STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN MARTINEZ,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 182200
LC No. 94-005154

Before: Taylor, P.J., and Markey and N. O. Holowka,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two years for the felony-firearm conviction, to be followed by concurrent terms of five to ten years for each of the assault convictions, and two to five years for the concealed weapon charge. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in admitting into evidence the preliminary examination testimony of a witness that failed to appear at the trial. We disagree.

An experienced police officer that knew the witness and the neighborhood checked places the witness was known to frequent and interviewed people who might reasonably have known the missing witness' whereabouts. *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). The prosecution's failure to take the additional measures suggested by defendant did not preclude a finding of due diligence. *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). The trial court did not abuse its discretion in finding that the witness was unavailable, that defendant had the opportunity and similar motive to cross-examine the witness at the preliminary examination, and in admitting the evidence. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995); MRE 804(b)(1).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also argues that he was denied a fair trial by prosecutorial misconduct. We find defendant is not entitled to any relief.

Although the prosecution arguably acted improperly by telling opposing counsel to "sit down" during trial, *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991), this remark was addressed to codefendant's counsel, not defendant's counsel. In no way did the remark to codefendant's counsel deny defendant a fair trial.

Further, while the prosecutor did display evidence later determined to be inadmissible[1] (see e.g., *People v Johnson*, 83 Mich App 1, 13; 268 NW2d 259 (1978)), this was not misconduct because the prosecution was attempting in good faith to introduce the evidence. *People v Davis*, 343 Mich 348, 357; 72 NW2d 269 (1955). The trial court cured any prejudice to defendant by giving two cautionary instructions regarding the evidence. We have no reason to believe the jury did not follow those instructions. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

Also, the prosecutor erroneously stated that a "defense of others" claim is invalid unless the other person was actually in danger. *People v Perez*, 66 Mich App 685, 692; 239 NW2d 432 (1976). However, there was no objection, foreclosing appellate review absent a miscarriage of justice or the inability of a curative instruction to eliminate the prejudicial effect of the comment. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We find neither. In any event, we are satisfied that the trial court's subsequent instruction, that the jury is to take the law as given by the court and that it was to follow what the court said if a lawyer said anything different, dispelled any prejudice. Cf. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

The trial court did not err in denying defendant's requests for several jury instructions. There was no evidence to support three of the requested instructions, *People v Mills*, 450 Mich 61, 79-82; 537 NW2d 909 (1995), amended 450 Mich 1202 (1995), and the instructions given covered the substance of the fourth. *People v Moldenhauer*, 210 Mich App 158, 159-160; 533 NW2d 9 (1995).

Defendant's request for a "no duty to retreat" instruction was properly denied because the attack occurred outside and not in defendant's own home. *People v Wytcherly*, 172 Mich App 213, 221; 431 NW2d 463 (1988).

The request for an instruction on evaluating the credibility of a witness on the basis of character for truthfulness was not supported by the evidence presented, which related only to that witness' aggressiveness and his prior conviction for theft. MRE 609(a). Although defendant questioned the soundness of the eyewitness identification, the testimony elicited did not create uncertainty that would support a misidentification instruction. *People v Heflin*, 434 Mich 482, 503-504; 456 NW2d 10 (1990).

Finally, the trial court's instruction on the elements of the concealed weapons charge fairly presented the substance of the requested instruction concerning lack of knowledge as a defense. *Moldenhauer*, *supra* at 159-160.

Defendant's final claim is that the trial court abused its discretion in excluding evidence of one of the victim's aggressive character. We disagree.

Evidence of a victim's character for aggressiveness or violence is admissible where the defendant claims self-defense or defense of another. *People v Fortson*, 202 Mich App 13, 19; 507 NW2d 763 (1993); *People v Cooper*, 73 Mich App 660, 665-666; 252 NW2d 564 (1977). However, we find that the trial court did not abuse its discretion when it prevented defendant from eliciting such evidence from the first prosecution witness in the form of reputation evidence because defendant failed to lay an adequate foundation to introduce reputation evidence through this witness. *People v Walker*, 150 Mich App 597, 602; 389 NW2d 704 (1985). The testimony was also properly excluded because defendant had not yet laid a foundation for a claim of self-defense or defense of another. *People v Johnson*, 113 Mich App 575, 582; 317 NW2d 689 (1982). Furthermore, any error in the exclusion of this evidence was harmless because extensive evidence concerning the victim's prior threatening and abusive behavior was admitted through a different witness. *Fortson*, *supra* at 19.

Affirmed.

/s/ Clifford W. Taylor
/s/ Jane E. Markey
/s/ Nick O. Nolowka

[1] Here, and elsewhere in its brief, the prosecution claims that counsel for defendant did not object and that it was counsel for the codefendant that objected. The cover page to the transcripts supports the prosecutor's position. However, a review of the actual contents of the transcripts shows the court reporter transposed the attorneys that represented defendant and the codefendant on the cover sheet. Thus defendant did make the necessary objection.