

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTINEZ E. WADE,

Defendant-Appellant.

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UNPUBLISHED

January 26, 2001

No. 217122

Wayne Circuit Court

Criminal Division

LC No. 98-001307

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of involuntary manslaughter, MCL 750.321; MSA 28.553, receiving or concealing stolen property over \$100, MCL 750.535; MSA 28.803, and leaving the scene of a serious accident, MCL 257.617; MSA 9.2317. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to a term of ten to fifteen years' imprisonment. He appeals as of right. We affirm.

On December 13, 1996, while driving a stolen Chevrolet Camaro, defendant was stopped by police officers for running a red light. When the officers approached his vehicle, defendant sped off at a high rate of speed and almost immediately struck another vehicle, resulting in the death of the other driver. Defendant fled from the scene of the accident and eluded the police until June 3, 1997, when he again tried to flee but was apprehended and arrested.

Defendant claims that he was denied his right to a fair trial by the prosecution's introduction of irrelevant and unfairly prejudicial evidence and improper arguments. Because defendant failed to timely and specifically object to the alleged prosecutorial misconduct at trial, appellate review is precluded unless a curative instruction could not have eliminated the prejudice or the failure to consider the issue would result in a miscarriage of justice. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

Defendant alleges several instances of prosecutorial misconduct, including (1) introducing evidence that prosecution witness Jason Franklin<sup>1</sup> was shot shortly after defendant's

<sup>1</sup> Franklin was a passenger in the stolen Camaro and identified defendant as the driver of the vehicle at the time of the fatal accident.

arrest, (2) presenting evidence that defendant attempted to flee from the police and arguing that defendant's flight implied guilt, (3) injecting evidence that defendant had a criminal history through testimony regarding defendant's "mug shot," and (4) eliciting testimony that blood found in the Camaro was Franklin's blood. Defendant also argues that the cumulative effect of the misconduct denied him a fair trial.

The test for prosecutorial misconduct requiring reversal of the conviction is whether defendant was denied his right to a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We examine the pertinent portions of the record and evaluate the alleged misconduct in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A defendant may be denied his right to a fair trial when the prosecution interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

Here, we find no errors that resulted in manifest injustice or that could not have been corrected by a curative instruction. The prosecutor did not engage in misconduct by introducing evidence that defendant shot a key prosecution witness prior to trial because it was probative of defendant's consciousness of guilt. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996) (a defendant's threat against a witness is admissible as conduct demonstrating consciousness of guilt). Further, the evidence regarding Franklin's shooting was necessary to respond to arguments of defense counsel implying that Franklin had something to gain by naming defendant as the Camaro's driver. *Schutte, supra* at 721. Likewise, the prosecutor's argument that defendant would benefit from Franklin's disappearance was not improper. Although the prosecutor could not make statements of fact that were unsupported by the evidence, the prosecutor was free to argue the evidence and all reasonable inferences arising from it. *Id.*

Similarly, the prosecutor did not commit misconduct by presenting evidence of defendant's flight from the police, both at the scene of the fatal accident and six months later at his arrest. Evidence of flight is generally admissible to show consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Further, defendant was not denied a fair trial by references to a mug shot. We have held that admission of a mug shot was not prejudicial where the photograph was edited to prevent inference of a prior conviction. *People v Heller*, 47 Mich App 408, 411; 209 NW2d 439 (1973). Here, there was a reference during a police officer's testimony to a mug shot of defendant, however, there was no evidence introduced that defendant had prior convictions. Further, defendant invited the challenged testimony by repeatedly questioning the police officer's ability to recognize the defendant, knowing that the identification was made through use of a mug shot. *People v Embry*, 68 Mich App 667, 670-671; 243 NW2d 711 (1976).

Contrary to defendant's last assertion of misconduct, the prosecutor did not vouch for defendant's guilt by eliciting a police officer's testimony that he "believed" that the blood found in the Camaro came from Franklin. The prosecutor merely asked the officer to explain why he did not have DNA tests performed to see if the blood found in the Camaro belonged to Franklin and why he waited until over a year after the fatal accident to have any DNA testing performed on the blood samples. The prosecutor's questioning and the officer's testimony in this regard

were responsive to issues raised by defense counsel and did not constitute misconduct. *Schutte, supra* at 721. Moreover, the officer was entitled to state his opinion that the blood was Franklin's where that opinion was rationally based upon his observations and investigation, and his opinion was helpful in explaining his actions. MRE 701; *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994).

Defendant also claims that the cumulative prejudicial effect of misconduct by the prosecutor denied him a fair trial. Because we find no misconduct by the prosecutor, there can be no cumulative effect warranting a new trial in this case. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Defendant's final claim, that his trial counsel was ineffective, is also without merit. When claiming ineffective assistance of trial counsel, defendant has the burden of showing that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). Here, defendant claims that his counsel was ineffective by failing to object to the alleged prosecutorial misconduct. However, because there was no misconduct by the prosecutor, counsel's failure to object was not objectively unreasonable.

Affirmed.

/s/ Martin M. Doctoroff  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter