

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

J. DAVID BRINTLEY,

Defendant-Appellant.

UNPUBLISHED

June 26, 1998

No. 200539

Oakland Circuit Court

LC No. 95-143152 FC

Before: Wahls, P.J., and Holbrook, Jr. and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2).¹ He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of fifty to eighty-five years for the murder and robbery convictions, and to mandatory two-year terms for each of the felony-firearm convictions. Defendant appeals as of right. We affirm.

This case involves the November 1991 robbery and murder of Richard Germany, a Brinks Security Services armored car messenger.

Defendant first argues that the trial court erred by allowing FBI Agent Michael Gearty to testify regarding a statement by Bryan Robinson. Specifically, defendant claims that it was error to admit Robinson's statement that he believed that defendant committed the robbery and murder. It is apparent from the context of the trial that Robinson's statement was not admitted to prove the truth of the matter asserted, but to establish why the police focused their investigation on defendant. Thus, the statement was not hearsay. MRE 801(c). Further, the trial court instructed the jury that Gearty's testimony was not being offered to prove the truth of Robinson's statement.²

Defendant also argues that Robinson's statements were not relevant and were highly prejudicial. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. A fact that is of consequence to the action is a

material fact. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, remanded 450 Mich 1212 (1995). However, materiality does not mean that the evidence must be directed at an element of a crime or applicable defense, but it must, at least, be at issue in the sense that it is within the range of litigated matters in controversy. *Id.* Moreover, although 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, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403.

Gearty's testimony regarding Robinson's statements was relevant and was not substantially more prejudicial than probative. Without Gearty's testimony that Robinson indicated that he believed defendant committed the armored truck robbery and murder, there was no basis for the jury to understand why the police focused their investigation on defendant nearly four years after the crimes occurred. Gearty testified that after conducting the initial investigation of the crime scene, the FBI and police had no evidence pointing to any suspects. Hence, the testimony regarding the information Robinson gave to Gearty was pertinent to an issue within the range of litigated matters in controversy. Furthermore, there is no indication that the jury gave Gearty's testimony undue or preemptive weight. *Mills, supra* at 75-76. Rather, the jury was instructed that Gearty's testimony with relation to Robinson was not offered to prove its truth and that Gearty was merely relating what Robinson told him. Therefore, we are not left with a definite and firm conviction that the trial court's decision to admit the evidence, which was within Gearty's personal knowledge as required by MRE 602, was erroneous.

Defendant next asserts that the trial court erroneously excluded evidence that Lamont Wilson told Gearty that someone other than defendant committed the armored car robbery and murder. In order to preserve a challenge to the trial court's exclusion of evidence, the opposing party must make the substance of the evidence known to the court by offer, unless it was apparent from the context within which the questions were asked. MRE 103(a)(2). In this case, defendant failed to make an offer of proof regarding the evidence which he now claims should have been admitted. Thus, this issue is not preserved for appellate review, and we decline to review it. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Defendant next argues that the prosecution did not provide reasonable assistance in locating Lamont Wilson, pursuant to MCL 767.40a(5); MSA 28.980(1)(5). The only relevant inquiry, upon entry of a guilty verdict, is whether the prosecutor's failure to produce a witness resulted in prejudice to the defendant. *People v Jackson*, 178 Mich App 62, 66; 443 NW2d 423 (1989). In order to preserve the issue of prejudice for appellate review, defendant must move for a new trial in the trial court on this basis or raise it in a motion for a post-trial evidentiary hearing. *Id.*; *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Because defendant did not move for a new trial or a post-trial evidentiary hearing, we need not consider this issue on appeal. *Grant, supra*. Moreover, we note that defendant did not provide a written request for assistance as required by MCL 767.40a(5); MSA 28.980(1)(5), and when he raised the issue in the trial court, he appeared satisfied with the prosecutor's response that he was provided the most recent information available on the location of the witness.

Defendant also argues that the trial court erred in admitting evidence that defendant had been previously incarcerated. Defendant failed to preserve this evidentiary issue for appellate review by lodging a specific objection at trial. MRE 103(a)(1). *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Further, defendant testified on direct examination that he had a prior criminal conviction.

Finally, defendant also contends that the trial court erred in admitting evidence that he practiced the voodoo religion. Defendant objected to the introduction of this evidence below on the basis that the evidence was irrelevant, and not on the basis that it was improper because it elicited defendant's religious beliefs. MRE 610. Objections to evidence must specify the same ground for challenge as the party seeks to assert on appeal. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). We decline to consider this issue because any error was not decisive of the outcome. *Grant*, *supra* at 552-553.

Affirmed.

/s/ Myron H. Wahls

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald

¹ Defendant was initially charged with felony murder, armed robbery and two counts of felony-firearm.

² Defendant's assertion that the trial court admitted evidence that Robinson told the FBI that two weeks before the armed robbery he and defendant were breaking into cars at the location of the bank and that defendant commented on the ease of robbing an armored car is misplaced. Defendant's objection to Gearty's testimony regarding the substance of Robinson's statement was sustained by the trial court. Thus, the jury did not hear testimony that defendant told Robinson that it would be easy to rob an armored guard.