

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS JEROME MILLER,

Defendant-Appellant.

UNPUBLISHED

June 28, 2005

No. 255941

Wayne Circuit Court

LC No. 03-011281-01

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to 25 to 45 years in prison for the second-degree murder conviction, 2 ½ to 7 ½ years in prison for the felon in possession of a firearm conviction, and 2 years in prison for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that the trial court denied defendant his Sixth Amendment right of confrontation when it admitted the autopsy report without the medical examiner who performed the autopsy being called as a witness. At trial, however, defense counsel explicitly stated that he had no objection to the admissibility of the report. Rather, trial counsel argued that he had the right to have the medical examiner who performed the autopsy testify to further develop medical issues in the case. Defendant, however, does not pursue that argument on appeal, focusing instead on whether the admission of the report itself violated his right to confrontation under *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Accordingly, we decline to review this issue.

Defendant's second issue on appeal is that he was denied a fair and impartial jury when the trial court refused to ask prospective jurors questions submitted by defense counsel. Defendant has waived this issue for appellate review.

An expression of satisfaction with a jury made at the close of voir dire examination waives a party's ability to challenge the composition of the jury thereafter impaneled and sworn. *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 493 (1996). In the instant case, at the close of voir dire, defense counsel stated, "we are satisfied that we have a fair and impartial jury." Because defense counsel expressed satisfaction with the impaneled jury and

because the record contains no indication that defense counsel was unsatisfied with the jury or consented to the composition of the jury as trial strategy to avoid alienating potential jurors, defendant has waived appellate review of this issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *Hubbard, supra*, pp 466-467. “Because any objections were waived, there are no errors [for this Court] to review.” *People v Ortiz*, 249 Mich App 297, 310-311; 642 NW2d 417 (2001).

Defendant’s third issue on appeal is that the trial court abused its discretion when it refused to order a mistrial and that the prosecution engaged in misconduct in its closing arguments. We disagree.

The grant or denial of a motion for mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. Prejudice is shown when the trial court's ruling is so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). A motion for mistrial should be granted only for an irregularity which is prejudicial to the rights of the defendant and which impairs the defendant's ability to get a fair trial. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996).

The trial court did not abuse its discretion in denying defendant’s motion for a mistrial. The prosecution sought to introduce evidence that Graves was uncomfortable testifying at trial because he was receiving death threats. Defense counsel objected to the testimony. The trial court overruled defendant’s objection. The trial court ruled that the fact that Graves received threats did not necessarily mean that they were coming from defendant. The trial court also stated that Graves was merely testifying regarding what he perceived and giving reasons why he feared testifying. The trial court provided curative instructions to the jury to insure that defendant received a fair and impartial trial. In addition, the prosecution’s question did not implicate that defendant threatened Graves in any way. Therefore, defendant has failed to demonstrate that the trial court’s ruling was so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *Wells, supra*, p 390.

This Court reviews claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Questions involving prosecutorial misconduct are decided case by case, and this Court must evaluate each question within the context of the particular facts of the case. *People v Rice*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

In a closing argument, a prosecutor may comment upon the evidence presented at trial and upon the witnesses’ credibility. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995). The prosecutor’s remarks are read in context, and otherwise improper remarks may not rise to an error requiring reversal when the prosecutor is responding to defense counsel’s argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In closing arguments, defense counsel argued that Graves’ reason for failing to report the shooting when he went to the police station after the shooting was “absurd.” Specifically, defense counsel argued that Graves’ excuse that he believed he would be detained if he reported the shooting was unbelievable. In rebuttal, the prosecution argued that Graves’ decision not to report the shooting immediately was based on his fear of defendant. The prosecution stated:

[Defense counsel] made a big deal out of Leroy Graves not reporting what he saw immediately. I believe you have to look at that and weigh that. [Graves] knows defendant. [Graves] was obviously as we heard under the belief that the defendant had shot and killed his brother, and that he didn't tell the police. But he did go tell the police that he had been grimed and he feared for his life. I think that's important. I think that's important that he did go.

The prosecution also stated:

So, it appears that Leroy Graves, he obviously does fear the defendant. There is no doubt that he fears the defendant and for a good reason. Because he is under the belief that his brother was killed by the defendant. And he came in here and like I said, if you look at the testimony when he's in front of the defendant he doesn't say it. But he has said it outside at the investigative subpoena and to the police that he fears the defendant.

Defendant asserts that the rebuttal remarks by the prosecution constituted prosecutorial misconduct and denied him a fair and impartial trial. However, the prosecution was merely attacking the weaknesses in defense counsel's theory regarding Graves' failure to report the shooting. Because the prosecution was merely responding to defense counsel's remarks, its response does not amount to an error requiring reversal. *Kennebrew, supra*, p 608. The prosecution's comments were properly responsive to defense counsel's argument that Graves' purported fear in reporting the shooting was unfounded. Therefore, the prosecution's comments were not improper and do not require reversal. Even so, any unfair prejudice produced by the challenged comments was cured by the trial court's careful and explicit instructions to the jury that it was required to decide the case on the evidence alone and that the lawyers' statements were not evidence. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray