

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH M. MCNORIELL,

Defendant-Appellant.

UNPUBLISHED
February 12, 2004

No. 240748
Wayne Circuit Court
LC No. 01-004952-01

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of assault with intent to commit murder, MCL 750.83, discharge of a firearm at an occupied structure, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of fifteen to twenty-five years' imprisonment for each assault conviction and thirty to forty-eight months' imprisonment for the discharge of a firearm conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions stemmed from evidence that he discharged a rifle at an occupied house in the city of Detroit on April 3, 2001. The five assault victims were inside of the home at the time of the shooting. The prosecution theorized at trial that defendant fired at the house because he was angry with one of the occupants, Stanley Cornelius, over Cornelius' relationship with defendant's girlfriend. The defense theory at trial was that defendant was not the shooter.

On appeal, defendant first challenges the trial court's denial of his motion to suppress evidence of a rifle that the police seized from defendant's home during a search without a warrant. Defendant argues that the prosecutor did not prove a valid consensual search. An appellate court reviews a trial court's factual findings at a suppression hearing for clear error, giving deference to the trial court's resolution of factual disputes. *People v Farrow*, 461 Mich 202, 208-209; 600 NW2d 634 (1999); *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). Questions of law are reviewed de novo. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999).

At the motion hearing, Officer Delawn Steen testified that he and his partner went to defendant's residence after receiving information that defendant may have been involved in the shooting. After Officer Steen rang the doorbell, Shawn Jackson answered the door. Officer

Steen asked Jackson whether he lived at the house and Jackson answered that he lived there with defendant, and then gave the officers permission to search the house. During the search, Officer Steen found a rifle in the back part of the house. Officer William DiCicco also testified at the hearing. He testified that he and his partner arrived at the house seconds after Officer Steen, but Officer DiCicco had no contact with Jackson until after the rifle was seized from the house. After the rifle was seized, Officer DiCicco took personal information from Jackson during which Jackson gave an address different from defendant's as his place of residence.

The validity of Shawn Jackson's consent to allow the police to search the premises turns on whether the police reasonably believed that Jackson had common authority over the premises at the time the search was conducted. *People v Goforth*, 222 Mich App 306, 312; 564 NW2d 526 (1997). As with other factual issues bearing on the validity of a search, the question of consent is judged under an objective standard based on the facts available to the police at the moment of the search. *Id.* at 306. Here, it was reasonable for the police officers to believe that Jackson had authority to consent to the search because he answered the door to the house after the police officers knocked, he was the only person at the house at the time, and he informed them that he lived there with defendant. These circumstances would not have caused a reasonable person to question Jackson's authority or control over the premises. Hence, a valid search did not require that the police conduct a further inquiry regarding Jackson's authority before conducting the search. *People v Gary*, 150 Mich App 446, 452; 387 NW2d 877 (1986). Accordingly, the trial court did not clearly err in denying defendant's motion to suppress.

Defendant next argues on appeal that the trial court erred by failing to sua sponte question jurors about whether they were improperly exposed to extraneous information or engaged in inappropriate discussions about the case following a "bomb scare" evacuation of the courthouse during trial. Apparently, a short while after the second day of trial began, the court stopped trial in order to evacuate the building because of a bomb scare. Trial resumed the following Monday with all jurors present, save one, and the missing juror was excused. Defendant now claims prejudice with regard to the incident. Having considered this unpreserved issue for plain error affecting defendant's substantial rights, we find no basis for relief. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In general, claims of juror misconduct do not per se require reversal. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). When a defendant claims that the jury was exposed to extraneous influences, the defendant has the initial burden of proving the jury's exposure to the extraneous influence and that the extraneous influence created a real and substantial possibility that it could have affected the jury's verdict. *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997).

Although there are circumstances in which a trial court may have a sua sponte duty to investigate, because defendant did not allege any claim of juror misconduct at trial and there is nothing in the record to indicate that the trial court should have been alerted to the possibility of juror misconduct, we conclude that the trial court's failure to sua sponte conduct an investigation was not error. *United States v Corrado*, 227 F3d 528, 536 (CA 6, 2000). Indeed, there is nothing in the record to suggest that defendant was connected to the courthouse evacuation. The fact that defendant's trial was interrupted by the evacuation did not impose a duty on the trial court to sua sponte question jurors whether they might have connected the evacuation to defendant or discussed the case. The trial court instructed the jurors on the first day of the trial to

“be sure you don’t discuss this case with anyone. The only time you can discuss the case is at the end of the trial, when you are all together starting your deliberations and I tell you to discuss it.” “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues on appeal that the evidence at trial was insufficient to establish his identity as the perpetrator of the charged crimes. The test for determining the sufficiency of the evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowak*, 462 Mich 392, 399; 614 NW2d 78 (2000), citing *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979). It is the jury’s function to determine what inferences may be fairly drawn from the evidence and the weight to be accorded to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

Viewed in a light most favorable to the prosecutor, the evidence in this case showed that defendant embarked on a course of conduct directed at Stanley Cornelius, which began on March 31, 2001, with defendant verbally manifesting anger and also displaying a gun and driving erratically around Cornelius’ car. Defendant’s conduct escalated when he shot at Cornelius’ car on April 1, 2001, and culminated with the charged crimes involving the firing of gunshots into Cornelius’ home on April 3, 2001. Defendant was linked to each of these events. Circumstantial evidence linked defendant to a vehicle connected to the shooting, and several shell casings and some bullet fragments that were recovered from the crime scene matched a firearm that was seized from defendant’s home shortly after the shooting. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant was the shooter. *Nowack, supra* at 399-400.

Finally, defendant argues on appeal that the prosecutor’s rebuttal argument was improper and deprived him of a fair trial. Defendant failed to preserve his claim that the prosecutor made arguments unsupported by the evidence because he did not object to the prosecutor’s rebuttal argument on this ground at trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). A timely objection would have given the trial court an opportunity to give an appropriate curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Further, defendant has not established any outcome determinative plain error. Any prejudice arising from the prosecutor’s remarks was dispelled by the trial court’s jury instructions that “lawyers’ statements and arguments are not evidence” and “you should decide this case from the evidence.” *Schutte, supra* at 721-722.

Defendant also failed to preserve with a timely objection his claim that the prosecutor made an impermissible burden-shifting argument during rebuttal. *Schutte, supra* at 720. But in light of defendant’s subsequent motion for a mistrial, made after the jury began deliberating, wherein defense counsel argued that the prosecutor improperly commented on defendant’s failure to produce a witness, we will consider defendant’s claim in this context. We review a trial court’s decision to deny a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A mistrial should be granted only for an irregularity that prejudices a defendant’s rights and impairs the defendant’s right to a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003)

The trial court did not abuse its discretion in denying defendant's motion for a mistrial. Underlying defendant's claim are remarks made about an individual, Claude Hunt, who testified at the preliminary examination, but was not called by either party at trial. Review of the record demonstrates that the prosecutor's rebuttal remarks were a fair response to defense counsel's repeated remarks in closing argument that the jury should find reasonable doubt because the prosecutor did not call Hunt as a prosecution witness. Defense counsel did not establish any basis for an evidentiary inference that the missing witness' testimony would have been unfavorable to the prosecutor. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003). Nonetheless, defense counsel advanced a theory in closing argument that implied that Hunt's testimony could exonerate him. Under these circumstances, the prosecutor's rebuttal argument that defendant did not have an obligation to present witnesses, but could have called Hunt as a defense witness, was not improper. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Indeed, the prosecutor specifically stated in her rebuttal remarks, "We have the burden of proof [sic] it doesn't shift to him, but the Defendant has rights he can bring in witnesses if he wants to. If he's so important he could have brought him in." Further, the trial court later instructed the jury that "[t]he defendant is not required to prove his innocence or to do anything. If you find that the Prosecutor has not proven every element beyond a reasonable doubt, then you must find the defendant not guilty."

Because defendant did not establish a burden-shifting error, the trial court did not abuse its discretion in denying defendant's belated motion for a mistrial. The trial court correctly determined that the prosecutor made a fair response to defense counsel's remarks. *Fields, supra*; see also *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra