

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 23, 2013

v

RICHARD ADAM SMITH,
Defendant-Appellant.

No. 308539
Macomb Circuit Court
LC No. 2011-002611-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of armed robbery, MCL 750.529, and carjacking, MCL 750.29a(1). He was sentenced to serve concurrent prison terms of 100 to 360 months for each conviction. We affirm.

Defendant’s convictions arise from the armed robbery of a 7-Eleven in Sterling Heights. The clerk testified that she was mopping the floor at approximately 5:30 p.m., when a man, whom she identified as defendant, came up to her, pointed a gun at her forehead, and demanded that she give him all the money in the register. After handing over the money, the clerk testified that defendant asked for her car keys, which she gave to him, and defendant drove away in her car. Store surveillance cameras captured the incident. Eventually, the police apprehended defendant, and he was charged with armed robbery, MCL 750.529, carjacking, MCL 750.29a(1), and two counts of possession of a firearm while committing a felony (felony-firearm), MCL 750.227b(1). The jury found defendant not guilty of the two counts of felony-firearm.

First, defendant argues that the prosecutor appealed to the jury’s sympathy during the closing argument. We disagree. Because defendant failed to preserve this issue for appellate review, we review it for plain error affecting defendant’s substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is only warranted if defendant was actually innocent and the plain error caused defendant to be convicted or “if the error ‘seriously affected the fairness, integrity, or public reputation of judicial proceedings,’” regardless of defendant’s innocence. *Id.* at 454, quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

“Given that a prosecutor’s role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). “Issues of

prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *Id.* at 64.

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Unger (On Remand)*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Specifically, prosecutors "need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66. Although prosecutors may not make statements of fact that are not supported by the evidence, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), they can "argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," *Unger (On Remand)*, 278 Mich App at 236. In addition, "[a] prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Dobek*, 274 Mich App at 64.

Specifically, defendant argues that the prosecutor's statements of "She will probably be scarred for life" and "That will affect her for the rest of her life," appealed to the jury's sympathy. While it is improper for the prosecutor to make appeals to the jury to sympathize with the victim, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), here, the prosecutor's statements were supported by reasonable inferences from the evidence and were not blatant appeals to the jury's sympathy. *Id.* at 591-592. The victim testified that she was terrified, crying, and shaking and had to quit her job because she feared a similar incident would happen again. Two other witnesses testified that the victim was scared, crying, and visibly upset after the incident. In particular, she was holding her stomach in anguish and could barely catch her breath while speaking. Based on the evidence, it would be reasonable to infer that this incident would scar or affect the victim for the rest of her life.

Further, when read in context, the statements did not blatantly appeal to the jury's sympathy. Rather, they were made as part of the prosecutor's argument to show that defendant assaulted the victim, which is an element of armed robbery, by specifically picking her and placing her in fear. See *People v Smith*, 478 Mich 292, 319; 733 NW2d 351 (2007). Although the prosecutor used emotional language, this is permitted in the closing argument, and the prosecutor is not required to confine the argument to the blandest possible terms. *Dobek*, 274 Mich App at 66; *Ackerman*, 257 Mich App at 454. Even if the prosecutor's remarks were improper, relief is not warranted because the crux of the argument was proper and any error could have been cured by a cautionary instruction. See *People v Cooper*, 236 Mich App 643, 653-654; 601 NW2d 409 (1999).

Finally, the remarks were not so inflammatory as to prejudice defendant, *Watson*, 245 Mich App 591-592, particularly because the trial court specifically instructed the jurors that they must not let sympathy or prejudice influence their decision and that the attorneys' statements and arguments were not evidence. And jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, these instructions were sufficient to protect defendant's substantial rights.

Next, defendant argues that the trial court erred by denying the jury's request for the testimony of two witnesses. We disagree. Generally, we review a trial court's decision regarding a jury's request to review testimony for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). However, because defendant failed to preserve this

issue, it is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 507 NW2d 130 (1999).

Defendant relies on MCR 6.414; however, that court rule was repealed and replaced with MCR 2.513.¹ See 489 Mich cxcvi. MCR 2.513(P) provides,

If, after beginning deliberation, the jury requests a review of certain testimony or evidence that has not been allowed into the jury room under subrule (O), the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may make a video or audio recording of witness testimony, or prepare an immediate transcript of such testimony, and such tape or transcript, or other testimony or evidence, may be made available to the jury for its consideration. The court may order the jury to deliberate further without the requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, the trial court did not err in denying the jury's request because the transcripts of the testimony would not be available until the following week. Waiting for the transcripts would have significantly delayed the deliberations; thus, it was not unreasonable for the trial court to request that the jury rely on its collective memory. Further, the trial court did not foreclose the jury's opportunity to review the testimony at a later time. The trial court simply stated that it could not provide the transcripts until "later next week" and asked the jury to rely on its collective memory. Although "[i]t might have been better practice to have told the jury explicitly that if they continued to feel a need for a transcript in the future, they could make another request," the trial court emphasized that it was denying the jury's request because there were two days of testimony and the transcripts were not immediately available. See *People v McDonald*, 293 Mich App 292, 297; 811 NW2d 507 (2011). The trial court did not tell the jury that the transcripts would not be available at all, and thus, did not foreclose the possibility of the jury obtaining the transcripts in the future.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's appeals to the jury's sympathy and the trial court's denial of the jury's request to review the testimony of the two witnesses. However, because we have concluded that the prosecutor's statements did not rise to the level of misconduct and that it was reasonable for the trial court to deny the jury's request, there was no basis for defense counsel to object in either instance. Thus, defense counsel was not ineffective for failing to make meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

¹ With the exception of some additions, MCR 2.513 retained the same language as MCR 6.414.

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood