

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICARDO CORA ROSARIO,

Defendant-Appellant.

UNPUBLISHED

June 1, 1999

No. 193662

Kent Circuit Court

LC No. 95-01308 FC

Before: Sawyer, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant Ricardo Cora Rosario was charged with first-degree murder, MCL 750.316; MSA 28.548. Following an eleven-day jury trial, defendant was found guilty of the lesser offense of second-degree murder, MCL 750.317; MSA 28.549. The trial court sentenced defendant to serve a ten to twenty-five year term in prison. Defendant appeals as of right and we affirm.

On appeal, defendant argues that he was denied a fair trial as a result of several instances of prosecutorial misconduct occurring during the prosecutor's rebuttal argument. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.*

Defendant first contends that the prosecutor's characterization of defense counsel's argument as "smoke and mirrors, red herring, blowing snow" constituted an improper personal attack on defense counsel. See *People v Dalessandro*, 165 Mich App 569, 579-580; 419 NW2d 609 (1988). Defendant failed to preserve this argument with an objection at trial. In any event, we disagree with his argument that the comments were improper. Viewed in context, it is apparent that the prosecutor was merely responding to defense counsel's argument that seven prosecution witnesses with no connection to defendant or the victim were nonetheless biased because they "wanted to help the police put somebody behind bars." Cf. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant also contends that the prosecutor improperly commented on defendant's right to remain silent. We disagree. During his rebuttal argument, the prosecutor argued that if defendant had killed the victim by accident or in self-defense, he should have "been able to tell the police his story and stand by it." Continuing, the prosecutor asked rhetorically, "What did he do? He took off." Viewed in context, it is apparent that the prosecutor was referring to defendant's pre-arrest flight. Under the circumstances, it was not improper for the prosecutor to argue that defendant's flight was inconsistent with his subsequent claims of accident and self-defense. See *People v Dixon*, 84 Mich App 675, 682; 270 NW2d 488 (1978); see also *People v Cetlinski*, 435 Mich 742, 760; 460 NW2d 534 (1990) (explaining that the rules against eliciting evidence of or comments on post-arrest silence do not apply to pre-arrest silence).

Defendant further contends that the prosecutor impermissibly shifted the burden of proof to defendant when he asked the jury to hold defense counsel to "what he said the facts would show in his opening statement." Unlike *People v Green*, 131 Mich App 232; 345 NW2d 653 (1982), the prosecutor did not ask the defendant to answer questions. Instead, the prosecutor merely asked the jury to consider whether the evidence presented at trial showed what defense counsel said it was going to show. This was not improper. See *People v Sanders*, 163 Mich App 606, 611; 415 NW2d 218 (1987).

Defendant finally contends that the prosecutor improperly "vouched for his case" when he argued, "[Defense counsel] gets up and tell tells [sic] you its my goal to convict. I've been a prosecutor 13 years, and that is not the goal of the prosecutor. I swore an oath. He did not. So I am tired of hearing these insults from [defense counsel]." Generally, a prosecutor may not attempt to place the prestige or the wisdom of the prosecutor's office behind a contention that defendant is guilty. See *People v Bahoda*, 448 Mich 261, 286-287; 531 NW2d 659 (1995); *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). However, where comments that might otherwise be deemed improper are made in response to arguments previously made by defense counsel, reversal is not mandated. *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). In this case, it is apparent that the prosecutor was responding to defense counsel's argument that the prosecutor's office and police had not properly investigated the case. Defense counsel opined, "It's not about justice. Their goal is to convict." Contrary to defense counsel's argument to the jury, the role of the prosecutor is not merely to convict, but to seek justice. *People v O'Quinn*, 185 Mich App 40, 43; 460 NW2d 264 (1990). Accordingly, under the circumstances of this case, the prosecutor's comments do not merit reversal of defendant's conviction. *Vauhn, supra* at 39.

Next, defendant argues that the trial court reversibly erred when it ordered defendant to disclose to the prosecution certain inconsistent statements made by prosecution witnesses to the defense investigator. In making his argument on appeal, defendant (1) fails to apprise this Court of the content of the discovery material he was required to turn over to the prosecution, and (2) fails to explain the effect of the trial court's ruling on the presentation of his case. Accordingly, we are not able to fully evaluate the merits of defendant's argument. An appellant generally bears the burden of furnishing the reviewing court with a record that "verifies the basis of any argument on which reversal or other claim for appellate relief is predicated." *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540;

506 NW2d 890 (1993); see also *People v Kowalski*, 230 Mich App 464, 488; 584 NW2d 613 (1998) (Corrigan, C.J., concurring). Furthermore, defendant now makes a claim of privilege that was not made at trial. Generally, this Court will not review issues raised for the first time on appeal. *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). For these reasons, defendant is not entitled to relief on this issue.

Affirmed.

/s/ David H. Sawyer

/s/ William B. Murphy

/s/ Michael J. Talbot