

Court of Appeals, State of Michigan

ORDER

People of MI v Marlon Westbrook

Docket No. 279544

LC No. 07-005517-01

Christopher M. Murray
Presiding Judge

Michael J. Talbot

Kurtis T. Wilder
Judges

The Court now orders removal of the application from abeyance and, pursuant to MCR 7.205(D)(2), in lieu of granting the application, this Court orders that the July 19, 2007, order, which granted defendant's motion for a new trial based on prosecutorial misconduct, is REVERSED. We review the trial court's grant of a new trial for an abuse of discretion, *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

First, nothing in the record supports a conclusion (and none was made by the trial court) that the prosecutor's attempt to admit the mask was done in bad faith or, more significantly, that defendant was prejudiced by the prosecutor's actions. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). The jury could not have accredited any weight to the mask in finding defendant guilty, especially in light of the victim's identification of defendant as the robber, and her testimony that the ski mask was not the one used by the accomplice in the robbery.

Second, we disagree with defendant's claim that it was reversible error for the prosecution to leave the ski mask on the prosecutor's table in the presence of the jury. Significantly, no objection was asserted and there is nothing in the record to verify that the mask remained in view of the jury. Therefore, *People v Brisco*, 15 Mich App 428, 429; 166 NW2d 475 (1968), does not apply.

Third and finally, a prosecutor is permitted to comment on a defendant's failure to produce corroborating witnesses whenever the defendant takes the stand and testifies on his own behalf. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993), overruled on other grounds 450 Mich 1025 (1996). See also *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995) and *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989). Accordingly, the prosecutor did not improperly shift the burden of proof by commenting on the alibi witness' failure to come forward to corroborate defendant's alibi. Moreover, the trial court's subsequent alibi instruction to the jury removed any possible impression that defendant was obligated to produce witnesses to corroborate his alibi.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 16 2007

Date

Sandra Schultz Mengel
Chief Clerk