

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TWYMAN MARK BURNELL,

Defendant-Appellant.

UNPUBLISHED

November 10, 2005

No. 254952

Saginaw Circuit Court

LC No. 03-022792-FH

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

PER CURIAM.

Defendant appeals as of right his jury convictions and sentences for assault with intent to commit great bodily harm less than murder, MCL 750.84, possession of marijuana, MCL 333.7403(2)(d), and carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced to concurrent sentences of five to fifteen years in prison for the assault and dangerous weapon convictions, and one year for the possession conviction. We affirm.

Complainant was seated with friends at a table in a bar. After an altercation, defendant stabbed complainant in the chest with a small nail file. The police responded to the scene, and as they pursued defendant, he dropped an object on the ground. An officer found two small baggies of marijuana when he searched the area.

Initially, defendant denied stabbing complainant, and claimed that complainant attacked him when he tried to stop complainant from beating up his girlfriend. Later, defendant admitted stabbing complainant, but claimed that he did so after complainant head-butted him. He also admitted possessing the marijuana.

At trial, defendant intimated that he had been attacked at least in part because he is an African-American, and complainant and his friends are Caucasian. His attorney first raised this issue during his opening statement. Defendant and his witness substantiated this assertion through their testimony.

Defense counsel raised the issue that the fight was racially motivated during his opening statement and during his closing argument. During rebuttal, the prosecutor responded that this argument was “a cheap attempt to get [the jury’s] attention” and that the defendant would not have cared “whether the person he stabbed was purple as long as he got the person that put his

hands on him because that's all he cared about." Defendant maintains that this comment was an improper personal attack on his counsel and denied him a fair trial.

We generally review claims of prosecutorial misconduct de novo to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). However, because defendant failed to object to the prosecutor's statement, our review is limited to plain error affecting defendant's substantial rights. *Id.* Defendant cannot show error requiring reversal where a curative instruction could have alleviated any prejudicial effect. *Id.*

It is error for the prosecutor to denigrate defense counsel or suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). We have held that reversal may be warranted by a prosecutor's comments characterizing the defense theory as misleading. See *People v Dalessandro*, 165 Mich App 569, 578-580; 419 NW2d 609 (1988). However, the prosecutor's comments must also be considered in light of defense counsel's comments. *Watson, supra* at 592-593. Here, the prosecutor's characterization of defense counsel's argument as a "cheap attempt to get [the jury] upset" was arguably inappropriate. However, it was contained in a permissible larger argument that race was not central to the issues in the case. A prosecutor is free to argue the evidence and all reasonable inferences arising therefrom as they relate to his theory of the case, and need not do so in the blandest possible terms. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In addition, the trial court mitigated the effect of any error when it provided a standard jury instruction that the attorneys' arguments were not evidence. Any remaining prejudice could have been further cured by an appropriate instruction, had defendant requested one. *Ackerman, supra*. Defendant is not entitled to relief on this issue.

Next, defendant argues that the trial court improperly scored Prior Record Variable (PRV) 1 at twenty-five points. See MCL 777.50. The presentence report stated that defendant was charged with accessory to robbery in San Bernardino, California, but did not indicate that he was convicted of this offense. Defendant maintains that PRV 1 was inappropriately scored.

Defendant did not raise this issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. Because his sentence was within the guidelines,¹ he cannot now raise this issue. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). In addition, even if we were to find this issue a proper subject for review, defendant has not shown that he is entitled to relief. *Id.* at 312. He has pointed to no plain error in the scoring decision. Moreover, during sentencing defendant specifically indicated that nothing in the report was factually inaccurate.

¹ Defendant admits that his sentence falls within both the guidelines as scored and the guidelines that would have been applicable had PRV 1 been scored at zero points.

Affirmed.

/s/ Hilda R. Gage

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray