STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 216576 Wayne Circuit Court
BYRON D. STREETER, Defendant-Appellant.	LC No. 98-006028

Before: McDonald, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted 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). He was sentenced to life imprisonment without parole for the murder conviction, and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant claims that the trial court erred by denying his motion for a mistrial that was based on two purported instances of prosecutorial misconduct. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "'A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.'" *Id.* (quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995)). Issues of prosecutorial misconduct are reviewed on a case-by-case basis, examining the relevant portions of the record in context and in light of the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant contends that he was denied a fair trial by the first sentence of the prosecutor's opening statement: "We're here today because that man [defendant] and another man killed a man . . . ." In *People v Montevecchio*, 32 Mich App 163, 165-166; 188 NW2d 186 (1971), we opined that a prosecutor's remarks regarding a defendant's guilt may be prejudicial where they are "made as statements of fact," and "would certainly lead the jury to think that the prosecutor believed that [the] defendant was guilty." On the other hand, we have also opined that the "question is not whether the jury would conclude that the prosecutor believes that the defendant is guilty, a conclusion that they would reach in any event, but rather, whether the prosecutor has attempted to vouch for the defendant's guilt" by placing the prestige of his office or that of the

police behind his or her contention that the defendant is guilty." *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). Similarly, in *People v Lee*, 212 Mich App 228, 255-256; 537 NW2d 233 (1995), we did not find it improper for the prosecutor to tell the jury that a defendant was on trial because he was guilty, opining that the remarks "said nothing more than that, on the basis of the facts as the prosecutor understood them, defendant was guilty of the crime charged."

Clearly, a prosecutor may argue that the facts suggest that a defendant is guilty. Here, the prosecutor made a conclusory statement that defendant killed the victim. The prosecutor followed up that comment with the facts that would be presented to support that position. We find that the prosecutor's statement, which was made at a very early stage of the trial, did not prejudice defendant and deny him of a fair trial.

Defendant also contends that he was prejudiced by the prosecutor's suggestion in the opening statement that a witness might not testify truthfully because he had been threatened. The prosecutor emphasized that the witness would testify that it was not defendant, defendant's brother, or anyone else he knew who made the threats. The witness did in fact testify that he was threatened and conceded that the threat has caused him to testify untruthfully. In addition, the witness' testimony was impeached several times by earlier statements and testimony. Thus, we believe that the prosecutor's opening statement correctly predicted the testimony of this witness. Moreover, defendant's reliance on *People v Burrell*, 127 Mich App 721, 727; 393 NW2d 239 (1983), is misplaced because the prosecutor here did not state a personal belief that a defense witness was lying. Therefore, we do not believe that defendant was deprived of a fair trial by this comment, nor do we find that the trial court abused its discretion by denying defendant's motion for a mistrial.

Next, defendant contends that the trial court made a comment that prejudicially impacted his ability to receive a fair trial. Indeed, a trial court's comments may not unjustifiably arouse suspicion in the mind of the jury concerning a witness' credibility, and we review whether this "partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

During the prosecutor's questioning of defendant's alibi witness, the prosecutor impeached the witness' credibility by noting that a court document that she relied on to support her position that she was in Detroit on March 18, 1998, the date of the incident, indicated that her obligation was on February 18, not March 18. The witness had testified that she drove from her Grand Rapids home to Detroit for this court date, and returned late that night, with defendant. According to her testimony, defendant was traveling with her at the time of the victim's death. The witness was unable to find the court documentation evidencing her obligation to be in Detroit on March 18, 1998, and defendant sought to introduce the witness' personal notes. Over plaintiff's objection to relevancy, the trial court admitted them "for what it's worth." Defendant contends that this latter comment undermined the credibility of the witness to the detriment of his defense.

In context, the trial court's statement appears to be a commentary on the utility of the document. In other words, just because an individual notes his or her obligation to be somewhere for an appointment, this does not establish that he or she actually attended the appointment. Moreover, the witness conceded that she had enough time during the break to write

the relevant date in the notes. Consequently we are not persuaded that the trial court's comment deprived defendant of a fair trial.

However, the witness ultimately received a copy of the court document evidencing her obligation to be in Detroit on March 18, 1998. The trial court denied defendant's request to reopen proofs to allow the witness' credibility to be rehabilitated. This request preceded both parties' closing statements. The trial court opined that the evidence related to a "collateral issue," apparently accepting the prosecutor's objection to its relevancy.

Our Supreme Court has opined, however, that "[i]f a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *People v Mills*, 450 Mich 61, 73; 537 NW2d 909 (1995). Thus, we believe that the prosecutor's challenge to this witness' credibility made the rehabilitative testimony relevant. In the absence of this evidence, the jury was left with an incorrect assumption that the witness was mistaken about the date she was in Detroit, or deliberately misleading the jurors. Her veracity, therefore, was relevant.

A trial court's decision regarding a request to reopen proofs rests within the "sound discretion" of the trial court, and relevant factors to be considered are "whether any undue advantage would be taken by the party moving to reopen the proofs and whether there is any showing of surprise or prejudice to the nonmoving party." *People v Keeth*, 193 Mich App 555, 560; 484 NW2d 761 (1992). In the instant matter, the prosecutor challenged the credibility of the alibi witness, and it is unlikely that the reopening of the proofs to rehabilitate the witness' credibility would have surprised or prejudiced the prosecution. Moreover, the request to reopen preceded closing arguments, and would have taken minimal time. As noted above, because the witness was testifying in support of defendant's alibi defense, her credibility was relevant. Arguably, it was an abuse of discretion for the trial court to deny defendant's request to reopen the proofs.

Nevertheless, it is presumed that a preserved, nonconstitutional error does not constitute "a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The evidence that defendant sought to admit would have established the witness' obligation to be in Detroit on March 18, 1998. However, this evidence would not have established that she was actually in Detroit or traveled from Detroit to Grand Rapids that evening, much less that defendant accompanied her on that trip. Further, there was eyewitness testimony that defendant shot the victim. Thus, we are not convinced that it is "more probable than not" that the jury would have rejected the eyewitness identification even if the trial court had granted defendant's request to reopen the proofs. Therefore, we must conclude that any error was harmless.

Finally, defendant contends that the cumulative effect of the purported errors deprived defendant of his constitutional right to due process.[1] We only consider actual errors in a

[1] To the extent that defendant contends that overwhelming proof of guilt may be overcome by the cumulative effect of errors, we note our Supreme Court's decision in *People v Anderson*, 446 (continued…)

cumulative effect argument. *People v Rice*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Because we have found only one error, and determined it to be harmless, defendant's cumulative effect argument is without merit.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald

(…continued)

Mich 392, 404-405; 521 NW2d 538 (1994). In *Anderson*, our Supreme Court opined that "harmless error" analysis is available to all errors, with the exception of a select few constitutional errors which defy this analysis and mandate reversal. *Id.*, 404-406. None of the errors alleged by defendant fall within the purview of these exceptions, including a general due process deprivation claim. Accordingly, "harmless error" analysis—which involves a consideration of the admissible evidence of defendant's guilt—is necessarily applicable to our inquiry.