STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESUS GARCIA,

Defendant-Appellant.

UNPUBLISHED
March 19, 2002

No. 220103
Wayne Circuit Court
Criminal Division
LC No. 97-000935

Before: Owens, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree premeditated murder, MCL 750.316, conspiracy to commit first-degree murder, MCL 750.157a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment for the first-degree murder and conspiracy convictions, and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions stem from the shooting death of Francisco Sanchez. Testimony at trial established that defendant was the leader of a gang known as the Insane Spanish Cobras. Defendant's gang name was "King Chuii," and he sat atop a hierarchy of gang membership. Sanchez was a member of a rival gang known as the Square Boys. The prosecution's theory of the case was that defendant ordered the drive-by shooting of Sanchez.

Mid-trial, a juror informed the court that she knew the mother of a Cobra gang member, that she had met this gang member, and that she had heard that a contract had been put out on the life of this gang member. During the remaining course of the trial, the court denied defendant's repeated requests that the juror be excused. Following defendant's conviction, he moved for a new trial, arguing that the juror had failed to disclose or concealed information during the court's inquiry of the matter. At the evidentiary hearing held on defendant's motion for a new trial, the juror's friend testified that she had told the juror "that this king guy" had ordered that her son be killed. The woman also testified the juror had divulged that she, the juror, was scared and had tried to get off the jury by informing the court of her knowledge of this other Cobra gang member.

"[W]hen information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief if he can establish (1) that he was

actually prejudiced by the presence of the juror in question, or (2) that the juror was properly excusable for cause." *People v Daoust*, 228 Mich App 1, 9; 577 NW2d 179 (1998). A juror may be dismissed for cause if the juror is "biased for or against a party" or "shows a state of mind that will prevent [the juror] from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be." MCR 2.511(D)(3) and (4). However, merely knowing a witness, or some facts about a case, is insufficient to support a challenge for cause where the juror indicates that she can keep an open mind and decide the case on the evidence. See *People v Lee*, 212 Mich App 228, 250; 537 NW2d 233 (1995). Hence, we conclude that the trial court did not abuse its discretion in refusing to dismiss the juror in question.

Although failure to reveal pertinent information during voir dire results in actual prejudice and may be grounds for reversal, *People v Hannum*, 362 Mich 660, 666; 107 NW2d 894 (1961); see also *People v DeHaven*, 321 Mich 327, 330-331-332, 334; 32 NW2d 468 (1948), that was not the case here. Rather, the juror in this matter did not become aware until mid-trial that she knew the mother of someone who was associated with defendant.

Next, defendant argues that the trial court abused its discretion by allowing the use of hearsay in a letter. We disagree. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

As an initial matter, because defense counsel asked that the witness' prior testimony be read into the record and did not ask the court to redact the statement in question, the question of the admissibility of the statement, for impeachment purposes, has been waived. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Although we agree that the prosecutor improperly referred to the statement for its truth during closing argument, considered in the context of the weight and strength of the untainted evidence, we cannot conclude that "it is more probable than not that a different outcome would have resulted absent the error." *People v Lukity*, 460 Mich 484, 495, 497; 596 NW2d 607 (1999).

Defendant next argues that the trial court abused its discretion by denying his motion for mistrial based on a witness' references to the fact that defendant had been in prison before. We disagree. A trial court's decision to deny a motion for mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

The witness' responses were unresponsive and volunteered answers to otherwise proper questions. Further, the responses were mentioned as a point of reference, to establish a time-line, not to emphasize that defendant had a prior history of criminality. Considered in the context of the circumstances of this case, there is no reasonable likelihood that the references affected the outcome. The trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); see also *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

We also agree that the trial court did not abuse its discretion in refusing to declare a mistrial due to references to another murder case. To a jury that had not heard anything about the other murder case, the questioning concerning a list of people charged with murder would probably appear as though the prosecutor was merely repeating himself, and the witness was agreeing. The comment of the investigating officer, although mentioning the location of another

murder, did not mention defendant at all. We are satisfied that defendant was not unduly prejudiced by the challenged testimony and that the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant also argues that he was denied a fair trial because of misconduct by the prosecutor. We disagree. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267, nn 5-7; 531 NW2d 659 (1995).

Nonetheless, a prosecutor's comments must be considered in light of the evidence and defense arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). "[A]n otherwise improper remark may not rise to error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Id.* at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

With regard to defendant's claim that the prosecutor improperly used the prestige of his office to help secure a conviction, we find that the prosecutor, through the challenged remarks, was merely responding to defense counsel's contentions that the prosecutor was withholding evidence and was on a vendetta to convict defendant at any cost. Considered in context, the remarks were not improper.

Further, although a "prosecutor may not vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *Bahoda*, *supra* at 276, the prosecutor here, in commenting on the testimony of a police officer, was again responding to defense counsel's argument that the officer had lied to the jury, and was interested only in convicting defendant. Hence, the comments were not improper.

Finally, we find no merit to defendant's claim that the prosecutor eviscerated the standard of proof. Rather, the record discloses that the prosecutor properly urged the jury to follow the instructions given by the trial court and, in this context, accurately asked that the jurors use their reason and common sense. See CJI2d 3.2 (3); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). The prosecutor's comparison to every day life-and-death driving decisions was no more inaccurate than defense counsel's comparison to decisions whether to buy a house, change jobs, or have a child. In context, the prosecutor was not telling the jury to follow their instincts; but was saying that, by listening, the jurors had internalized the information they had heard over this long trial, and should trust their experience and common sense in processing that information. We conclude that the comments were not misleading and did not deprive defendant of a fair trial.

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage