

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL MELVIN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

April 8, 1997

No. 184981

Muskegon Circuit Court

LC No. 94-037514-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE WARREN MAGNUSON,

Defendant-Appellant.

No. 184982

Muskegon Circuit Court

LC No. 94-037530-FC

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

At a joint jury trial, defendants were convicted of armed robbery, MCL 750.529; MSA 28.797. Defendant Johnson was also found guilty of being a third-felony offender, MCL 769.11; MSA 28.1083, and defendant Magnuson was found guilty of being a fourth-felony offender, MCL 769.12; MSA 28.1084. Defendant Johnson was sentenced to ten to thirty-five years' imprisonment, while defendant Magnuson was sentenced to twelve to thirty-five years' imprisonment. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm.

The trial court did not abuse its discretion in denying defendant Magnuson's motion for severance. Although there may have been some inconsistencies between the defense theories presented

at trial, the core defenses were not necessarily mutually exclusive or irreconcilable such that defendant Magnuson's substantial rights were prejudiced. *People v Hana*, 447 Mich 325, 331, 345, 349-350; 524 NW2d 682 (1994). This was simply not a case where the jury had, by necessity, to believe either defendant Magnuson's version of the events or defendant Johnson's version of the events to determine who committed the crime. The jury could have believed either defendant without the other defendant being implicated. However, the jury apparently decided to believe neither defendant, choosing instead to believe the prosecution. Severance was properly denied. *Id.*

Defendant Magnuson was not denied a fair trial or his Sixth Amendment right to confrontation by the admission of statements made by defendant Johnson regarding defendant Magnuson. First, there was no "confession" by defendant Johnson that implicated either himself or defendant Magnuson in the robbery of Donald Humphrey. As in *Richardson v Marsh*, 481 US 200, 208-211; 107 S Ct 1702; 95 L Ed 2d 176 (1987), the statements by defendant Johnson testified to by Tony Prus only possibly became incriminating to defendant Magnuson when linked with other evidence introduced at trial. Under such circumstances, the trial court's limiting instruction on the use of the rebuttal testimony mitigated the prejudice to defendant Magnuson because "[w]here the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." *Id.* at 208. Second, and decisively, defendant Johnson was not a nontestifying codefendant; rather, he testified at trial and both he and Prus were subject to cross-examination by defendant Magnuson. Cf., *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968); *People v Banks*, 438 Mich 408; 475 NW2d 769 (1991).

The trial court also did not abuse its discretion in allowing Prus and Brad Wilson to testify in rebuttal and neither defendant's rights were severely prejudiced by the late endorsement of the rebuttal witnesses. MCL 767.40a(4); MSA 28.980(1)(4); *People v Burwick*, 450 Mich 281, 290-291, 294-296; 537 NW2d 813 (1995). The testimony was admissible to rebut defendant Johnson's testimony on direct- and cross-examination. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). While a denial cannot be elicited on cross-examination simply to facilitate the admission of new evidence, the prosecutor was entitled to explore the veracity of defendant Johnson's prior testimony, *Id.* at 401, i.e., his assertions that he had no money on the day following the robbery and his statements regarding the events that transpired at the trailer. The trial court appropriately gave a limiting instruction to the jury regarding the use of the rebuttal testimony. In light of the limiting instruction and the other evidence at trial, any prejudice suffered by defendants due to the admission of the rebuttal evidence does not warrant reversal in this case. *Id.* at 400; *People v Mateo*, 453 Mich 203, 206, 214-215, 221; 551 NW2d 891 (1996). The trial court properly exercised its discretion in denying defendant Johnson's motion for new trial brought on this basis. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

Nor did the trial court abuse its discretion in admitting purported bad-acts evidence that defendant Magnuson had been in prison. *People v Vandervliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Defendant Magnuson concedes that the evidence was probative as to the identity of one of the perpetrators. MRE 404(b)(1). Although the evidence was prejudicial to defendant Magnuson, its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. The

existence of other evidence regarding defendant Magnuson's identity as one of the perpetrators lessened the prejudicial effect of the purported bad-acts evidence. *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995).

Finally, defendant Magnuson was not denied a fair trial by prosecutorial misconduct. He failed to object to any of the allegedly improper remarks during closing arguments at trial. Therefore, our review of this claim is precluded unless a curative instruction could not have eliminated the prejudicial effect of the remarks or where a miscarriage of justice would result from our failure to review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). No miscarriage of justice results in this case because the prosecutor's arguments were reasonable inferences based on the evidence presented at trial, specifically testimony by Humphrey and Trooper Cribbs as it related to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Contrary to defendant Magnuson's contention on appeal, the prosecutor did not engage in prosecutorial misconduct based on speculative arguments having no support in the record. *Id.* This claim is without merit.

Affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski