

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERICK THOMPSON,

Defendant-Appellant.

UNPUBLISHED
February 10, 2005

No. 251012
Wayne Circuit Court
LC No. 99-011055-01

Before: Zahra, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant Derick Thompson appeals as of right his jury trial convictions for carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to twenty to forty years in prison for the carjacking and armed robbery convictions and two years in prison for the felony-firearm conviction. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that the prosecutor improperly shifted the burden of proof to defendant during closing argument. We disagree.

This Court reviews claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Such claims are reviewed on a case by case basis, *People v Rice*, 235 Mich App 429, 435; 597 NW2d 843 (1999), examining the remarks as a whole, *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991), and in the context of defense arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Generally, a prosecutor may not comment on a defendant's failure to present evidence or testify. *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999). A prosecutor may not attempt to shift the burden of proof to the defendant, *id.*, such as by suggesting that a defendant must prove something. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). However, a prosecutor may comment in closing argument upon the evidence presented at trial and upon the witnesses' credibility. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). A prosecutor is free to relate the facts adduced at trial to the prosecution's theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury. *Johnson, supra* at 625. The prosecutor need not state the inferences in the blindest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

We find that the prosecutor's argument in this case was proper and did not shift the burden of proof to defendant. In rebuttal of defense counsel's argument that the fingerprint found on the sunroof belonged to the actual second perpetrator of the crime, rather than defendant, the prosecutor stated:

The false assumption is that Mr. Cunningham wants to argue to you that the fingerprint up in the sun roof was put there during the robbery. There is no testimony to that effect. There is no testimony in any way shape or form that anybody ever touched that sunroof. I submit to you that, that the fingerprint, that the fingerprint was put there who knows when. Fingerprints have the ability to stay around. Just like we can argue to you there is [sic] other prints. Okay there is [sic] other prints on both the driver's window of the car and on the passenger window of the car. The assumption is that Mr. Cunningham wants to argue to you is that all of those prints were put there during the course of this event. That's necessarily not true. It could have been put there at any time. We know that Mr. Bass did touch - - one of the prints did belong to him and was put there. We know that Ms. Williams' [sic] fingerprint is there also, but she's there driving the car pretty much on a daily basis. So there is no absolute testimony or testimony that all those prints were put there during the course of the robbery. They could have been put there at any time.

The prosecutor also stated:

And who says, all right, who says that what we have here are mostly nine prints, okay, of one form or another, either too light, smudged, smeared, who says that they aren't the fingerprints? Who says that those aren't the fingerprints of this defendant, Derick Thompson?

The prosecutor summarized his argument by stating:

The point of the matter is simply this. Mr. Cunningham asked you to assume, first of all, or at least implies that all of these prints were put on during the course of this robbery and this event that happened. I submit to you that that's not necessarily true. They could have been put on at other times. Mr. Cunningham then says, all right, what he says is well, they're not the prints of Derick Thompson. Derick Thompson's print hasn't been identified. And that's correct, but what you also have to conclude about this as you listen to the testimony of Officer Scrutchin is that these in fact are fingerprints, that people touch this, all right. And one of them, based on the testimony of Kimberly Evans, could in fact have been this defendant, Mr. Derick Thompson, but the prints are smudged. Prints are smeared. Some of the prints are too light, and some of the prints are overlaid. So it doesn't mean, I submit to you, ladies and gentlemen, that Derick Thompson wasn't in that car because Kimberly Evans tells you that he was. Kimberly Evans tells you what Mr. Thompson did, what Mr. Thompson said to him, said to her in the times that he left. So I ask you to think about that when you think about the fingerprint argument.

These comments, when read in context as a response to defense counsel's closing argument, do not improperly shift the burden of proof to defendant. It is permissible for a prosecutor to observe that the evidence against the defendant is uncontroverted or undisputed even if the defendant has failed to call corroborating witnesses. *Fields, supra* at 115. Furthermore, once the defendant advances evidence or a theory, the prosecutor may properly argue regarding the inferences created. *Id.* The comments merely responded to and attacked the strength of defendant's argument that the unidentifiable fingerprints belonged to someone else and proved exculpatory for defendant. The prosecutor's comments were also grounded in evidence admitted at trial. Therefore, the prosecutor's comments were proper and do not require reversal. Moreover, any unfair prejudice produced by the challenged comments would have been cured by the trial court's careful and explicit instructions to the jury that it was required to decide the case on the evidence alone, that the lawyer's statements were not evidence, and that plaintiff had the burden of proving defendant guilty beyond a reasonable doubt. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Jessica R. Cooper