# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE L. HARRIS,

Defendant-Appellant.

UNPUBLISHED
December 5, 1997

No. 195515
Recorder's Court
LC No. 95-009583

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Before: Bandstra, P.J., and Cavanagh and Markman, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and 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 and a term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

On appeal, defendant argues that Quinittia Davis' in-court identification was tainted by a pretrial identification procedure that was unduly suggestive and conducted in violation of his right to counsel. Because defendant did not challenge the propriety of Davis' pretrial identification in the trial court, or object to her in-court identification at trial, appellate review of this issue is precluded absent manifest injustice. See *People v Whitfield*, 214 Mich App 348, 351; 543 NW2d 347 (1995). Even if a pretrial identification is improperly conducted, a witness' in-court identification will still be permitted if an independent basis for the identification can be established. *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993), cert den 510 US 1058 (1994).

In the present case, the testimony at trial established that defendant was not a stranger to Quinittia Davis. On the contrary, Davis testified that she knew defendant from the neighborhood and saw defendant on a daily basis and on more than one hundred separate occasions during the months immediately preceding the charged offense. Because Davis' testimony sufficiently established an independent basis for her in-court identification of defendant, we conclude that manifest injustice has not been shown.

We also reject defendant's claim that defense counsel was ineffective for failing to move to suppress Davis' in-court identification. Counsel was not required to argue a frivolous or meritless motion. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant also argues that defense counsel was ineffective for failing to move to suppress Donald Williams' in-court identification. However, this claim is premised on the factual assertion that Williams picked the wrong person out of a police line-up, and was then told by the police to pick defendant. We have reviewed the record and find that it does not factually support defendant's claim. Although the attorney who presided over the line-up testified that it was her impression that Williams had selected someone other than defendant, the attorney never testified that the police told Williams which person to select, nor did she testify that the line-up itself was either unduly suggestive or unfairly conducted. Therefore, defendant's claim is without merit.

Next, defendant maintains that the prosecutor deliberately injected prejudicial insinuations and innuendo during his examination of Quinittia Davis, thereby requiring reversal under the holding of *People v Whalen*, 390 Mich 672; 213 NW2d 116 (1973). We disagree. *Whalen* instructs that it is improper for a prosecutor to deliberately inject prejudicial insinuations or questions regarding irrelevant matters, or to engage in personal attacks of a defense witness. See *id*. at 684-686. A review of the challenged line of questioning reveals that the prosecutor was attempting to elicit testimony from Quinittia Davis, a prosecution witness, regarding a possible motive for the offense. Evidence of motive is always relevant in a murder case. *People v Mihalko*, 306 Mich 356, 361; 10 NW2d 914 (1943). Also, Davis had testified that, upon seeing defendant, she tried to get Tirrell's attention by waving her arms and calling out Tirrell's name. Through his questioning, the prosecutor was carefully attempting to elicit an explanation for this conduct without causing Davis to offer a response that could be considered hearsay. We are satisfied that the prosecutor's questions did not prejudice defendant's right to a fair trial. See *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995).

Next, defendant asserts that the trial court erred in admitting testimony regarding certain hearsay statements made by Donald Williams and Quinittia Davis to the police. We find that the trial court did not abuse its discretion because the statements were admissible under the excited utterance exception to the hearsay rule. See MRE 803(2); *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996). Each of the statements arose from the fatal shooting of Rahkine Tirrell, a startling event, and related to the circumstances of that event. Moreover, the officers' testimony established that Williams and Davis were still under the stress of excitement caused by the event when the statements were made. See *People v Straight*, 430 Mich 418, 424-425; 424 NW2d 257 (1988); *Kowalak*, *supra* at 557-558.

Defendant further contends that his right to a fair trial was jeopardized because these evidentiary matters were argued in front of the jury. Defendant's claim is premised on the assumption that the jurors, through the evidentiary discussions, were improperly exposed to inadmissible evidence. However, because each of the statements was admissible, defendant was not prejudiced by the discussions.

Defendant next argues that the trial court erred in admitting Officer Jaafar's testimony regarding an anonymous tip. The sole basis for defendant's objection to this testimony at trial was that it constituted hearsay. However, the testimony was offered to explain Officer Jaafar's actions after receiving the information, not to prove the truth of the matter asserted. Therefore, it was not hearsay. See MRE 801(c); *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988).

Defendant further argues, for the first time on appeal, that Officer Jaafar should have been permitted to testify only to the fact that he acted on certain information, without revealing the substance of the information received. Cases have recognized that it may be improper to admit the content of an informant's tip under certain circumstances, even when the tip is offered for a nonhearsay purpose. See, e.g., *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980). As the Supreme Court explained in *Wilkins*, however, admissibility of such evidence is not a question of hearsay, but rather relevancy under MRE 401, or undue prejudice under MRE 403. *Wilkins, supra* at 72-73. In this case, defendant's objection to the testimony was that it constituted hearsay. Because an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground, *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996), defendant's argument is not preserved for appellate review. Furthermore, we find that manifest injustice will not result from our failure to review this issue because the record indicates that the evidence in question was never argued by the prosecutor, and because the only possible relevancy of the evidence involves the issue of identification and the prosecutor provided other competent identification evidence through the testimony of Quinittia Davis and Donald Williams. See *Lewis, supra* at 268; *People v Slaton*, 135 Mich App 328, 338; 354 NW2d 326 (1984).

Defendant next argues that a new trial is required because Officer Jaafar testified regarding his request for an attorney upon being confronted by the police. Defendant contends such testimony amounts to an impermissible comment on the exercise of his constitutional right to remain silent upon arrest. However, because the request was made spontaneously, rather than during a custodial interrogation, and before the police had the opportunity to advise defendant of his *Miranda*[1] rights, it was not constitutionally protected. See *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995); *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992).

Furthermore, we reject defendant's claim that, apart from any constitutional question, Officer Jaafar's testimony was erroneously admitted as substantive evidence of his guilt. The record indicates that the testimony was neither offered, nor argued, as substantive evidence of guilt. Rather, the testimony came out as part of an unresponsive answer to an otherwise proper question. An unresponsive, volunteered answer to a proper question is not grounds for a new trial unless the error is so egregious that the prejudicial effect can be removed in no other way. *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). The test is not whether there were some irregularities, but whether the defendant received a fair and impartial trial. *Id*. at 298. In this case, the reference to defendant's request for an attorney was fleeting, and the prosecutor did nothing to emphasize it to the jury. Nor did the prosecutor mention the reference during argument. Accordingly, we conclude that the reference did not prejudice defendant's right to a fair trial.

Next, defendant argues that the trial court erred in admitting testimony by Officer Moore to the effect that he was the only suspect in the case. Defendant claims that such testimony requires reversal under the holding of *People v Humphreys*, 24 Mich App 411; 180 NW2d 328 (1970). We disagree. *Humphreys* merely advances the well-established rule that it is improper to seek a conviction on the basis of a police officer's personal opinion as to the defendant's guilt. See *id*. at 418-419. In this case, Officer Moore did not offer a personal opinion as to defendant's guilt. Rather, he testified regarding the results of his police investigation, mentioning that the investigation did not produce any information or evidence that led to any other suspect. In this context, we conclude that the testimony was not improper.

Defendant next contends that the trial court erred in allowing Officer Moore to testify as an expert witness regarding the effectiveness of gun residue testing. We disagree. The determination regarding the qualification of an expert and admissibility of expert testimony is within the trial court's discretion. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). Because information regarding the effectiveness of gun residue testing is not within the common knowledge of a layman, it is a proper subject for expert testimony. *Id.* at 707-708. Under MRE 702, a witness may be qualified as an expert by knowledge, skill, experience, training, or education. In this case, before the testimony in question was received, Officer Moore had been questioned by defense counsel about gun residue testing and was asked to explain the procedure to the jury. He did so, explaining the procedure in detail. His testimony sufficiently established that he was qualified by knowledge, training, and experience to testify regarding gun residue testing. Therefore, the trial court did not abuse its discretion in admitting the officer's subsequent testimony on this subject during the prosecutor's redirect examination. Cf. *People v Stimage*, 202 Mich App 28, 29-30; 507 NW2d 778 (1993); *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993); *Ray, supra*.

Defendant also argues that he was denied a fair trial when the trial court itself questioned Officer Moore about gun residue. However, defendant did not object to the court's comments below, and appellate review is therefore precluded absent manifest injustice. *People v Weatherford*, 193 Mich App 115, 121; 483 NW2d 924 (1992). Manifest injustice is not present here because the trial court was merely seeking to clarify the witness' testimony, and there is no indication that the questions were asked in an intimidating or argumentative fashion, or that the questions demonstrated prejudice, unfairness, or partiality. See *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992).

Defendant next argues that the evidence was insufficient to establish premeditation and deliberation, two necessary elements of first-degree murder. See *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). We disagree. The evidence describing the manner in which defendant approached the victim, the absence of any provocation by the victim, defendant's use of a deadly firearm, the number of shots fired, and defendant's actions in fleeing the scene immediately afterwards, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to infer the elements of premeditation and deliberation beyond a reasonable doubt. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Next, we reject defendant's claim that the prosecutor improperly commented on his failure to testify during closing argument. Viewed in context, the challenged remarks were not intended to draw attention to defendant's failure to testify. Rather, the prosecutor was arguing that the evidence was uncontradicted because defense counsel's questions were not evidence. In this context, the commentary was not improper. See *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996).

Finally, defendant did not object to the prosecutor's remarks about the police line-up. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Here, the remarks in question were responsive to defense counsel's closing argument and a curative instruction could have cured any prejudice caused by the remarks. Accordingly, our failure to review this issue will not result in a miscarriage of justice. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Stephen J. Markman

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).