STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER LEO GALLOWAY, JR.,

Defendant-Appellant.

UNPUBLISHED
May 9, 1997

No. 179020
Recorder's Court
LC No. 93-013596

Before: Holbrook, Jr., P.J., and White and A. T. Davis*, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of three counts of armed robbery, MCL 750.529; MSA 28.797, and pleaded guilty to being an habitual offender, fourth, MCL 769.12; MSA 28.1084. He was sentenced to twenty-five to fifty years' imprisonment for each count of armed robbery. The armed robbery sentences were vacated and defendant was sentenced to serve forty to one hundred years' imprisonment as a fourth habitual offender. He now appeals as of right, and we affirm.

Defendant firsts argues that the trial court erred in permitting Detroit Police Officer Dennis Myers to testify as a rebuttal witness. However, because defendant failed to object to the trial court's permitting Myers to testify as a rebuttal witness, this Court will review the issue only to prevent manifest injustice. *People v King*, 210 Mich App 425, 433; 534 NW2d 534 (1995); *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994).

As a general rule, the prosecutor cannot introduce evidence on rebuttal that could have been presented in the prosecution's case in chief. *King*, *supra*, 433. Consequently, the prosecution is limited to introducing rebuttal evidence which refutes, contradicts, or explains evidence presented by the defendant. *Id.* Here, defendant asserted an alibi defense that was corroborated by three witnesses. On rebuttal, Myers testified regarding the contents of defendant's signed statement to police, which contradicted defendant's evidence. Because Myers' testimony contradicted defendant's in-court testimony regarding his whereabouts at the time of the robbery and impeached the three corroborating

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

witnesses, admission of the evidence was proper and manifest injustice will not result from our failure to further review this issue.

Defendant also argues that the court erroneously refused to suppress the portion of the statement in which defendant stated "I talked to my … parole officer after 1:00 p.m. and told her I had started to work." We agree that the court erred in failing to redact this portion of the statement. Simply because the statement was voluntarily made by defendant does not render it admissible. The court was still obliged to weigh the statement's probative value against its prejudicial impact. Nevertheless, under the circumstances that the prosecutor did not refer to this portion of the statement in argument, and the identification evidence against defendant was overwhelming, we conclude that the error was harmless, *People v Mateo*, 453 Mich 208; 551 NW2d 891 (1996), and a new trial is not warranted..

Defendant next argues that the prosecutor's remarks during rebuttal closing argument denied defendant a fair and impartial trial. We disagree. Because defendant failed to object to the allegedly improper remarks, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). After examining the allegedly improper remarks in context, we conclude that defendant's allegations are without merit. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). Moreover, the trial court cured any potential for prejudice by instructing the jurors, both at the outset and at the close of the proceedings, that counsel's arguments are not evidence and that the jury should consider only the evidence in rendering a verdict. Failure to further review this issue will not result in a miscarriage of justice. *Stanaway, supra*, 446 Mich 687.

Defendant also argues that the trial court erred in denying his motion to suppress a toy gun seized during a warrantless search of defendant's automobile. We disagree. This Court reviews a trial court's ruling with regard to a motion to suppress evidence on legal grounds for clear error. *People v Fancett*, 442 Mich 153, 170; 499 NW2d 764 (1993); *People v Smielewski*, 214 Mich App 55, 62; 542 NW2d 293 (1995); *People v Bloxson*, 205 Mich App 236, 239; 517 NW2d 563 (1994). Clear error exists if, although there is evidence to support the ruling, this Court is left with a definite and firm conviction that a mistake has been made. *People v Shields*, 200 Mich App 554, 556; 512 NW2d 849 (1993); *People v Lewis*, 199 Mich App 556, 558; 502 NW2d 363 (1993).

Both the United States and Michigan constitutions guarantee the right of people to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art I § 11. This right is subject to a few well-recognized exceptions. *People v Champion*, 205 Mich App 623, 627; 518 NW2d 518 (1994). Here, the prosecution argued that the warrantless search of defendant's car could be justified by reference to either the automobile or search-incident-to-an-arrest exceptions to the warrant requirement. Defendant argued that the car was too remote from defendant to be searched incident to arrest, and that an automobile search without a warrant can only be justified where there are exigent circumstances. Defendant did not challenge, and does not here challenge, whether there was probable cause to justify the search, but, rather, argues that it was invalid for lack of a warrant. We must agree with the prosecutor that the United States Supreme Court does not require a separate

showing of exigency where an automobile is searched

on probable cause, but without a warrant. *Texas v White*, 423 US 67, 46 L Ed 2d 209, 96 S. Ct 304 (1975); *Michigan v Thomas*, 458 US 259, 73 L Ed 2d 750, 102 S Ct 3079 (1984); *Florida v Meyers*, 446 US 380, 80 L Ed 2d 381, 104 S Ct 1852 (1984).

Defendant also argues that the sentence for his habitual offender conviction violates the principle of proportionality. We disagree. Our review of sentencing decisions is limited to determining whether an abuse of discretion has occurred. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). Our review of defendant's habitual offender sentence is limited to determining whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Gatewood (On Rem)*, 216 Mich App 559; 550 NW2d 265 (1996). Here, the record reveals that defendant pointed a gun that appeared to be real at one witness' head and threatened to shoot another. Moreover, the presentence investigation report indicates that defendant has an extensive criminal history. Some of the prior felonies involved similar crimes against the person. Based on these factors, we conclude that the sentencing court was justified in finding that defendant showed no potential for rehabilitation and in sentencing defendant as a fourth habitual offender to a term of forty to one hundred years.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Helene N. White
/s/ Alton T. Davis