

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERAH D. ARNOLD,

Defendant-Appellant.

UNPUBLISHED

December 20, 2005

No. 257027

Wayne Circuit Court

LC No. 03-001252-01

Before: Whitbeck, C.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of 22-1/2 to 50 years' imprisonment for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the fatal shooting of Ramad "Pig" Taylor ("decedent") in an apartment building in Detroit on November 21, 2001. Tasha Boykin and Fiuleaters Roberson testified that they saw defendant shoot Taylor with an automatic rifle. Defendant's first two trials, held in April 2003 and December 2003, ended in mistrials because the juries failed to reach a verdict.

Defendant argues that the trial court violated his constitutional right to confront witnesses by restricting his cross-examination of Roberson and Boykin. Boykin and Roberson initially failed to identify defendant as the shooter. Roberson explained that he left Michigan for West Virginia soon after the shooting, fearing that defendant would retaliate if he cooperated with the prosecutor. He was returned to Michigan pursuant to a material witness detainer after he was incarcerated in West Virginia for an unrelated offense. Roberson testified at defendant's first trial that he could not identify defendant as the shooter because the shooter wore a hood over his face. At defendant's second and third trials, Roberson recanted his previous testimony and identified defendant. He explained that he had lied about the identification because he feared that his fellow inmates would target him as a snitch.

Defense counsel cross-examined Roberson extensively about his belated decision to cooperate with the prosecutor and identify defendant. Counsel insinuated that Roberson went to West Virginia because he was involved in the decedent's homicide, and that the prosecutor offered him leniency in exchange for his testimony against defendant. He also insinuated that

Roberson received favorable treatment in the West Virginia case after he agreed to cooperate with the prosecutor in defendant's case. On redirect examination, Roberson denied receiving any leniency in the West Virginia case in exchange for his testimony against defendant. On recross-examination, defense counsel asked Roberson several times whether he had been charged with any offense in relation to the decedent's homicide. Roberson replied that he had not. The trial court then precluded counsel from asking Roberson any more questions about charges against him. Defendant moved for a mistrial, arguing that the trial court impermissibly restricted his cross-examination regarding favorable treatment for Roberson, and Roberson's prior testimony that the shooter's face was obscured by a hood. The trial court denied the motion.

Boykin identified the wrong person at defendant's lineup. A few weeks later, she admitted to the police that she recognized defendant at the lineup, but deliberately picked the wrong person because she was afraid of becoming involved. The police held a second lineup, and Boykin identified defendant. She also identified him at each of his trials. Boykin testified that Pastor Jenkins advised her to come forward with the truth. Boykin testified at defendant's first trial that Pastor Jenkins was affiliated with the First Baptist Church, but she did not name the church at defendant's third trial.

Two days after Boykin testified at defendant's third trial, defense counsel requested the trial court to recall her for further cross-examination. Counsel explained that he recently learned that either Pastor Jenkins or the church did not really exist, and he wanted to impeach Boykin with this information. The trial court denied the request, because defendant had already had ample opportunity to cross-examine Boykin.

Defendant argues that the trial court's restrictions on defense counsel's cross-examination of Roberson and Boykin violated his constitutional right to confront witnesses. A defendant has a constitutional right to confront the witnesses against him through cross-examination. US Const, Am VI; Const 1963, art 1, § 20; *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). The right to confront witnesses is not unlimited, however, and the trial court has broad discretion to impose reasonable limits on cross-examination, in order to avoid harassment of witnesses, or interrogation that is repetitive or only marginally relevant. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). We review a trial court's decision to limit cross-examination for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002).

The trial court did not abuse its discretion in limiting the cross-examination of Roberson. The trial court did not preclude questions about favorable treatment for Roberson, or Roberson's motives in leaving the state. It only precluded further questioning after defendant thoroughly covered these matters, and the questions became redundant. The trial court also permitted defendant to impeach Roberson with his prior statements that he could not see the shooter's face because it was obscured by a hood. The trial court did not impose any restrictions on this line of questioning, and defendant did not indicate that he wished to pursue the matter further until he moved for a mistrial.

The trial court also did not abuse its discretion in denying defendant's request to recall Boykin. Defendant had ample opportunity to cross-examine Boykin, and he had known since at least defendant's first trial that she attributed her decision to cooperate to her consultation with Pastor Jenkins at the First Baptist Church. Furthermore, defendant would not have been allowed

to use any extrinsic information he acquired to impeach Boykin on this collateral matter. Pursuant to MRE 608(b), a witness generally may not be impeached with extrinsic evidence regarding collateral, irrelevant, or immaterial matters. *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). Accordingly, we find no violation of defendant's right to confront witnesses.

Defendant raises two claims of prosecutorial misconduct. First, he argues that the prosecutor improperly vouched for Roberson's credibility during this exchange from Roberson's direct examination:

Q. Did you have a change of heart about identifying the person who killed Pig?

A. Yes.

Q. Okay. And why did you have a change of heart at that time?

A. Because the people need to know the truth.

Q. Thank you.

People need to know the truth.

And did you then identify the defendant as the person who shot and killed Pig?

A. Yes.

Defendant did not object to this exchange or request a curative instruction. We therefore review this issue for plain error affecting defendant's substantial rights. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

A prosecutor may not vouch for a witness' credibility or suggest that the government has some special knowledge that a witness' testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, the prosecutor's mere repetition of the witness' own words, without elaboration, embellishment, or fanfare, cannot reasonably be construed as vouching. Accordingly, there was no plain error affecting defendant's substantial rights.

Defendant also claims that the prosecutor improperly attempted to impeach a key defense witness with a prior homicide conviction. Jermaine Glenn testified that he and defendant were in the same holding cell on the first day of defendant's trial in November 2003, and that he heard an exchange between defendant and Roberson, who was confined in a nearby holding cell. Glenn's testimony contradicted Roberson's account of an encounter with defendant in the holding cells. On cross-examination, the prosecutor asked Glenn whether he had also been awaiting trial for murder the day he met defendant in the holding cell. Defendant objected, and the trial court heard the parties' arguments outside the presence of the jury. The trial court opined that the question "may be permissible," but excluded the question on grounds of fairness. When the jury returned, the trial court instructed it to disregard the question. Defendant now argues that the prosecutor's question was impermissibly prejudicial. Although defendant successfully objected to the question as an evidentiary matter, he did not argue that the prosecutor committed

misconduct by attempting to elicit the testimony. Accordingly, the issue is unpreserved and we review it for plain error affecting defendant's substantial rights. *Pfaffle, supra*; *Kelly, supra*.

Defendant cannot establish error, let alone plain error affecting his substantial rights, because the question did not constitute prosecutorial misconduct. The prosecutor may attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). There is no indication that the prosecutor asked the question in bad faith. MRE 609 precludes evidence that a witness was *convicted* of a crime for the purpose of attacking the witness' credibility, unless the crime contained an element of dishonesty or theft. MRE 609(a). Here, however, the question was not whether Glenn had been convicted of murder, but whether he was awaiting trial for murder on the day in question. Under these circumstances, we cannot conclude that the question prejudiced defendant, especially when the trial court excluded the question and instructed the jury to disregard it. *Id.* at 661.

Defendant next argues that the trial court violated his right to present a defense by excluding his alibi witness and denying him a continuance to file a timely notice of alibi. Defendant consistently testified that he was with his girlfriend, Tonya, when the decedent was killed. However, he did not call Tonya as a witness at his first or second trials. After the last defense witness testified at the third trial, defendant informed the trial court that Tonya was present and prepared to testify. He asked the court to permit her to testify, notwithstanding his failure to file a notice of alibi. The trial court denied the request, stating that it would unfairly surprise the prosecution to permit her to testify so late in the proceeding.

If a defendant charged with a felony proposes to offer an alibi, he must notify the prosecution of his intention to claim that defense within fifteen days after his arraignment but "not less than 10 days before the trial of the case, or at such other time as the court directs" MCL 768.20; *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995). A trial court may exclude alibi evidence if the defendant fails to comply with the statutory notice requirement. *Id.* A trial court's decision to exclude alibi evidence for noncompliance with MCL 768.20 is reviewed for an abuse of discretion. *Id.* A trial court should consider the following when a defendant asks to call an alibi witness despite a notice violation:

(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case. [*People v Travis*, 443 Mich 668, 682; 505 NW2d 563 (1993), quoting *United States v Myers*, 550 F2d 1036, 1043 (CA 5, 1977).]

Here, the trial court found that the prosecutor would be unfairly surprised and prejudiced by the introduction of unannounced alibi testimony so late in the proceeding. Although the trial court did not explicitly address the remaining factors, they do not militate in defendant's favor where he waited until the final day of his third trial to declare his intent to call Tonya. We therefore find no abuse of discretion.

Defendant alternatively argues that the trial court should have granted a continuance to file a timely notice of alibi, although he did not request one below. “The longstanding rule of this state is that, in the absence of a request for a continuance, a trial court should assume that a party does not desire a continuance.” *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000). Defendant has not demonstrated any circumstance justifying an exception to this rule.

Finally, defendant claims that the cumulative effect of the alleged errors deprived him of a fair trial. This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *Knapp, supra* at 387. Because we have found no individual errors, there can be no cumulative effect.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Christopher M. Murray