

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PJETAR DEDVUKAJ,

Defendant-Appellant.

UNPUBLISHED

August 19, 2003

No. 237907

Wayne Circuit Court

LC No. 01-002507

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

Defendant was charged with first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, defendant was acquitted of murder and convicted of felony-firearm. He was sentenced to two years' imprisonment and now appeals as of right. We affirm.

This case involves the shooting death in 1994 of Lorenzo Montgomery inside a gas station's convenience store. The prosecution's theory was that defendant was patronizing the store where Montgomery performed odd jobs, and got into an argument with Montgomery. Defendant later returned with another man and shot Montgomery, according to the store's cashier. The cashier gave inconsistent statements to the police about the shooting, first stating that he was in a rest room and did not see anything, and later stating that he saw defendant and the other man enter the store and heard a shot. At trial, the cashier admitted that his recollection of the event was "vague."

According to the cashier, after the shooting, defendant ran out of the store. Defendant was arrested in another country in 2000 and was returned to Michigan to stand trial.¹

The defense theory was that the cashier did not actually see what happened and there was no physical evidence connecting defendant with any offense.

¹ Defense counsel stated at trial that defendant waived extradition.

I. Flight

Defendant first argues that the trial court erred by allowing evidence of flight and a corresponding jury instruction. The standard jury instruction regarding flight was read to the jury. See CJI2d 4.4.

The instruction, requested by the prosecutor, was supported by the evidence because the cashier testified that defendant “ran away” from the store after the shooting. Further, an attorney negotiated on defendant’s behalf for his return to Michigan to face charges, confirming that defendant was aware that the police were looking for him.² See *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified 450 Mich 1212 (1995) (trial court must give an instruction on any theory or defenses if it is requested and is supported by the evidence).

Defendant argues that the trial court improperly allowed hearsay evidence from a police officer concerning defendant’s arrest in another jurisdiction (Australia) and extradition efforts. It is undisputed that defendant was arrested overseas; he sought credit against his sentence for this offense for time served in Australia. Defendant argues that the police officer’s testimony concerning defendant’s whereabouts was inadmissible hearsay because the officer based that statement on information received from others. We find no error requiring reversal where the officer’s statement can be verified through the record or through defendant’s admission at sentencing that he was incarcerated in Australia. Cf., MRE 803(6) (records of regularly conducted activity); MRE 803(8) (public records); MRE 803(24) (hearsay statement with “equivalent circumstantial guarantees of trustworthiness” may be allowed under catch-all exception). Any error in the form of the testimony did not affect defendant’s substantial rights. MRE 103.

II. Opinion Evidence of Guilt

Defendant next argues that the trial court erred by allowing a police officer to render opinion testimony of his guilt, and by allowing the officer to testify that statements from a non-witness corroborated the officer’s opinion. Defendant further argues that he was denied his right to confront witnesses against him. US Const, Am VI.

Although defendant relies primarily on two questions and one closing argument to support his position on this issue, those isolated references do not accurately reflect the record. Viewing the matter in context, we find no error.

One of the responding police officers testified that he went to a restaurant next door to the gas station, where he talked to three men. The prosecutor asked the officer whether he remembered what one of the men, Eddie Smith, had told him. Defendant’s objection to hearsay was sustained. The prosecutor then instructed the witness not to disclose the content of the

² The attorney’s letter was withheld from the jury, though, because it contained reference to plea negotiations.

communication, but to describe whether he developed any investigative leads as a result of the conversation. The officer confirmed that, as a result of the conversation, he obtained a photograph from the restaurant depicting someone he believed was involved in the shooting. That photograph depicted defendant. No further objection was raised at this time.

The officer continued, stating that Smith told him that the person “I was looking for” was depicted in the photograph. Defendant objected that the answer was hearsay, but the court overruled the objection, ruling that the testimony was excluded from the definition of hearsay under MRE 801(d)(1)(C) (statement of identification). In addition, the officer testified that another person at the restaurant, Nick Dedvukaj, identified the man in the photograph as defendant.

On cross-examination, defendant asked further questions about the officer’s conversations with Smith and the photograph that he obtained from the restaurant, summarizing what had been elicited on direct examination. The officer also testified that, based on the information that he had received, he had no reason to believe that Smith was involved in the shooting.³ Defendant inquired whether the cashier was a suspect in the shooting; the officer responded that he suspected the cashier knew more than he was saying. Cross-examination concluded with essentially the same question:

Q. Mr. Bazzi [the cashier] was a suspect, wasn’t he?

A. Oh, by all means.

The prosecutor immediately began his redirect examination with a follow-up question:

Q. And Mr. Pjetar Dedvukaj, what was he in your mind?

A. The shooter.

No objection was asserted.

