STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAMADIN GARFIELD WALTERS,

Defendant-Appellant.

UNPUBLISHED
February 27, 1998

No. 194512
Cass Circuit
LC No. 91-007524

Before: White, P.J., and Cavanagh, and Reilly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of delivery of more than fifty grams, but less than 225 grams, of cocaine, MCL 333.7401(2)(a); MSA 14.15(7401)(2)(a). We affirm.

An informant working with the Cass County sheriff's department testified that on July 1, 1990, after first meeting with a Cass County detective to set up a controlled buy, she picked up three bags of cocaine from defendant. The informant returned immediately to the place where she had met with the detective and gave the cocaine to the detective. The detective testified that he followed the informant and witnessed defendant handing three bags to her. The bags were later determined to contain seventy-six grams of cocaine. Defendant testified that he was in Miami, Florida on July 1, 1990, and denied delivering cocaine to the informant.

I

Defendant argues first that the trial court abused its discretion in admitting evidence that defendant offered a bribe to a sheriff's corrections officer during the course of defendant's trial. He asserts that the evidence was irrelevant, and, additionally, that it was improperly admitted on rebuttal because it should have been introduced in the prosecutor's case-in-chief.

Assuming arguendo, that the evidence was admitted in error, the error was harmless. *People v Mateo*, 453 Mich 203, 212; 551 NW2d 891 (1996). The evidence against defendant was overwhelming. The informant testified that defendant had provided her with seventy-five grams of cocaine. A detective observed the transaction, and his testimony corroborated that of the informant.

Although defendant testified that he was in Florida when this transaction was alleged to have occurred, the prosecution presented two witnesses in rebuttal who observed defendant in Michigan during the time defendant stated he was in Florida. Thus, any error was harmless.

II

Next, defendant contends that the trial court abused its discretion in not certifying a material witness for the defense and in denying defendant's request to adjourn the trial until the witness could be secured.

On May 26, 1992, one week before trial was to commence, defendant filed a motion pursuant to MCL 767.91 *et seq*.; MSA 28.1023(191) *et seq*.[1] to certify Bruce Bernard as a material witness for the defense and to compel his presence and testimony. On the same day, defendant filed a motion to adjourn trial based on Bernard's absence.

The motions were heard June 1, 1992, the day before trial, and the trial court denied the motions on the ground that defendant's request was untimely. In *People v Williams*, 114 Mich App 186, 201; 318 NW2d 671 (1982), this Court held that where a defendant filed a petition under the uniform act four days before trial, the petition was untimely. The Court reasoned that the defendant knew that the witnesses were important to his case, yet waited five months before filing his petition. *Id*.

In this case, defendant filed his first motion to adjourn trial on February 7, 1992, arguing that additional time was needed to secure witnesses to sustain his alibi defense. Defendant requested that his trial be adjourned until June 1992. The trial court granted defendant's first request for an adjournment, finding that "witnesses material to the defense are presently unavailable, and need to be located and interviewed."

Thus, the trial court had already adjourned trial once in order to allow defendant to secure witnesses to support his alibi defense. Notwithstanding defendant's assertion that he believed that Bernard would be cooperative and only found out at the last minute that he would not appear voluntarily, we conclude that the court did not abuse its discretion in finding the request untimely and denying defendant's motions. Having obtained one adjournment to secure Bernard's presence, defendant should not have relied on his voluntary appearance.

III

Defendant next argues that the trial court abused its discretion in denying defendant's motion for a new trial where one of the jurors was a sister of a Cass County undersheriff.

A new trial may be granted on the basis of juror bias or misconduct. MCR 2.611(A)(1)(b); *Froede v Holland Ladder Co*, 207 Mich App 127, 130; 523 NW2d 849 (1994). A juror is presumed to be qualified and competent. *Id*. To rebut this presumption, the moving party must establish that the juror would have been challenged for cause or otherwise dismissed had the truth been revealed before trial, or establish actual proof of prejudice on the part of the challenged juror. *Id*. Where a defendant fails to present sufficient evidence of prejudice or juror misconduct, the trial court

does not abuse its discretion by denying defendant's motion for a new trial. *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 64; 454 NW2d 188 (1990).

In this case, when the juror revealed her connection to the Sheriff's Department during trial, the court questioned the juror and determined that she was not biased. Defendant did not object to the juror's continued service. Although the sheriff's corrections officer did not testify until after the court's questioning of the juror, a sheriff's detective had already testified, and defendant was not concerned with the juror's bias regarding the detective. Defendant has presented no evidence of the juror's bias or prejudice aside from defendant's assertion that she was biased because of her relationship to an undersheriff. Therefore, defendant has failed to present sufficient evidence of prejudice, and the trial court properly denied defendant's motion for a new trial.

IV

Finally, defendant argues that the trial court abused its discretion in failing to strike the testimony of two rebuttal witnesses where the prosecutor failed to give defendant notice of the rebuttal witnesses.

MCL 768.20; MSA 28.1043 requires the prosecutor to file notice of rebuttal witnesses as follows:

> (2) Within 10 days after the receipt of the defendant's notice but not later than 5 days before the trial of the case, or at such other time as the court may direct, the prosecuting attorney shall file and serve upon the defendant a notice of rebuttal which shall contain, as particularly as is known to the prosecuting attorney, the names of the witnesses whom the prosecuting attorney proposes to call in rebuttal to controvert the defendant's defense at the trial of the case.

The sanction for failing to file notice of rebuttal is set forth in MCL 768.21; MSA 28.1044:

> (2) If the prosecuting attorney fails to file and serve a notice of rebuttal upon the defendant as provided in section 20 or 20a, the court shall exclude evidence offered by the prosecution in rebuttal to the defendant's evidence relevant to a defense specified in section 20 or 20a. . . .

Defendant filed a notice of alibi defense indicating his intent to call Bruce Bernard as an alibi witness. The notice stated that "defendant claims that on July 1, 1990, and July 2, 1990, the time the offense was allegedly committed, he was in Miami, Florida." On May 22, 1992, defendant filed a withdrawal of notice of alibi defense because Bernard would not voluntarily return to Michigan to testify as a witness. On May 28, 1992, defendant filed a renotice of alibi defense stating that if the trial court granted defendant's motion to certify Bernard as a witness, defendant would present an alibi defense with Bernard's testimony. The renotice of alibi defense also stated "should this court deny Defendant's motion, such that the Defendant is unable to secure Bernard's testimony, Defendant will not present an alibi defense, except for the possible testimony of Defendant." The trial court denied defendant's motion to certify Bernard as a witness. However, defendant did testify at trial, stating that he was in Florida with Bernard and Charlotte Cole from June 18, 1990 through August 1990.

Defendant argues that the testimony of two of the prosecutor's rebuttal witnesses was improper. Frederick Schneider testified that he had seen defendant at defendant's apartment in Niles, Michigan on two separate occasions between June 18, 1990 and August 1990. Jeffrey Arthur testified that on July 2, 1990, Bernard checked into the hotel that Arthur manages in South Bend, Indiana, and Cole checked into the hotel on July 5, 1990. Defendant had testified that Bernard and Cole were with him in Florida from June 18, 1990 until August 1990.

Schneider's testimony did not rebut defendant's alibi that he was in Florida the evening of July 1. Rather, it impeached his testimony regarding his general whereabouts during the summer of 1996. Until defendant testified, however, the prosecutor had no notice of the testimony regarding defendant's whereabouts from June 18 through August. Arthur's testimony presents a closer question. We conclude, however, that given that defendant did not present an alibi witness and only offered his own testimony, the substance of which was not known until trial, the court did not err in permitting the rebuttal testimony.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

[1] The uniform act to secure the attendance of witnesses from without a state in criminal proceedings provides as follows:

> (1) If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certification under the seal of the court stating these facts and specifying the number of days the witness will be required. The certification may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. [MCL 767.93; MSA 28.1023(193).]