

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY OLIVER, JR.,

Defendant-Appellant.

UNPUBLISHED

February 9, 2006

No. 256749

Wayne Circuit Court

LC No. 03-007177-01

Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Defendant Ray Oliver, Jr., appeals as of right his jury trial conviction of possession of a firearm during the commission of a felony¹ and plea-based conviction of assault with intent to do great bodily harm less than murder.² This was a procedurally unusual case. Defendant was originally also charged with armed robbery.³ Prior to trial, the prosecutor offered to dismiss that charge in exchange for defendant's plea of nolo contendere to the assault charge. Defendant rejected the offer and a trial was held. At the conclusion of defendant's trial, the jury was given proper instructions regarding felony-firearm, armed robbery, and assault with intent to do great bodily harm. After a full day of deliberation, however, the jury indicated that it had reached a unanimous verdict only on the charge of felony-firearm. Rather than instructing the jury to continue deliberating until they reached a verdict on the other two charges, the trial court accepted their verdict on the felony-firearm charge. The court then dismissed the jury for ten days, to allow one juror to go on a pre-arranged vacation. In the interim, defendant agreed to accept the prosecution's offer and entered a nolo contendere plea to assault with intent to do great bodily harm. Pursuant to the plea agreement, defendant was sentenced to four to ten years' imprisonment for the assault conviction and to a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

¹ MCL 750.227b.

² MCL 750.84.

³ MCL 700.529.

I. Facts

Defendant's convictions arose from the shooting of Rabih Islim during an armed robbery of a Clark gas station in the city of Detroit. Mr. Islim testified that, when he arrived at the station to begin his shift on the night of the robbery, he was approached by four men who demanded entry into the station. Mr. Islim knocked on the station's back door upon their order, and another employee, Ali Assi, answered. The four men then forced their way inside with Mr. Islim. Defendant pushed Mr. Islim aside and pointed a revolver at Ali Assi. Mr. Islim grabbed defendant's hand and the two men wrestled for the gun, moving into a back storeroom in the process. Meanwhile, Ali Assi tried to defend himself against two of the other assailants.⁴ One man opened the cash register and removed the till from the drawer, while the other fought with Mr. Assi. Ali Assi then heard two gunshots from the storeroom and turned to see defendant running away. The men took almost \$2,000 from the cash register. Mr. Islim was shot twice in the abdomen and required surgery for his injuries.

Both Ali Assi and Mr. Islim recognized defendant, as he had been in the station many times in the past and frequently loitered in the area. In fact, Mr. Islim testified that defendant broke out the windows of his car the previous month. Samir Assi, part owner of the gas station, also testified that defendant came into the station two weeks before the offense and offered to sell him a semi-automatic weapon. Before defendant left, he indicated that he also had a revolver for sale. Although Mr. Islim and Ali Assi identified defendant, defendant claimed that he was at his grandmother's house helping his cousin with her laundry at the time of the robbery. However, Terrell Dike testified that defendant was involved in the planning of this robbery. Mr. Dike testified that defendant asked him if he wanted to make some money. They walked to the Clark gas station with two other men whom Mr. Dike did not know. Mr. Dike further testified that defendant was carrying a revolver that night. Mr. Dike testified that he ran away when Ali Assi hit him with a broom, and that he heard three gunshots as he ran through the alley behind the station.

II. Confrontation Clause

Defendant contends that the trial court improperly allowed the prosecutor to read Mr. Islim's preliminary examination testimony into evidence in lieu of presenting his live testimony. Following the preliminary examination, Mr. Islim returned to Lebanon to visit his family. When he attempted to return, INS officials discovered that Mr. Islim had violated the conditions of his student visa by working at the Clark station. He was, therefore, denied reentry into the country and was unable to be present at defendant's trial.

Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.⁵ When a trial court's decision regarding the admission of evidence involves a preliminary question of law, we review the issue de novo.⁶ Defendant contends that the trial

⁴ The fourth man had already fled the scene.

⁵ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

⁶ *Id.*

court admitted this evidence in violation of his Sixth Amendment right to confront the witnesses against him. Pursuant to the United States Supreme Court's decision in *Crawford v Washington*,⁷ the "testimonial statements of a witness who did not appear at trial [are inadmissible] unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination."⁸ Mr. Islim's preliminary examination testimony implicating defendant in the charged offenses was clearly testimonial.⁹ We agree with the trial court, however, that Mr. Islim was unavailable and that defendant had an opportunity to cross-examine the witness.

An "unavailable witness" is defined by the rules of evidence, in relevant part, as follows:

"Unavailability of a witness" includes situations in which the declarant—

* * *

(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.^[10]

If a declarant is deemed "unavailable" under this rule, his or her testimony in a previous hearing is admissible if the opposing party "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."¹¹ The party proffering the former testimony must demonstrate that a reasonable, good faith effort was made to secure the declarant's presence for trial.¹² The test for due diligence is "one of reasonableness and depends on the facts and circumstances of each case[;] i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it."¹³

The trial court conducted an evidentiary hearing to determine whether the prosecution exercised due diligence to secure Mr. Islim's presence at defendant's trial. Detroit Police Officer James Kraszewski testified that Mr. Islim notified him of his plan to travel to Lebanon. Officer Kraszewski was subsequently notified by an INS official that Mr. Islim had been denied reentry into the United States. Ali Assi further testified that he telephoned Mr. Islim in Lebanon and learned that he was not allowed to return to this country. In fact, defense counsel stated, from his own experience in the area of immigration law, that Mr. Islim would be permanently barred from

⁷ *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1374; 158 L Ed 2d 177 (2004)

⁸ *Id.* at 53-54.

⁹ *Id.* at 68 ("Whatever else the term covers it applies at a minimum to prior testimony at a preliminary hearing . . .").

¹⁰ MRE 804(a)(5).

¹¹ MRE 804(b)(1).

¹² *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

¹³ *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

entering the United States due to this infraction. Under these circumstances, no amount of due diligence could have secured Mr. Islim's presence at defendant's trial.

Furthermore, defendant did, in fact, cross-examine Mr. Islim on a prior occasion. Whether a defendant had a similar motive to develop the testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding.¹⁴ Mr. Islim's preliminary examination testimony was originally elicited by the prosecutor to establish probable cause of defendant's guilt and was introduced at trial to establish his guilt.¹⁵ Defendant had the requisite opportunity to cross-examine the declarant and made full use of that right. Therefore, the trial court's admission of this testimony into evidence violated neither MRE 804, nor defendant's Sixth Amendment right to confront the witnesses against him.

III. Other Bad Acts Evidence

Defendant also challenges the admission of evidence of prior bad acts. Specifically, defendant asserts that the trial court improperly admitted evidence that he broke the windows on Mr. Islim's car one month before the robbery and subsequently offered to sell Samir Assi a revolver. All relevant evidence is generally admissible.¹⁶ However, evidence of other bad acts is inadmissible to prove an individual's propensity to act in conformity therewith.¹⁷ Such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material. . . ."¹⁸ We evaluate the admission of other acts evidence by considering if: (1) it was offered for a proper purpose under the rule; (2) it was relevant; (3) its probative value was not substantially outweighed by unfair prejudice; and (4) a limiting instruction, if requested, was provided by the court.¹⁹

We agree that the trial court improperly admitted evidence that defendant broke the windows of Mr. Islim's car. The prosecution presented sufficient evidence that Mr. Islim and Ali Assi were familiar with the defendant (and, therefore, could easily identify him) without relying on this highly prejudicial evidence of a prior criminal act. In light of the overwhelming evidence properly presented against the defendant, however, this error does not warrant reversal.

Moreover, it is well established that the prosecutor may introduce evidence that a defendant possessed the same type of weapon used in the current charged offense at another point in time.²⁰ Such evidence is relevant to establish the identity of the shooter.²¹ Samir Assi

¹⁴ *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

¹⁵ See *People v Meredith*, 459 Mich 62, 67; 586 NW2d 538 (1998).

¹⁶ MRE 402.

¹⁷ MRE 404(b)(1); *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

¹⁸ MRE 404(b)(1).

¹⁹ *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

²⁰ See *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989) (in which police officers
(continued...))

testified that defendant offered to sell him a revolver two weeks before the robbery. This is the same type of weapon that defendant carried that night according to the testimony of Ali Assi, Mr. Islim, and Mr. Dike. The prosecution presented this evidence to further support defendant's identity as the shooter, not to establish that he had committed other weapons-related offenses in the past. The probative value of this evidence clearly outweighed its prejudicial effect, and the trial court properly allowed its admission.

IV. Prosecutorial Misconduct

Defendant also contends that the prosecutor improperly shifted the burden of proof, appealed to the jurors' civic duty to convict, and pervasively denigrated defense counsel. Prosecutorial misconduct claims are reviewed on a case-by-case basis, examining any remarks in context to determine if the defendant received a fair and impartial trial.²² As defendant only objected to the prosecutor's alleged attempt to shift the burden of proof, our review of the remaining claims is limited to plain error affecting defendant's substantial rights.²³ "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."²⁴

A. Shifting Burden of Proof

Defendant asserts that the prosecutor impermissibly shifted the burden of proof by commenting on defendant's failure to call certain alibi witnesses in support of his defense. Defendant claimed that he was with his cousin and grandmother at the time of the shooting. Although he listed both women on his notice of alibi, defendant presented only the testimony of his cousin in this regard. During closing argument, the prosecutor commented regarding the absence of defendant's grandmother from the trial.²⁵ Defendant's cousin further testified that her

(...continued)

subsequently found a sawed-off shotgun used in an armed robbery in the defendant's vehicle); *People v Houston*, 261 Mich App 463, 465-470; 683 NW2d 192 (2004) (in which the prosecution presented evidence that the defendant possessed a .380-caliber pistol, the alleged murder weapon, three days before the shooting).

²¹ *Houston, supra* at 469.

²² *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

²³ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

²⁴ *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

²⁵ Specifically, the prosecutor argued:

Was granny there, the grandmother? Yes. Grandmother's listed as a witness here. Where's grandma to come and say he was there? She's not here. What did grandma say? Where's grandma's statement? . . . "Can you tell me what nights he was here with you last week? Every night. No, there was a night he wasn't here, it was either Tuesday or Wednesday. . . ." That's the grandma. Right. So, why is grandma not here? She's listed as a witness to come and testify to his alibi that he was there on Wednesday night, on that Wednesday night. She's not here.

father was also with the defendant on the night in question, and the prosecutor commented on his absence at trial. “It is well established that where the defendant presents evidence of an alibi, the prosecutor may comment on the weakness of the alibi defense by pointing out the lack of corroboration testimony”²⁶ A prosecutor does not shift the burden of proof by commenting on a defendant’s failure to support any defense theory.²⁷ Accordingly, defendant’s challenge is meritless.

B. Civic Duty

Defendant also asserts that the prosecutor made veiled remarks during opening statement appealing to the jurors’ civic duty to reach a guilty verdict. Defense counsel stated:

It’s a strong case, ladies and gentlemen, and I think it will be much more [than] [sufficient to convince you beyond a reasonable doubt that this man is guilty as we’ve charged him, armed robbery, assault with intent to do great bodily harm. And my God, shooting someone in the stomach twice.

You will see that his condition was critical at the start. The man easily could have died and not be treated [sic]. So, I think it would be much more than enough to convince you that that’s assault with intent to do great bodily harm.

A prosecutor may not argue that jurors should convict a defendant as part of their civic duty.²⁸ However, the prosecutor did not do so in this case. The prosecutor properly argued that the evidence supported a conviction on the charge of assault with intent to do great bodily harm.

C. Denigration of Defense Counsel

Defendant argues that the prosecutor repeatedly denigrated defense counsel both within and outside the hearing of the jury. A prosecutor may not denigrate defense counsel or suggest that defense counsel is intentionally attempting to mislead the jury.²⁹ A prosecutor has a duty to seek justice and ensure that a defendant has a fair trial, not just to seek a conviction.³⁰ Engaging in unprofessional attacks against defense counsel during the course of trial clearly violates that

²⁶ *People v Ovegian*, 106 Mich App 279, 382; 307 NW2d 472 (1981).

²⁷ *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

²⁸ *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

²⁹ *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

³⁰ See *People v O’Quinn*, 185 Mich App 40, 43; 460 NW2 264 (1990), overruled in part on other grounds *People v Koonce*, 466 Mich 515; 648 NW2d 153 (2002); *People v Wallace*, 160 Mich App 1, 10; 408 NW2d 87 (1987). See also MRPC 3.8, comment:

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

duty. The prosecutor did make several rude and offensive remarks toward defense counsel during defendant's trial. The prosecutor told defense counsel to "Shut [his] mouth," and "Sit down." He asked the court, "Would you please tell this man to sit down and control himself," and commented that "I don't know what you do when Mr. Elsey isn't in your court, so the prosecutor doesn't mislead you. I don't know how you manage." We do *not* condone the prosecutor's unprofessional behavior in this case. We note, however, that defense counsel's behavior toward the prosecutor was equally inappropriate. The attorneys continually interrupted each other,³¹ accused each other of mischaracterizing the evidence, and deliberately ignored rulings of the court. The trial judge was forced to repeatedly referee these heated disputes. Defense counsel also had a duty to conduct himself with professionalism and restraint,³² which he clearly violated.

Although the prosecutor's conduct was uncalled for, reversal is not warranted under the circumstances. The trial court made every effort to control the overbearing temperaments of these attorneys. The court chastised the attorneys for their inappropriate remarks on numerous occasions, continually called the attorneys to the bench, and threatened to hold counsel in contempt of court if they ignored its evidentiary rulings. The trial court sought to protect defendant's right to a fair trial by responding to the misconduct of *both* attorneys.

Defendant also argues that defense counsel was ineffective for failing to object to the prosecutor's remarks. As defendant failed to include this issue in the statement of questions presented, as required by MCR 7.212(C)(5), it is not properly before us on appeal.³³ As previously noted however, the prosecutor's comments, although rude and inappropriate, do not warrant reversal. We further note that defense counsel responded in kind.

V. Mistrial

Defendant argues that the trial court improperly denied his motion for a mistrial. We review a trial court's decision on a motion for mistrial for an abuse of discretion.³⁴ "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial."³⁵ Although the trial court's decision to allow the jury to enter one verdict and delay further deliberations for ten days was highly irregular, the defendant does not challenge the fairness of the proceedings on that ground. Rather, defendant contends that he was prejudiced by the prosecutor's failure to provide defense counsel with several items requested during discovery until trial. Specifically, defendant claims that he did not receive a

³¹ These interruptions caused the prosecutor to remark, "Can I finish when I'm speaking to the Judge, please," and "If I may speak two sentences, Judge." They prompted defense counsel to comment, "If I could just finish my statement," and "—if I ever get a chance to get a word in."

³² See MRPC 3.5. All attorneys must refrain "from undignified or discourteous conduct" while in the courtroom. *Id.*, comment.

³³ *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

³⁴ *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

³⁵ *Id.*

photograph of the crime scene, Mr. Islim's medical records, and an evidence technician's report during pretrial discovery. The prosecution's failure to disclose this evidence was highly improper and again, we do not condone his conduct. Defense counsel was accorded an opportunity to review the challenged evidence, although late in the trial process. In light of the overwhelming evidence presented against defendant at trial, however, defendant has not established that these errors were outcome determinative. Accordingly, reversal is unwarranted.³⁶

VI. Motion for New Trial and to Vacate Plea

Defendant also contends that the trial court improperly denied his motions for a new trial and to vacate his plea and sentence. Specifically, defendant contends that he was denied a fair trial by the cumulative effect of the errors that occurred. As the factual basis to support his plea to assault with intent to do great bodily harm was adduced at that trial, he asserts that the trial court should not have accepted it.³⁷ We review a trial court's denial of a motion to vacate a plea and for a new trial for an abuse of discretion.³⁸ It is true that the defendant's trial was riddled with errors. However, we have already determined that none of the challenged errors amounted to reversible error. In light of the specific identification of defendant by Ali Assi and Mr. Islim, there were no grounds to grant defendant a new trial. Accordingly, we find that the trial court properly accepted defendant's nolo contendere plea on the charge of assault with intent to do great bodily harm.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Jessica R. Cooper

/s/ Pat M. Donofrio

³⁶ *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

³⁷ See MCR 6.302 (the trial court must conduct a hearing to determine if there is factual support for a defendant's plea of nolo contendere).

³⁸ *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).