

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THADDEUS HATCHETT,

Defendant-Appellant.

UNPUBLISHED

May 14, 2009

No. 284646

Wayne Circuit Court

LC No. 07-014857-FC

Before: Sawyer, P.J., and Murray and Stephens, JJ.

PER CURIAM.

Defendant was convicted by a jury of carjacking, MCL 750.529a, armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent prison terms of 7 to 25 years for the carjacking, robbery, and assault convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that improper remarks by the prosecutor during opening statement and closing argument denied him a fair trial. Because defendant did not object to the remarks at trial, this issue is not preserved. Therefore, relief is precluded unless defendant establishes a plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted).” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The prosecutor’s remarks must be considered in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Hedelsky*, 162 Mich App 382, 386; 412 NW2d 746 (1987); *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982).

Opening statements and closing arguments are not evidence. *People v Bailey*, 451 Mich 657, 681; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). The purpose of opening statement is to state the facts to be proved at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). The prosecutor may comment on the evidence to be presented and the reasonable inferences to be drawn therefrom if the comments are a fair introduction to the

evidence. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (Kelly, J., concurring), aff'd sub nom *People v Tilley*, 405 Mich 38 (1979). In closing, the prosecutor may argue the evidence and all reasonable inferences therefrom as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He “must refrain from denigrating a defendant with intemperate and prejudicial remarks,” *id.* at 283, and may not inject “unfounded or prejudicial innuendo into the proceedings.” *People v George*, 130 Mich App 174, 180; 342 NW2d 908 (1983). However, the prosecutor “may use ‘hard language’ when it is supported by evidence and [is] not required to phrase arguments in the blandest of all possible terms.” *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

It is improper for the prosecutor to inject into the case an issue broader than the defendant’s guilt or innocence. *People v Cooper*, 236 Mich App 643, 650-651; 601 NW2d 409 (1999). Therefore, the prosecutor should not resort to civic duty arguments that appeal to the fears and prejudices of the jurors. *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998).

In his opening statement and closing argument, the prosecutor repeatedly referred to defendant as a “young thug” or a “teenage thug.” Considering the evidence presented, which showed that defendant confronted a couple at gunpoint and stole the woman’s car, referring to defendant as a “thug” was a fair comment on the evidence and was not so intemperate or prejudicial as to deny defendant a fair trial.

The prosecutor concluded his rebuttal argument by saying, “Based on the totality of the circumstances everything that has been presented in this case, the People are asking for a verdict of guilty because this is a young thug, who no longer needs to be on the streets of Detroit. And I’m asking you to find him guilty.” Because the prosecutor’s remark, taken in context, was tied to the evidence rather than to any improper purpose such as the need for safe streets in general, it was not improper.

Because the prosecutor’s remarks were not improper, we reject defendant’s argument that trial counsel was ineffective for failing to object. The law is clear that counsel is not ineffective for failing to raise a meritless objection. *People v Matuszak*, 263 Mich App 42, 60; 687 NW2d 342 (2004).

Defendant also argues that the trial court erred in denying his motion to suppress the victim’s identification testimony. “The trial court’s decision to admit identification evidence will not be reversed unless it is clearly erroneous.” *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). “Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Id.*

“An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process.” *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). An identification procedure may be improperly suggestive if the witness is shown a group of people in which one person is singled out in some way. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). “The relevant inquiry . . . is not whether the lineup . . . was suggestive, but whether it was unduly suggestive in light of all of the circumstances” such that it led to a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993). Because counsel was present at the

lineup, the burden of proof is on defendant to factually support his claim that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

The trial court found from photographs of the lineup participants that everyone was substantially similar in appearance and that defendant did not stand out to the extent that the lineup was unduly suggestive. Defendant does not contend that this finding is clearly erroneous, but rather asserts that had the court been able to see the other participants to gauge their relative weight, height, and complexion, it might have reached a different conclusion. While the victim's trial testimony indicated that there were some variations among the participants, such variations do not compel a finding that the lineup was unduly suggestive.

“[A] suggestive lineup is not necessarily a constitutionally defective one. Rather, a suggestive lineup is improper only if under the totality of the circumstances there is a substantial likelihood of misidentification.” *Kurylczyk, supra* at 306. The fact that there are physical differences between the defendant and other subjects in the lineup does not generally in and of itself render the lineup impermissibly suggestive. *Id.* at 312. “Physical differences among the lineup participants . . . are significant only to the extent that they are apparent to the witnesses and substantially distinguish the defendant from the other lineup participants.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Defendant has not identified any characteristics that substantially distinguished him from the other participants such that the lineup was rendered unduly suggestive.

Affirmed.

/s/ David H. Sawyer
/s/ Christopher M. Murray
/s/ Cynthia Diane Stephens