

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL CURRIE BRIDGES,

Defendant-Appellant.

UNPUBLISHED

May 7, 2009

No. 279518

Wayne Circuit Court

LC No. 07-003318-01

Before: Gleicher, P.J., and K.F. Kelly and Murray, JJ.

PER CURIAM.

A jury convicted defendant of two counts of 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. The trial court sentenced defendant to concurrent prison terms of 35 to 55 years for each murder conviction, and 2-1/2 to 5 years for the felon-in-possession conviction, to be served consecutively with a two-year term of imprisonment imposed for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a September 2005 shooting at an illegal after-hours club known as "The Candy Store," located on East Canfield Street in Detroit. The shooting resulted in the deaths of Rodney Perry, the club owner, and patron Katrina Harper, and multiple bullet wounds to several other club patrons.

I. Jury Instructions

Defendant first asserts that the trial court erred by denying his request to instruct the jury on potential causes of the victims' deaths in accordance with CJI2d 16.15. This Court reviews jury instructions as a whole to determine if error requiring reversal exists. *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). We review de novo any jury instruction issues that involve questions of law, but review for an abuse of discretion a trial court's decision whether an instruction applies to the facts of the case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Jury instructions must encompass all elements of the charged offense and must not exclude any material issues, defenses, and theories that have evidentiary support. *Wess, supra* at 243. Even if somewhat imperfect, the instructions do not qualify as erroneous if they fairly present the issues to be tried and sufficiently protect the defendant's rights. *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007).

The instruction sought by defendant in this case, CJI2d 16.15, provides as follows:

[There may be more than one cause of death.] It is not enough that the defendant's act made it possible for the death to occur. In order to find that the death of [*name deceased*] was caused by the defendant, you must find beyond a reasonable doubt that the death was the natural or necessary result of the defendant's act.

The use notes for this instruction explain that it applies “where there is an issue as to whether an act of the defendant caused death, or whether death was caused by some intervening cause.”

Defendant maintains that the trial court should have read the jury CJI2d 16.15 because the evidence reveals that other persons fired guns inside the club, thus making it possible that bullets fired by someone else killed the two decedents. Some evidence at trial, together with a January 10, 2009 Michigan State Police (MSP) laboratory report reexamining the voluminous firearm-related evidence, did establish that at least two other guns were fired inside the club. The recent MSP report concludes that the two fired bullets removed from the decedents' bodies “are consistent with being .22 Class jacketed (.222/.223/5.45mm caliber) fired boat-tail bullets,” the same caliber previously identified at trial. The MSP report did not positively link the two bullets removed from the decedents as fired from the same weapon, as did the prior firearm evidence examiner, Detroit Police Department Officer Kevin Reed. But nothing in the MSP specialist's examination tended to undermine Officer Reed's trial testimony that the .22-caliber class of bullets can possibly be fired from several models of assault rifles, and are not compatible with handguns that could have fired the other caliber of casings and bullets the police found, i.e., .38-caliber and .45-caliber. And the medical examiner testified at trial that with respect to the extensive damage he observed in one decedent's body, “it would be more likely to be a high velocity weapon than a handgun.” Two witnesses wounded in the shooting described at trial that they saw defendant holding an “AK-47,” or a “long” gun, but no witnesses saw any other individual inside the club shooting with an assault weapon.

In summary, no evidence suggested that there could have been more than one cause of the decedents' deaths. The trial court instructed the jury that to convict defendant it must find beyond a reasonable doubt that he “was the person who committed [the crimes].” Because the record contains no evidence suggesting more than one cause of the decedents' deaths, we find that the trial court's instruction sufficiently protected defendant's rights. The trial court did not abuse its discretion in finding CJI2d 16.15 inapplicable under the circumstances of this case.

II. Sufficiency of the Evidence

Defendant additionally contends that the evidence did not suffice to support his second-degree murder convictions. In reviewing a challenge to the sufficiency of the evidence, this Court reviews the evidence the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000); *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict,” irrespective “whether the evidence is direct or circumstantial.” *Nowack, supra* at 400.

A conviction of second-degree murder requires proof that the defendant caused the victim's death, and that the defendant acted with malice and without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Malice exists when "the killing was done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v Abraham*, 256 Mich App 265, 269-270; 662 NW2d 836 (2003) (internal quotation omitted).

Defendant here disputes that the evidence sufficiently proved his identity as the person who caused the two victims' deaths. Club patron and shooting victim Rakeya Hall testified that on the early morning of the shooting she saw defendant playing dice in the club's basement, later noticed him running out of the club, and shortly thereafter heard and saw rapid-fire shooting commence from outside, causing bullets to enter the club through its walls and door. Another shooting victim, Lynda Polk, testified that she watched defendant enter the club's door while firing an assault rifle. Hall recounted that after the shooting from outside had ceased, she observed defendant standing near the club's entrance holding an assault rifle, and that she heard him announce, "You think this shit is a fucking game?"¹

No witness actually saw defendant fire the assault rifle precisely when any of the victims endured their gunshot wounds. However, given the agreement of several witnesses that gunshots entered the club from outside, shortly after Hall had observed defendant running outside, circumstantial evidence supported a reasonable inference that defendant was the person who fired the assault rifle into the club from outside; and Polk's testimony supplied direct evidence that defendant had fired into the club. Although some evidence proved the presence of other gunfire inside the club, the record contains no evidence that an individual other than defendant possessed an assault rifle. And as we have addressed, the evidence established that the .22-caliber class of bullets that killed the decedents can possibly be fired from several models of assault rifles, and are not compatible with handguns that might have fired the other caliber of casings and bullets the police found. Viewed in the light most favorable to the prosecution, ample evidence supported the jury's finding beyond a reasonable doubt that defendant caused the decedents' deaths.

III. Challenged Conduct of the Prosecutor

Defendant next argues that several instances of prosecutorial misconduct denied him a fair trial.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in

¹ Two other shooting victims similarly recalled that gunshots had entered the club from outside, and one of the victims also believed that some people inside the club had shot toward the outside.

light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

“[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Although the trial court characterized the prosecutor as “a little out of order” when he interrupted defense counsel’s cross-examination of Aissa Hamilton and accused counsel of “throwing . . . whatever you want out there,” the court rebuked the prosecutor and permitted defense counsel to continue his line of cross-examination. The prosecutor’s objection thus did not deprive defendant of a fair trial.

Defendant also submits that the prosecutor improperly labeled tapes of recorded jailhouse telephone conversations with titles that the prosecutor made up. Defendant fails to explain how he endured prejudice from the labeling of the tapes, and moreover, the prosecutor agreed to relabel the tapes by number. We detect no basis for finding that the prosecutor’s labeling of the tapes had any adverse effect on defendant’s right to a fair trial.

With respect to the prosecutor’s challenged closing argument that the content of defendant’s recorded telephone calls showed that he was “the kind of person that would commit this horrific act,” we find no impropriety. The prosecutor made the characterization in the context of arguing that defendant acted with premeditation, a requisite element of the charged first-degree murder counts. Our review of the record reflects that the prosecutor properly commented on the evidence and the reasonable inferences arising therefrom when he suggested that defendant had the capacity to commit the charged offenses. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Moreover, the jury’s acquittal of defendant with respect to the first-degree murder charges renders apparent that the prosecutor’s comment did not improperly influence the jury.

Defendant complains that the prosecutor improperly commented on the absence of defendant’s testimony at trial. However, given defense counsel’s mention in his opening statement that defendant intended “to get on the stand and tell you everything because . . . he wants you to know what really happened that night,” it did not qualify as improper for the prosecutor to comment on defendant’s failure to deliver this promised testimony. *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005) (observing that “[i]t is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely”) (internal quotation omitted). To the extent that the prosecutor’s remarks could be interpreted as an improper comment on defendant’s right not to testify, the trial court cured any potential prejudice when it immediately cautioned the jury that “every Defendant has a right not to testify and the fact that the Defendant did not testify in this case must not enter into your deliberations in any way.” *Bahoda*, *supra* at 281.

