

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK LEE JONES,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 271213

Berrien Circuit Court

LC No. 2006-400167-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals from his jury trial convictions of breaking and entering, MCL 750.110, and entering without breaking, MCL 750.111. We affirm.

Defendant's convictions arose from a larceny that occurred in a hotel room. Defendant's former girlfriend, Jennifer Cuyler, testified that she and defendant were smoking crack cocaine in a hotel room. Defendant suggested that they rob someone to obtain money to buy more cocaine. Defendant told Cuyler that he had noticed an open window in a nearby hotel, and he suggested that they rob that room. The two went to the adjacent hotel. Cuyler walked to the main entrance of the hotel, and down the hallway toward the room. Defendant entered through the window, and opened the door of the room for Cuyler. A man was lying on the bed, sleeping. Defendant grabbed the man's cell phone, and Cuyler grabbed his keys. The two later returned to complainant's room. Cuyler entered the hotel through the back door. After first entering an adjacent room, she saw defendant at the entrance to complainant's room. Defendant took complainant's wallet and other items.

Cuyler remained in the room, and complainant awoke and discovered her. She told him that he had met her in the hallway, that they had consumed alcohol together, and that he had passed out. Complainant apparently believed her initially, but then noticed that his wallet and other items were missing. Complainant opened the window blinds and saw defendant at the window. Defendant apologized, stated that he had the wrong room, and left. Cuyler left the hotel, and complainant called the police. The police apprehended defendant and Cuyler. Cuyler gave a statement and assisted the police in recovering complainant's possessions.

Defendant first says that the prosecutor improperly vouched for Cuyler's credibility. Generally, a claim of prosecutorial misconduct is reviewed de novo as a constitutional issue. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, "[r]eview of

alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant did not object to the prosecutor’s closing remarks; thus, we review for plain error that affected defendant’s substantial rights. *Id.* We evaluate challenged remarks in context to determine if defendant was denied a fair trial. *Bahoda, supra*. The remarks are read as a whole and evaluated in light of defense arguments and their relationship to the evidence and testimony at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Reversal is not required if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

A prosecutor may not vouch for the credibility of a witness or imply that he or she has “special knowledge of the witness’ truthfulness.” *Bahoda, supra* at 276. “But a prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). An assertion that a witness has no reason to lie is proper as long as the prosecutor does not express his or her personal belief regarding the truthfulness of the witness, and the comments are responsive to defense arguments. *Id.*

Here, defendant maintains that Cuyler, who testified pursuant to a plea bargain, was the sole perpetrator and lied about defendant’s involvement. During closing argument, the prosecutor stated that defendant would likely argue that Cuyler was a liar. He then argued that Cuyler was not lying because her testimony matched the statement that she gave to the police, in which she implicated herself, and that she would not have had anything to gain when she gave her earlier statement. During defense counsel’s closing argument, counsel repeatedly called Cuyler’s veracity into question. On rebuttal, the prosecutor acknowledged that the case turned on whether the jury believed Cuyler’s account. He maintained that Cuyler had very little time to fabricate and also argued that, if she were lying from the beginning, she would have implicated only defendant. He acknowledged that Cuyler had received a plea bargain for her promise to tell the truth, and that she had done so. The prosecutor also argued that Cuyler’s testimony matched that of the victim. We find that the prosecutor’s remarks fell within the category of permissible commentary. The prosecutor did not indicate that he had special knowledge of Cuyler’s veracity, nor did he use the prestige of his office to argue that she was telling the truth. His comment that she had no reason to lie was responsive to defense counsel’s arguments.

Defendant also contends that the prosecutor presented insufficient evidence to support his conviction for entering without breaking. We disagree.

We review an allegation of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* However, we do not interfere with the jury’s role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1202 (1992). Satisfactory proof of the elements of the crime can be shown by circumstantial evidence and reasonable inferences arising therefrom. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). It is for the trier of fact to determine what inferences can fairly be drawn from the

evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To prove the offense of entering without breaking, the prosecutor was required to show that defendant entered the room, without breaking, with the intent to commit a felony or any larceny. MCL 750.111; CJI2d 25.3. Defendant argues that no evidence showed that he entered the room a second time. However, Cuyler testified that when she and defendant returned to the motel and she proceeded through the back door, defendant did not accompany her. Instead, she saw defendant at the entrance to complainant's room after she first accidentally entered an adjacent room. This testimony provided adequate circumstantial evidence that defendant re-entered the room through the window.¹ Defendant's claim of error is without merit.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

¹ Defendant appears to have missed this second entry, and discusses only his third, abandoned attempt to enter the room.