

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM FRANCIS COCKREAM,

Defendant-Appellant.

---

UNPUBLISHED

November 19, 2009

No. 286046

Mason Circuit Court

LC No. 07-001876-FC

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. Jury Instructions

Defendant first argues that the trial court erred when it failed to instruct the jury on the lesser-included offense of common law involuntary manslaughter. We disagree. We review for an abuse of discretion whether the facts of a particular case warrant an instruction for involuntary manslaughter. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

At the outset, we note that it is unclear from the record whether defendant requested an instruction for common law involuntary manslaughter, which is a necessarily lesser-included offense of murder, *People v Mendoza*, 468 Mich 527, 540-541; 664 NW2d 685 (2003), or statutory involuntary manslaughter, MCL 750.329, which is a cognate lesser-included offense of murder, *People v Smith*, 478 Mich 64, 73; 731 NW2d 411 (2007). Where a defendant requests an instruction on a necessarily lesser-included offense of the charged offense, the trial court must instruct the jury if a rational view of the evidence supports the instruction. *Mendoza, supra* at 541. However, a trial court is not required to give an instruction on a cognate lesser-included offense. *Smith, supra* at 73. Here, although it is unclear which instruction defendant requested, we find it is immaterial, based on our review of the record, whether defendant requested an instruction for common law or statutory involuntary manslaughter because he was entitled to neither.

Again, statutory involuntary manslaughter is a cognate lesser-included offense of murder because it is possible to commit a murder without committing statutory involuntary manslaughter. *Id.* Hence, if defendant requested an instruction for statutory involuntary manslaughter, the trial court correctly held that defendant was not entitled to that instruction. If, on the other hand, defendant requested an instruction for common law involuntary manslaughter, defendant was not entitled to that instruction because a rational view of the evidence does not support a finding that defendant was grossly negligent when he shot decedent.

Moreover, we note that the trial court instructed the jury regarding first-degree felony murder and second-degree murder. The jury convicted defendant of first-degree felony murder, the greater offense. Because the jury refused to convict defendant of the lesser offense of second-degree murder, defendant cannot demonstrate that the trial court's failure to give a common law involuntary manslaughter instruction was outcome determinative. *Gillis, supra* at 140 n 18. Accordingly, relief is not warranted on this basis.

## II. Prosecutorial Misconduct

Defendant next argues that he was denied his constitutional right to a fair trial when the prosecutor improperly shifted the burden of proof during her rebuttal argument. Prosecutorial misconduct issues are decided on a case-by-case basis, with the reviewing court examining and evaluating a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). As a general rule, prosecutors are afforded great latitude in their arguments and trial conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor is not allowed to comment on a defendant's failure to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

Defendant's argument relies on the following argument the prosecutor made on rebuttal:

In every criminal case the Prosecutor has the burden of proof. However, the Defense has the right to call witnesses, to subpoena witnesses in this case.

Defense is presenting to you this idea that we're only giving you bits and pieces, that there's other things out there that we didn't present. Well, the Defense also has the right to call witnesses.

The prosecutor made these remarks after defendant's closing argument, during which defense counsel compared the prosecution's case and its burden of proof to a "puzzle." Defense counsel argued that there were pieces to the puzzle pertaining to who really murdered decedent that the prosecutor had "thrown aside." She further commented on the prosecutor's failure to produce witnesses to testify regarding the missing pieces of evidence counsel believed were necessary to prove defendant's guilt.

Thus, when viewed in context and in light of defense counsel's closing argument, it is clear that the prosecutor's statements did not improperly shift the burden of proof to defendant. Rather, when viewed in context, the prosecutor's comments were made in response to defense counsel's closing argument and, thus, were proper. *People v Spivey*, 202 Mich App 719, 723-

724; 509 NW2d 908 (1993). Moreover, because the trial court specifically informed the jury that the prosecutor alone had the burden of proof and that defendant did not have to prove anything, the prejudicial effect, if any, of the prosecutor's comments was remedied. *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Accordingly, defendant was not denied his right to a fair and impartial trial on this basis.<sup>1</sup>

### III. Standard IV Brief

In a separately filed brief, defendant raises several additional prosecutorial misconduct arguments. Because defendant failed to object to the alleged misconduct below, we review these claims for plain error affecting substantial rights. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

#### A. False Evidence

Defendant first argues that the prosecutor improperly used false and tampered evidence to convict him. We disagree. Prosecutors are obligated to ensure that a criminal defendant receives a fair trial. *Id.* at 354. In doing so, a prosecutor is not permitted to use false evidence to convict the defendant. *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). A prosecutor's good faith effort to admit evidence does not constitute prosecutorial misconduct. *Dobek, supra* at 70.

