STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT LEE YOUNES,

Defendant-Appellant.

UNPUBLISHED
December 29, 1998

No. 196940
Recorder's Court
LC No. 95-006916

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment for the first-degree murder conviction, to two terms of twenty to forty years for the assault convictions, and to a mandatory two-year term for the felony-firearm conviction. We affirm.

This case arises from the fatal shooting of Detroit Police Officer Jerry Philpot. Defendant fired at Philpot, Detroit Police Officer Russell Solano, and Ted McClellan in an alley, at nighttime, with an assault rifle. Defendant asserted a defense of self-defense, although there was little evidentiary support for this defense. Indeed, the evidence at trial indicated that the victims were not even aware of defendant's presence until just before he fired the shots.

On appeal, defendant first argues that several statements made by the prosecutor during rebuttal argument were improper and had the effect of shifting the burden of proof onto himself to prove that he acted in self-defense. We disagree. Because there was no objection to the challenged remarks at trial, appellate review of this issue is precluded unless a curative instruction could not have remedied the prejudicial effect of the statements, or our failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

As defendant correctly observes, once evidence of self-defense is introduced, the prosecution bears the burden of disproving the defense beyond a reasonable doubt. *People v Fortson*, 202 Mich

App 13, 20; 507 NW2d 763 (1993). Thus, it is generally improper for a prosecutor to argue or suggest in closing argument that the defendant must prove something or present an explanation for damaging evidence because this type of argument tends to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, once a defendant testifies or advances an alternative theory of the case that would exonerate him, a prosecutor's argument on the validity of the defense theory does not shift the burden of proof. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

Here, the prosecutor's comments addressed the evidence presented at trial and were largely responsive to defense counsel's comments during closing argument suggesting that defendant acted in self-defense. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (explaining that prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997) (explaining that prosecutorial comments must be considered in light of defense arguments). Viewed in context, the prosecutor's comments involved the weight and credibility of the defense claim of self-defense. Accordingly, they were not improper. Moreover, even if the comments had been improper, defendant would not be entitled to relief on appeal, because any prejudice could have been remedied by a prompt curative instruction regarding the burden of proof.

Defendant next challenges several other instances of alleged prosecutorial misconduct, some of which were objected to at trial. 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.* In this case, defendant was not denied a fair and impartial trial by the challenged remarks.

First, we do not believe that the prosecutor improperly injected his personal opinion about this case into his argument. The prosecutor's comments were properly made in reference to the evidence presented at trial and did not involve the prosecutor vouching for defendant's guilt or placing the prestige of his office behind a contention of defendant's guilt. See *People v Cowell*, 44 Mich App 623, 638; 205 NW2d 600 (1973).

Second, the prosecutor's remark about "brute force" or "street rule" was not an appeal to the jurors' civic duty, but rather an apparent reference to the attempts of the parties involved in this case to take matters into their own hands. See *Bahoda*, *supra* at 282-285. Moreover, defendant failed to make a timely objection to this comment. Had defendant timely objected, a prompt curative instruction could have remedied any prejudicial effect. *Stanaway*, *supra* at 687.

Third, the prosecutor did not denigrate defense counsel. Viewed in context, the challenged remarks were not improper attacks on defense counsel, but rather permissible comments regarding the strength of defendant's arguments regarding the evidence. See *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). Clearly, the prosecutor was free to argue from the evidence that the defendant's theory of self-defense was not worthy of belief.

Fourth, defendant's argument that the prosecutor improperly vouched for the credibility of his witnesses is likewise unpersuasive. Viewed in context, the challenged comments were responsive to the defense argument that the police witnesses had fabricated testimony. Otherwise improper remarks may not amount to error requiring reversal where they are responsive to defense arguments. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Moreover, to the extent the comments could be viewed as improper, we conclude that they did not deprive defendant of a fair and impartial trial. *McElhaney, supra* at 283.

Finally, defendant has not cited any authority for his argument that it was improper for the prosecutor to ask the jury to return an honest verdict, consistent with the jurors' integrity and common sense. We will not search for authority to sustain a defendant's argument. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994). Nonetheless, we are not persuaded that the comment deprived defendant of a fair and impartial trial. See *People v Bass (On Rehearing)*, 223 Mich App 241, 251-252; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 865 (1998).

In his final argument on appeal, defendant contends that he was denied a fair trial when the trial court erred when it failed to instruct the jury on the cognate lesser included offense of involuntary manslaughter pursuant to either CJI2d 16.10 (Involuntary Manslaughter) or CJI2d 16.11 (Involuntary Manslaughter – Firearm Intentionally Aimed). We disagree.

Defendant requested an instruction pursuant to CJI2d 16.11 at trial and this request was denied. We agree with the trial court's determination that the evidence in this case did not warrant an instruction on "statutory involuntary manslaughter" pursuant to CJI2d 16.11. With respect to CJI2d 16.10, defendant failed to preserve the issue by requesting the instruction at trial. In any event, even if the trial court had erred in failing to instruct the jury on involuntary manslaughter, such error would be deemed harmless because the jury was instructed on, and rejected, the intermediate lesser included offense of second-degree murder. *People v Zak*, 184 Mich App 1, 16, 457 NW2d 59 (1990).

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot