

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN DAVID GREENE,

Defendant-Appellant.

UNPUBLISHED
February 21, 2013

No. 308448
Ogemaw Circuit Court
LC Nos. 11-003674-FH
11-003679-FH

Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

A jury convicted defendant of larceny of property valued at \$1,000 or more but less than \$20,000, MCL 750.356(3)(a) (11-003674-FH), larceny of property valued at more than \$20,000, MCL 750.356(2)(a) (11-003679-FH), and racketeering, MCL 750.159i(1) (11-003679-FH). He was sentenced as a habitual offender, MCL 769.11, to 26 months to 10 years' imprisonment for the larceny under \$20,000 offense, 26 months to 20 years' imprisonment for the larceny over \$20,000 offense, and 10 years and six months to 40 years' imprisonment for the racketeering offense. We affirm.

I. BASIC FACTS

Defendant was tried along with co-defendants David Ritchie and Fabian Loonsfoot.¹ Defendant, Ritchie, Loonsfoot and Ritchie's girlfriend, Misr Abdur-Rahim, were members of a group that robbed businesses of their equipment. Abdur-Rahim accepted a plea deal and agreed to testify against her co-defendants. Abdur-Rahim testified that defendant would come to where she lived with Ritchie and she would hear the two "talk about places that they could hit larcenies at," and that she was with defendant and Ritchie on several occasions when equipment was stolen. The larcenies happened the same way with the same individuals: "They would take a trailer hooked onto a truck, go to the place where they planned on committing their larcenies, fill the trailer up and go." Abdur-Rahim acted as a lookout and observed defendant and the others load "tractor supply stuff" and "lawn equipment" into the trailers. Both the stolen trailer and the stolen equipment were found at Abdur-Rahim and Ritchie's home.

¹ Ritchie was convicted of racketeering, larceny between \$1,000 and \$20,000, and larceny over \$20,000. Loonsfoot was acquitted of two larceny charges for items valued between \$1,000 and \$20,000, but was found guilty of two counts of larceny over \$20,000.

Defendant was convicted and sentenced as outlined above. He now appeals as of right.

II. RACKETEERING/CONDUCTING A CRIMINAL ENTERPRISE

On appeal, defendant initially argued that his racketeering conviction could not stand because the larceny offenses did not provide a basis for a “pattern of racketeering activity” pursuant to MCL 750.159f(c), which requires “not less than 2 incidents of racketeering.” However, at oral argument defendant conceded that larceny is a predicate offense for racketeering. MCL 750.159g(cc). Because defendant’s felony larceny convictions pursuant to MCL 750.356(2)(a) and (3)(a) clearly qualify as predicate offenses for his charge of racketeering, there is no error.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor improperly vouched for the credibility of Abdur-Rahim during the rebuttal portion of her closing argument. We disagree.

Defendant did not object to the prosecutor’s argument nor did he seek a curative instruction. Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objected below, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). When there was no contemporaneous objection and request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger*, 278 Mich App at 235.

When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. Further, the propriety of a prosecutor’s remarks will depend upon the particular facts of each case. In addition, a 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. Furthermore, otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense. Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence. [*People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003) (citations omitted).]

Defendant claims that the prosecutor personally vouched for the credibility of Abdur-Rahim when the prosecutor argued:

Again, keep your eyes on the big picture.

And defense attorneys are saying, well, all you have is Misr’s statement putting the defendants at the scene of the crime. But ladies and gentlemen, not only do you have Misr’s statements but you have independent facts that are backing up what she was saying. She said they scouted. We have pictures to prove that she was scouting. She said that they used keys.

Well, they found keys. She said that we were driving three vehicles. She has got pictures of three vehicles. So look at the totality of her testimony and weigh it. You know, if there is independent corroboration for the main factors of what she is saying. *If she is telling you the truth about that, can she be telling the truth on everything else. I would submit that she is.* [Emphasis added.]

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). However, viewed in context and as a whole, it is clear that the prosecutor was only arguing that the evidence presented at trial allowed the jury to draw an inference that Abdur-Rahim's testimony was credible, as the testimony was corroborated by other, independent evidence. Contrary to defendant's assertion, the prosecutor did not personally vouch for the credibility of the prosecution witness; instead, she merely advanced her position that the facts and evidence demonstrated that the witness was credible. Although a prosecutor may not vouch for the credibility of a witness, the prosecutor may argue from the facts that a witness is credible. *People v Marshall*, ___ Mich App ___; ___ NW2d ___ (Docket No. 297115, decided October 4, 2012), slip op p 6. Further, the prosecutor's comments were a fair response to defendant's argument that Abdur-Rahim's testimony was not credible.

In addition, the trial court instructed the jury that the attorneys' statements were not evidence and that the jury was to decide the facts of the case, including whether to believe a witness, presumably curing any prejudice arising from the comments. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Finally, even if the comments by the prosecutor were prejudicial, reversal is not warranted because the alleged error did not result in the conviction of an actually innocent defendant, or seriously affect the fairness, integrity, or public reputation of judicial proceedings. Accordingly, defendant's argument is without merit.

Defendant also argues that the prosecutor acted improperly by charging him with racketeering. However, as we have already discussed, defendant's larceny convictions were proper predicate offenses for a racketeering charge. Moreover, "[t]he prosecution is given broad charging discretion" and, therefore, "has discretion to bring any charges supported by the evidence." *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004). To the extent that defendant argues prosecutorial misconduct in telling the jury that larceny or receiving and concealing stolen property were included in the statutory definition of racketeering, those arguments are also without merit. The prosecutor's statement accurately reflected that "racketeering" includes "[a] felony violation of section 535 or 535a, concerning stolen, embezzled, or converted property." MCL 750.159g(jj).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Karen M. Fort Hood