

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARLON RICHARDSON,

Defendant-Appellant.

UNPUBLISHED

May 19, 1998

No. 193328

Recorder's Court

LC No. 95-001841

---

Before: Neff, P.J., and O'Connell and Young, Jr., JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree murder, MCL 750.317; MSA 28.549. He was sentenced to fifteen to forty years in prison. We affirm.

Defendant's first issue relates to the prosecutor's comments during his opening statement that Robert Riley and Maurice Avery would give testimony implicating defendant in the shooting. Defendant moved for a mistrial after the prosecutor rested his case-in-chief without presenting the testimony of those witnesses. Initially, we note that, because defendant requested the trial court to "focus [its] thoughts . . . only on Robert Riley," defendant has failed to preserve this issue with respect to Maurice Avery. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). We review for an abuse of discretion the trial court's decision denying defendant's request for a mistrial. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to receive a fair trial. *Id.*

When a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted in the absence of a showing of bad faith on the part of the prosecutor or prejudice to the defendant. *People v Wolverson*, 227 Mich App 72, 75-77; \_\_\_ NW2d \_\_\_ (1997). In the present case, there is nothing to indicate that the prosecutor acted in bad faith when he told the jury that Riley would testify. Indeed, a subpoena was issued to compel Riley's testimony, but the police could not locate him. Moreover, there was overwhelming evidence of

defendant's guilt, and the trial court instructed the jury that "the lawyers' statements and arguments are not evidence." Thus, defendant has failed to demonstrate that he was prejudiced. We cannot say that the trial court abused its discretion in denying defendant's motion for a mistrial.

Defendant's second argument is that he was denied a fair trial as a result of several comments made by the prosecutor during his closing argument. Questions of misconduct by the prosecutor are decided on a case by case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context in order to determine whether the defendant was denied a fair trial. *Id.*

Defendant claims that the prosecutor improperly argued that Nevada Watson's written statement made to the police after the shooting supported a finding of guilt. The trial court ruled earlier in the trial that Watson's statement could only be used for purposes of impeachment, and not as substantive evidence of defendant's guilt. We conclude that any prejudice to defendant was cured by the trial court's instruction that the jury consider Watson's statement only for the purpose of determining whether he testified truthfully. See *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991).

Defendant also argues that the prosecutor improperly made repeated references to the fact that defendant had been charged with assaulting with intent to murder one of the prosecution's witnesses, Antonio DeBerry. However, as more fully explained below, this evidence was properly admitted. Defendant's last claim of prosecutorial misconduct is that the prosecutor improperly argued that Tremell Woolen "was too distracted to know for sure [that defendant was] not shooting." Defendant has abandoned this claim of error by failing to argue its merits in his appellate brief. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Finally, defendant argues in a supplemental brief filed in propria persona that the trial court abused its discretion in admitting evidence that defendant had been charged with assaulting with intent to murder DeBerry. We disagree. Evidence of "other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to prevail under the balancing test of MRE 403." *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997); see also *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Here, evidence relating to defendant's alleged assault on DeBerry was admitted for a proper purpose – to show why DeBerry eventually decided to come forward with information about defendant's involvement in the shooting – and not to prove defendant's character or propensity to commit the charged offense. The evidence was relevant to rebut defense claims that DeBerry was not a credible witness because he waited almost two years to tell police what he knew. Moreover, we are not convinced that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Finally, contrary to defendant's assertion, the prosecution was not required to present

“substantial proof” that the assault in fact occurred.<sup>1</sup> We find no abuse of discretion in the trial court’s decision.

Affirmed.

/s/ Janet T. Neff

/s/ Peter D. O’Connell

/s/ Robert P. Young, Jr.

<sup>1</sup> Defendant relies on *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), for this assertion. However, in *VanderVliet, supra* at 68, the Supreme Court expressly rejected such a heightened standard of logical relevance.