STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LAWAJUAN GREEN, Defendant-Appellant.	UNPUBLISHED February 15, 2011 No. 294570 Oakland Circuit Court LC No. 2009-225264-FC

Before: SAAD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court imposed sentences of eight to 30 years' imprisonment each for the carjacking and robbery convictions, and two years' imprisonment for the felony-firearm conviction, the latter to be served consecutively to the sentence for robbery. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS

This case arises from an incident that took place on the night of January 6, 2009. The victim testified that he returned home from work, parked his 1998 Cadillac in front of his house, and went to check his mail, when a blue Buick with five persons in it appeared and parked nearby. According to the victim, defendant left that car and asked him something he did not understand,[1] then produced a shotgun, pointed it at the victim, and commanded him to empty his pockets. The victim complied, producing his wallet and car keys, after which defendant ordered him to the ground, then took the wallet and keys and started the victim's car. The victim described running from the scene in fear, but nonetheless observing defendant enter the victim's car and start driving.

[1] The victim speaks only a little English.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant's first issue on appeal is that the trial court erred in denying his motion for a new trial because his conviction of carjacking was against the great weight of the evidence. We disagree. "The standard of appellate review regarding a trial judge's decision to grant or deny a motion for a new trial is 'entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion . . . .'" *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998), quoting *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

"A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, 456 Mich at 627. A trial court might disturb a jury verdict where testimony upon which it depended is "patently incredible or defies physical realities," or where "the witness['s] testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id.* at 643-644 (internal quotation marks and citations omitted).

In this case, defendant does not challenge the victim's credibility, but instead argues that the victim's account did not amount to an instance of carjacking. The crime of carjacking is defined statutorily as follows:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years. [MCL 750.529a.]

In particular, defendant argues that the prosecution did not prove that defendant had the requisite intent to commit carjacking or that defendant took the car in the presence of a person in lawful possession of it. With regard to the intent element, carjacking is a general intent crime. *People v Davenport*, 230 Mich App 577, 581; 583 NW2d 919 (1998). The offense of carjacking does not require intent to permanently deprive the victim of the vehicle. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998). Rather, a defendant must intend to commit the proscribed acts of using force, threats or fear. *Davenport*, 230 Mich App at 581. With regard to whether the car was taken in the victim's presence, a carjacking occurs in the presence of a person if it occurs "within his reach, inspection, observation or control that he could, if not overcome by violence or prevented by fear, retain his possession" of the carjacked vehicle. *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997) (internal quotation marks and citation omitted).

Defendant concedes that the evidence shows that he used force or threats to rob the victim of the contents of his pockets, but argues that that the evidence does not demonstrate that he had the intent to take the victim's car until after that display of force or threats ceased. However, "[a]n actor's intent may be inferred from all of the facts and circumstances, . . . and

because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). In this case, the victim testified that defendant took possession of his car keys and started the car before the victim ran away. Those actions are sufficient circumstantial evidence of intent to deprive the victim of his car all along. Further, because the victim was threatened with a shotgun only moments earlier, he could well be deemed still under the stress of that threat when defendant took those initial steps toward taking possession of the car. For these reasons, the conclusion that defendant had the requisite intent to use force or threats in the course of taking the victim's car comported with the great weight of the evidence.

Defendant argues that because the victim testified that he had run from the scene by the time defendant actually started driving the car, the evidence cannot reasonably be deemed to show that the car was taken in the victim's presence. However, according to the victim's account, defendant seized his car keys from his person, thus initiating the forcible taking of the car in the victim's presence. Further, the account of fleeing did not suggest that the victim had reached a place of temporary safety, or was otherwise wholly disassociated from the crime scene, before defendant starting driving. Although the victim described running from the scene in fear, his testimony that he saw defendant drive his car indicates that he had not wholly succeeded in doing so as of that moment. For these reasons, the conclusion that defendant took the car in the presence of its owner comported with the great weight of the evidence. The trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. PROSECUTORIAL MISCONDUCT

Defendant's second issue on appeal is the prosecutor engaged in misconduct when he repeatedly stated that the events underlying this case could have resulted in a homicide. Defendant argues that this commentary was irrelevant, inflammatory, highly prejudicial, and in violation of the prosecutor's duty to seek justice. Having examined the challenged comments in context, we disagree.

A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764. Comporting with this standard is this Court's pronouncement in *People v Unger*, 278 Mich App 210; 749 NW2d 272 (2008), that "[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or failure to review the issue would result in a miscarriage of justice." *Id.* at 234-235 (internal quotation marks and citation omitted).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). At the same time, "[a] prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). Moreover, a

prosecuting attorney may not express personal opinions about the defendant's guilt, urge the jury to convict based on its civic duty, or appeal to the jurors' fears or prejudices. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

Defendant first makes issue of the following remark from closing argument: "It was this close to being a murder trial." Considered in isolation, this could appear to be an attempt to inflame the jury, inject improper civic duty argument, or to confuse the jury with argument not relevant to the question of defendant's guilt. But in context, it is apparent that this argument was intended to underscore the seriousness with which the victim's testimony should be taken:

> Almost a [life] altering event occurs. Think about what happened to [the victim]. It was this close to being a murder trial. When you have a weapon pointed at you, a shotgun pointed at you, a 12 gauge shotgun pointed at you. And in this case that's exactly what happened to [the victim].

Because the prosecuting attorney was pointing out the danger that the victim faced in urging that he be believed, rather than urging the jury to convict over concerns for hazards that did not come to fruition, the argument was not improper.

Soon afterward, the prosecuting attorney touched on this argument again, stating, "[a]s I said before, one little movement and we're here on a murder charge." But this immediately followed commentary about how the victim "pretty much . . . could actually see his life pass before his eyes," and immediately preceded admonishments concerning how closely the victim and his assailant were situated. Again, the prosecuting attorney was arguing for a favorable reading of that witness's credibility, not asserting that defendant was a dangerous man deserving of conviction because of what might have happened but did not.

Finally, defendant notes that the prosecuting attorney stated in rebuttal, "somebody almost got shot and killed." That remark came in the context of an assertion that the evidence was overwhelming, plus the admonishment that "[i]t's not a game of semantics. It's . . . real life. Real life where somebody almost got shot and killed." Although the prosecution is arguing that the victim should be believed, this may seem to touch briefly on an improper civic duty argument.

In any event, any error caused by the prosecutor's conduct was remedied by the trial court's instructions. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009) (internal quotation marks and citations omitted). In this case, the trial court instructed the jury to decide the case solely on the basis of the evidence and not to rely on the statements of counsel, which are not evidence. For these reasons, we reject this claim of error.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio