

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRA WILLIS,

Defendant-Appellant.

UNPUBLISHED
November 5, 1996

No. 162612
LC No. 92-046396

Before: Michael J. Kelly, P. J., and Hood and H. D. Soet*, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of felonious assault, MCL 750.82; MSA 28.277, arising from an assault with a tire iron upon his brother, Anthony Willis. He was sentenced to two to four years' imprisonment and appeals as of right. We affirm.

First, defendant argues that the district court abused its discretion by amending the information to change him with assault with intent to commit murder, MCL 750.83; MSA 28.277, after proofs were taken at the preliminary examination. We disagree.

Defendant was originally charged with assault with intent to maim, MCL 750.86; MSA 28.281. The prosecutor moved to amend the charges, without specifying what the changes would entail, before the preliminary examination began. The district court simply acknowledged the motion and took testimony. At the close of testimony, the prosecutor moved to amend the complaint to include the charge of assault with intent to murder, MCL 750.83; MSA 28.277, which the district court granted.

A district court must bind over a defendant if the evidence presented at the preliminary examination establishes that a felony has been committed and there is probable cause to believe that the defendant committed the crime. *People v Goecke*, 215 Mich App 623, 628; 547 NW2d 338 (1996). A trial "court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection omission in form or substance or of any variance with the evidence." MCL 767.76; MSA 28.1016; see *People v Fortson*, 202 Mich App 13, 15; 507 NW2d 763 (1993). This

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

Court will not reverse a district court's decision to add a count to the charges against a defendant unless the amendment would have caused unacceptable surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Defendant does not challenge the sufficiency of the evidence presented to support a bindover charge. Rather, defendant contends that he did not have sufficient notice that he could be bound-over for assault with intent to commit murder and that his counsel would have conducted a more effective cross-examination of the witnesses if she had such notice. Yet, defense counsel failed to pursue any questions regarding defendant's intent in relation to assault with intent to maim or in relation to the potential charge of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 750.86, despite the fact she was apprised by the prosecutor that defendant might be charged with this crime. In view of counsel's failure to pursue these questions, it is difficult to believe that this would have occurred had she known of the higher charge. We also note that the defendant had ample time (7 months) prior to trial to further prepare for the new charge. Therefore, we cannot conclude that there was "unfair surprise, inadequate notice, or an insufficient opportunity to defend against the accusations lodged against him." *Hunt, supra* at 365 (emphasis in original).

Next, defendant asserts that the trial court abused its discretion in denying his motion for a mistrial based on an improper question posed by the prosecutor. This Court reviews a trial court's grant or denial of a mistrial for an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). A mistrial should only be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.* The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Bohada*, 448 Mich 261, 267; 531 NW2d 659 (1995).

The prosecutor's question to defendant, "you didn't get arrested by the Wichita Falls police for attempt [sic] murder?," elicited a negative response by defendant and raised an objection by defense counsel. Our Supreme Court, in *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973), held that "in the examination or cross-examination of any witness, no inquiry may be made regarding proper arrests or charges against such witness which did not result in conviction." Thus, the prosecutor's question was improper because the arrest did not result in a conviction. Yet, the question clearly related to defendant's credibility on the subject of his brother's aggressive propensities, a topic raised by defendant on direct. Otherwise improper prosecutorial remarks might not require reversal where they address issues raised by the defense. See *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). Defendant also attempted to portray himself as a peaceful individual, and to this end, the question properly sought to discredit this self-characterization. MCR 611(b).

Moreover, the trial court instructed the jury that they were to consider evidence of an alleged prior assault on Anthony Willis by defendant for the sole purpose of evaluating Anthony's state of mind and the credibility of both men - not because of defendant's alleged bad conduct. The trial court also instructed the jurors that the lawyers' statements were not evidence. We believe that these instructions served to dissipate any perceived prejudice as a result of this question. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Cunningham, supra; People v Cross*, 202 Mich 138, 143; 508 NW2d 144 (1993).

Defendant further contends that the trial court abused its discretion in allowing the rebuttal testimony of Sergeant Green and Anthony Willis. We disagree.

The decision to admit evidence in rebuttal rests within the trial court's discretion. *People v Nantelle*, 215 Mich App 77, 85; 544 NW2d 667 (1996). The test for rebuttal evidence is whether it is justified by the evidence it is offered to rebut. *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the other party. *Nantelle, supra*. A prosecutor may not, as a general rule, introduce evidence in rebuttal that could have been introduced in the case-in-chief. *Id.*

With respect to the rebuttal testimony of Sergeant Theresa Green, it should be noted that defendant in his appellate brief, has apparently misidentified the time frame concerning the telephone messages. Green's testimony concerned events in 1993 not 1992 as claimed by defendant. Nevertheless, Green's statements concerning defendant's wife, Denise Willis, contradicted Denise's assertion that she had no contact with Green, and were thereby properly admitted. *Nantelle, supra* at 85.

Defendant also argues that Green's testimony was improperly admitted on the alternative ground that no proper foundation had been laid and cites MRE 901. No objection was raised at trial, and as a result, this aspect of defendant's issue is waived. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Defendant further claims that the prosecutor improperly elicited from Anthony Willis that defendant assaulted him in Texas and that defendant was assaultive by nature. A review of the record reveals that the trial court properly found that Anthony's testimony relevant to "the respective state of minds of these witnesses." Indeed, one of the central disputes at trial involved the assaultive nature of Anthony and defendant. The reference to the Texas attack was not collateral but relevant to the brothers' psyche at the time of the fight. Further, this testimony was clearly covered during the direct examination of Anthony and defendant. Therefore, the testimony was properly admitted rebuttal. *People v Vasher*, 449 Mich 494, 504-505; 537 NW2d 168 (1995)

Next, defendant alleges that the prosecutor made several improper comments which deprived him of his right to a fair trial. However, defendant failed to object to each instance and therefore this issue is reviewed to prevent manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1987). After a thorough review of the prosecutor's closing argument and rebuttal, we fail to find any prosecutorial misconduct. Accordingly, no manifest injustice results from our failure to review this issue.

Defendant additionally contends that counsel was ineffective. In order to establish a claim of ineffective assistance of counsel, defendant must show that counsel's standard fell below an objective standard of reasonableness and that the representatives so prejudiced defendant so as to deprive him of a fair trial;. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). We find no ineffective assistance of counsel in this case.

Defendant first contends that counsel was ineffective for failing to strike Sergeant Green's direct testimony regarding her efforts in locating Rebecca Williams, Anthony's, girlfriend, who was present during the attack. On direct, Sergeant Green testified that she made several attempts to locate Williams. On cross-examination, defense counsel questioned Green on whether she had called certain telephone numbers defense counsel supplied. Counsel repeatedly asked Green about her efforts in locating Williams.

With respect to counsel's failure to object to the prosecutor's questions to Green, it would appear from counsel's subsequent cross-examination of Green that she planned on probing this subject. The defense strategy seemed aimed at portraying Green as failing to diligently attempt to locate Williams. This court will not substitute its judgment for counsel regarding matters of trial strategy. *People v Barnett* 163 Mich App 331, 383; 414 NW2d 378 (1987). Defendant has not overcome the presumption in favor of effective assistance of counsel to prevail on this claim. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant further asserts that counsel was ineffective for failing to request a *Robinson*¹ hearing to determine whether Williams was res gestae witness, whether the prosecutor exercised due diligence in attempting to produce this witness, and for counsel's failure to request the "missing witness" instruction. The record reveals that numerous attempts were made to secure Williams' presence at trial but to no avail. Both attorneys elicited details of Green's undertaking in this regard. Because it appears that the prosecutor exercised due diligence in locating Williams, defendant would not have been entitled to an instruction regarding a missing res gestae witness. See *People v DeMeyers*, 183 Mich App 286, 291; 454 Mich 202 (1990); see also CJI2d 5.12. Because defendant has failed to demonstrate how he was prejudiced by counsel's failure to request a Robinson hearing, defendant was not denied effective assistance of counsel. *Pickens, supra*.

Defendant also asserts that the cumulative effective of various errors in this case were so prejudicial as to deny him a fair trial. *People v Malone*, 180 Mich App 347, 362; 447 NW2d 157 (1989). However, because we find no errors, we find no cumulative errors warrants reversal. *People v Lyle*, 148 Mich App 583, 600; 385 NW2d 676 (1986).

Finally, defendant argues that his two-to four-year sentence violates the principles of proportionality found in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant has already served his minimum sentence and counsel agreed at oral argument that we need not review this issue. *People v Robinson*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/Michael J. Kelly

/s/ Harold Hood

/s/ H. David Soet

¹ *People v Robinson*, 390 Mich 629; 213 NW2d 106 (1973).