Defendant additionally alleges impropriety arising from a portion of the prosecutor’s closing argument in which he made reference to the recorded telephone calls, then remarked, “Why is he—if he’s not involved in this case, if he’s not the shooter, why is he keeping these people from coming to court? Is it possible because they gave a statement to the police?” The

prosecutor's remarks about defendant's purpose in attempting to keep witnesses from appearing in court constituted proper commentary on the evidence and the reasonable inferences arising therefrom, and thus were not improper. *Bahoda, supra* at 282.

Defendant further avers that the prosecutor improperly sought to prevent defense counsel from commenting on the fact that additional charges had been dismissed in the course of trial. When the prosecutor queried, "[W]hat is going on here? Are we going to follow the rules[.]" the trial court overruled this objection and allowed defense counsel to continue his argument. Accordingly, no basis exists for concluding that the prosecutor's conduct denied defendant a fair trial.

Defendant lastly challenges as improper denigration of the defense and inappropriate commentary on his right to remain silent the prosecutor's rebuttal argument remarks commenting on the defense failure to present evidence as promised during defense counsel's opening statement. Our review of the record reflects that the prosecutor made no inappropriate contentions, but once again properly noted the defense's failure to produce evidence on which it had sought to rely. *McGhee, supra* at 634.

In summary, no prosecutorial misconduct occurred that deprived defendant of a fair trial.

IV. Defendant's Supplemental Brief

Defendant also asserts in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-4, Standard 4, that his trial counsel was ineffective for failing to call expert witnesses in the areas of eyewitness identification testimony and gunshot particle evidence. Because defendant did not raise these complaints in a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, the defendant bears the burden of showing "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997) (internal quotation omitted). The decision whether to call an expert witness falls within the realm of trial strategy, "for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant did not dispute his presence at the club on the night of the shooting. Of the four shooting victims who testified at trial, Hamilton testified that it was very dark, and neither she nor William Daniels could identify defendant at all. Hall testified that she saw defendant holding a gun, but did not see him shoot. It appears highly unlikely that an expert on eyewitness identifications would have aided in discrediting Hall's identification testimony in light of the facts that she had known defendant from the neighborhood and elsewhere for many years, well enough to know his real name, and she had seen defendant shoot a friend of hers the previous

week.² With respect to Polk, the only witness who testified that she saw defendant shooting, defense counsel discredited her testimony by eliciting that she claimed to have chosen two people in a photo showup, and that no evidence corroborated that a showup ever took place. On this record, we conclude that defense counsel reasonably determined that he did not need to call an identification expert to aid the defense.

Defendant has also failed to demonstrate the need for a defense expert on particle evidence. The police detected gun residue on a jacket that they seized, but defendant never admitted that he owned or had worn the jacket. More importantly, defense counsel successfully undermined the significance of the gunshot residue evidence through his cross-examination of the forensic chemist. Defense counsel elicited from the chemist that (1) a gun emits more than a million particles when fired, but that only 10 particles were found on the jacket, (2) it was possible that anyone standing in a room where a weapon was fired would have residue on them, and (3) he could not tell how long the residue had been on the jacket, and that the residue did not establish that the person wearing the jacket had fired a gun. Defense counsel also elicited that the police had asked the laboratory to test residue swabs taken from the hands of one of the decedents and from other persons present in the club at the time of the shooting, but that those samples were never tested because the prosecutor advised the lab that the testing was “no longer needed.” Because defense counsel successfully minimized the significance of the gunshot residue found on the jacket through his cross-examination, his failure to secure a defense expert on particle evidence did not render the outcome of the trial unreliable or otherwise prejudice the defense. *Mitchell, supra* at 156.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Christopher M. Murray

² Hall’s possible motive in identifying defendant, rather than her ability to identify him, was primarily at issue, and defense counsel cross-examined Hall concerning her potential bias against defendant. An identification expert would not have been relevant to the issue of motive.