

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DEMETRICE ROSHELLE MCCRACKEN,

Defendant-Appellant.

UNPUBLISHED

August 26, 2004

No. 246817

Wayne Circuit Court

LC No. 02-006111

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from her convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. Facts and Proceedings

Defendant's convictions arise out of an incident that occurred on the street outside the duplex residence of Deanna Hudson and Kelly Willis in the early morning hours of April 21, 2002. The victim, Jerod Johnson, defendant's sister, Ruby, and others were at the apartment building, visiting Hudson and Willis. Defendant's sister had an altercation with a guest who lived in an upstairs part of the duplex, and left the duplex to return shortly thereafter with defendant and others to resume the fight.

When defendant, defendant's sister and their friends returned, people inside the duplex, including the victim, exited to confront defendant's sister. During the confrontation, defendant displayed a gun and shot it approximately six times toward the group on the porch. As the individuals on the porch fled, the victim was struck by two bullets. One bullet hit the victim's knee and the other struck him in the buttocks. When he was treated at the hospital, a pin was placed in the victim's knee. However, the bullet that had entered through his buttocks could not be recovered.

The witnesses to the shooting were shown a photographic lineup that was constructed with the aid of a defense attorney. The victim and another witness identified another individual rather than defendant as the shooter. However, the two witnesses who were closest to the front of the porch when the shooting began identified defendant as the shooter.

At trial, defendant presented her boyfriend as an alibi witness. Defendant and her boyfriend had lived together for five years and had a child together. Defendant's boyfriend testified that he and defendant had been at bars and parties when the shooting occurred. The prosecution questioned defendant's boyfriend concerning his failure to report this information prior to trial, either to the police or at the preliminary examination. During closing arguments, the prosecution reiterated that defendant's boyfriend failed to come forward with pertinent information prior to trial and highlighted the absence of testimony that could have corroborated his story.

Following a jury trial, defendant was found guilty of assault with intent to do great bodily harm, two counts of felonious assault, and possession of a firearm during the commission of a felony. Defendant was sentenced to three to ten years' imprisonment for assault with intent to do great bodily harm, one to four years' imprisonment for each of the felonious assault convictions and two years' imprisonment for the felony-firearm conviction. Defendant now appeals.

II. Standards of Review

We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Watson*, 265 Mich App 572, 586; 629 NW2d 411 (2001). Because defendant failed to preserve this issue, we review a defendant's unpreserved claims of prosecutorial misconduct for plain error that was outcome determinative. *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We review a claim that the evidence was insufficient to support a defendant's conviction to determine whether a rational trier of fact could find that the prosecution proved all of the essential elements of the crime beyond a reasonable doubt, viewing the evidence in a light most favorable to the prosecution. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

III. Analysis

Defendant first argues on appeal that the prosecutor committed misconduct by impermissibly shifting the burden of proof to defendant by questioning defendant's alibi witness regarding why he did not make a statement to police or come forward before trial with his exculpatory evidence. We disagree. Where a defendant puts forth an alibi defense, that defense can be challenged by cross-examination concerning unexplained delays in its assertion or untruths in its substance. *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002).

Defendant further contends that the prosecutor committed misconduct during closing arguments by noting the lack of evidence corroborating defendant's alibi. Again, we disagree. The prosecutor's argument was based on reasonable inferences from the evidence introduced at trial, and highlighted a weakness in defendant's case by noting the lack of corroboration for defendant's alibi. This did not constitute misconduct. See *People v Fields*, 450 Mich 94, 111-117; 538 NW2d 356 (1995). Further, defendant relies upon inapposite cases and does not adequately explain how they support her position that the prosecutor's arguments constituted misconduct, and for this reason, also, defendant's claims must fail. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In sum, defendant has failed to establish plain error.

Defendant next argues on appeal that the evidence introduced at trial was insufficient to support her convictions. Specifically, defendant asserts that, based on the testimony from the alibi witness and the other eyewitnesses that it was dark and that there were other, unidentified women outside during the shooting, there was insufficient evidence that she was, indeed, the shooter. We disagree.

When the evidence is viewed in a light most favorable to the prosecution, defendant's claim fails because his assertion ignores the testimony of two eyewitnesses who stated that they saw defendant fire the gun, and the testimony of two other witnesses who testified that they saw defendant at the scene of the crime just before and just after the shooting. Thus, defendant's challenge to the sufficiency of the evidence amounts to a challenge of the jury's determination of witness credibility. Because the jury, as the finder of fact, is to determine the credibility of identification testimony, we will not resolve that question anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). We are persuaded that the eyewitness testimony that placed defendant at the scene of the crime and identified her as the shooter, when viewed in the light most favorable to the prosecution, was sufficient to support defendant's convictions. *Kelly*, *supra* at 640-641.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder