

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUE TAVARES BLANKS,

Defendant-Appellant.

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UNPUBLISHED

January 4, 2005

No. 250142

Wayne Circuit Court

LC No. 03-003366-01

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant's first claim on appeal is that he was denied due process when the trial court admitted into evidence in-court identifications of defendant and refused to order a second lineup after discovering that the initial lineup was never performed. We disagree. We review a trial court's decision to deny a party's request for a lineup for an abuse of discretion and its decision on a motion to suppress de novo. MCR 2.613(C); *People v Van Tubbergen*, 249 Mich App 354, 359-360; 642 NW2d 368 (2002); *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000).

A defendant's due process rights are violated when an identification procedure is so suggestive in view of the totality of the circumstances that it gives rise to a substantial likelihood of misidentification. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). An identification procedure that is merely suggestive may not constitute a constitutional defect. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). Factors to consider include: the opportunity for the witness to observe the offender at the time of the crime; the witness' degree of attention; the accuracy of any prior description; the witness' amount of certainty at the identification procedure; and the time duration between the offense and the confrontation. *Id.* at 304-305.

Here, even if the in-court identification procedure was suggestive, as was the case in *Colon*, *supra* at 305, we conclude that, under the totality of the circumstances, the record does not indicate a substantial likelihood of misidentification. The prosecutor showed that the two eyewitnesses to the shooting had ample time and lighting to view defendant during the incident,

the preliminary examination and trial occurred within one year after the incident, neither witness previously misidentified defendant, and neither witness was involved in the shooting, which suggests that their perceptions were not altered by the stress of the incident. Only one eyewitness testified during the preliminary examination regarding defendant's identity as the shooter, suggesting that he was not unduly influenced by the other eyewitness at that time. All witnesses were sequestered during trial, and there was no evidence that any other witness identified defendant while the two eyewitnesses were in court. Moreover, there was no evidence of police or prosecutorial coercion or suggestion that defendant committed the crime. The trial court properly held that the record contained sufficient evidence of an independent basis for the identification of defendant. Considering the totality of the circumstances, we conclude that there was not a substantial likelihood of misidentification here; therefore, the trial court did not commit clear error by admitting the identification evidence. See *Colon, supra*.

Further, the trial court did not err in refusing to grant defendant's request for a subsequent lineup. "A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *McAllister, supra*. Here, eyewitness identification was an issue of consequence but we agree with the trial court that there was not a reasonable likelihood of mistaken identification for the reasons discussed above; therefore, the trial court did not abuse its discretion in denying the request for another lineup.

Next, defendant argues the trial court abused its discretion by improperly excusing a juror without a detailed inquiry into whether the juror could render a fair and impartial verdict. We disagree. We review a trial court's decision to remove an impaneled juror for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

When a criminal defendant chooses to be tried by a jury, he has a right to a fair and impartial trial. *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). A trial court has discretion to remove a juror by weighing a defendant's due process right to a fair and impartial jury against his right to retain the original jury as chosen in his case. *Tate, supra* at 562. Pursuant to MCL 768.18, the trial court has authority to excuse a juror for "any condition" that a trial court opines would "justify the excusal of any of the jurors so impaneled from further service." Although the trial court cannot arbitrarily excuse extra jurors, the court need not meet the just cause requirement to excuse a juror. *Tate, supra* at 561-562.

During the trial, one of the impaneled jurors approached the deputy and informed him that she knew by appearance, not name, a member of defendant's family who was attending the trial from playing bingo with her at the local hall. The trial court questioned the juror at length concerning the extent of her contact with defendant's family member and her ability to decide this case impartially. Prior to the conclusion of trial testimony and jury deliberations, the trial court excused the juror after stating that it was "greatly concerned" about the juror's answers to the court's questions. The trial court found that the juror saw defendant's family member between three and five times a week at bingo. The trial court also found that the juror expressed fear of possible consequences due to her involvement with the case and ambivalence toward her ability to render a fair and impartial verdict. The trial court noted that the juror's "demeanor" and "body language" during questioning indicated her uneasiness with the situation. The trial court concluded that the juror "show[s] a state of mind that will prevent her from rendering a just verdict, and therefore I am going to excuse her."

Upon review of the record, we find that the trial court did not abuse its discretion by excusing the juror in question. The juror's acquaintance with a member of defendant's family and statements regarding the affect this might have on her ability to decide the case in a fair and unbiased manner provided adequate justification for her excusal. Moreover, the trial court's dismissal of the juror left twelve jurors, approved of by defendant, to determine the verdict as required under MCL 768.18.

Next, defendant claims that the prosecutor improperly introduced evidence that he was incarcerated pending trial which violated his right to a fair trial. We disagree. Because defendant failed to object to the admission of this evidence, our review is for plain error affecting defendant's substantial rights. See *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Relevant evidence is material to the issues and has probative value. *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). Any party is permitted to attack the credibility of a witness. *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). Pursuant to MRE 611(b), a party may cross-examine a witness "on any matter relevant to any issue in the case, including credibility." Proof of bias tends to make the facts to which the witness testified less likely in the perception of the jury than had there been no testimony of bias. *People v Layher*, 464 Mich 756, 762-763; 631 NW2d 281 (2001). Therefore, evidence of bias or interest is "almost always relevant." *Id.* at 764. Moreover, the circumstances surrounding an alibi account may be highly probative of the witness' truthfulness. *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002). "Where a defendant puts forth an alibi defense, that defense can be challenged by cross-examination concerning unexplained delays in its assertion or untruths in its substance." *Id.*

Here, the prosecutor questioned an alibi witness regarding her visit with defendant in jail. The prosecutor asked the witness if she went to the Wayne County Jail to visit defendant, and the witness responded in the affirmative. The prosecutor elicited this testimony on cross-examination in response to the alibi witness' direct testimony placing defendant at his sister's house near the time that the victim was shot. The prosecutor elicited testimony that the witness became an alibi witness after visiting defendant in jail approximately five to seven months after the incident. This testimony was also part of an examination in which the witness disclosed that, despite the fact that she visited defendant's sister approximately four times a month and called her approximately twice a week, she found out about the victim's murder approximately a month later from a co-worker. She further admitted that the night in question held no significance to her before visiting defendant and realizing that she had been at a house with defendant on the night of the shooting. The witness also testified that she did not talk to the police after she realized this information and explained that she did not think that the information was important.

The alibi witness' credibility was at issue in this case. The prosecutor's questioning during cross-examination emphasized the witness' possible interest and motivation to lie. The prosecutor noted the significance of the alibi testimony and the suspicious timing and location of the witness' realization of the alibi. Clearly, the prosecutor's cross-examination was responsive to the witness' testimony on direct and called attention to her lack of credibility as a witness. The prosecutor's reference to defendant's incarceration was related to the alibi witness' motivation and credibility and thus was within the permissible standards of cross-examination.

Therefore, defendant was not deprived of his right to a fair trial by the admission of evidence that defendant was incarcerated pending trial.

Next, defendant argues that the prosecutor improperly appealed to the emotions and civic duty of the jury by arguing that the jury would make a “mockery of justice” if it did not find defendant guilty and that defense witnesses had made a “mockery of justice” by testifying as alibi witnesses. We disagree. Because defendant failed to timely and specifically object to the prosecutor’s closing arguments that formed the basis of the alleged misconduct, our review is for plain error affecting defendant’s substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A prosecutor is not permitted to urge jurors to convict a defendant based on their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor is permitted to argue the evidence and any reasonable inferences from the evidence as it relates to his theory of the case. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). A prosecutor’s remarks must be viewed in light of defense argument. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Moreover, a prosecutor may use emotional language and is not required to argue in the “blandest” language possible. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Here, the prosecutor opened her rebuttal by stating the following:

Finding of not guilty in this case based on this evidence would be a mockery of justice. A mockery of justice. Kind of like the mockery of justice the defendant’s family members, Miss Blanks and Miss Agee tried to do here in court. That’s a mockery of justice.

The prosecutor’s rebuttal followed defense counsel’s closing comments stating, “Ladies and gentlemen, based on the evidence that you’ve heard, there is no question that this, this is a finding of not guilty should be entered in this case [sic].” The prosecutor’s rebuttal comments directly addressed defense counsel’s argument for the jury to find defendant not guilty. The prosecutor asserted that a not guilty verdict would make a “mockery of justice” and argued for a finding of guilt. After considering the prosecutor’s statements within context, we conclude that the prosecutor was not appealing to the jury for sympathy. Instead, the prosecutor was merely responding to defense counsel’s closing argument and asserting her trial position that defendant was guilty of murder.

Moreover, during rebuttal the prosecutor expounded on specific aspects of the evidence that would support her position and would discredit the defense witnesses’ testimony. The prosecutor emphasized that the facts supported the testimony of prosecutorial witnesses. The prosecutor also reminded the jury of the strong evidence by two disinterested witnesses supporting the identification of defendant as the shooter. The prosecutor concluded the rebuttal by encouraging the jury to render “a verdict consistent with the evidence.” From the prosecutor’s comments following the cited statement, we conclude that her initial remark during rebuttal regarding defense witnesses was not an appeal to the emotions of the jury, but was a summary of the forthcoming argument emphasizing evidence that supported the credibility of prosecutorial witnesses and demonstrated the inconsistencies in the testimony of defense

witnesses. Therefore, we hold that the prosecutor's arguments were not improper and did not constitute plain error.

In a related argument, defendant contends that the prosecutor's statements constituted a pattern of improper conduct that cumulatively resulted in depriving defendant of his right to a fair trial. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). However, here we held that the prosecutor's statements were not erroneous thus this issue is without merit.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Karen M. Fort Hood