

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 161530

LC No. 91-111012-FC

RONALD C. DILLARD,

Defendant-Appellant.

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Before: Neff, P.J., and Smolenski and D. A. Johnston,\* JJ.

NEFF, P.J., (concurring in part and dissenting in part).

I concur in the conclusions and reasoning expressed in Parts I and IV of the majority opinion. However, I respectfully dissent from the remainder of that opinion.

I

My primary point of departure from the majority opinion relates to defendant's allegation of prosecutorial misconduct (part III of the majority opinion) which I find persuasive. I would reverse defendant's conviction on that basis.

A

Whether prosecutorial misconduct exists is determined on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Prosecutorial comments are read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1993). Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object, unless failure to review the issue would result in a miscarriage of justice. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). A miscarriage of justice will not be

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\* Circuit judge, sitting on the Court of Appeals by assignment.

found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id.*

## B

The alleged damaging remarks in this case come from the prosecutions rebuttal arguments to defendant's closing argument. The prosecutor's remarks, in essence, challenge defendant's right to self-representation. Specifically, the prosecutor stated:

I don't think it's easy to commit an armed robbery but he could do it and he did it.

And I don't think its easy to come into court and represent yourself as a lawyer but he chose to do it.

\* \* \*

Ladies and gentlemen, I'm not saying to you that he's not intelligent. But I am saying to you, ladies and gentlemen, that he is here for number one.

And he's taking care of number one.

He likes to be in control. Throughout this whole trial he has been in control. He was in control the night of the armed robbery.

But the difference or the distinction is the night of the armed robbery, he could use a gun, he could use his force. He's a big man. He could physically push people around. He could intimidate them just by his size and standing behind them.

Ladies and gentlemen, he can't bring a gun to court and he can't push us around and intimidate us.

But he still keeps control. He kept control throughout this trial just the way he kept control the night of the armed robbery.

He's looking out for number one. He's going to stop at nothing to get what he needs for number one, be it some money. If he thinks number one needs money, he's going to steal it if he has to.

And ladies and gentlemen, if it means coming into court and browbeating witnesses and telling you about a party that never existed, he's capable of doing that if he thinks it's going to take care of number one.

In *People v Sterling*, 154 Mich App 223, 232; 397 NW2d 182 (1986), this Court held that the prosecutor's comments denied the defendant a fair trial where, in part, the thrust of the prosecution's closing argument was that defendant was a "jailhouse lawyer" and "manipulative" because he had requested new attorneys and assisted in his own defense. This Court noted that this kind of argument bears no relevance to the issue of defendant's guilt. *Id.* Further, this Court found the comments chilled the defendant's exercise of his constitutional right to self-representation. *Id.*

Here, I too fail to see how the prosecutor's comments related to defendant's guilt or innocence. That defendant decided to, for whatever reasons, represent himself, has nothing to do with whether he committed the crime in question. I construe the prosecutor's remarks as an attempt to penalize defendant for his right of self-representation. *Id.*

Further, I conclude that defendant's lack of objection to these comments does not constitute a waiver of this error. This is not a case in which the evidence against defendant was so overwhelming that the error can be considered harmless. Also, I find the prosecutor's comments especially damaging in this case because the comments inextricably linked defendant's constitutional right to self-representation to his guilt.

Accordingly, I would reverse defendant's conviction. The prosecutor would be, of course, free to retry defendant if it so chooses.

## II

I also disagree with part V of the majority opinion with regard to defendant's plea to the habitual offender charge. Because the trial court failed to follow the requirements of MCR 6.302 I would reverse.

Because the record reflects that the trial court did not follow the requirements of MCR 6.302, the only question is whether defendant waived this issue by failing to request below to withdraw his plea. I conclude that this issue is not waived due to the trial court's minimal compliance with the court rule, and it is my opinion that defendant's conviction on the underlying charge should be reversed. *People v Quinn*, 194 Mich App 250, 254; 486 NW2d 139 (1992). Accordingly, I would vacate defendant's plea of guilty of being an habitual offender, second offense.

## III

Finally, I find that the record is insufficient to determine whether the trial court improperly allowed defendant's prior conviction to be used to impeach him. Accordingly, because I would reverse and remand, I would direct that if the issue is again raised on retrial the trial court follow the requirements of *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988), when making its ruling.

/s/ Janet T. Neff