

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BUS ALLEN WHITE,

Defendant-Appellant.

UNPUBLISHED

January 20, 2005

No. 250130

Roscommon Circuit Court

LC No. 02-004348-FH

Before: Hoekstra, P.J., and Cavanagh and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(6)(d), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Police officers observed defendant stop his pick-up truck in the middle of a road next to a parked commercial truck, exit the truck, and urinate in the road. Defendant failed several field sobriety tests, and was arrested for OUIL. At trial, defendant denied that he had driven to the scene just before the officers arrived, and maintained that he had parked his pick-up truck several hours earlier and had returned to the scene on foot to perform maintenance on the commercial truck.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant argues that the prosecutor committed misconduct by asking him on cross-examination if the police officers' testimony was truthful, and by expressing his personal opinion during closing argument. We disagree. Defendant did not object to the prosecutor's questions or argument; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecutor acted improperly by asking defendant to comment on the officers' credibility. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). However, any prejudice could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). Moreover, the trial court instructed the jury

that it alone determined the credibility of the witnesses. No plain error occurred. *Carines, supra*. The prosecutor's assertion that he believed that defendant was operating a vehicle and therefore was guilty was made after he summarized and commented on the evidence. The prosecutor did not ask the jury to convict defendant based on his personal knowledge. *People v Matuszak*, 263 Mich App 42, 54; 687 NW2d 342 (2004).

Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them. Even if somewhat imperfect, instructions do not create error requiring reversal if they fairly presented the issues for trial and sufficiently protected the defendant's rights. Error does not result from the omission of an instruction if the charge as a whole covered the substance of the omitted instruction. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

Defendant argues that the trial court denied him a fair trial by simply rereading CJI2d 15.2 in response to a question from the jury on what constituted the operation of a vehicle. We disagree. Waiver constitutes the intentional abandonment of a known right, while forfeiture constitutes the failure to timely assert a right. A party who forfeits a right might still obtain appellate review, but a party who waives a known right cannot seek appellate review of a claimed deprivation of that right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). In response to the trial court's inquiry defense counsel stated that he had no objection to the trial court's instruction. By approving the trial court's response, defendant has waived the issue on appeal. *Id.*; *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello