

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ALBERTO HERNANDEZ-DIAZ,

Defendant-Appellant.

UNPUBLISHED

December 20, 2007

No. 273179

Wayne Circuit Court

LC No. 06-004359-02

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS FERNANDO HERNANDEZ-DIAZ, a/k/a
LOUIS FERNANDO HERNANDEZ,

Defendant-Appellant.

No. 273180

Wayne Circuit Court

LC No. 06-004359-01

Before: Saad, P.J., and Owens and Kelly, JJ.

PER CURIAM.

In a joint trial, a jury convicted defendants Daniel Alberto Hernandez-Diaz and Louis Fernando Hernandez-Diaz of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced both defendants to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. Daniel Hernandez-Diaz appeals in Docket No. 273179, and Louis Hernandez-Diaz appeals in Docket No. 273180. For the reasons stated below, we affirm.

I. Docket No. 273179 (Daniel Hernandez-Diaz)

A. Translation

Defendant claims that the trial court violated his right to confrontation when it failed to adequately address his claim of inaccuracies in the translation of Miguel Campos-Romero's

testimony. As this Court explained in *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001):

“The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” The right to confront one’s accusers consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses’ demeanor. [Citations omitted.]

In some instances, inadequate translation that interferes with a right of cross-examination can deny a defendant his constitutional right to confront the witnesses against him. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). However, occasional lapses in literal translation do not render a trial fundamentally unfair. *Id.* at 654-655.

Contrary to defendant’s argument, when the issue arose, the trial court thoroughly investigated the issue of faulty translation. With respect to the translation issue, the trial court heard from both translators and the parties; the trial court also listened to an audio recording of Campos-Romero’s testimony while defendant’s translator was allowed to identify any perceived translation deficiencies. Although the witness’s translator agreed there were some flaws in translation, the trial court determined that they involved minor, immaterial matters. The crucial testimony provided by Campos-Romero was that both defendants admitted their involvement in the charged shooting. There were no translation issues on this point. After reviewing the record, we find no error in the trial court’s handling of this matter and conclude that translation problems did not hinder defendant’s constitutional right of confrontation.

B. Search Warrant Instruction

Defendant claims that the trial court erred when it commented on the effect of a search warrant during its final jury instructions. Specifically, defendant maintains that the trial court’s comments improperly directed the jury to disregard his attack on the credibility of prosecution witness Corine Jennings. Because defendant did not object to the trial court’s instructional comments, this issue is not preserved and our review is limited to plain error affecting defendant’s substantial rights. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003).

When instructing the jury, a court has discretion to “make such comment on the evidence, the testimony and character of any witnesses, as in [its] opinion the interest of justice may so require.” MCL 768.29; *People v Young*, 472 Mich 130, 140-141; 693 NW2d 801 (2005). Here, evidence showed that the police executed a search warrant at Jennings’s house and that Jennings thereafter came forward with the information about defendants. In his closing argument, defense counsel suggested that the search warrant was related to Jennings’s involvement with illegal drugs and that Jennings revealed the information about defendants because she was making a deal to save herself. However, there was no evidence that Jennings was ever charged or threatened with any crime, or that any drugs were found at Jennings’s house. Viewed in context,

the purpose of the trial court's instruction was to convey to the jury that a search warrant, by itself, is "not evidence of anything." Because defense counsel had made a point of emphasizing the existence of the search warrant in his closing argument, and because there was no clear evidence regarding the purpose of the search warrant and, more importantly, no evidence that any illegal drugs were found or that Jennings was charged or threatened with any criminal charges, the trial court reasonably instructed the jury that the existence of a search warrant, by itself, was not evidence of criminal activity. The court did not instruct the jury how to decide Jennings's credibility; it only instructed that the mere existence of a search warrant leads to no conclusion. Under the circumstances, we conclude that the trial court's comments did not constitute plain error.

C. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial because of improper arguments by the prosecutor during closing and rebuttal arguments. Because defendant did not object to the prosecutor's conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

Defendant contends that the prosecutor made an improper civic duty argument. A prosecutor may not urge the jurors to convict a defendant as part of their civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Further, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

Here, the prosecutor made the challenged remark in response to defense counsel's suggestion that Jennings's failure to come forward immediately after the shooting showed that she was lying. Jennings testified that she did not initially disclose what she knew about the incident because she was afraid of defendants. The prosecutor made the challenged remark in the context of arguing that intimidation was the reason that Jennings failed to immediately come forward with the information she knew about the shooting. The prosecutor was not urging the jury to convict defendants as part of some civic duty. Therefore, we find no plain error.

We also find no merit to defendant's argument that the prosecutor improperly commented on defendant's exercise of his constitutional rights. See *People v Buckey*, 424 Mich 1, 11-14, and n 5; 378 NW2d 432 (1985). Viewed in context, the prosecutor was merely explaining the burden of proof and arguing that she had satisfied her burden.

Defendant further claims that the prosecutor improperly denigrated the defense. We disagree. The prosecutor properly argued from the evidence that defendant was unworthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). Further, the prosecutor's comment characterizing defendant's need for an interpreter as a charade was not improper in light of the testimony at trial that defendant was able to speak and understand English without the aid of an interpreter. Also, the prosecutor did not improperly suggest that defense counsel was intentionally attempting to mislead the jury. See *People v Watson*, 245 Mich App 572, 592;

629 NW2d 411 (2001). Rather, the prosecutor merely commented on the validity of a defense theory, which was not improper. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999).

We also hold that the prosecutor did not improperly vouch for her firearms expert, David Pauch. The prosecutor could argue from the facts and testimony that, in light of Pauch's experience as a firearms examiner, his opinion was credible. The prosecutor did not imply that she had some special knowledge, unknown to the jury, that Pauch was testifying truthfully. *Dobek, supra* at 66.

For these reasons, we find no merit to defendant's claim that the prosecutor's arguments denied defendant a fair trial.¹

II. Docket No. 273180 (Louis Hernandez-Diaz)

A. Aiding and Abetting Instruction

Defendant claims that the trial court gave an erroneous aiding and abetting instruction after the jury asked for the instruction again.

We review de novo questions of law, including questions concerning the applicability of jury instructions. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *Gonzalez, supra* at 225. This Court will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.*

To establish guilt under an aiding and abetting theory, a prosecutor must show that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615 (2001). To be convicted of aiding and abetting first-degree murder, a defendant must either (1) have the intent to kill, or (2) have given aid knowing that the principal possessed the intent to kill. *People v Buck*, 197 Mich App 404, 410; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb*, 444 Mich 853 (1993).

The record shows that, consistent with Michigan law, the trial court repeatedly instructed the jury that to find defendant guilty of aiding and abetting first-degree murder, it would have to find either that defendant had the requisite intent himself, or knew that his brother possessed the requisite intent at the time defendant provided aid or assistance. Moreover, the court's final instruction did not diminish the intent necessary to convict a person as an aider and abettor, but

¹ Defendant also argues that defense counsel was ineffective for failing to object to the trial court's comments regarding the search warrant during jury instructions, and for failing to object to the prosecutor's conduct. In light of our conclusion that neither the trial court's comments nor the prosecutor's conduct were improper, we similarly conclude that defense counsel was not ineffective for failing to object. Counsel is not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

only instructed the jury, appropriately, that it could infer intent from the facts and circumstances surrounding the crime. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988); *People v Hart*, 161 Mich App 630, 635; 411 NW2d 803 (1987). Viewed as a whole, the trial court's aiding and abetting instructions fairly presented the issues to be tried and sufficiently protected defendant's rights.

B. Gang Membership

Defendant claims that he was denied a fair trial because of evidence of his gang membership, and because of evidence and arguments suggesting that Corine Jennings was intimidated by gang members.

All relevant evidence is admissible at trial, except as otherwise prohibited by the rules of evidence, the state or federal constitutions, or other court rules. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401. Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Defendant did not object to the evidence of his gang membership, so we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 446; 669 NW2d 818 (2003); *Barber, supra* at 296. The record reflects that defense counsel referred to defendant's gang membership in his opening statement. Further, the prosecutor's theory at trial was that the victim was shot because he was a rival gang member. Thus, defendant's gang membership was probative of the issue of motive, which is always relevant in a murder case. *People v Fisher*, 449 Mich 441, 453 n 13; 537 NW2d 577 (1995). The evidence of gang membership was highly relevant, not unduly prejudicial, and its admission did not constitute plain error.

Further, though defendant was not directly connected to the evidence of intimidation against Jennings, the evidence was relevant to her credibility as a witness, especially in light of the defense suggestion that Jennings's failure to come forward earlier indicated that she was lying. The evidence of the intimidation tactics directed at her provided an alternative reason for her unwillingness to come forward earlier. It was also probative of Jennings's credibility and was not substantially outweighed by the danger of unfair prejudice.

Though defendant claims that the prosecutor improperly appealed to the fears and prejudices of the jurors during closing and rebuttal arguments, defendant did not object to the prosecutor's remarks at trial, so we review this issue for plain error affecting defendant's substantial rights. *Barber, supra* at 296. Viewed in context, the prosecutor argued that defendants' conduct was intended to intimidate witnesses from coming forward, which explained why Jennings delayed coming forward with what she knew. Considered in this context, the prosecutor's argument did not constitute plain error. Further, because the prosecutor's argument was not improper, defendant counsel was not ineffective for failing to object. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ Henry William Saad

/s/ Donald S. Owens

/s/ Kirsten Frank Kelly