony, and suggested that Taylor would not have fabricated a statement that implied that defendant acted in self-defense. Moreover, as previously indicated, the trial court's instructions that the lawyers' statements are not evidence, that the case should be decided on the basis of the evidence, and that the jurors were the sole judges of the witnesses' credibility were sufficient to dispel any perceived prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.

Defendant's final claim is that the trial court erred by excluding evidence of Taylor's character for truthfulness, under MRE 608. We disagree. At trial, defense counsel sought to present the testimony of Shalvase Chambers under MRE 608. Defense counsel made an offer of proof, stating that Chambers would testify that Taylor told him what defendant supposedly admitted to him, and that, upon observing Taylor's demeanor when he relayed what defendant said, Chambers concluded that Taylor was not being truthful. Defense counsel asserted that the proposed testimony was Chambers' "opinion" that Taylor was not telling the truth, and that it would relay "a specific instance of conduct." The trial court denied defense counsel's request, concluding that the proffered testimony, i.e., that Chambers did not believe that Taylor was telling the truth when he told him what defendant said, was not the type of "opinion evidence" that falls under MRE 608. The court noted that defense counsel was in effect "asking [the court] to allow this witness to testify as a human lie detector," and that credibility is a matter for the jury. On appeal, defendant argues that the inquiry was permissible under MRE 608, because it was relevant to Taylor's credibility.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). We agree with the trial court that the proffered testimony was not admissible under MRE 608. The proposed evidence did not fall within the scope of MRE 608(a), because it did not involve the witness' opinion of Taylor's general character for truthfulness. Likewise, the evidence was not admissible under MRE 608(b), because it concerned the witness' opinion of whether a particular statement by Taylor was truthful, not a specific instance of Taylor's conduct bearing on his character for truthfulness. Additionally, under MRE 608(b), specific instances of conduct may be inquired into only on cross-examination. Here, the defense called Chambers as a witness. Thus, even if the proposed testimony relayed the type of specific instance of conduct admissible under MRE 608(b), the defense could not properly present it during direct examination.

Moreover, as noted by the trial court, the proffered testimony would have merely presented a witness' opinion of whether another witness was telling the truth. To admit the testimony would have circumvented the well-established rule prohibiting a witness from commenting or providing an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). It is for the jury to determine whether a particular witness is credible. *Id.*; *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Accordingly, the trial court did not abuse its discretion by precluding the proffered testimony under MRE 608.

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello