

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BROWN EDWARDS, JR.,

Defendant-Appellant.

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UNPUBLISHED  
September 3, 1996

No. 180003  
LC No. 94-050267

Before: Corrigan, P.J., and Jansen, and M. Warshawsky,\* JJ.

PER CURIAM.

Defendant appeals by right his convictions of second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and subsequent guilty plea to habitual offender, second offense, MCL 769.10; MSA 28.1082. We affirm.

On January 8, 1992, defendant shot and killed Charles Lowe at the Ashwood Apartments in Flint. Defendant thereafter admitted his act to several witnesses. Although defendant raises several issues regarding the prosecutor's conduct, none of his claims warrant reversal.

We review claims of prosecutorial misconduct on a case-by-case basis. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We examine the record and evaluate the alleged improper conduct in context. The test is whether the defendant was denied a fair trial. *Id.* When the defendant fails to object or to request a curative instruction regarding the prosecutor's alleged misconduct, however, our review is limited to whether the conduct was so egregious that a curative instruction would not have prevented prejudice to the defendant or whether manifest injustice would result from our failure to review the issue. *Id.* at 341-342.

First, defendant argues that the prosecutor engaged in misconduct when he questioned several witnesses regarding whether they were "afraid" of defendant. Defendant did not object to these questions. Although testimony about a witness' fear of the defendant is not necessarily improper,

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

*People v Meier*, 47 Mich App 179, 198-199; 209 NW2d 311 (1973), a curative instruction that the jury not consider defendant's character as substantive evidence could have relieved any prejudicial effects of this testimony. Further, in light of the overwhelming weight of the evidence against defendant, including his three confessions, manifest injustice will not result if we decline to review this issue.

Next, defendant claims that the prosecutor improperly placed his character in issue by referring to defendant's alleged prior assault upon witness Sandra Nichols. During the direct examination of witness Nola Tolbert, the prosecutor asked whether she recalled anything happening in the summer of 1992. On cross-examination, the trial court allowed testimony that Tolbert had observed Nichols' blackened eye shortly after defendant left Nichols' apartment. Finally, Nichols herself testified that defendant "went off on" her. On appeal, defendant contends that this testimony was irrelevant and prejudicial character evidence.

The prosecutor theorized at trial that certain witnesses were reluctant to come forward with inculpatory testimony because they were afraid of defendant. The prosecutor therefore elicited testimony that would give some credence to their fears that defendant assaulted a witness to dissuade her from testifying about the murder. The elicitation of this testimony, in light of the prosecutor's theory that certain witnesses might be reluctant to testify because they were afraid, was not improper. See *Meier, supra* at 198-199. Moreover, defendant has set forth no authority for the proposition that the prosecutor's elicitation of such testimony amounted to misconduct. Therefore, he has abandoned this issue on appeal. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995).

Next, defendant contends that the prosecutor's closing argument was improper because the prosecutor referred to certain testimony that defendant had confessed to an inmate as "uncontradicted." Defendant argues that this comment infringed upon his right not to testify because only defendant could contradict this testimony. A criminal defendant has a right against self-compelled incrimination and may elect to rely on the presumption of innocence in choosing not to testify. US Const, Am V; Const 1963, art 1, § 15. To effectuate that right, the prosecutor may not comment about a defendant's failure to testify. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). A prosecutor's remark that testimonial evidence was uncontradicted or undisputed is not an improper comment on the defendant's failure to testify, even though only the defendant could have provided contradictory testimony. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991); *People v Lasenby*, 107 Mich App 462, 469; 309 NW2d 572 (1981). Rather, a prosecutor's remark that evidence is undisputed or uncontradicted is proper argument regarding the weight to be assigned the witness' testimony. *Guenther, supra* at 177. The prosecutor's comment that the inmate's testimony was uncontradicted falls squarely within this rule. Further, defense counsel reminded the jury that they could not hold defendant's right not to testify against him. The trial court reiterated this concept by instructing that every defendant has an absolute right not to testify and that the exercise of this right must not affect the jury's verdict.

Defendant next claims as improper the prosecutor's comment that defendant beat witness Nichols and that witness Linda Hammonds knew it. Because this evidence was properly admitted, however, the prosecutor's comment thereon was not improper.

Finally, defendant argues that the prosecutor engaged in misconduct warranting reversal by moving to admit a document containing information about inmate Robert Higgins' transfer to another jail because of defendant's alleged threats against him. At trial, Higgins testified that, immediately after the murder, defendant confessed to shooting Lowe. Higgins also testified that defendant subsequently threatened to have Higgins killed if he was released from jail. Later, the prosecutor sought to admit an inter-office memorandum transferring Higgins to a different jail based upon Higgins' claim that defendant threatened him. Defendant objected to its admission because it was not probative of any fact in issue when Higgins had already testified that he was afraid of defendant. The court overruled defendant's objection, stating that the document was no more prejudicial than Higgins' testimony regarding the threats. On appeal, defendant does not challenge the trial court's admission of this document; rather, he contends that the prosecutor's conduct in moving to admit it was prejudicial. The prosecutor's motion to admit the document was part of the adversarial system; defendant was not denied a fair and impartial trial. *People v Harvey*, 167 Mich App 734, 747; 423 NW2d 335 (1988).

Affirmed.

/s/ Maura D. Corrigan  
/s/ Kathleen Jansen  
/s/ Meyer Warshawsky