STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME LITTLE,

Defendant-Appellant.

UNPUBLISHED
December 27, 1996

No. 187811
LC No. 94-008041

Before: Jansen, P.J., and Saad and M. D. Schwartz,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for second-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). We affirm.

Defendant's first argument on appeal is that the trial court improperly redacted a portion of an unavailable prosecution witness' preliminary examination testimony before allowing the former testimony to be read to the jury. We disagree.

Former testimony is excepted from the hearsay rule. MRE 804(b)(1). Testimony of an unavailable prosecution witness given at a previous hearing may be admitted in evidence when the defendant had an opportunity to cross-examine the witness at the prior hearing. *People v Barclay*, 208 Mich App 670, 673-674; 528 NW2d 842 (1995); MRE 804(b)(1). However, it does not follow that the entire transcript of the previous hearing must be read to the jury merely because the former testimony falls within an exception to the hearsay rule. Rather, any testimony improperly admitted at the preliminary examination may be excluded at trial even though the prosecutor failed to object to the testimony during the preliminary exam. See *People v Whalen*, 129 Mich App 732, 738-740; 342 NW2d 917 (1983).

Here, the prosecutor moved to admit the preliminary examination testimony of an unavailable witness but sought to have a portion of the cross-examination testimony redacted before the transcript

* Circuit judge, sitting on the Court of Appeals by assignment.

was read to the jury. The excluded testimony centered on the unavailable witness' belief that defendant thought the victim possessed a gun when defendant shot the victim.

The trial court ruled that the redacted testimony was irrelevant speculation and thus, inadmissible at trial. We agree. While all relevant evidence is admissible, irrelevant evidence is inadmissible. MRE 402. Evidence is relevant only if it has the tendency to make the existence of any material fact more or less probable than without the offered evidence. MRE 401. What one witness thought another person believed calls for inadmissible speculation. Therefore, the trial court properly excluded the testimony at issue as irrelevant.

Defendant next contends that his conviction should be reversed because the prosecutor injected improper civic duty argument into his rebuttal. We disagree. During his rebuttal argument, the prosecutor stated as follows:

> Edmund Burke, he was a minister back in the seventeenth century in England and he made an interesting comment. He said evil succeeds when good people do nothing. Think about that.
>
> There will always be bad times in our society. When we look at the holocaust in Germany, did it succeed because of Adolph Hitler and Nazism? No. It succeeded because good people did nothing -- good people did nothing.
>
> You lived by the sword, you die by the sword -- is that the type of value situation that is going to exist? Is that going to be your verdict, that you're going to wash your hands of this and walk out of this building? That is what the Defense Attorney wants you to do.

In addition to the above statements, just before concluding his remarks and after relating his argument to the facts of the case, the prosecutor stated, "And, remember Edmund Burke -- for evil to succeed, good people must do nothing. The law, she is not going to read you any law that says if you live by the sword, you're going to die by the sword."

This portion of the prosecutor's argument was clearly improper. *People v Wise,* 134 Mich App 82, 102; 351 NW2d 255 (1984). A prosecutor may not, in rebuttal, make improper civic duty arguments because the right to a jury trial contemplates "a jury that ultimately exercises its own judgment in resolving disputed questions of fact." *People v Humphreys,* 24 Mich App 411, 418-419; 180 NW2d 328 (1970). Improper civic duty argument exists when the prosecutor injects into rebuttal issues broader than the guilt or innocence of the accused under the controlling law. *People v Bahoda,* 448 Mich 261, 284; 531 NW2d; 659 (1995).

Here, the prosecution clearly went beyond the facts of the case. However, reversal is not warranted. Defendant failed to preserve the issue for appeal by objecting at trial and requesting a curative instruction. Appellate review of a claim that the prosecutor made improper civic duty arguments in closing is precluded where the defendant failed to object and request a curative instruction

below unless the prejudicial effect of the comments could not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Where a curative instruction could have removed the prejudice, no miscarriage of justice will be found. *People v Rivera*, 216 Mich App 648, 651-652, 550 NW2d 593 (1996).

Although defendant did not object and request a curative instruction, the trial court nonetheless gave such an instruction to the jury when the court read the jury instructions. The court stated:

> When you discuss the case and decide on your verdict, you may only consider the evidence that was properly admitted in the case. Therefore, it's important that you understand what is and what is not evidence.
>
> Evidence includes the sworn testimony of witnesses . . . and anything else I may have told you to consider as evidence.

The court went on to state that "[t]he lawyer's statements and arguments are not evidence."

The jury instructions were sufficient to remove any possible prejudice for two reasons. First, other than the quoted portion of the rebuttal, the prosecutor's argument was based upon the evidence. Secondly, this Court is less likely to find a manifest injustice where the evidence against the defendant was overwhelming. *Wise, supra*, 134 Mich App 106. Because the only issue at trial was whether defendant acted in self-defense when he shot and killed the victim, and because there was overwhelming evidence that defendant used excessive force, there was no miscarriage of justice. Defendant shot the victim multiple times with two different handguns. There was additional evidence that when the victim attempted to flee following the first few gunshots, defendant pursued and proceeded to shoot down the victim. On this record, there is no danger of manifest injustice. Accordingly, reversal is inappropriate.

Defendant's final argument is that defendant was denied his rights to a fair trial and due process of law when an alternate juror was removed from the venire. We disagree.

A trial court's decision to remove a juror will only be reversed when there has been an abuse of discretion, *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391 (1989); *People v Van Camp*, 356 Mich 593, 604-605; 97 NW2d 726 (1959), and the defendant can demonstrate prejudice. *People v Weatherspoon*, 171 Mich App 549, 560; 431 NW2d 75 (1988). The trial court did not abuse its discretion when it removed juror number seven.

Following its reading of the jury instructions, thirteen jurors remained on the venire. The court noted that juror number seven had slept through nearly all of the reading of the jury instructions. The prosecutor also had suspicions that the juror had been drinking while serving on the venire. Rather than orally dismissing the juror for cause, the trial court instructed the clerk to place all of the jurors' names into a container, to conduct a mock lottery, and to intentionally draw and dismiss juror number seven. The elaborate procedure was conducted over defendant's objection in order to save the juror from embarrassment.

Defendant argues that the procedure imposed was improper. Specifically, defendant claims that the procedure violated MCR 6.102. That rule was amended and re-adopted as MCR 6.411. The rule now provides that when more than twelve jurors remain impaneled before deliberations are to begin, the names of all jurors must be placed in a container and the panel reduced to twelve members. *Id.*

The trial court did not abuse its discretion in removing juror number seven. The record reflects that juror number seven was removed for cause in an innovative matter designed by the judge to avoid publicly embarrassing the juror. A trial judge in a felony case is authorized to excuse any juror that has been impaneled during the course of a trial should any condition arise justifying the juror's excusal. MCL 768.18; MSA 28.1041. In addition, pursuant to MCL 600.1335; MSA 27A.1335, "[t]he presiding judge of the court to which a person is returned as a juror may excuse him from serving when it appears that the interests of the public or of the individual will be materially injured by his presence." In the instant case, the trial judge believed that juror number seven slept through the charge to the jury and decided to remove him from the panel for cause. The trial court did not abuse its discretion because under these circumstances, it is clear that the interest of the public would have been materially injured by allowing juror number seven to remain on the panel.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Michael D. Schwartz