

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JASON BOYCE,

Defendant-Appellant.

UNPUBLISHED
October 22, 1996

No. 181191
LC No. 94-005059

Before: M.J. Kelly, P.J., and Hood and H. D. Soet,* JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of unarmed robbery, MCL 750.530; MSA 28.798. He was sentenced to four to fifteen years' imprisonment, and appeals as of right. We affirm.

According to complainant, he met defendant in the Huron Valley Correctional Facility while both were serving time for committing armed robberies. In 1993, complainant was paroled. He occasionally saw defendant when he would visit his parole officer. On April 20, 1994, complainant was driving west on Fenkell Road when he was waived down by defendant and his girlfriend, Kimberly Sevigny, the codefendant in this matter. They asked, and complainant agreed, to take them to a friend's house. Later that evening, complainant was stopped at a red light when he was approached by defendant, who was holding a knife, and another individual, who was carrying a gun. Complainant and defendant struggled. Defendant stabbed complainant twice. Complainant was then instructed to drive to a nearby vacant house. The codefendant was inside the house. Defendant took complainant's car keys and started swinging at him with the knife and with his fists. Defendant then robbed complainant of his money, pager, and jewelry. Defendant and the codefendant went outside, while the individual with the gun continued to point it at complainant. As defendant and the codefendant attempted to get into complainant's car, they activated the alarm. Complainant then wrestled with the gunman and escaped from the house, found a pay phone and called the police.

Defendant first argues that he was denied a fair trial when the trial court instructed the jury on the lesser included offense of unarmed robbery because he was charged with armed robbery. We disagree. This Court reviews jury instructions in their entirety to determine if there was an error requiring

reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *Id.*

If evidence has been presented that would support a conviction of a lesser included offense, it is error requiring reversal for the judge to refuse to give a requested instruction for that offense. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993). If the lesser offense is one that is necessarily included in the charged offense, the evidence always supports the lesser offense if it supports the greater. *Id.*; *People v Garrett*, 161 Mich App 649, 652; 411 NW2d 812 (1987). Unarmed robbery is a necessarily lesser included offense of armed robbery. *Garrett, supra*. It is armed robbery absent the element of use of a weapon. *Id.* If there is evidence to allow the case to go to the jury on the armed robbery offense, there must necessarily be evidence adduced at trial to support a charge of unarmed robbery. *Id.* Here, the prosecutor requested an instruction on the lesser included offense of unarmed robbery. Because the evidence presented at trial supported the greater charge of armed robbery, the trial court properly instructed the jury on the necessarily included offense of unarmed robbery.

Defendant next argues that the trial court abused its discretion in ruling that codefendant's statement, which was excluded as substantive evidence because the prosecution failed to disclose it in violation of a discovery order, could be used to impeach the codefendant when she took the stand. Again, we disagree. A trial court has discretion to fashion a remedy for noncompliance with a discovery order or agreement. *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). The exercise of that discretion involves a balancing of the interests of the courts, the public, and the parties. *Id.* The exclusion of otherwise admissible evidence on the basis of nondisclosure is a remedy that should follow only in the most egregious cases. *Id.*

Here, the trial court fashioned an appropriate remedy. The court penalized the prosecution for failing to turn over codefendant's statement when it ruled that the statement could not be used as substantive evidence. The trial court, however, properly allowed the prosecution to use the statement for impeachment purposes when codefendant took the stand and intended to give testimony different from her statement. We are not convinced that failure of the prosecution to disclose the statement was so egregious as to allow codefendant to testify differently on the stand.

Defendant also argues that he was denied a fair and impartial trial due to prosecutorial misconduct. Defendant's claim of prosecutorial misconduct pertains to statements made during closing argument. This Court evaluates the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Questions of misconduct by the prosecutor are decided case by case. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Having reviewed the pertinent portion of the record and evaluated the prosecutor's remarks in context, we conclude that defendant was not denied a fair and impartial trial. See, e.g., *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993); *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

Finally, defendant argues that the prosecution impermissibly elicited opinion testimony about defendant's guilt from the officer in charge. Defendant did not object below to the argument. This Court's review is therefore precluded absent a miscarriage of justice or unless a cautionary instruction could not have cured the prejudicial effect. *Lee, supra* at 245.

In this case, defense counsel placed the investigation of the case at issue by inferring that it was inadequate. The officer testified as to how the investigation was conducted and stated that the robbery could have occurred as suggested by complainant. The officer did not testify as to whether defendant was guilty, but only that there was sufficient evidence to believe that a robbery occurred and that defendant was a possible suspect. A lay witness may testify to his opinion if rationally based on the perception of the witness and if helpful to a clear understanding of a fact in issue. MRE 701; *Daniel, supra* at 57-58. Because the officer's testimony was permissible, defendant was not denied a fair and impartial trial.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet