STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN J. MCDONALD,

Defendant-Appellant.

UNPUBLISHED
January 10, 1997

No. 170000

Genesee County
LC No. 93-048159

Before: McDonald, P.J., and Murphy and J. D. Payant, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530; MSA 28.798. Subsequently, defendant pleaded guilty to being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to twenty to thirty years' imprisonment. Defendant now appeals as of right. We affirm.

Defendant first contends that he was denied a fair trial by the cumulative effect of various acts of prosecutorial misconduct. We disagree.

Defendant failed to object to all but two of the alleged instances of improper remarks by the prosecutor. Failure to review those unchallenged remarks further would not result in a miscarriage of justice since the statements were proper comments on facts in evidence, *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995) or were made in response to issues raised by defense counsel, *People v Duncan*, 402 Mich 1; 260 NW2d 58 (1977); *People v Spivey*, 202 Mich App 719; 446 Mich 857 (1994).

As for defendant's first challenged remark, on the ground that that the prosecutor resorted to a civic duty argument, we conclude that this assertion is entirely unfounded. As a general rule, civic duty arguments are condemned because they inject issues into the trial that are broader than a defendant's

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

guilt or innocence and because they encourage the jurors to suspend their own powers of judgment. *People v Potra*, 191 Mich App 503; 479 NW2d 707 (1991). Here, the prosecutor sought to explain the victim's actions on the evening in question in view of his handicap.

Defendant also claims that the prosecutor was bolstering the testimony of certain witnesses on trial. Viewing the argument in context, it is apparent that the prosecutor merely attempted to explain the basis for the inconsistencies in the witnesses' stories and properly commented on facts in evidence. *Bahoda, supra*. Accordingly, we find no error in isolation or in the aggregate that requires reversal.

Next, defendant claims that the trial court's sentence of twenty to thirty years of imprisonment for his habitual offender, fourth offense, was disproportionate. Because defendant has failed to provide a copy of his presentence report as required under MCR 7.212(C)(6), the issue is waived. *People v Oswald*, 208 Mich App 444; 528 NW2d 782 (1995). Moreover, given defendant's criminal background and the circumstances surrounding the offense, we believe that the sentence is proportionate. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995).

Defendant further claims that his due process rights were violated because the trial court failed to give an instruction of larceny by trick. We disagree.

A trial court must instruct on lesser included offenses when so requested and if supported by the evidence. *People v Moore*, 189 Mich App 315; 472 NW2d 1 (1991). There are two types of lesser included offenses: necessarily included and cognate lesser. Necessarily included offenses are those which are committed as part of the greater offense. *People v Mosko*, 441 Mich 496; 495 NW2d 534 (1992). A cognate lesser included offense shares several elements with the greater offense but may contain elements not found in the higher offense. *Id.* Where a defendant requests an instruction regarding a necessarily included offense, the court must instruct the jury on the lesser included offense. *People v Marji*, 180 Mich App 525; 447 NW2d 835 (1989). When the lesser included offense is a cognate offense, the court must examine the evidence presented and give the instruction when the evidence adduced would support a conviction for the lesser offense. *Id.* Where a court fails to give a requested instruction on a cognate lesser included offense, a harmless error analysis is employed. *People v Mosko*, 441 Mich 496; 495 NW2d 534 (1992).

Defendant was charged with armed robbery. The trial court gave instructions for this offense, unarmed robbery, larceny of a person and obtaining money by false pretense. The trial court refused defendant's request to give an instruction regarding larceny by trick, which is a cognate offense of armed robbery. *People v Stephens*, 407 Mich 402; 285 NW2d 664 (1979). The elements of this offense include the criminal taking of property by means of fraudulent contrivances rather than by trespass, "where the true owner has no intention of giving ownership but only intends to give up possession." *People v Styles*, 61 Mich App 532, 534; 233 NW2d 70 (1975), quoting *People v Niver*, 7 Mich App 652, 657; 152 NW2d 714 (1967). A review of the record supports the trial court's conclusion that defendant's actions resembled the crime of false pretense rather than larceny by trick. Defendant testified that he deceived Jason into parting with eighty dollars in order to purchase a

full stereo unit, with the promise that Jason would receive a CD player. Jason did not retain title to his money in defendant's version. Rather, according to defendant, Jason parted with his money for good with the hope that he would receive a new CD player. The evidence did not support a larceny by trick instruction, and the trial court properly denied defendant's request.

Finally, defendant contends that the trial court abused its discretion by admitting a tape recording that contained a reference to a polygraph as well as its results.

As an initial matter, an actual transcription of the tape was never included in the lower court record and as a result, this aspect of defendant's issue will be deemed forfeited. *People v Coons*, 158 Mich App 735; 405 NW2d 153 (1987). Defendant did however challenge the prosecutor's attempt to elicit information regarding the polygraph during cross-examination of defendant. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1; 532 NW2d 885 (1995).

The victim's mother, Deborah Stevens, testified that defendant, while attempting to pretend to be someone from the prosecutor's office, claimed that defendant had passed his lie detector test. While the results of a polygraph test are inadmissible at trial, "neither public policy nor federal or state law requires that statements made before, during or after the administration of a polygraph examination are excludable per se as evidence at trial." *People v Ray*, 431 Mich 260, 265, 268; 430 NW2d 626 (1988). This testimony constituted defendant's remarks to Stevens and may or may not be true.

As for defendant's contention that the prosecutor informed the jury that he failed a polygraph test by the nature of his question, it should be noted that on direct-examination of defendant, defense counsel asked defendant about the content of his phone conversation with Stevens. Defendant admitted to calling Stevens because he wanted her to investigate the allegations more thoroughly. The prosecutor's question during cross-examination inquired whether defendant, during this particular phone conversation with Stevens, stated that defendant had taken a polygraph test and passed it seven times. This was proper cross-examination. MRE 611(b).

Additionally, the question did not address the actual polygraph test but instead concerned defendant's own statement made after the test was administered. The remark is not inadmissible per se. *Ray, supra*. Further, this was not direct evidence but a question of counsel. The jury was instructed that the attorneys' questions are not considered evidence; thus, any perceived prejudice should be dissipated. *McElhany, supra*. Therefore, we find no abuse of discretion by the trial court.

Affirmed.

/s/ Gary R. McDonald
/s/ William B. Murphy
/s/ John D. Payant