STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE MORROW,

Defendant-Appellant.

UNPUBLISHED
November 4, 1997

No. 188081
Macomb Circuit Court
LC No. 94-002730-FC

Before: Young, P.J., and Markman and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to mandatory life imprisonment for the first-degree murder conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that his convictions should be reversed because the trial court did not grant a mistrial or give the jury a cautionary instruction after the prosecutor elicited testimony that revealed that defendant had been previously incarcerated. Defendant contends that the prosecutor intentionally elicited this highly prejudicial testimony. We disagree. There is no evidence that the prosecutor deliberately injected into the trial the fact that defendant had been previously incarcerated, and the prosecutor made no further mention of it. See *People v McQueen*, 85 Mich App 348, 350; 271 NW2d 231 (1978); *People v Solis*, 32 Mich App 191, 193; 188 NW2d 166 (1971). Although the trial court did not give a corrective instruction, this is only one factor to consider. *People v Alexander*, 118 Mich App 112, 115; 324 NW2d 350 (1982). Moreover, we note that defendant waived a cautionary instruction. Because any inadvertent irregularity caused by the testimony did not prejudice defendant or otherwise deny him a fair trial, we conclude that he was not entitled to a mistrial on this basis. See *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Next, defendant argues that his conviction should be reversed because the prosecutor improperly called a witness knowing that she would assert her Fifth Amendment privilege not to testify

and that the trial court failed to grant a mistrial or issue a cautionary instruction to cure this highly prejudicial error. It is well-established that "[a] lawyer may not knowingly offer inadmissible evidence or call a witness knowing that he will claim a valid privilege not to testify." *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977); see also *People v Paasche*, 207 Mich App 698, 708-709; 525 NW2d 914 (1994). However, in this case there is no evidence to support defendant's claim that the prosecutor knew or should have known that the witness would assert the Fifth Amendment privilege. Moreover, we find that the witness' assertion of the privilege did not deny defendant a fair trial. The witness was not an accomplice or a codefendant, and defendant has not cited any evidence to support his bare assertion that the witness was "substantially related to the criminal episode." No logical inference of defendant's guilt could reasonably have arisen as a result of the witness' assertion of the Fifth Amendment privilege. Therefore, a mistrial was not required on this basis. See *People v McNary*, 43 Mich App 134; 203 NW2d 919, aff'd in part and rev'd in part on other grounds 388 Mich 799 (1972). Furthermore, in light of the overwhelming evidence of defendant's guilt, any error was harmless beyond a reasonable doubt. See *People v Hines*, 88 Mich App 148; 276 NW2d 550 (1979).

Defendant next claims that the prosecutor improperly stated during closing argument his personal belief in the appropriateness of the murder charge brought against defendant. Defendant failed to preserve this issue for our review by objecting below to the prosecutor's comments. Therefore, 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 Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). No miscarriage of justice would result from our failure to review this issue. Reversal is not required because the comments did not urge the jury to improperly suspend its own powers of judgment in deference to those of the prosecutor, *People v Pomranky*, 62 Mich App 304, 309-310; 233 NW2d 263 (1975), and because there was ample evidence supporting defendant's guilt. *People v Swartz*, 171 Mich App 364, 371-372; 429 NW2d 905 (1988). In addition, the remarks were responsive to comments made by defense counsel during opening statement. *People v Bahoda*, 448 Mich 261, 286; 531 NW2d 659 (1995). Finally, any potential prejudice was cured by the trial court's instruction that the arguments of the attorneys were not evidence. *Id*. at 281.

Finally, defendant argues that the jury's verdict was coerced by the circumstances surrounding its deliberations. We conclude that the trial court acted properly under the circumstances. The trial court's instruction to continue deliberating for a "few more minutes," in light of juror six's indication that a verdict was "very close," did not suggest that the jury was required to reach a verdict that evening in order to accommodate juror five's vacation plans. See *People v Vettese*, 195 Mich App 235, 245; 489 NW2d 514 (1992). Moreover, defendant's claim that juror five coerced the other jurors into reaching a verdict is factually unsupported.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Stephen J. Markman
/s/ Michael R. Smolenski