Other than defendant's self-serving accusations and some inconsistency in eyewitness testimony regarding the color of the handgun, there is simply no indication in the record that the handgun introduced at trial was not the same handgun the police recovered, let alone that the prosecutor knew or should have known this. The testimony reflects that police officers found the handgun in a black bag seized from defendant's sister's basement. The officers took pictures of this handgun. These pictures were introduced at trial, as was the handgun. Officers testified regarding the chain of custody followed after they seized the handgun, and one officer testified that the handgun depicted in the photographic exhibits was the same handgun introduced at trial. That some of the eyewitnesses testified inconsistently regarding what the handgun looked like makes no difference to defendant's claim of misconduct. Rather, any inconsistency in the eyewitness testimony in this case merely affected the weight and credibility of the evidence presented. See *People v Naugle*, 152 Mich App 227, 235-236; 393 NW2d 592 (1986). Thus, there is no merit to defendant's position.

---

<sup>1</sup> We note that defendant raises an additional argument related to the prosecutor's comments made during rebuttal. Specifically, defendant contends that the trial court erred when it refused to grant defendant's motion for a mistrial. Although defendant raised this issue below, he failed to raise this issue in his questions presented to this Court on appeal. An issue not raised in a party's questions presented is not properly presented for appeal. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; \_\_\_ NW2d \_\_\_ (2009). Nevertheless, because the prosecutor did not engage in misconduct that caused prejudice, defendant cannot demonstrate that the trial court abused its discretion when it denied his motion for a mistrial. See *People v Gonzales*, 193 Mich App 263, 265; 483 NW2d 458 (1992); see also *Daniel, supra* at 56 (observing that curative instructions are presumed to cure most errors).

## B. Improper Testimony

Next, defendant argues that the prosecutor improperly offered testimony regarding a blue and white flannel shirt that defendant allegedly wore when he murdered decedent. Defendant argues that the prosecutor was required to first admit the shirt into the record before she could elicit testimony about it. This argument is unavailing. There is nothing in our rules of evidence to support defendant's argument. Prosecutors have the discretion to prove their case by whatever admissible evidence he or she chooses, and they are not required to present evidence that a defendant deems appropriate. *People v Pratt*, 254 Mich App 425, 429; 656 NW2d 866 (2002). Thus, this argument fails.

## C. Vouching for Witness's Credibility

Defendant also asserts that the prosecutor improperly vouched for his codefendant's credibility. Specifically, defendant argues that because the prosecutor asked defendant's codefendant whether the statements made in connection with his plea agreement were truthful, the prosecutor improperly implied to the jury that she had a special knowledge regarding the truthfulness of codefendant's testimony. We cannot agree.

It is true that a prosecutor may not vouch for the credibility of a witness "to the effect that he [or she] has some special knowledge concerning a witness' truthfulness." *Bahoda, supra* at 276. When viewed in context, however, we do not find that the prosecutor improperly vouched for the credibility of defendant's codefendant. On cross-examination of codefendant, defendant's trial counsel raised considerable doubt regarding the witness' credibility. Moreover, the codefendant testified that he told officers what they wanted to hear in order to receive the benefit of his plea. Under these circumstances, the prosecutor was allowed to ask the witness about statements made in exchange for the plea and whether he was telling the truth when he made those statements. See *id.* at 276-280. Nothing about this line of questioning, when viewed in context, implies that the prosecutor had some special knowledge about codefendant's truthfulness. Accordingly, defendant's argument that the prosecutor's conduct denied him a fair and impartial trial is unavailing, as there was no plain error. Thus, we decline to grant relief on this basis.

## D. Ineffective Assistance of Counsel

Finally, defendant also contends that his trial counsel's failure to object to the instances of prosecutorial misconduct previously addressed deprived him of effective assistance of counsel. Because we have concluded that the prosecutor's conduct did not constitute prosecutorial misconduct, defendant is not entitled to relief on this issue. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ Stephen L. Borrello  
/s/ William C. Whitbeck  
/s/ Kirsten Frank Kelly