

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

October 5, 1999

Plaintiff-Appellee,

v

No. 207455

Recorder's Court

JAMES F. JONES,

LC No. 97-000490

Defendant-Appellant.

Before: Doctoroff, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, malicious destruction of personal property over \$100, MCL 750.377a; MSA 28.609(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to concurrent terms of thirty-two to forty-eight months in prison for the felonious assault and malicious destruction of personal property convictions, and to a consecutive two-year prison term for his felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentences, but remand for the deletion of certain information from defendant's presentence report.

Defendant first argues that the trial court abused its discretion when it denied his request for a continuance to obtain civilian clothing. We disagree. A trial court's decision regarding a request for a continuance is reviewed for an abuse of discretion. *People v Echavarría*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

On the day trial was to begin, but before jury selection began, defense counsel moved for a continuance of the jury selection to obtain civilian clothing. Defendant appeared in court wearing a green jail outfit from the Wayne County Jail. Defense counsel stated on the record what defendant was wearing: "It is a short-sleeve green top with a white T-shirt underneath, and the green jail pants and the flip-flops, with white socks." Defendant had planned to wear civilian clothing at trial, but found that the clothing he had planned to wear did not fit him because he had gained weight while in jail. The trial court denied defendant's request for a continuance. Defendant wore his prison clothing during the jury selection proceeding, but wore civilian clothing during the remaining two days of trial.

Generally, when a defendant makes a timely request to wear civilian clothing, rather than prison clothing, at trial, the request must be granted. *Estelle v Williams*, 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976); *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993); *People v Shaw*, 381 Mich 467, 475; 164 NW2d 7 (1969). Here, however, the trial court did not abuse its discretion in denying defendant's request for a continuance to obtain civilian clothing.

Defendant cites *People v Lee*, 133 Mich App 299; 349 NW2d 164 (1984) to support his position that the trial court's refusal to grant a continuance to allow him to obtain civilian clothing for trial was an abuse of discretion. In *Lee*, this Court held that the trial court abused its discretion when it denied the defendant's pretrial request for a continuance to obtain civilian clothes, and reversed his conviction. *Id.* at 300. The defendant had planned to wear the civilian clothing he had stored at the jail, but learned that it had become infested with lice and could not be worn. *Id.* This Court explained:

This is not a case in which defendant procrastinated, failed to obtain civilian clothing, and then at trial asked for a continuance to be allowed to secure civilian clothes. Instead, defendant planned to wear his civilian clothes stored at the county jail, but belatedly learned that they were infested with lice. [*Id.* at 301.]

We find the instant case to be distinguishable from *Lee*. In the instant case, defendant had ample time to acquire civilian clothing before the day of trial. In *Lee*, defendant only "belatedly learned" that the clothing he planned to wear was unavailable. Here, considering defense counsel's statement that "when [defendant] went in to jail he was half the size that he is now, clothing-wise and build-wise," defendant must have known prior to the day of trial that he had outgrown the clothing he had worn before he entered the jail. While the lice infestation in *Lee* was unexpected, the fact that defendant's clothes did not fit him due to his substantial weight gain was not. Thus, *Lee* does not support defendant's position.

Similarly, we find the facts of the instant case to be distinguishable from those of *People v Turner*, 144 Mich App 107; 373 NW2d 255 (1985). In *Turner*, as in the instant case, the defendant intended to wear civilian clothing at trial, but was unable to fit into the clothing because he had gained weight while in jail. *Id.* at 110. The defendant objected to being tried in prison clothing before the jury was impaneled. *Id.* However, the trial court refused the defendant's request to obtain civilian clothing, and the defendant was tried in the jail clothes with a yellow jail band on his wrist. *Id.* On appeal, this Court stated that the situation before it was similar to that of *Lee, supra* because, due to "unfortunate circumstances," the defendant was unable to wear the civilian clothes he planned to wear. *Id.* Noting that the defendant's request to obtain civilian clothes was timely, that the request would not have caused an undue delay because the court granted a recess for other reasons shortly after the request, and that the court failed to indicate on the record whether the defendant's clothing appeared to be prison clothing, this Court held that the trial court abused its discretion in denying the defendant's request. *Id.* at 111-112.

In the instant case, defendant's request for a continuance to obtain civilian clothing was made before he was seen by the jury. However, unlike *Turner*, the trial court in the instant case noted that defendant's attire did not necessarily appear to be jail garb, but "looks like those scrubs I see people

wearing around the streets, you know, sometimes. I don't think that it's so conspicuous that those are prison clothes that it would be of any concern." In addition, the trial court noted that defendant was seated away from the jury with a podium situated between defendant and the jury. We give deference to the trial court's opportunity to observe defendant, as well as to its finding that defendant's clothing did not mark him as a prisoner. *Harris, supra* at 152. Furthermore, while the facts of *Turner* do not indicate the degree of the defendant's weight gain, the record in the instant case indicates that defendant's weight gain was substantial. Thus, as already stated, defendant must have known prior to the day of trial that he had outgrown the clothing he had planned to wear. Defendant had ample time to acquire appropriate civilian clothing, but failed to assert his right to do so. See *People v Porter*, 117 Mich App 422, 425; 324 NW2d 35 (1982). Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's request for a continuance to obtain civilian clothing.

Defendant next argues that he was denied his right to a fair and impartial trial because of prosecutorial misconduct. We disagree. The test for prosecutorial misconduct is whether the prosecutor's remarks or conduct denied the defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.*

Here, defendant argues that the prosecutor unfairly prejudiced him when she compared the instant case to a criminal sexual conduct case. Because the jury was made up of eleven women, defendant argued that the analogy to criminal sexual conduct was made to inflame the jury. Thus, the relevant inquiry is whether potentially inflammatory references were intentionally injected, with no apparent justification except to arouse prejudice. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). Taken in context, it appears that the prosecutor's comments were an attempt to inform the jury that, despite the lack of physical evidence of the charged crimes, the jury could still find that defendant was guilty of the crimes beyond a reasonable doubt on the basis of the evidence presented. The remarks were made in response to defense counsel's comments regarding the lack of physical evidence. An otherwise improper remark may not amount to an error requiring reversal when the prosecutor's remark is made in response to the defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). After having reviewed the remarks in context, we conclude that they did not unfairly prejudice defendant or deny him a fair and impartial trial.

Defendant also argues that the prosecutor personally attacked defense counsel when she said that the jury had been witness to "some very slick¹ lawyering" and when she stated that the defense attorneys were throwing "red herrings" to distract the jurors. A prosecutor may not personally attack the credibility of defense counsel. *Kennebrew, supra* at 607. Here, the remark regarding "slick lawyering" was a description of the manner in which the defense attorneys were attempting to persuade the jury and was not necessarily a negative comment regarding defense counsel's credibility. Furthermore, in response to defense counsel's motion for a mistrial, the trial court emphasized to the jury that the arguments of counsel were not evidence and that the jury should not be "swayed by certain terms or words" used by the attorneys. Under these circumstances, we cannot conclude that the prosecutor's comments denied defendant a fair and impartial trial.

Additionally, the prosecutor's remark that the defense attorneys were throwing "red herrings" was not a personal attack on credibility when viewed in the context in which it was made. Rather, the reference was made in response to defense counsel's suggestion that the charges against defendant were the result of a police conspiracy. *Kennebrew, supra* at 608. Furthermore, the jury was instructed that the arguments of counsel were not evidence. Accordingly, defendant was not denied a fair and impartial trial.

Finally, defendant argues, and we agree, that he is entitled to have his presentence report corrected, striking information the trial court agreed to have deleted from the report. Defendant argued at sentencing that the following statement in his presentence report was irrelevant because it related only to codefendant Waller: "He was apprehended after a brief chase and was found to be in possession of crack cocaine as well. Co-defendant, D. Waller was arrested." The trial court agreed on the record to delete the sentence. Accordingly, we remand for the deletion of the challenged information regarding codefendant Waller from defendant's presentence report. MCL 771.14(56); MSA 28.1144(6); *Paquette, supra* at 346-347.

Defendant's convictions and sentences are affirmed. This case is remanded for correction of defendant's presentence report in accordance with this opinion.

/s/ Martin M. Doctoroff

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly

¹ Random House Webster's College Dictionary defines "slick" as "smooth in manners, speech, etc.; suave" and "sly; shrewdly adroit."