STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS AKRAWI,

Defendant-Appellant.

UNPUBLISHED
May 9, 2000

No. 200584
Recorder's Court
LC No. 94-011968

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317; MSA 28.549, conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.157a; MSA 28.354(1) and MCL 750.84; MSA 28.279, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).[1] He was sentenced to concurrent terms of fifteen to twenty-five years' imprisonment for the second-degree murder conviction, and six to ten years each for the conspiracy and assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

This is the third time this case has been before this Court. Previously, in Docket No. 187519, the prosecution successfully appealed the trial court's decision to hold a pretrial evidentiary hearing on the issue of prosecutorial and police misconduct during grand jury proceedings. Later, in Docket No. 195065, the prosecution successfully appealed the trial court's mid-trial decision precluding it from introducing a witness' inconsistent grand jury testimony.

I

In the instant appeal, defendant argues that he was deprived of a fair trial because of several instances of prosecutorial misconduct. We disagree. The test for prosecutorial misconduct is generally

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267, nn 5-7; 531 NW2d 659 (1995).

First, defendant claims that the prosecutor committed misconduct when he knowingly allowed false testimony to stand uncorrected. As our Supreme Court observed in *People v Wiese*, 425 Mich 448, 453-454, 455; 389 NW2d 866 (1986), "[i]t is inconsistent with due process when the prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears, even when the false testimony goes only to the credibility of the witness." After carefully reviewing the record, we find that any duty in this regard did not extend to Sergeant Flanagan's testimony because, although his testimony was strongly refuted, the proofs did not "conclusively establish" that he was lying. See *People v Lester*, 232 Mich App 262, 278; 591 NW2d 267 (1998). Further, accepting as true defendant's claim that James Mobley's testimony concerning the identity of the trigger man was false, because the facts necessary to reach this conclusion were fully brought out and presented to the jury and because the prosecutor essentially conceded during closing arguments that the testimony was false, we find no basis for granting appellate relief on this issue. Under the circumstances, there is no "reasonable likelihood" that the false testimony affected the judgment of the jury concerning defendant's role in the conspiracy. *Wiese*, *supra* at 454.

Next, defendant is not entitled to relief with regard to his claims of police misconduct and intimidation of witnesses where the witnesses testified in the manner they wished at trial, the alleged intimidation was exposed before the jury, and the witnesses were impeached with their prior inconsistent statements or testimony. *People v Jones*, 236 Mich App 396, 401, 408; 600 NW2d 652 (1999); *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992).

Regarding the prosecutor's introduction of grand jury testimony evidencing threats toward a witness, which were not connected to defendant, we agree that the trial court abused its discretion when it declined to rule on the admissibility of discrete portions of the grand jury testimony. Contrary to the trial court's stated belief, this Court's earlier decision allowing substantive and impeachment use of the grand jury testimony decided only that, under MRE 801(d)(1)(A), the testimony could not be the object of a blanket exclusion. This Court did not decide, nor was it necessary to decide, whether certain portions of the testimony violated other rules of evidence. See *Kalamazoo v Dept of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998) (law of the case doctrine applies only to questions actually decided or necessary to the prior determination). However, because the prosecutor openly conceded that the alleged threats were not specifically connected to defendant, the jury was not misled, and, therefore, the challenged testimony was not so prejudicial as to deny defendant a fair trial. *Bahoda*, *supra* at 266-267.

Last, with regard to defendant's challenge that the prosecutor intentionally injected the issue of a witness' religion by questioning her about her headwear, the record does not reveal a purpose or intent to arouse the prejudice of the jury. *Id.* at 271. Thus, reversal on this basis is unwarranted.

II

Defendant next argues that he was deprived of a fair trial by Sergeant Flanagan's improper and contumacious conduct. We disagree.

Sergeant Flanagan was a prosecution witness and his conduct may be imputed to the prosecution. *People v Canter*, 197 Mich App 550, 569-570; 496 NW2d 336 (1992); *Stacy*, *supra* at 25. However, the record discloses that defense counsel made considered strategic decisions not to seek a mistrial or request curative instructions on account of Sergeant Flanagan's alleged improper conduct. Accordingly, reversal is unwarranted.

III

Defendant next argues that the trial court erred in finding that the prosecution exercised due diligence in attempting to locate a witness, Demetrius Crayton, and, therefore, abused its discretion in allowing the prosecutor to read Crayton's preliminary exam testimony into the record at trial. We disagree.

The test for due diligence "is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). After carefully reviewing the record, we are satisfied that the trial court did not clearly err in its determination of due diligence. See id. (due diligence is a question of fact reviewed for clear error).

The parties stipulated to the efforts made by the police to locate Crayton. The police had no reason to place Crayton in protective custody because he had not indicated an intent to flee, and he had been granted immunity. Although efforts to locate Crayton were started rather late, the police checked all the appropriate places in an attempt to locate him. The trial court did not abuse its discretion in allowing the testimony to be read into the record.

IV

Defendant further argues that the trial court abused its discretion by allowing the prosecutor to read unredacted grand jury testimony into the record.

We agree that the trial court erred in ruling that it was precluded under the law of the case doctrine from deciding the admissibility of particular portions of the grand jury testimony. *Kalamazoo*, *supra* at 135. However, after reviewing the objectionable portions of the transcript in context, we find that reversal is not required because defendant has failed to show that, "in the context [of the weight and strength] of the untainted evidence[,] … it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). To the extent that defendant challenges particular hearsay statements on the ground that his constitutional right to confrontation was violated, we conclude that any error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).

V

Next, having found no merit to the various allegations of error addressed above, we conclude that defendant was not denied a fair trial on the basis of cumulative error. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

VI

Finally, defendant argues that the trial court erred in denying his motion for a new trial. We note that the trial court correctly predicted the demise of the thirteenth juror approach when evaluating defendant's motion for a new trial. See *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). We agree that defendant is not entitled to a new trial on the basis of the issues previously addressed in this decision.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Joseph B. Sullivan

[1] Defendant, along with four others, was originally charged with first-degree murder, MCL 750.316; MSA 28.548, conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1), assault with intent to commit murder, MCL 750.83; MSA 28.278, and felony-firearm. The first-degree murder and conspiracy charges were reduced at trial at the close of proofs.