STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN EUGENE DAUGHERTY,

Defendant-Appellant.

UNPUBLISHED
June 24, 1997

No. 196673
Lenawee Circuit Court
LC No. 95-6671 FC

Before: Markman, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right convictions by jury of carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to 40 to 120 months in prison for his carrying a dangerous weapon with unlawful intent conviction, life in prison without the possibility of parole for his first-degree murder conviction, and two years in prison for his felony-firearm conviction, with the former two sentences to be served consecutively to the latter. We affirm.

Defendant raises three issues on appeal. First, defendant argues that the trial court abused its discretion in denying his motion for a new trial where an unauthorized visit by one of the jurors to the crime scene provided information about lighting conditions to the jury that jeopardized defendant's right to a fair trial.

Our sister states have given more consideration than has Michigan to the issue of jury taint caused by unauthorized visits to crime scenes by jurors. However, the standard employed by Michigan and by her sisters states appears to be the same, i.e., whether the unauthorized visit, like any other form of juror misconduct, prejudiced the defendant's right to a fair and impartial trial. *People v Sowders*, 164 Mich App 36, 47; 417 NW2d 78 (1987), citing *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960); *People v Davis*, 122 Mich App 597, 602-603; 333 NW2d 99 (1983). See also *State v Hartley*, 656 A2d 954, 961 (RI, 1995); *Hill v United States*, 622 A2d 680, 685-686 (DC App, 1993); *State v Bell*, 225 Mont 83; 731 P2d 336, 341-342 (1987).

After reviewing the record on appeal, we conclude that the volume of eyewitness evidence produced at trial overwhelmed any possibility of prejudice to defendant's right to a fair and impartial.

Approximately ten witnesses testified at defendant's trial that they saw defendant walk up to the victim, ask the victim if he had a gun, and then shoot the victim in the head at point blank range. None of these witnesses hesitated in identifying defendant as the man who shot the victim, and none testified that the lighting conditions at the scene interfered with their ability to see the shooting. Further, two witnesses saw defendant commit suspicious acts before and after the shooting that helped fix his face in their minds. One witness saw defendant take something out of the trunk of a nearby car shortly before the shooting. The other saw defendant point the gun at him, then at the watching crowd, shortly after the shooting. Based on this compelling evidence, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Sowders, supra* at 47; *People v Hayes,* 126 Mich App 721, 729; 337 NW2d 905 (1983).

Next, defendant claims that the trial court committed reversible error by allowing the prosecutor to elicit evidence about the victim's peaceful character during his case-in-chief. We note that defendant failed to object to the prosecutor's questions at trial, so we may only review this issue to prevent manifest injustice. *People v King,* 210 Mich App 425, 433; 534 NW2d 534 (1995). We find no manifest injustice in this case. Defendant was identified as the shooter by about ten people who clearly saw him walk up to the victim and shoot him in the head. The evidence of the victim's peaceful character was, in any event, not extensive. See *People v Edwards,* 139 Mich App 711, 717-718; 362 NW2d 775 (1984). Defendant also presented rebuttal evidence that the victim had been involved with drugs. We conclude that the trial court did not commit error requiring reversal by allowing the prosecutor to elicit evidence about the victim's peaceful character during his case-in-chief. *People v Price,* 214 Mich App 538, 546; 543 NW2d 49 (1995).

Finally, defendant contends that the prosecutor deprived him of a fair trial by questioning him during cross-examination as to the whereabouts of several witnesses who were not called to testify, thereby shifting the burden of proof to defendant. Defendant presented an alibi defense and the witnesses the prosecutor drew attention to would have supported defendant's alibi. Where a defendant testifies to an alibi and calls no additional witnesses to support it, the prosecution, by commenting on the nonproduction of corroborating alibi witnesses, is merely pointing out the weakness in the defendant's case. *People v Holland,* 179 Mich App 184, 191; 445 NW2d 206 (1989), citing *People v Shannon,* 88 Mich App 138, 145; 276 NW2d 546 (1979). The prosecutor asked defendant why his aunt and father did not testify. Defendant testified that the day of the shooting he had gone to his aunt's house in Monroe, then to his father's house in Toledo. Defendant listed as potential witnesses two other family members who could have verified his arrival in Toledo, but did not call them to testify. Further, defendant also listed as a potential witness the man he said had driven him to Toledo. This man also did not testify at trial, although he was in the courtroom for part of the trial and could easily have been called. We conclude that the trial court committed no error by allowing the prosecutor to question defendant as to the whereabouts of his alibi witnesses. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557 (1994); *People v McElhaney,* 215 Mich App 269, 283; 545 NW2d 18 (1996).

Affirmed.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell