

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DON GIBSON,

Defendant-Appellant.

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UNPUBLISHED

August 2, 1996

No. 180410

LC No. 93-002318

Before: Michael J. Kelly, P.J., and Markman and J.L. Martlew,\* JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit armed robbery, MCL 750.89; MSA 28.284, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279; and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to two years for the felony-firearm conviction to be followed by concurrent terms of six to twenty years for the assault with intent to rob while armed conviction and four to ten years for the assault with intent to do great bodily harm conviction. Defendant now appeals as of right. We affirm.

Defendant argues that he was denied a fair trial by the prosecutor's failure to disclose the fact that the complainant had given false testimony during the preliminary examination and believed he would not be prosecuted for that perjury if he testified against defendant at trial. Since defendant raised this issue to the trial court on a motion for mistrial, we will review the trial court's denial of the mistrial. We find that defendant was not denied a fair trial by the alleged prosecutorial misconduct and, therefore, the trial court did not abuse its discretion in denying this motion. See *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994).

The changes in the complainant's testimony related only to how defendant and the complainant met, not to the complainant's identification of defendant or the details of the crime. Since defendant did not request disclosure and the changed testimony was not material to the crime or exculpatory, the prosecution was not required to volunteer the information. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). Further, defendant was not prejudiced by the non-disclosure. The

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

complainant's trial testimony conformed to his earliest statements to police. Defendant impeached the complainant's preliminary examination testimony with these statements. Thus, defendant was not denied a fair trial due to an impaired and inadequate opportunity to prepare for cross-examination of the complainant at trial. See *People v McWhorter*, 150 Mich App 826, 831-832; 389 NW2d 499 (1986). Further, the district court was aware of the complainant's credibility problems, but chose to bind defendant over for trial. While the prosecution was required to reveal any actual promises of immunity to a witness or the reasonable expectations of a witness that he would not be prosecuted for a crime in exchange for his testimony, *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976), the complainant's expectations of immunity from prosecution in exchange for his trial testimony were revealed and explored at trial.

Defendant also argues that he was denied a fair trial by improper prosecutorial remarks during the course of the trial and in closing arguments. Defendant moved for a mistrial based on prosecutorial misconduct during trial. At several points, the prosecutor protested or ridiculed defendant's objections and made other sarcastic and inappropriate remarks. While these remarks were clearly impermissible and unprofessional, considering them in light of the trial court's strongly worded and frequent remonstrances, we find that defendant was not denied a fair trial. See *People v Guenther*, 188 Mich App 174, 182; 469 NW2d 59 (1991). The trial court did not abuse its discretion in denying defendant's motion for mistrial.

The prosecutor also made two improper remarks in her closing arguments. She appealed to sympathy for the victim, *People v Siler*, 171 Mich App 246, 258; 429 NW2d 246 (1988), and compared defendant to a criminal charged with similar crimes, *People v Sharbnow*, 174 Mich App 94, 101-102; 435 NW2d 772 (1989). Her rebuttal argument relating to the consistencies in the complainant's testimony, however, was a proper response to defendant's attack on the complainant's credibility. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Considering the improper statements in light of the entire closing argument, we find that these statements were not sufficiently prejudicial to deny defendant a fair trial. *Siler, supra* at 258. Further, the trial court's jury instructions, cautioning the jury that the attorney's statements were not evidence, cured any prejudice caused by these limited remarks. *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991). Defendant was not denied a fair trial by the prosecutor's remarks in closing arguments.

Finally, the trial court did not abuse its discretion in barring cross-examination regarding the complainant's diagnosed mental disorder. Evidence which affects a witness' credibility must be admitted to preserve a defendant's right to confrontation. *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). However, defendant did not offer any evidence to show that the complainant's mental disorder, identified as a type of manic depression, would affect the complainant's ability to perceive events accurately or to present the events truthfully or would be otherwise relevant to the case.

Affirmed.

/s/ Michael J. Kelly  
/s/ Stephen J. Markman  
/s/ Jeffrey L. Martlew