

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KENNY WILSON,

Defendant-Appellant.

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UNPUBLISHED  
February 23, 2006

No. 257727  
Wayne Circuit Court  
LC No. 04-005602-01

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant was convicted of second-degree murder, MCL 750.317, following a jury trial. He was sentenced to 20 to 40 years in prison. Defendant appeals as of right. We affirm.

Defendant's first argument on appeal is that there was insufficient evidence to support his conviction; therefore, the trial court erred in denying the motion for directed verdict. We disagree.

This Court reviews insufficiency of the evidence claims de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court reviews the evidence presented in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). This Court must afford deference to the jury's special opportunity and ability to determine the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992).

The elements of second-degree murder are: (1) a death, (2) caused by the defendant's act, (3) with malice, and (4) without justification. *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003). Malice requires an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result. *People v Abraham*, 256 Mich App 265, 269-270; 662 NW2d 836 (2003).

Here, evidence was presented that defendant held a grudge against the victim. Deidra Todd (Todd) testified that she saw two men approach the victim, subsequently saw flashes, heard

gunshots, saw an armed defendant and an accomplice flee the scene, and later picked defendant out of a group of over 50 photographs that Sergeant John Jenkins showed her. Todd was able to get a clear look at defendant as he fled, and she had seen him before and recognized him, although she did not know his name. There was additional evidence that two assailants were involved in the crime and fled the scene. Dr. Francisco Diaz, who was stipulated to as an expert in forensic pathology, testified that multiple gunshot wounds were the cause of the victim's death. Furthermore, defendant never came forward after he knew there was a warrant out for his arrest, and there was evidence suggesting flight. Therefore, a rational trier of fact could reasonably infer that defendant shot and killed the victim. Thus, a rational trier of fact could conclude that defendant committed second-degree murder.

Defendant argues that there was insufficient evidence to establish second-degree murder because defense witnesses established an alibi defense and the shell casings found at the scene were possibly inconsistent with Todd's description of defendant's gun. However, the alibi testimony was inconsistent because Tonya Harden testified that defendant went to Minnesota in March, and Simone Taylor, who was defendant's girlfriend, testified that defendant never went to Minnesota in March. Furthermore, Todd's description of the gun was vague by her own admission as she knew little about guns. Officer Frank Horan testified that the handgun that fired the spent casings could have met Todd's description of an 18 inch gun, and, most importantly, the jury chose to disregard the alibi defense as unbelievable and chose to believe Todd's testimony. This Court must afford deference to the jury's special opportunity and ability to determine the credibility of witnesses. *Wolfe, supra* at 514-515. Therefore, we conclude that, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have concluded that the elements of second-degree murder were proven beyond a reasonable doubt. The court did not err in denying the motion for directed verdict.

Defendant's second argument on appeal is that the prosecutor engaged in misconduct that deprived defendant of his right to a fair and impartial trial. We disagree.

Defendant failed to question either claimed instance of prosecutorial misconduct at trial on the same ground that he raises on appeal, and thus, has failed to properly preserve either claim for appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999); *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Generally, a claim of prosecutorial misconduct is evaluated on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). However, when a claim of prosecutorial misconduct is not objected to at trial, it is reviewed for plain error which affected the defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings regardless of the defendant's innocence. *Id.* at 454.

A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice, supra* at 438. A prosecutor may not argue facts not in evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Reversal is not warranted for a prosecutor's good faith statement that certain evidence will be presented at trial if that evidence is later not admitted, unless the failure to prove the allegations contained in the opening statement resulted in prejudice to the defendant. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

Defendant's claim, that he was denied his right to a fair and impartial trial when the prosecutor stated that Todd was scared to testify and was threatened by defendant's family, fails. Threats against a witness are generally admissible to show the effect of the threats on a witness' testimony or to explain a witness' prior inconsistent statement. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983). Here, even though the prosecutor never brought forth evidence that Todd was threatened, defendant failed to establish that the prosecutor acted in bad faith when she stated that she was going to bring forth evidence of threats made against Todd. There is no misconduct reflected in the record. Furthermore, the trial judge properly instructed the jury that it was to determine the case based on the evidence presented and that the statements made by the prosecutor and defense counsel were not evidence. Therefore, we find a lack of prejudice. Moreover, Todd testified that she saw an armed defendant fleeing the area where the victim was killed, immediately after Todd had seen flares and heard gunshots. The prosecutor's comments in this regard did not deny defendant his right to a fair and impartial trial, let alone amount to plain error. Reversal is unwarranted.

Furthermore, defendant's claim, that the prosecutor's reference to "Michigan's Most Wanted" denied him a fair and impartial trial, likewise fails. The prosecutor made the reference in the middle of an attempt to elicit testimony from Taylor regarding when she found out about the outstanding warrant for defendant's arrest and when she subsequently informed defendant about the outstanding warrant for his arrest. The reference was part of a leading question made in response to Taylor's previous response that she found out about the outstanding warrant on a television show. Though it is irrelevant which television show informed Taylor that there was an outstanding warrant for defendant's arrest, the specific mentioning of "Michigan's Most Wanted" was not prejudicial to defendant. The jury already knew that defendant was a murder suspect because it was in the process of determining defendant's guilt or innocence on murder charges, and therefore, the fact that the jury knew defendant was on "Michigan's Most Wanted" was not prejudicial. Furthermore, given Todd's testimony that she saw an armed defendant fleeing the area where the victim was killed, immediately after Todd had seen flares and heard gunshots, and considering the fact that the trial judge properly instructed the jury that the prosecutor's comments and questions were not to be considered as evidence, we conclude that the aforementioned prosecutorial reference to "Michigan's Most Wanted" did not deny defendant his right to a fair and impartial trial, let alone amount to plain error that affected defendant's substantial rights. Thus, we conclude that the prosecutor's actions in this regard do not amount to prosecutorial misconduct.

Defendant's third argument on appeal is that the trial court abused its discretion when it determined that the facts supported a flight instruction. We disagree. When reviewing a trial court's determination whether a jury instruction was applicable to the facts of the case, this Court reviews for an abuse of discretion. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *Id.* at 57. A trial court must clearly present the case to the jurors and instruct them on the applicable law. *Id.* at 51. Jury instructions must therefore include all the elements of the charged offenses and any material issues, defenses, and theories which are supported by the evidence. *Id.* Jury instructions are reviewed in their entirety. *People v Holt*, 207 Mich App

113, 116; 523 NW2d 856 (1994). There is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly represented to the jury the issues to be tried. *Id.*

In Michigan, it is well established that evidence of flight is admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight itself is not sufficient to sustain a conviction. *Id.* A flight instruction can be supported by evidence that a defendant fled the scene itself, ran from the police, resisted arrest, attempted to escape custody, or left the state or jurisdiction. *Id.* However, mere departure from a crime scene is insufficient to support a jury instruction on flight. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989) (evidence that the defendant walked away from the crime scene was insufficient to support a flight instruction).

Here, evidence was presented that defendant was in Minnesota after the crime was committed, remained in Minnesota for some time after discovering that there was a warrant out for his arrest in Michigan, and never turned himself in when he finally returned to Michigan. Furthermore, eyewitness Todd testified that she saw an armed defendant running away from the crime scene. Therefore, we conclude that the trial court did not abuse its discretion when it determined that a flight instruction was supported by the facts of this case. Moreover, the trial court gave the proper flight instruction. CJI2d 4.4. Thus, the trial court did not commit error when it gave the flight instruction.

Defendant's final argument on appeal is that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to object to the prosecution's reference to "Michigan's Most Wanted." We disagree.

Defendant failed to properly preserve this issue by making a motion for a new trial or requesting an evidentiary hearing. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law, which this Court reviews, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was deficient, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Counsel's performance must not be judged with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Here, as discussed above, the prosecutor's isolated reference to "Michigan's Most Wanted" was not prejudicial and did not deny defendant a fair trial. Any objection to the prosecutor's aforementioned reference would have been futile. Counsel's performance was not

deficient. Given Todd's testimony as discussed above and the harmless nature of the reference, the results of the proceedings would not have been any different if defense counsel would have objected to the reference.

Affirmed.

/s/ Pat M. Donofrio  
/s/ William B. Murphy  
/s/ Kirsten Frank Kelly