On recross-examination, defendant continued to ask the officer what he had seen and what he had heard:

Q. What physical evidence, sir, did you have that Mr. Dedvukaj was the shooter?

A. I had no physical evidence, just circumstantial evidence at the time.

Q. You had – what you had, sir, was somebody saying something?

³ The cashier did not identify defendant by name, but gave the general description of a white male with a white t-shirt, accompanied by a black man with no further description. When shown the photograph, the cashier told the police that the man depicted—defendant—was the man involved in the shooting.

* * *

Q. What you had was somebody saying something about Mr. Dedvukaj, correct?

* * *

A. Based on the evidence that I saw, the information that I've seen and heard and through my conversations, both the circumstantial evidence and the real evidence that I observed, based on that, I had surmised that the defendant was the shooter.

Defendant did not object to the testimony that he solicited from the officer. Instead, he used the testimony as a springboard for a series of questions about the physical evidence, which revealed that there was no weapon, no evidence that defendant had moved the body, no fingerprints, no DNA evidence, and no gunpowder residue or paraffin tests linking defendant to the offense.

On further redirect, the prosecutor asked “[d]id the information that you receive[d] from Eddie Smith corroborate the physical evidence?” Defendant objected that the question called for a hearsay response; the court overruled the objection because the question had not been completed when the objection was lodged. The prosecutor repeated the question, and the officer responded “[y]es, it did.” Defendant’s objection was overruled.⁴

A further request for a limiting instruction was also denied, the court explaining:

[T]he question was in response to the witness’s efforts on cross or recross by [defense counsel], and the witness kept trying to indicate that it was a totality of things which led him to this conclusion. And [defense counsel’s] cross-examination was focused not necessarily on the totality but on the physical evidence, and the witness kept trying to indicate that it was more than simply the physical, it was – and [defense counsel] kept qualifying, I don’t want you to talk about what someone told you. And again, what that presented the prosecution with the opportunity to do is to again emphasize that it was a totality of things without referring to the actual content . . . [a]voiding the hearsay problem.

During closing argument, the prosecutor referred to this “corroboration,” arguing that whatever Eddie Smith had told the officer, “it had to be compelling” and “I submit to you [that] the same man that Officer Miller spoke to . . . said defendant was the shooter.”

While it may be objectionable that the prosecutor phrased his arguments in terms of statements by a non-witness, Eddie Smith, the court instructed the jury that the arguments of

⁴ Considering that the officer conceded there was no physical evidence linking defendant to the shooting, his further testimony that his conversation with Eddie Smith “corroborated” the physical evidence appears to be a weak link rather than opinion evidence of guilt, as defendant argues.

counsel are not evidence. More importantly, we find no error in the trial court's treatment of the testimony. The initial objection to hearsay was sustained. A later objection to identification testimony was properly overruled under MRE 801(d)(1)(C). Following those rulings, defendant launched into a more detailed examination of what the officer was told and how it matched or did not match physical evidence. Defendant inquired whether other people were considered suspects on the basis of the information received by the officer. Once defendant opened the door, the prosecutor was entitled to ask whether that same information implicated defendant. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

III. Prosecutor's Arguments

Finally, defendant argues that the prosecutor engaged in misconduct. We review claims of prosecutorial misconduct on a case-by-case basis, reviewing the record as a whole to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

In rebuttal argument, the prosecutor argued that "I don't have to tell you about hate. The last two days have told you plenty about hate. I don't have to explain why he did it." Defendant argues that this was an improper reference to the September 11 tragedy, which occurred while trial was pending, and to two bomb threats which caused the evacuation of the courthouse. We disagree. The argument did not specifically refer to the terrorist attacks or the bomb threats,⁵ and was made in response to a defense argument that the prosecution had not shown a motive for the killing. Defendant argued in closing: "I'm going to shoot somebody because they're homeless, according to [the prosecutor]? I mean he's got to come up with some reason why this happened. Does this make sense to you, I'm going to shoot someone because they're homeless?" The prosecutor was entitled to respond to defendant's closing argument. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly

⁵ Defendant conceded this point at trial while arguing his objection.