

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN CHRISTOPHER MANNION,

Defendant-Appellant.

UNPUBLISHED

April 24, 2007

No. 269293

Oakland Circuit Court

LC No. 2005-203966-FC

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of armed robbery, MCL 750.529. He was sentenced to a term of 5 to 20 years in prison. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Jeffrey Hess and Brett Pascoe testified that they were working at a pizzeria when a man entered the store and robbed them at gunpoint. The man appeared to be of Asian descent, had tattoos on his forearms, and wore a bandana that covered his nose and the lower part of his face. Subsequently, Hess viewed a photographic lineup that included defendant's photograph, and identified defendant as the robber. Hess also recognized defendant's distinctive tattoos upon viewing a photograph. Pascoe indicated that the tattoos appeared to him to have been written in script, and acknowledged that he did not mention the tattoos in his original statement to police. Pascoe could not identify photographs of defendant's tattoos with certainty.

During closing argument, the prosecutor stated that the jury would be able to review the tattoo photographs during deliberations. The prosecutor noted that one of defendant's tattoos was a tattoo of the word "death." Defendant did not object to this remark.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich

App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant argues that the prosecutor committed misconduct and denied him a fair trial by offering unsworn testimony regarding one of his tattoos. Specifically, defendant complains that the prosecutor stated during argument that the tattoo read "death," and that the prosecutor suggested that defendant had an "odd preoccupation with death." Given the fact that Hess and Pascoe were robbed at gunpoint, defendant asserts that the prosecutor's suggestion that he was preoccupied with death very likely convinced the jury to convict. We disagree.

Defendant failed to object to the prosecutor's remark about which he now complains; therefore, our review is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The fact that defendant had tattoos on his forearms was not disputed at trial. Defendant correctly observes that neither Hess nor Pascoe testified that one of the tattoos read "death." However, both witnesses testified that defendant had very noticeable tattoos on his forearms. Hess identified photographs of defendant's tattoos, and those photographs were admitted into evidence. A prosecutor is free to argue the evidence and reasonable inferences arising therefrom. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). And a prosecutor is not required to state inferences and conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Here, the prosecutor argued that defendant's tattoos, as depicted in the photographs admitted into evidence, were distinctive, as the witnesses had mentioned. The prosecutor's remark that one tattoo read "death," considered in context, was merely a comment on the evidence. Moreover, contrary to defendant's argument, the prosecutor did not argue that defendant had an "odd preoccupation with death."

Any prejudicial effect from the prosecutor's argument could have been cured by a timely instruction. *Leshaj, supra* at 419. Even assuming the existence of prosecutorial misconduct, the misconduct was not so egregious that no curative instruction could have counteracted any prejudice. *Launsburry, supra* at 361. Further, the trial court instructed the jury at the end of trial that the attorneys' arguments were not evidence, and that the case was to be decided only on the evidence that had been admitted during trial. This instruction alone was sufficient to eliminate any prejudice that might have resulted from the prosecutor's remarks. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Given the strength of the identification testimony provided by Hess, and in light of other evidence that defendant attempted to rob a similar pizzeria the following night with a gun that matched Hess's and Pascoe's description of defendant's weapon, we conclude that the prosecutor's argument regarding defendant's tattoos did not result in outcome-determinative plain error. *Carines, supra* at 763-764.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello