

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LEE MOOREHEAD,

Defendant-Appellant.

UNPUBLISHED

June 24, 1997

No. 186879

Calhoun Circuit Court

LC No. 94-3422 FH

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

Defendant was convicted of larceny from a person, the jury rejecting the defense that defendant was guilty only of the misdemeanor offense of false pretenses under \$100. The theory of the defense was that defendant obtained money from the victim by trickery, while the victim claimed that defendant did so by means of demands and threats.

Defendant on this appeal of right first contends that the prosecutor deprived him of a fair trial by shifting the burden of proof during closing argument. The prosecutor rhetorically inquired in front of the jury as to the whereabouts of ostensibly corroborating defense witnesses, whose identity was explored by defense counsel during direct examination of defendant's nephew, but who were not produced by defendant at trial. Parenthetically, this Court notes that although defense counsel asserted to the trial court that bench warrants should issue for these witnesses, who had failed to honor subpoenas, the trial court noted that there was no evidence before it that the subpoenas, which were for different dates than the actual date of trial, had been followed up with any advice to the witnesses as to the rescheduled trial date. Furthermore, immediately after the request for bench warrants was denied, a recess was taken and it appears no effort was made to contact these witnesses, although defendant's nephew testified that they could both be found at home at that very moment. Furthermore, defense counsel did not request a continuance to secure the presence of those witnesses.

Therefore, the prosecutor's argument did not unfairly exploit the absence of these witnesses, and inasmuch as defendant testified in his own defense, it was proper for the prosecutor to challenge the

failure to produce corroborating witnesses. *People v Spivey*, 202 Mich App 719, 722-723; 509 NW2d 908 (1993).

Defendant's second argument is that the prosecutor expressed his personal belief in defendant's guilt during rebuttal closing argument, over objection. The trial court overruled the objection, agreeing with the prosecutor that, because the prosecutor had prefaced his remark with the phrase "The evidence shows . . ." the statement was not one of personal opinion. Whether it was or not, however, in no sense did the comment seek to invoke the prestige of the prosecutor's office or any knowledge of facts or evidence not admitted at trial. There was, therefore, no reversible error in this regard. *People v Bahoda*, 448 Mich 261, 286-287; 531 NW2d 659 (1995).

Affirmed.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra