STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUAN LEE JORDAN,

Defendant-Appellant.

UNPUBLISHED
October 28, 1997

No. 192284
Ingham Circuit Court
LC No. 95-068820-FC

Before: Kelly, P.J., and Reilly and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of armed robbery, MCL 750.529; MSA 28.797, two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), felonious assault, MCL 750.82; MSA 28.277, and felon in possession of a weapon, MCL 750.224f; MSA 28.421(6). Defendant was sentenced to two concurrent two-year terms of imprisonment for the felony-firearm convictions, to be followed by concurrent terms of fifteen to forty years for the conviction of armed robbery, thirty-two to forty-eight months for the conviction of felonious assault, and forty to sixty months for the conviction of felon in possession of a weapon. We affirm.

This case arises out of an armed robbery that occurred at a Taco Bell restaurant in the City of Lansing on November 21, 1994 at approximately 6:45 p.m. Several witnesses identified defendant as the gunman. Moreover, defendant's accomplice, Joel Torres, testified that he and defendant were involved in the armed robbery and Torres also identified defendant as the man who shot the gun during the robbery. Defendant maintained that he was not present and that he was not a participant in the robbery. In this regard, defendant produced alibi witnesses at trial.

I

Defendant first argues that the trial court denied him due process of law in denying his motion for a new trial on the basis of newly discovered evidence. Before a new trial on the basis of newly discovered evidence is warranted, a defendant must demonstrate that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) probably would have caused a different result,

and (4) was not discoverable and producible at trial with reasonable diligence. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *Id.*, p 47.

The trial court ruled that the evidence could have been produced if there had been reasonable efforts and diligence exercised before trial, that the evidence was merely cumulative, and that the evidence would not produce a different result on retrial. We find no abuse of discretion in this ruling. The evidence concerned a journal entry by Sara Elizabeth Jester, a friend of defendant. Jester testified at trial that she went to defendant's mother's house at approximately 6:00 p.m. on the night of the robbery. She testified that she remained at the house for about 1 ½ hours and that defendant was at the house the entire time. She also testified that she was sure about the date and time because she had recorded the information in her journal, although she had lost her journal after she left it in a friend's car. The journal entry was then produced after trial on a piece of notebook paper.

In this case, even if the evidence was newly discovered, the trial court correctly ruled that the evidence was merely cumulative, that the evidence could have been discovered before trial with reasonable diligence, and the evidence would not have resulted in a different result on retrial. Jester testified that she was with defendant during the time of the robbery, thus the evidence was before the jury and the journal entry was properly classified as merely cumulative by the trial court. Jester claimed that she found the journal entry in late December of 1995 or early January of 1996. The trial occurred in late November of 1995. Although the prosecutor attacked the existence of the journal and Jester's claim that the journal corroborated her testimony, the journal would not have likely bolstered Jester's credibility since the journal entry was written on a piece of loose-leaf notebook paper. The journal entry could easily have been fabricated and attacked as such by the prosecutor. Moreover, in considering the numerous witnesses who identified defendant as the gunman, including defendant's accomplice, we agree with the trial court that the evidence would not have caused a different result.

II

Defendant next argues that he was denied due process by the trial court's failure to order the production of a res gestae witness as requested by defendant. We initially note that this issue has not been properly preserved for appellate review. Defendant did not object at trial or move for a postjudgment evidentiary hearing or new trial on this basis. In other words, defendant did not request the production of res gestae witnesses. Therefore, this issue has been forfeited for appellate review. See *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989).

Moreover, there is no "plain error" here. The prosecutor did not violate the statutory dictates of MCL 767.40a; MSA 28.980(1). The prosecutor's initial list of witnesses included thirty-six individuals, most of whom were res gestae witnesses. The prosecutor's amended list of trial witnesses included eighteen individuals, all of whom were called at trial. At trial, defense counsel attempted to elicit the description of the gunman from a police officer as provided by several witnesses who were not called at trial. The prosecutor objected on the grounds of hearsay, and the trial court sustained the prosecutor's objection. However, defense counsel was able to elicit from the officer that there were some inconsistencies in the witnesses' description of the gunman. Later, defense counsel argued that the

statements of the witnesses should be admitted under MRE 803, but the trial court disagreed. Counsel then stated that he would have to subpoena three or four additional witnesses listed on the police reports. The prosecutor stated that she had no objection to any witness that the defense wished to call. No further mention is made of the witnesses in the record.

At no time did defense counsel request reasonable assistance from the prosecutor to locate and serve process upon a witness. See MCL 767.40a(5); MSA 28.980(1)(5). Further, defendant cannot complain that he was not given the names of all res gestae witnesses because the prosecutor clearly provided the list before trial. Further, the prosecutor called all witnesses listed on the amended witness list at trial. On this record, we conclude that there is no statutory violation, and, therefore, no plain error. Defendant's failure to request the production of the res gestae witnesses leads to the conclusion that the issue has been waived.

To the extent that defendant also argues that he was denied the effective assistance of counsel for failure to re-request the attendance of the "missing" witnesses, we find that the issue is not properly presented or preserved. First, this issue is not stated in the statement of questions presented. MCR 7.212(C)(5); *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Second, this issue has not been preserved through a motion for new trial, nor was an evidentiary hearing on this basis held below. Thus, our review is limited strictly to the record. *People v Barclay,* 208 Mich App 670, 672; 528 NW2d 842 (1995). We cannot conclude that defendant was denied the effective assistance of counsel based on the record before us because counsel did elicit testimony from the police officer that there were inconsistencies in the witnesses' statements concerning the gunman's physical appearance. Therefore, defendant has failed to show that he was prejudiced by counsel's performance in this regard. *People v Pickens,* 446 Mich 298, 314; 521 NW2d 797 (1994).

III

Defendant next argues that the trial court denied him a fair trial and committed error requiring reversal when it ruled that the prosecutor could impeach one of defendant's alibi witnesses with a 1986 conviction for armed robbery. We review this issue for an abuse of discretion. *People v Cross*, 202 Mich App 138, 147; 508 NW2d 144 (1993).

Tony Powell, Jester's boyfriend, was listed as an alibi witness. Powell would have testified consistently with Jester that they were at defendant's mother's house during the time of the armed robbery and that defendant was with them. The prosecutor wanted to impeach Powell with his armed robbery conviction. Powell stated, outside the presence of the jury, that he was convicted of armed robbery on January 23, 1986, and that he was discharged from parole on March 30, 1994. In light of the trial court's decision to allow the prosecutor to impeach Powell with the armed robbery conviction, defendant elected not to call Powell as an alibi witness.

A witness' credibility may be impeached with evidence of prior convictions, MCL 600.2159; MSA 27A.2159, if the convictions satisfy the criteria set forth in MRE 609. In this case, Powell's conviction is for armed robbery. The trial court determined that armed robbery

contains an element of theft and is punishable by imprisonment in excess of one year. MRE 609(a)(2). Further, the trial court determined that the conviction had significant probative value on the issue of Powell's credibility. Although the conviction was nine years old at the time of trial, Powell had been on parole status until March 1994, just eight months before the present armed robbery.

We find no abuse of discretion in the trial court's ruling. Armed robbery contains an element of theft, but has a lower probative value on the issue of credibility that would other theft crimes. *People v Allen*, 429 Mich 558, 611; 420 NW2d 499 (1988). However, the recentness of the conviction and the witness' parole status heightens the probative value of the evidence. *Id.* Although the crimes involved were the same, defendant presented other alibi witnesses, and the trial court's ruling was not one involving the *defendant's* decision to testify. Since the trial court merely had to determine whether the evidence had significant probative value with respect to the issue of credibility, MRE 609(a)(2)(B), we find no abuse of discretion where the trial court found that armed robbery contains an element of theft and Powell had been on parole as recently as eight months before the present armed robbery occurred.

IV

Defendant next argues that he was denied his right to cross-examination of Joel Torres when the trial court did not permit defendant to ask Torres how much prison time he was avoiding by his agreement with the prosecutor in exchange for the testimony.

During the direct examination of Torres, the prosecutor elicited testimony that Torres was charged with armed robbery and felony-firearm for his participation in the present armed robbery. The prosecutor also elicited testimony that Torres was allowed to plead guilty to a charge of assault with intent to rob while armed in exchange for his truthful testimony. The prosecutor also elicited testimony that Torres, as part of the plea bargain, was given a sentence cap of one year in the county jail and five years' probation. During defense counsel's cross-examination of Torres, the following colloquy occurred:

> Q. You entered into a plea agreement with the prosecution in exchange for your testimony against my client, is that right?
>
> A. That's correct.
>
> Q. And as a result of that plea agreement, you avoided going to prison, isn't that true?
>
> A. Yes.
>
> Q. You could have gone to prison for a good number of years, couldn't you, as a result of this?
>
> [THE PROSECUTOR]: Objection, Your Honor.
>
> THE COURT: Sustained.

[DEFENSE COUNSEL]: It goes to bias.

THE COURT: Be very careful where you go with this.

[DEFENSE COUNSEL]: I will, just –

THE COURT: Counsel.

[DEFENSE COUNSEL]: I understand.

THE COURT: Just be careful. Penalty is not an issue for the jury to consider.

[DEFENSE COUNSEL]: Only as it relates to his testimony.

THE COURT: I understand that and I'm just cautioning you to be very careful.

[DEFENSE COUNSEL]: I understand, Your Honor.

THE COURT: You may continue.

Q. The question I asked you is you avoided prison for a significant number of years as a result of testifying today, right?

A. I don't know how many but I avoided going to prison.

Defendant contends that he trial court impermissibly limited cross-examination in violation of this Court's ruling in *People v Mumford*, 183 Mich App 149; 455 NW2d 51 (1990). In *Mumford*, this Court held that the trial court abused its discretion in not allowing the defendant to cross-examine the codefendant regarding the sentencing disparity between the offense with which the defendant was charged and the offense to which the codefendant had pleaded guilty. We do not believe that the trial court's ruling in the present case is in violation of *Mumford*. Here, the issue of the accomplice's plea bargain, the crime to which he pleaded guilty, the extent of the bargain, and the exact sentence received were all placed squarely before the jury. Moreover, in response to defense counsel's question that he avoided prison for a significant number of years as a result of the plea bargain, Torres admitted that he avoided going to prison as a result of the plea bargain, but stated that he did not know how many years he actually avoided.

There is no error here. Torres' exact sentence was stated to the jury. Further, Torres himself stated that he did not know how many years of imprisonment he avoided, but that he did avoid going to prison as a result of the plea bargain. Thus, it does not appear that Torres could have stated the sentencing differences since he did not know how many years of imprisonment he had avoided. Unlike *Mumford*, the sentencing consideration was squarely placed before the jury. The trial court did not abuse its discretion or place any unreasonable limit on defendant's right to cross-examine Torres regarding the extent of the plea bargain.

V

Defendant's next argument concerns that of alleged prosecutorial misconduct. Specifically, defendant argues that the prosecutor impermissibly shifted the burden of proof and denigrated defendant by arguing that alibi witnesses had a duty to tell the police of defendant's alibi and by arguing that Jester's journal had "conveniently disappeared."

A

First, defendant argues that the prosecutor impermissibly questioned Jester and Alberta Jordan, defendant's mother, regarding why they did not tell the police or the prosecution that defendant had an alibi defense. This issue is controlled by this Court's recent decision in *People v Phillips*, 217 Mich App 489; 552 NW2d 487 (1996). There, this Court held that the prosecutor is under no obligation to lay any special foundation before attempting to impeach alibi witnesses during cross-examination concerning the failure of the witness to inform the police or the prosecution of the alibi information before trial. *Id.*, p 494. This Court also stated that the credibility of an alibi witness, regarding both the alibi account and the failure to come forward earlier with that account, should not be taken away from the jury through the imposition of any special foundational requirement. *Id.*, p 496. Accordingly, in light of *Phillips*, we hold that the prosecutor did not deny defendant a fair trial when she questioned Jordan and Jester regarding the alibi accounts.

B

Defendant also argues that the prosecutor impermissibly suggested to the jury in closing argument that Jester's journal had "conveniently disappeared." Defendant contends that this statement placed the burden of proving the alibi defense on him.

In reading the prosecutor's argument as a whole and in its proper context, we find no improper conduct. We do not agree with defendant's characterization that this comment shifted the burden of proof. Rather, the prosecutor was arguing the evidence and reasonable inferences from the evidence as it related to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). It was true that Jester's journal was not produced at trial. The prosecutor's comment on the journal was a fair one rising from a reasonable inference from the evidence. Accordingly, we do not find that the prosecutor's statement was error requiring reversal. *Id.*, p 283.

VI

Defendant next argues that he was denied a fair trial when a prosecution witness testified that he had asked a police officer if he could invoke his Fifth Amendment right against self-incrimination.

The witness, Toribio (Tobie) Torres,[1] was sixteen years old at the time of trial. While defendant and Joel Torres committed the robbery at Taco Bell, Tobie and Jimmy Blake[2] remained in a car outside of the restaurant. Outside the presence of the jury, Tobie was called to the witness stand by the prosecutor to have him "put under oath and tell this Court what he intends to do." While on the witness stand, the prosecutor informed Tobie, as she had done before trial, that he would be granted full immunity in the Taco Bell armed robbery. However, he had been involved in other unrelated crimes,

and the prosecutor refused to grant him any immunity in any crimes not related to the present case. Tobie initially told the prosecutor that he would assert his Fifth Amendment right to not testify if he was not given "a full grant of my immunity." The prosecutor refused to grant Tobie any immunity with regard to crimes not involving the Taco Bell armed robbery. At that point, Tobie became belligerent and used profanity. The trial court held him in contempt of court. The trial court then informed Tobie that he was being granted immunity for the events relating to the Taco Bell armed robbery, and that he therefore had no Fifth Amendment right to not testify in this case. Thereafter, Tobie stated that he would testify honestly before the jury.

The jury was then brought into the courtroom and Tobie was examined by the prosecutor. After giving his age and birth date, Tobie agreed that the prosecutor had given him a full grant of immunity with the respect to the Taco Bell armed robbery. In response to the prosecutor's question that he, Joel Torres, Jimmy Blake, and defendant were driving around the Taco Bell on the evening of November 21, 1994, Tobie stated, "I don't remember." The following colloquy then occurred between Tobie and the prosecutor:

> Q. You don't remember. Do you remember talking to Detective Deatrick here about this case?
>
> A. Yes. When I was locked up, he—he wanted me to say that I was the one—he thought I was the one who robbed Taco Bell. That's what I remember.
>
> Q. Were you the one that robbed Taco Bell?
>
> A. No. That's what he insisted. He thought—that's what he thought. That's all I remember.
>
> Q. Do you remember talking to Detective Deatrick on Monday?
>
> A. No, I don't.
>
> Q. Isn't it true that on Monday you told Detective Deatrick that you weren't going to testify today?
>
> A. No, that's not the truth. He told me what they said and I had no response to him. I asked him if I could take the Fifth Amendment, and that's all I said.
>
> [DEFENSE COUNSEL]: Your honor, I would ask for a clarification of what "they" said. The witness indicated that Detective Deatrick told him what "they" said. I'd ask the witness to expound on that, who "they" is.
>
> THE WITNESS: Jimmy Blake and Joel Torres.

Defendant relies upon the rule of law that a lawyer may not knowingly offer inadmissible evidence or call a witness knowing that the witness will claim a valid privilege not to testify. *People v*

Dyer, 425 Mich 572, 576; 390 NW2d 645 (1986); *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977). However, we note that Tobie did not assert his Fifth Amendment right to not testify in his response to the prosecutor's question. Rather, Tobie's response to the prosecutor's question was merely that Tobie asked the detective if he could "take the Fifth Amendment." Defendant contends that Tobie's testimony in this regard was inadmissible, prejudicial, and denied him a fair trial. Defendant further contends that Tobie's testimony implied that he and defendant and the others in the car were guilty of the armed robbery.

We find no error requiring reversal on the record before us. First, defendant did not object to Tobie's testimony in this regard. Thus, the issue had not been preserved for appellate review. Moreover, we do not believe that the rule set forth in *Dyer* and *Giacalone* has been violated in this case. The prosecutor did not call Tobie as a witness knowing that he would claim a valid privilege not to testify. Out of the presence of the jury, Tobie swore under oath that he would testify honestly. Further, and more importantly, Tobie could not claim a *valid* privilege not to testify in this case because he was given immunity for his involvement in the Taco Bell armed robbery. Because he was not faced with prosecution for the present case, Tobie did not have a Fifth Amendment privilege to assert. See *In re Watson*, 293 Mich 263, 274; 291 NW 652 (1940); *In re Cohen*, 295 Mich 748, 751; 295 NW 851 (1940). Finally, the record reveals that there was no Fifth Amendment assertion. Tobie did not assert his Fifth Amendment right to not testify; he merely responded to the prosecutor that he had asked a detective if he could assert the Fifth Amendment privilege at trial.

Accordingly, we do not find any violation of the rule set forth in *Dyer* and *Giacalone*. Defendant was not denied a fair trial due to Tobie's testimony in this regard.[3]

VII

Defendant next argues that the prosecutor and trial court denied him a fair trial by referring repeatedly to the O.J. Simpson trial. Defendant contends that such references were highly prejudicial because he is black and the jurors were all white. Defendant concedes that the prosecutor and trial court were using the O.J. Simpson trial to point out differences between California law and Michigan law, but argues that the "tactic was actually a thinly veiled attempt to inflame the jurors' passions against a black defendant."

We first note that defendant did not object to any of the references to the O.J. Simpson trial, thus, the issue has not been preserved. Further, the record does not support defendant's assertions that the references were a thinly veiled attempt to inflame the jurors' passions against defendant. Taking the prosecutor's comments in context, we do not believe that the comments were intentionally injected with no apparent justification except to arouse prejudice. See *Bahoda*, *supra*, p 266. Rather, the references were used to test the jurors for bias, to identify with the jury in layman's terms, and to inform the jurors that most trials are not conducted in the same manner as such highly publicized trials. There being no evidence that the prosecutor or trial court made any appeals to racial prejudice, we find no error requiring reversal.

VIII

Next, defendant argues that he was denied a fair trial by the false and unprovable suggestion that there were threats against two witnesses who testified against him.

Defendant complains about the testimony given by two witnesses, Helen Taylor and Joel Torres. Taylor testified that a friend told her that defendant admitted to the crime and was laughing about the situation. Taylor also testified that she was frightened about testifying and that her fear was the reason that she had not previously told the police or prosecutor about defendant's involvement in the crime. Taylor also responded affirmatively to the prosecutor's question if Taylor had not previously come forward was that she was afraid that somebody was going to go after her. With respect to Torres, the prosecutor asked if he had received any threats from defendant, and Torres stated that he was not worried about any threats, that he was not fearful of defendant, and that he had heard of the threats.

Generally, a defendant's threat against a witness is admissible because it is conduct that can demonstrate consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). In *Sholl, supra*, p 740, our Supreme Court stated that "it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony produced in the case."

There is no error here. Taylor did not testify that she was threatened by defendant and her testimony did not bring an objection by defendant. Further, the prosecutor's questioning of Taylor in this regard was an attempt to rehabilitate her because defense counsel had attempted to impeach her credibility by asking her if she had talked to the police or the prosecutor before testifying. Torres' remarks are likewise admissible in light of the Supreme Court's ruling in *Sholl* that it is for the jury to determine the significance of a threat in conjunction with its consideration of the other testimony at trial. Defendant's contention that Torres' testimony was irrelevant and that its probative value was substantially outweighed by its prejudicial effect is not preserved because defense counsel only objected to Torres' testimony on the basis that it was hearsay.

IX

As his last issue, defendant argues that he is entitled to resentencing because the prosecutor argued that defendant's claim of innocence was repulsive and the trial court agreed.

At sentencing, defendant asserted that he was "about to do another man's time." The prosecutor responded by stating that for defendant "to stand before this Court and deny his participation in this crime is absolutely repulsive." The trial court, when imposing the sentence, then made the following observation:

> The Court had the advantage of listening to all of the witnesses. I think [the prosecutor's] observations about your proffered defense here today are correct. It is not colorable that the persons that you have pointed the finger at are the persons who committed this crime. The Court is going to reject the prosecutor's request to exceed the guidelines because I think the guidelines take into account all of the factors that had been offered in this case.

Although a trial court may not consider a defendant's failure to admit guilt at sentencing, *People v Calabro*, 166 Mich App 389, 395-396; 419 NW2d 791 (1988), contrary to defendant's assertion, nothing in the trial court's statements reflect that it considered defendant's failure to admit guilt when imposing the sentences. The sentences were well within the sentencing guidelines and a review of the trial court's remarks at sentencing reveal that it considered appropriate factors when sentencing defendant. Defendant is not entitled to resentencing.

Affirmed.

/s/ Michael J. Kelly
/s/ Maureen Pulte Reilly
/s/ Kathleen Jansen

[1] Tobie Torres is Joel Torres' younger brother. It was defendant's theory at trial that Joel testified that defendant was the gunman to protect his younger brother, with defendant claiming that Tobie was the actual gunman.

[2] Jimmy Blake also testified at trial pursuant to a plea agreement. Blake testified much in the same manner as Joel Torres. Blake stated that he drove defendant and Joel Torres, along with Tobie Torres, to Taco Bell. Blake testified that defendant and Joel Torres entered the Taco Bell restaurant, that he heard two or three gunshots, that the two were running to the car after the gunshots, and that Blake drove off after they entered the car.

[3] Defendant's assertion that he was denied his right to cross-examination of Tobie because of Tobie's refusal to testify to anything other than being asleep is particularly unavailing. Defense counsel did cross-examine Tobie, and Tobie admitted to having a nine-millimeter gun when he was arrested after the robbery. Since there was no assertion of the Fifth Amendment right to not testify on Tobie's part, there is no error on the record before us.