

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LAMAR JENKINS,

Defendant-Appellant.

UNPUBLISHED

July 23, 1996

No. 177859

LC No. 93-11759

Before: Cavanagh, P.J., and Hood and J.J McDonald,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions 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). Defendant was sentenced to five to ten years' imprisonment for the robbery armed conviction and two years' consecutive imprisonment for the felony-firearm conviction. We reverse defendant's convictions and remand for a new trial.

Defendant raises multiple issues on appeal; however, we find one to be dispositive. Defendant asserts that he was denied a fair trial because the prosecutor improperly shifted the burden of proof during rebuttal argument. Defendant properly preserved this argument by objecting to the prosecutor's argument at trial.

The propriety of a prosecutor's conduct depends on all the facts and circumstances of a case and must be evaluated in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because this argument tends to shift the burden of proof. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part on other grounds 450 Mich 94, 115 (1995); *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Due process entitles an accused to the presumption of innocence, while the prosecution carries

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

the burden of proving guilt beyond a reasonable doubt. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

We conclude that the prosecutor's rebuttal argument shifted the burden of proof to defendant. The prosecutor's argument portrayed defendant as presumptively guilty. The prosecutor told the jury that it had to disbelieve the testimony of three prosecution witnesses in order to acquit defendant. According to the prosecutor, if the jury found that even one of the prosecution witnesses was testifying truthfully, then defendant had to be found guilty. However, this does not necessarily follow. For example, the jury could have believed the police officers' testimony, yet considered the complainant's identification of defendant to be unreliable, especially in light of the abundant alibi testimony presented by defendant. Because the prosecutor's argument put the burden on the defendant to prove that all three of the prosecutor's witnesses were lying or mistaken, we find that the prosecutor's comments constitute error requiring reversal.

Reversed and remanded for a new trial.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald