STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFONSO MACIAS, JR.,

Defendant-Appellant.

UNPUBLISHED
May 9, 1997

No. 197792
Oakland County
LC No. 94-131544

ON REMAND

Before: Reilly, P.J., and Michael J. Kelly and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to commit 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). He was sentenced to ten to twenty years of imprisonment for the assault conviction to be served consecutively to the two-year prison term for the felony firearm. In our original opinion, unpublished opinion per curiam of the Court of Appeals, issued May 7, 1996 (Docket No. 177103), we concluded that prosecutorial misconduct necessitated reversal of defendant's convictions. The prosecutor appealed. The Supreme Court remanded to this Court by order, 453 Mich 882; ___ NW2d ___ (1996), for reconsideration in light of *People v Mateo*, 453 Mich 203; 551 NW2d 891 (1996), a case involving the standard of review on appeal of preserved error not involving a constitutional claim. Upon further review, we conclude that the prosecutor's remarks were not improper and that the other issues raised by defendant in his original appeal do not warrant reversal. Accordingly, we affirm defendant's conviction and sentence.

I.

In our original unpublished opinion, we said:

> Our review indicates that the prosecutor improperly attacked the credibility of a defense alibi witness with argument unsupported by the evidence, including argument that was false. This error was not harmless beyond a reasonable doubt; defendant's convictions must be reversed.

In *Mateo, supra*, this Court affirmed the defendant's conviction despite the admission of improper rebuttal on a collateral issue because there was overwhelming evidence of guilt and any error was "harmless beyond a reasonable doubt." *People v Mateo*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 1993 Docket No. 134528). The Supreme Court affirmed, but held that the "harmless beyond reasonable doubt" test that this Court applied was not the proper standard to apply to preserved nonconstitutional error. The Supreme Court left open for future resolution the level of confidence a reviewing court must have that a preserved nonconstitutional error was harmless. *Mateo*, 453 Mich at 207.

Upon reconsideration of the error claimed in the instant case, namely the prosecutor's argument to the jury regarding the testimony of an alibi witness, we hold that *Mateo* is irrelevant to our decision in this case because the prosecutor's arguments were not improper.

Brenda, one of defendant's alibi witnesses, testified that defendant was with her during the early morning hours of January 1, 1994. On cross-examination, she further testified that she last saw defendant at the end of January, and that she last talked to him about the incident on the Friday before her testimony, e.g. June 21, 1994. The prosecutor asked her: "Did you discuss your testimony with anybody else other than the defendant?" Brenda answered, "No." The following discourse then ensued:

Q. "You haven't talked to Jennifer [a defense witness]?"

A. "Oh, yes, me and her talked about what happened."

* * *

Q. "Have you talked to . . . Angela [another defense witness]?"

A. "No."

There were no further questions by either counsel regarding the witness' discussion of the incident with anyone. Brenda was listed as an alibi witness by defendant in his notice of alibi filed May 9, 1994. The trial began June 20, 1994.

During closing arguments, both counsel argued regarding the credibility of their witnesses. In her rebuttal argument, the prosecutor stated:

> Ladies and gentlemen, you have seven eyewitnesses who said it's the defendant who did it. You have one young lady who had been drinking Boone's Farm, who isn't sure what she was watching, who says, "Yeah, we were there for two or three hours watching movies."
>
> Well, Brenda, where were you in January? She said the end of January she had talked to the defendant. Why didn't she go to the police then and say, "Hey, you've got the wrong guy"?

Defense counsel then objected, claiming the argument was based on facts not in evidence, that there was no showing that the witness even knew that the police had issued any warrants or that defendant was charged or wanted for anything. The objection was overruled.

The prosecutor continued:

> Ladies and gentlemen, she comes forth the day of trial or shortly before and says, not to the police but to someone else apparently, "You've got the wrong guy." Is that consistent with common sense? Is that consistent with truth? No, it is not. If she knew that he wasn't there, why didn't she go to the police and tell them?

Having reviewed Brenda's testimony and the statements made in rebuttal closing argument, we are now convinced that the prosecutor's argument did not contain false or misleading statements of fact, but was a legitimate argument based on legitimate inferences drawn from the witness' testimony. Because the argument was appropriate under the circumstances, we need not determine whether the error was harmless.

II.

In his original appeal, defendant also argued that the trial court erred in determining that the prosecution exercised due diligence in its attempts to locate a missing endorsed res gestae witness. The prosecutor may delete from the list of witnesses that the prosecutor intends to call at trial at any time upon leave of the court and for good cause shown. MCL 767.40a(4); MSA 28.980(1)(4). As explained in *People v Burwick*, 450 Mich 281, 292; 537 NW2d 813 (1995), "The Legislature could have, but did not, condition the addition or deletion of witnesses the prosecutor would produce on a showing of prior due diligence." Deletion from the list is within the discretion of the trial court and is reversible only for abuse. *Id.* at 291.

Here, rather than finding "good cause", the court found that the prosecutor exercised due diligence in attempting to locate the witness. The record indicates that the officers checked the witness' last known address and spoke to his father, who said he had not seen the witness for approximately a month. They also checked hospitals and ran a LEIN check. Because these unsuccessful efforts satisfied the good cause requirement of the statute, as well as the due diligence standard, defendant is not entitled to a new trial on this basis.

III.

In a supplemental brief filed by defendant in pro per before the Supreme Court's remand, defendant asserted that the evidence of intent to commit murder was insufficient. We disagree. The victim testified that defendant pointed a gun at the victim's face, that defendant pulled the trigger and the victim heard a clicking, "like the gun misfired or it was empty in that chamber or something." This testimony was sufficient for a reasonable factfinder to infer that defendant intended to commit murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

IV.

Finally, defendant's supplemental brief also asserts that the sentence, which was within the sentencing guidelines, was disproportionate. Defendant did not present any unusual circumstances to the trial court before sentencing to demonstrate that a sentence within the sentencing guidelines would be disproportionate. Accordingly, defendant is precluded from raising a challenge to the sentence's proportionality on appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). In any event, because defendant's sentence was within the recommended range of the sentencing guidelines, it is therefore presumed proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 N2d 789 (1987). Defendant has not overcome the presumption.

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Mark J. Cavanagh