

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESHAWN CHRISTIAN HOWARD,

Defendant-Appellant.

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UNPUBLISHED  
December 4, 2007

No. 272248  
Wayne Circuit Court  
LC No. 06-002141-01

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, two counts of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 30 to 60 years' imprisonment for his second-degree murder conviction, 10 to 40 years' imprisonment for each armed robbery conviction, 20 to 50 years' imprisonment for his assault with intent to commit murder conviction and two years' imprisonment for his felony-firearm conviction. We affirm.

I.

Defendant first argues that the trial court erred when it concluded that, although the prosecution failed to exercise due diligence in locating potential *res gestae* witnesses Thomas McMichael and Tony Gibbons, it could not give an adverse missing witness instruction as a matter of law. We review preserved claims of instructional error *de novo*. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). We review preliminary questions concerning the applicability of specific instructions to the facts of a particular case, including "a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004).

A prosecutor who endorses a witness pursuant to MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *Id.* at 388. Use of the missing witness instruction, CJI2d 5.12, may be appropriate when the prosecution fails to produce an endorsed witness who has not been properly excused. *People v Perez (Perez II)*, 469 Mich 415, 420; 670 NW2d 655 (2003); *Eccles, supra*, p 389 n 7. In this event, "it might be appropriate to instruct a jury that the missing witness would have been unfavorable to the prosecution." *Perez II, supra*, p 420.

Although the prosecutor endorsed McMichael and Gibbons as witnesses, he was unable to produce them at trial. During trial, a due diligence hearing was conducted regarding McMichael and Gibbons. Based on the testimony of Officer Anthony O'Rourke, the trial court held that the prosecution did not exercise due diligence in attempting to locate McMichael and Gibbons. Although the trial court found that due diligence was not exercised, it found that the defense was not entitled to an adverse witness jury instruction. Based on its interpretation of *People v Perez (Perez I)*, 255 Mich App 703; 662 NW2d 446 (2003), aff'd in part and vacated in part *Perez II, supra*, the trial court agreed with the prosecution that the instruction was no longer viable, even if a lack of due diligence was found.

Although the trial court was under the impression that *Perez I* prevented it from giving an adverse missing witness instruction despite the fact that the prosecution failed to exercise due diligence in locating McMichael and Gibbons, the court was mistaken. In *Perez II*, the Supreme Court found that, although this Court properly found that an adverse witness instruction was not warranted under the facts of *Perez I*, it did not agree with this Court's "broader conclusion that there remains 'no justification' for such an instruction." *Perez II, supra*, p 420. The Supreme Court found that an adverse witness instruction was still appropriate, particularly in situations where the prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused. *Id.* The Supreme Court further found that "there may be other occasions that warrant the jury instruction; in every instance, the propriety of reading [an adverse witness instruction] will depend on the specific facts of that case." *Id.* at 420-421.

In light of *Perez II*, the trial court erroneously concluded that, even though the prosecution failed to exercise due diligence in locating McMichael and Gibbons, it could not grant defendant an adverse witness instruction. We note, however, that "reversal for failure to provide a jury instruction is unwarranted unless it appears that it is more probable than not that the error was outcome determinative." *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003). In this case, McMichael was expected to testify that, before Clinton Drains was shot, McMichael walked past two suspicious men at the gas station and told Drains, "those guys are up to something, I don't know if they're after me." At trial, Drains testified that, while walking away from the gas station, someone he recognized from the neighborhood approached him and warned him about two suspicious men nearby. Gibbons was expected to testify that he pointed out defendant's green Cadillac to the police as the vehicle involved in the shooting of Damon Borden. Investigator Dwight Pearson testified to the same information at trial without objection from the defense.

Considering that McMichael and Gibbons were not expected to present evidence favorable to defendant, and that their testimonies probably would have bolstered the prosecution's case, an instruction that the missing witnesses' testimony would have been unfavorable to the prosecution would have been inappropriate. Furthermore, there is no basis on which we can conclude that an adverse witness instruction would have altered the outcome of this case. Reversal is not warranted. See *Id.*

## II.

Defendant also argues that he was entitled to a mistrial because Sergeant Matthew Gnatek, the officer-in-charge, referenced a polygraph test during examination. We review the grant or denial of a motion for a mistrial for an abuse of discretion. *People v Wells*, 238 Mich

App 383, 390; 605 NW2d 374 (1999). “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.” *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (internal citations omitted). When deciding whether a trial court abused its discretion in denying a mistrial when a witness has mentioned a polygraph, the reviewing court should consider: (1) whether the defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness’s credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

During direct examination, while discussing the contact that he had with defendant, Sergeant Gnatek stated, “I had some prior contact with him. Earlier that day I was supposed to take him for a polygraph.” Based on the context of Sergeant Gnatek’s statement, it appears that he referenced the polygraph test inadvertently. After the reference was made, defense counsel immediately moved to strike the reference from the record. The court granted the motion to strike and instructed the jury to disregard Sergeant Gnatek’s answer. Sergeant Gnatek did not mention the polygraph again, and it appears that no one else mentioned the polygraph. Additionally, the statement did not address whether a polygraph was ever actually administered, or if so what the results were; it only showed that Sergeant Gnatek was supposed to take defendant for a polygraph. Furthermore, during jury instructions the court instructed the jury “not to speculate about whether [defendant] had such polygraph examination.”

This Court has previously found that “not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.” *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007) (internal quotations omitted). While answering the prosecutor’s question, Sergeant Gnatek referenced the polygraph in context to the line of questioning. The mention of the polygraph was a volunteered response to a proper question and such “brief incidental mention did not warrant a mistrial.” *Griffin, supra*, p 37. In light of the considerations set forth in *Ortiz-Kehoe, supra*, p 514, and the trial court’s curative instructions to the jury, we hold that the trial court did not abuse its discretion in denying defendant’s request for a mistrial.

### III.

Defendant further argues that the cumulative effect of improper statements made by the prosecutor denied him a fair trial. Because defendant did not object to the comments at the time they were made, we review defendant’s unpreserved claim for plain error affecting his substantial rights, and will reverse only if the “error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant’s innocence.” *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Issues of prosecutorial misconduct are considered “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of the defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the

evidence and any reasonable inferences that may arise from the evidence.” *Ackerman, supra*, p 450. The “propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

During closing argument the prosecutor made several statements about the police, including using a metaphor that the police “like sharks, they did their job. They smelled blood.” Defendant argues that the statements were improper because they bolstered the credibility of the officers and appealed to the emotions of the jury. We disagree.

The statements at issue were proper because the evidence supported them. The prosecution presented evidence showing that while the police investigated Borden’s murder on Seward Street, a green Cadillac drove by. Two witnesses then pointed out to the police that the green Cadillac was the vehicle involved in Borden’s shooting. Based on the vehicle’s identification, Officer Gerald Thomas and Investigator Pearson instructed another officer to stop the green Cadillac and investigate it. The investigation of the green Cadillac led the police to defendant. While defendant was in police custody, Investigator Pearson was informed that the green Cadillac was also connected to Drains’ shooting. The evidence further showed that defendant made several statements regarding the shootings at issue, which he later changed. Defendant first denied knowing anything about the shootings and claimed that he had loaned his car to Jonathan Elliot and Joseph Hollaway around the time of the shootings. Defendant later changed his statement, however, and admitted that he was driving with Elliot and Holloway as his passengers at the time of the shootings, but had been forced to drive them around against his will.

Even though the prosecutor used the words “sharks” and “blood” when discussing the police and their activities when investigating the involvement of defendant, the use of these words was not improper. Although a prosecutor may not appeal to a juror’s sympathy, a prosecutor may use emotional language during closing argument. *Ackerman, supra*, p 454; *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Prosecutors may also “use ‘hard language’ when it is supported by evidence and [they] are not required to phrase arguments in the blandest of all possible terms.” *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). The evidence supported the statements at issue, and therefore, defendant has failed to show prosecutorial misconduct.

Defendant further argues that the prosecutor made several improper religious references. Defendant takes issue with the following statements: “you heard about - - you heard - - because of the grace of God Clinton Drains survived his injuries,” and “the Lord works in mysterious ways.” The comment referring to Drains surviving his injuries by the “grace of God” was not improper. The comment was made to show the jury that despite being shot several times, which included being shot in the head, Drains survived his injuries. This evidence was pertinent to supporting defendant’s charge of assault with intent to murder. MCL 750.83. The prosecutor’s statement that the “Lord works in mysterious ways,” referred to the way in which defendant was apprehended. Because defendant was driving around in his green Cadillac in the Seward Street area at the same time witnesses were giving their statements to the police about the green Cadillac’s involvement in Borden’s shooting, the police were able to apprehend defendant and connect him to the shootings at issue. Even if the prosecutor’s statement crossed the line, any minimal prejudice was cured by the trial court’s instructions that the jury had to decide the case

based on the evidence and that the remarks of counsel were not evidence. See *Thomas, supra*, p 456.

Defendant argues that the cumulative effect of these instances of alleged prosecutorial misconduct requires reversal. “The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal.” *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). However, reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* Since no errors were found, “there are no errors that can aggregate to deny defendant a fair trial.” *Ackerman, supra*, p 454.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Stephen L. Borrello

/s/ Jane M. Beckering