

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEJI KENYATTA LEE,

Defendant-Appellant.

UNPUBLISHED
September 11, 2003

No. 240348
Eaton Circuit Court
LC No. 01-020166-FH

Before: Meter, P.J., Talbot and Borrello, JJ.

PER CURIAM.

Defendant Deji Kenyatta Lee appeals as of right from his conviction of failure to return rented property between \$1,000 and \$20,000, MCL 750.362a(3)(a), following a jury trial. He was sentenced as a second habitual offender, MCL 769.10, to 12 to 90 months in prison and ordered to pay \$5,630 in restitution. We affirm.

This case arose after defendant rented a Pontiac Grand Am from Enterprise Rent-A-Car and failed to return the vehicle when due. At trial, defendant contended he had been a victim of identity theft, and that someone else had rented the car using his identity. However, overwhelming evidence against defendant was presented at trial, and defendant was ultimately convicted.

On appeal, defendant argues that he was denied a fair trial based on prosecutorial misconduct. Specifically, defendant argues that the prosecutor denigrated defendant, stated his personal opinion regarding defendant's guilt, and vouched for the credibility of his own witnesses.

We review claims of prosecutorial misconduct on a case by case basis. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), citing *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). Additionally, a defendant must timely and specifically object to prosecutorial comments, or appellate review of the alleged misconduct is precluded. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2003), citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). However, if the objection would not have cured the error or a miscarriage of justice would result from failure to review the issue, then this Court may review the claimed error. *Id.*

Contrary to defendant's claim that during rebuttal argument defense counsel objected to the prosecutor's statements requesting the jury to not be defendant's second victims, no objection by the defense to any prosecutorial statements was made in either the closing or rebuttal arguments. Thus, we must determine whether an objection would have been futile or if a miscarriage of justice would result without review. *Rodriguez, supra* at 30.

Defendant first argues that the prosecutor denigrated him by calling him a fraud and asking the jury not to become his second victim. In his closing argument, the prosecutor stated, "This case is about fraud" and "I'd ask that you folks don't become the second victim in this case, the second victim of fraud."

The defense relies on *Mathis v United States*, 513 A2d 1344 (DC Cir, 1986), where misconduct was found when the prosecutor called the defendant "the Godfather" and the "self-proclaimed Godfather" because the court concluded that such terms had negative connotations and prejudicial overtones. *Id.* The defense in the instant case argues that the prosecution's "labeling" of defendant as a fraud invoked negative connotations similar to those found in *Mathis*, as did the prosecutor's argument that the jury would be the next victim if it was "duped" into believing defendant's story.

We find the instant case distinguishable from *Mathis, supra*. In the present case, the prosecutor never directly called defendant a fraud but merely referred to his crime against the rental car agency as a fraud. The prosecutor also never used the inflammatory word "duped," but merely asked the jury not to believe defendant's story and to avoid being a second victim of his fraud. Because referring to the crime as fraud and asking the jury not to believe defendant's story does not contain improperly prejudicial overtones or evoke negative connotations of the same type found in *Mathis*, defendant's argument fails.

Defendant next argues that he was denied a fair trial when the prosecutor stated his personal opinion regarding defendant's guilt. Generally, "the prosecuting attorney should be permitted to argue the testimony, but has no right to state what he personally thinks or believes of defendant's guilt, except as shown by proof." *People v Slater*, 21 Mich App 561, 566; 175 NW2d 786 (1970). "A prosecutor may properly respond to issues previously raised by a defense counsel." *People v Modelski*, 164 Mich App 337, 348; 416 NW2d 708 (1987).

In his closing argument, defense counsel stated that the rental car manager had many reasons to lie, pointed out documents that she did not provide, and then implied that regardless who was tried, she would testify that was the person who rented the car to save her job. In rebuttal, the prosecutor responded by telling the jury that the manager had no reason to lie and that she had adequately explained why many of the documents the defense referenced were not available. Because the prosecution's remarks were made in response to issues raised by the defense, defendant's argument is without merit. See *Id.*

Defendant also suggests that the prosecutor's referral to defendant as a "fraud" and his comments to the jury that it was being "duped" into becoming a "second victim" were presented as statements of fact, thus depriving him of a fair trial. In *People v Davis*, 57 Mich App 505; 226 NW2d 540 (1975), when the defendant cited prior cases to argue a prosecutor may not state what he personally thinks regarding a defendant's credibility or guilt, this Court stated, "It can hardly be error to allow an idea to be expressed in language which is no stronger than other words

which would convey the same meaning and would yet be admissible on the issue.” *Id.* at 512, quoting *Driscoll v People*, 47 Mich 413, 418; 11 NW 221 (1882).

More importantly, the prosecutor never referred to *defendant* as a fraud but was instead referring to the *crime* as a fraud. He also did not tell the jurors that they were being “duped” into becoming a second victim; he merely asked the jury in the closing argument to not allow themselves to become his second victim. Thus, the prosecutor did not make these comments as statements of fact.

Next, defendant contends that he was denied a fair trial because the prosecutor told the jury what evidence it should and should not consider. In his closing argument, the prosecutor pointed out that the testimony of the police was given to help show that the “mistaken identity” defense was false. Two different police officers testified that defendant was the person they saw on the night in question at two locations that helped identify defendant as the person who rented – and then abandoned – the rental car. Defendant told the jury that he was not present at either location on the night in question. Because both stories cannot be correct, it was reasonable for the prosecutor to argue that defendant had the most to gain by lying.

Defendant next argues that he was denied a fair trial when the prosecutor vouched for the credibility of his own witnesses. Because of the prominence of the prosecutor’s office, statements that the prosecutor makes vouching for the credibility of witnesses should be reviewed very cautiously. *People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973). However, the prosecutor is “free to argue that the evidence shows that the defendant is guilty . . . and he has not only the right but the duty to vigorously argue the people’s case.” *Id.* at 632, quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). This Court must examine whether the prosecutor vouched for the defendant’s guilt, not whether the jury finds that the prosecutor believes defendant to be guilty. *Id.* In the present case, the prosecutor addressed the truth of his witnesses’ testimony only in response to the defense’s argument that they were lying; he did not vouch for defendant’s guilt.

Defendant also argues that the prosecutor denigrated him by calling him a “fraud” to disparage the defense’s argument that defendant was the victim of identity theft. In *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992), the defendant argued that the prosecutor denigrated the defense and introduced inflammatory and prejudicial material, resulting in prosecutorial misconduct. *Id.* This Court held that because the defendant did not object to the statements at trial, the issue was not preserved. *Id.* Further, this Court determined that in the absence of an objection by the defense, prejudice will be dispelled with a judicial instruction to the jury that attorney arguments are not evidence. *Schutte, supra* at 721-722, citing *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995), and *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). In the present case, the judge instructed the jury that statements made by the prosecution and defense were not to be considered as evidence; thus, if prosecutorial misconduct occurred, it was effectively cured.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello