

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUIS L. MARTIN,

Defendant-Appellant.

UNPUBLISHED

June 28, 1996

No. 181047

LC No. 94-132773 FC

Before: Young, P.J., and Corrigan and M.J. Callahan,* JJ.

PER CURIAM.

Defendant appeals of right his convictions by jury of armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to a three- to ten-year term of imprisonment for the armed robbery conviction and a consecutive two year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's claim that he is entitled to a new trial because of prosecutorial misconduct is without merit. Defendant raised no objection to the challenged remarks. Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant, or manifest injustice would result from this Court's failure to review the alleged misconduct. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.*

Defendant first contends that the prosecutor improperly asked defendant to comment on the veracity of the two detectives involved in this case. Defendant further claims that the prosecutor later improperly referenced this testimony during closing argument. Although a prosecutor should not ask a defendant to comment on the veracity of prosecution witnesses, see *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), no error requiring reversal arises if defendant did not object. *People v Austin*, 209 Mich App 564, 570; 531 NW2d 811 (1995). Defendant did not object; indeed, it

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

appears from the defense closing argument that the decision not to object was a deliberate trial strategy. The prosecutor's questions did not deny defendant a fair trial.

Defendant claims that the prosecutor then impermissibly incorporated defendant's above testimony in her closing and rebuttal arguments. A review of the prosecutor's closing argument reveals that she simply stated the jury's role: to assess the witnesses' credibility. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Her additional remarks were proper commentary on the evidence at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Regarding defendant's assertion that the prosecutor's rebuttal remarks were improper, the record reveals that the prosecutor's rebuttal argument addressed credibility issues that defendant's counsel had raised in closing argument. The prosecutor's response to defendant's credibility argument was entirely permissible. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Moreover, a prosecutor may permissibly comment on a defendant's lack of credibility during closing argument. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990); *People v Sharbnaw*, 174 Mich App 94, 100; 435 NW2d 772 (1989).

Next, defendant claims that Detective Stanley Domanick improperly vouched for defendant's involvement in the crime. Defendant objected to this testimony. Not only did the trial court sustain defense counsel's objection, it later gave a curative instruction. Defendant was not denied a fair and impartial trial as a result of this line of questioning. See *Bahoda, supra*, at 226-267. No error occurred that requires reversal. *Id.*

Defendant's additional challenges to the prosecutor's questioning of Domanick do not require reversal. Defendant did not object to these alleged improprieties; a curative instruction could have ameliorated any perceived prejudice. See *Austin, supra* at 570.

Next, defendant argues that he was denied effective assistance of counsel because defense counsel failed to object to certain of the prosecutor's questions. Because defendant failed to move for an evidentiary hearing or for a new trial, we consider this claim only to the extent that alleged mistakes are apparent on the record. *People v Norrell Johnson*, 174 Mich App 108, 113; 435 NW2d 465 (1989). To succeed on this claim, defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In addition, defendant must overcome the presumption that the alleged error was not the product of trial strategy, and must demonstrate that he was prejudiced as a result of the error. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Failure to raise an objection may qualify as a matter of trial strategy. *People v Lawless*, 136 Mich App 628, 635; 357 NW2d 724 (1984).

Defense counsel may have decided to forego objection during the prosecutor's questioning of defendant to avoid highlighting the undesirable testimony. Moreover, as discussed *supra*, the prosecutor merely responded to matters raised by the defense on direct examination. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Defendant's additional claim that counsel was

ineffective for failing to request a cautionary instruction regarding Domanick's testimony concerning defendant's role as a lookout is without merit. The trial court gave a cautionary instruction to the jury before deliberations that addressed defendant's concerns. The omission of an immediate instruction did not affect defendant's chance of acquittal. As a result, reversal is not required. *People v Norman*, 176 Mich App 271, 276; 438 NW2d 895 (1989).

Next, defendant claims that the trial court should have granted his motion for a directed verdict. When ruling on a motion for a directed verdict, the trial court must consider the evidence presented through the time of the motion in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant admitted in his police statement that he knew his codefendant planned to commit a robbery, and admitted giving codefendant the gun moments before the robbery occurred. Authorities arrested defendant inside the complainant's car on the morning of the robbery. Police recovered a gun containing strands of the victim's hair from defendant's seat. Complainant identified codefendant as her attacker. Ample evidence was thus presented to convict defendant as an aider and abettor to armed robbery. *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995); *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Moreover, the prosecution introduced ample evidence to sustain defendant's felony-firearm conviction. MCL 750.22b; MSA 28.424(2); *People v Ben Williams*, 212 Mich App 607, 608; 538 NW2d 89 (1995).

Finally, we reject defendant's contention that his sentence is disproportionate. The sentencing guidelines range was thirty-six to ninety-six months. Thus, defendant's three-year minimum sentence fell at the lowest end of the guidelines range and is presumptively proportionate. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant has failed to overcome the presumption of proportionality. *Id.*; *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). Contrary to defendant's assertion, a sentencing court is not required to consider a codefendant's sentence. *In re Jenkins*, 438 Mich 364, 376; 475 NW2d 279 (1991); but see *People v Weathington*, 183 Mich App 360, 365; 454 NW2d 215 (1990).

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Maura D. Corrigan

/s/ Michael J. Callahan