

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

January 14, 2000

Plaintiff-Appellee,

v

No. 213595

Kent Circuit Court

ANTWON DWAYNE COPELAND, a/k/a
TWANNY, a/k/a TWAN,

LC No. 97 012646

Defendant-Appellant.

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with the intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a third habitual offender, MCL 769.11; MSA 28.1083, to the following consecutive prison terms: mandatory two years for the felony-firearm offense and ten to twenty years for assault with the intent to do great bodily harm. Defendant appeals as of right. We affirm.

This case arises from a shooting which occurred in the early morning hours of November 6, 1997, on a street corner in Grand Rapids. At trial, the gunshot victim, Altie Grant, testified that defendant shot him because he owed defendant \$25 from a drug transaction which took place three weeks before the shooting. The prosecution presented no physical evidence to link defendant to the shooting, and although Grant stated that there were other people around the bus stop where the shooting took place, the police were unable to identify and question eyewitnesses. Police officers testified that Grant was uncooperative and that Grant initially stated that he did not know the identity of the person who shot him. While recovering in the hospital, Grant decided not to seek retribution on his own and thereafter named defendant as the shooter.

Defendant was arrested in Muskegon nine days after the shooting. A Muskegon police officer testified that he saw defendant speeding and attempted to stop him, but defendant sped up. The police officer testified that, after a pursuit of approximately a half mile, defendant jumped out of his rolling vehicle, and ran through backyards and jumped over fences. The Muskegon officer caught defendant

approximately fifteen minutes later as defendant jumped into a vehicle being started by an elderly woman whom defendant did not know.

Defendant first contends that the trial court erred by denying his motion in limine to exclude testimony regarding his flight from arrest. Defendant argues that the evidence should have been excluded because the defense did not receive timely notice that the prosecution intended to use the flight evidence, the evidence was not relevant, and the prejudicial effect of the evidence substantially outweighed any probative value. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The test for an abuse of discretion is very strict, and often elevates the standard of review to an apparently insurmountable height. *Sparks v Sparks*, 440 Mich 141, 150-151; 485 NW2d 893 (1992). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999). Under the circumstances of this case, the trial court did not abuse its discretion in admitting evidence of flight by defendant before his arrest.

Flight evidence is generally relevant, and may be admissible to indicate consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Defendant asserts that while the prosecutor asked the jury to infer consciousness of guilt in this case, “a more logical” reason for defendant’s flight was that he was operating a motor vehicle on a suspended license and there were narcotics in the vehicle. Although “flight . . . may be as consistent with innocence as with guilt,” it is the jury’s role to say whether a defendant’s flight arose under such circumstances as to evidence guilt. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993), quoting *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927). Accordingly, the existence of other reasons for flight does not render evidence of flight irrelevant and inadmissible. We find unpersuasive defendant’s argument that the admission of flight evidence forced him to choose whether to present evidence of another criminal offense to explain his actions, or take the risk that without an explanation, the jury would infer that defendant ran because he was guilty of shooting Grant. This Court has held that such a predicament “is not a compulsion, but a reasonable strategic choice created by the need to [offer an alternative explanation for flight].” *Cutchall, supra* at 406.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Brownridge*, 459 Mich 456, 461; 591 NW2d 26 (1999). “Unfair prejudice” does not mean “damaging,” *Chmielewski v Xermac, Inc*, 216 Mich App 707, 710; 550 NW2d 797 (1996), rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Sclafani v Peter S Cusimano*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). This Court has held that flight evidence, in particular, should be admitted with caution “where its probative value is slight in light of other evidence presented in the case.” *Cutchall, supra* at 399.

The trial court's admission of the flight evidence in this case presented a close evidentiary call, considering the lack of physical evidence and eyewitness testimony. Grant's inconsistent statements and his substantial delay in naming the shooter are troubling. However, Grant did eventually make a positive identification of defendant as the shooter. Grant offered valid and believable explanations for being uncooperative with police, which the jury was entitled to accept. Grant's testimony supports the conclusion that the jury's verdict may have rested on more than the flight evidence, and that admission of the flight evidence did not unfairly prejudice defendant.

Defendant next argues that he was denied a fair and impartial trial because, during closing arguments, the prosecution (1) attempted to shift the burden of proof to the defense, and (2) improperly argued that public policy and the jurors' civic duty dictated a conviction. When considering allegations of prosecutorial misconduct, this Court considers the alleged misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457; 592 NW2d 767 (1999).

Defendant asserts that the prosecution improperly attempted to shift the burden of proof onto defendant by reminding the jury (1) that there was no evidence presented to explain why Grant would name defendant if he was not the real shooter, (2) that defendant's conduct just before his arrest did not make any sense if he did not know he was guilty of the charges, and (3) that the jury had heard no evidence to the contrary. These arguments were not improper. Although a prosecutor may not comment on a defendant's failure to testify or present evidence, a prosecutor may argue that certain evidence is uncontroverted or undisputed even if the defendant is the only one who could have contradicted the evidence. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).

Defendant also argues that the following statements, which were made by the prosecution during closing arguments, constitute an impermissible "civic duty" argument:

You've sat through this case yesterday and today and I got to believe there's a little bit of temptation maybe with some folks to go, why are we here? Why should we really care, right? I mean, what is there about a couple of little drug dealers out on Franklin and Eastern? Who cares? Maybe you think that. Or maybe some people would say if you play with fire, you're going to get burned. If you are going to take the road down to drugs and illegal activities, you better be prepared to pay for that choice. You get shot, too bad.

That's a cop out and I think you know that. But it's a natural tendency. And maybe, to tell you the truth, that's exactly what the defendant wants you to do because if you do that, you turn him loose, right? Because really what you have got as far as Altie Grant's statements that he and the defendant got into this illegal stuff and I mean, come on. I mean come on, that's offensive, so the natural tendency is to say well, you know, not in my back yard. As long as it doesn't happen in my back yard, what do I care?

The fact is, that's what allows this to go on all the time in Grand Rapids. You are telling him that's their business and if we allow things like this to go on --.

After defendant objected to the prosecution's argument, the trial court stated: "I don't think, counsel, I would continue in this argument if I were you. If you would move along." Following the objection, the prosecution continued:

What I want you to do is convict the defendant of assault with intent to commit great bodily harm and felony firearm because that's what he did. You don't punish people for who they are, you punish them for what they do. You have got to be responsible for the consequences of your actions. If you take a loaded gun, point it at a person and pull the trigger, you got to tell him he's responsible for that. Just because he picked on somebody like Altie Grant to do it to, somebody who nobody is disputing is not the greatest guy in the world, but, and maybe that's why you get away with it. He didn't shoot a priest, he didn't shoot a teacher, he shot a guy out on the street playing the same little game as him.

A prosecutor may not ask the jury to convict the defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant argues that the court's cautionary statement was insufficient and that a curative instruction should have been directed to the jury. See *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). However, it does not appear that defendant ever sought a curative instruction, and defendant does not argue on appeal that the instructions as given were erroneous. We cannot say that the prosecution's comments were so egregious as to require the trial court sua sponte to give a curative instruction.

Our Supreme Court has recently held that "a preserved, nonconstitutional error is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id.* at 495. The prosecution's comments, in an otherwise proper closing argument, do not require reversal of defendant's convictions.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald