STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN THOMAS THOMPSON,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 177896
LC No. 93-011914

Before: Jansen, P.J., and Reilly, and M.E. Kobza,* JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering into an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, and thereafter pleaded guilty of being an habitual offender, fourth offense, MCL 67.12; MSA 28.1084. Defendant was sentenced as an habitual offender to fifteen to thirty years in prison. He appeals as of right, and we affirm.

I.

First, defendant argues that he was denied a fair trial when the court failed to grant his motion for a mistrial based upon police officer Pomorski's unresponsive remarks that suggested defendant was implicated in other crimes. We disagree.

As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance how that witness would answer. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). However, when an unresponsive remark is made by a police officer, this Court will scrutinize that statement to make sure the officer has not strayed into forbidden areas that may prejudice the defense, because police officers have a special obligation not to venture into such forbidden areas. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

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

Although Pomorski's "volunteered" testimony was highly prejudicial to defendant, we find that the comments did not deprive defendant of a fair trial. Defendant was seen throwing items stolen from the victim's apartment on to the roof of a carport where they were recovered by police. Even if Pomorski's remarks had not been made, the evidence against defendant was so strong that we cannot believe that any jury would have voted to acquit him. *Holly, supra*, at 416. Furthermore, the prosecution's reference to Pomorski's testimony during closing argument was "invited error," and as such may not be used as grounds for reversal. See *People v Embry*, 68 Mich app 667, 670; 241 NW2d 711 (1976). The trial court's denial of defendant's motion for a mistrial was not an abuse of discretion.

II.

Defendant next argues that the trial court abused its discretion in permitting defendant to be "impeached" about where he had obtained the Elgin watch that he was wearing when he was arrested. We agree. Defendant testified on direct examination that he was wearing "jewelry" when he was arrested. On cross-examination, the prosecution elicited that defendant was wearing an Elgin watch which he claimed was his own. In order to "impeach defendant's credibility," the trial court permitted Pomorski to testify that another victim of a recent break-in had identified that particular Elgin as his own, and that the watch was in fact released to the victim. In the process of providing this testimony, Pomorski also suggested that defendant was involved in other unsolved similar crimes in the area.

We find that the trial court abused its discretion by allowing this testimony. Proper rebuttal testimony must be on a material, not a collateral matter. *People v Holland*, 179 Mich App 184, 193; 445 NW2d 206 (1989). Furthermore:

> if the evidence was not raised in the prosecutor's case in chief, the defense must have raised a new issue. The prosecutor is not allowed to elicit a denial from the defendant on cross-examination only to inject a new issue on rebuttal or revive the right to introduce evidence that should have been introduced in the case in chief. [*Holland, supra*, 179 Mich App 194.]

The issue of ownership of the Elgin watch was collateral to the substantive issues in this case. Furthermore, the only relevance of the ownership issue was defendant's credibility. Thus, the prosecution had no legitimate reason to seek permission for Pomorski to testify about stolen watch recovered from defendant until defendant claimed, *while he was being cross-examined by the prosecution*, that he owned the Elgin. The prosecution appears to have accomplished in the instant case precisely what *Holland* stated is prohibited, *e.g.*, injection of a new issue into a case based upon defendant's answers on cross-examination. See also *People v Sutherland*, 149 Mich App 161, 163-165; 385 NW2d 637 (1985).

However, although Pomorski's testimony was undeniably prejudicial to defendant, we nonetheless conclude that the error was harmless. *People v Mateo*, ____ Mich ____; ____ NW2d

____(Docket No. 96079, issued July 31, 1996). In light of the other overwhelming evidence of defendant's guilt, the error had only "slight or negligible influence on the verdict." *Id.* slip op at 17. We therefore find that the trial court's error in permitting the improper rebuttal evidence was harmless.

III.

Finally, defendant argues that the trial court abused its discretion when it denied his second motion for a mistrial. That motion was based upon the prosecutor's comments during closing argument about defendant's failure to present corroborating witnesses and evidence in support of his "innocent" explanation for being at the apartment complex where he was arrested. The Michigan Supreme Court has recently addressed the permissible scope of a prosecutor's argument in the face of a "shifting burden of proof" allegation:

> [W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

After careful review of the record in this vigorously-tried case, we find no comments by the prosecutor which violate *Fields*. Therefore, the court did not abuse its discretion by denying the motion for a mistrial based on this argument.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Michael E. Kobza