STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED EARL OWENS, JR.,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 195521
Oakland Circuit Court
LC No. 95-138234

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), second-degree murder, MCL 750.317; MSA 28.549, assault with intent to murder, MCL 750.83; MSA 28.278, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to mandatory life imprisonment for the first-degree murder conviction. The trial court also imposed life sentences for defendant's second-degree murder and assault convictions, and two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the admission of evidence regarding the circumstances of his arrest. Specifically, defendant sought to exclude evidence of his flight to Nashville, Tennessee, and his arrest by FBI agents after a five hour standoff involving over a hundred agents and police officers during which defendant yelled obscenities and made threats. Defendant argues that the trial court abused its discretion in admitting this evidence without balancing its prejudicial impact against its probative value. We disagree.

It is "well-established in Michigan law that evidence of flight is admissible" although, by itself, it is insufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Such evidence is considered probative because it "may indicate consciousness of guilt." *Id*. Evidence of flight includes "fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *Id*. Evidence of flight may be excluded under MRE 403 if

its probative value is substantially outweighed by the danger of unfair prejudice. *People v Cutchall*, 200 Mich App 396, 398-401; 504 NW2d 666 (1993).

In this case, the challenged evidence related to defendant's flight and his attempt to resist arrest. *Coleman*, 210 Mich App at 608. The evidence was probative of defendant's consciousness of guilt, especially in light of the fact that defendant presented an alibi defense at trial. See *Cutchall*, 200 Mich App at 400-401. The evidence's probative value was not substantially outweighed by the danger of unfair prejudice and, therefore, MRE 403 does not require its exclusion. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995). The trial court did not abuse its discretion in admitting it, even if it did not discuss MRE 403 on the record. See *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992) (misidentification of grounds for admission not reversible error).

Next, defendant argues that several instances of prosecutorial misconduct denied him a fair trial. We again disagree.

Any error that occurred when the prosecutor commented to the jury that they should feel "chilled to the bone" by having been seated so close to defendant during the trial was cured when the trial court immediately instructed the jury to disregard the remark. This comment did not have the effect of depriving defendant of a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).

Defendant also alleges that the prosecutor improperly denigrated defense counsel, suggested that defense counsel was attempting to mislead the jury, made an impermissible civic duty argument, commented on defendant's failure to testify, and disobeyed three of the trial court's rulings. In most of these alleged instances of misconduct, defendant failed to preserve the issue by timely objection. Further, after carefully reviewing the record, we find that any potential prejudice could have been cured by a timely instruction and that no manifest injustice will result from our failure to review this issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant's claim that he was deprived of a fair trial by the cumulative effect of the prosecutors misconduct is similarly without merit. *People v Bahoda*, 448 Mich 261, 292-293 n 64; 531 NW2d 659 (1995).

Defendant argues that the jury's verdict was against the great weight of the evidence. We disagree. Defendant failed to preserve this issue by moving for a new trial. *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991). Further, although there were some questions raised regarding the credibility of the prosecution's star witness, his testimony was not so lacking in credibility as to justify setting aside the jury's verdict. See *People v Herbert*, 444 Mich 466, 474-477; 511 NW2d 654 (1993).

Finally, defendant argues that his constitutional right to testify was chilled when the prosecutor decided to subpoena defendant during the course of trial. We disagree. First, defendant did not raise this issue before the trial court. Appellate courts will consider claims of constitutional error for the first time on appeal when the alleged error could have been decisive of the outcome. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Second, defendant has provided no support for his assertion

that his decision not to testify was caused by the subpoena. Third, defendant has provided no evidence that the subpoena "stemmed from the same alleged set of operative facts" as this case. Fourth, to the extent that defendant argues that the subpoena prevented him from calling his associates as witnesses, this issue was not preserved by including it within the statement of questions presented. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Finally, any error could not have been decisive of the outcome given the overwhelming evidence of defendant's guilt. *Grant*, *supra*, p 547.

Affirmed.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor