

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EDWARD TERRELL,

Defendant-Appellant.

UNPUBLISHED

November 13, 1998

No. 196785

Kalamazoo Circuit Court

LC No. 95-1112-FC

Before: Hood, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of two counts of first degree premeditated murder, MCL 750.316; MSA 28.548; two counts of armed robbery, MCL 750.529; MSA 28.797; four counts of felony-firearm, MCL 750.227b; MSA 28.424(2); and one count of being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Defendant was sentenced to consecutive two year terms for each of the four felony-firearm convictions to be followed by concurrent sentences of life in prison without parole for each of the first degree murder convictions, life in prison for each of the armed robbery convictions, and forty to sixty years for being a felon in possession of a firearm. He appeals as of right, and we affirm.

The crimes at issue took place at a Video Watch video rental store in Kalamazoo, Michigan in December 1994. Two employees were murdered shortly after the store closed at midnight. Money was stolen from one of the registers, and the front door was broken from the inside out, which apparently allowed the perpetrator to escape after the murders.

I

Defendant claims that the grand jury indictment was invalid and, thus, his convictions should be reversed. He alleges that the multicounty grand jury was not authorized to investigate the crimes at issue because it was limited to considering only narcotics offenses committed in two or more counties and did not have jurisdiction over homicides committed in one county.

This Court can convene a multicounty grand jury if a petition is properly filed pursuant to MCL 767.7b; MSA 28.947(2). See MCL 767.7c and d; MSA 28.947(3) and (4). In docket number 181750, this Court convened the Southwest Michigan Multi-County Grand Jury for the counties of Branch, Calhoun, Kalamazoo and St. Joseph pursuant to a properly filed petition. The petition upon which this Court convened the grand jury sought permission to investigate crimes, including drug and related crimes and a homicide¹.

Defendant moved the trial court to quash the grand jury's indictment, which indicted him for non-drug related crimes. The trial court refused to do so, ruling that because the petition was not limited to drug crimes, the grand jury had authority to investigate any crimes. It also ruled that the multicounty grand jury had authority to indict defendant even though the crime occurred in only one county. We agree with the trial court.

First, there is no question that a multicounty grand jury may indict a person for an offense that was committed in only one county over which the grand jury has jurisdiction. MCL 767.23a; MSA 28.963(1). That statute provides:

A grand jury convened under section 7c may indict a person for an offense committed in any county over which the grand jury has jurisdiction. If the grand jury indicts a person under this subsection, the grand jury shall specify in the indictment the county or counties in which the offense took place.

Therefore, it was proper for the multicounty grand jury to indict defendant even though the crimes for which he was accused did not take place in two or more counties, but only took place in Kalamazoo county. In so ruling, we note that a separate panel of this Court reached an identical result in codefendant David Payne's appeal, ruling that:

Defendant's argument is without merit because although a petition must show probable cause that a crime, or a portion of the crime, occurred in two or more counties, a subsequent indictment may charge a defendant with a crime that occurred in only one county. This result does not render the indictment improper. [*People v David Payne*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 1998 (Docket No. 196692).]

Second, a grand jury is not limited to investigating only the crimes set forth in the petition. Recently, this Court decided *People v Morris*, 228 Mich App 380; 579 NW2d 109 (1998), lv pending. In *Morris*, the defendant challenged his grand jury indictment on the basis that the order, not the petition, convening the grand jury was "not specific as to the scope of the inquiry to be created." *Id.* at 381. This Court held that an order convening a multicounty grand jury does not have to specifically delineate the scope of its inquiry. *Id.* at 382. In so holding, this Court noted:

There are a number of reasonable explanations why the Legislature would want to require more specificity in the petition than in the order. For example, by placing a specificity requirement in the petitioning procedures, the Legislature would ensure that

the multicounty grand jury process will be initiated by a belief that some criminal activity has occurred. However, by not limiting the scope of the inquiry, the Legislature is ensuring that if evidence of other criminal activity is discovered during the grand jury proceedings, the grand jury will be able to indict on the basis of that evidence. [*Id.*, n 1.]

Here, the petition contained the requisite specific information necessary to convene the multicounty grand jury, including a statement setting forth probable cause that specific crimes were believed to have been committed in two or more counties. MCL 767.7b; 28.947(2). Those included drug and related crimes and a homicide. The petition, however, did not seek to limit the grand jury to investigate only the crimes mentioned within it. Given that the grand jury came into possession of the evidence regarding the crimes at issue while it was properly seated and that this Court has indicated that a grand jury is not limited to investigating only those crimes listed in the petition or order, the indictment flowing from the investigation into the crimes committed by defendant was not improper. The grand jury did not overstep its bounds by indicting defendant, and we will not reverse defendant's convictions on the ground that the indictment was improperly obtained.

II

Defendant next argues that his counsel was ineffective because he called witness Jerry Bowman to the witness stand. Defendant claims that his counsel never talked to Bowman before calling him as a witness, and, instead, relied upon an officer's report to determine what Bowman would say at trial. Defendant argues that because Bowman was the only person to place him directly at the scene, his counsel's error in calling Bowman to the stand was serious and prejudicial. He claims that such a serious, outcome determinative mistake requires reversal.

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that, but for defense counsel's error, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell, supra*. Where, as here, defendant fails to move for a new trial or evidentiary hearing, our review is limited to errors that are apparent from the trial court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Counsel's conduct in calling Bowman to the stand did not constitute ineffective assistance of counsel. First, in reviewing the record, there is nothing to support defendant's assertion that his counsel failed to contact and speak with or attempt to speak with the witness before trial. Second, even if counsel had failed to interview the witness before trial, this failure is not grounds for automatic reversal. In *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990), this Court specifically stated that the failure to interview witnesses does not itself establish inadequate preparation. "It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Id.* See also *People v Johnson (After Remand)*, 125 Mich App 76, 81; 336

NW2d 7 (1983). In this case, defendant makes no showing that an interview with Bowman would have revealed that he was going to take the stand and contrary to his previous statements to police in the case, identify defendant as being at the scene. Defendant has therefore not met his burden. Moreover, we note that Bowman's statement to the police, which was given the day after the murders, did not match his in-court testimony. Defendant's counsel was admittedly surprised by Bowman's in court identification of defendant and thereafter arduously and effectively attacked Bowman's credibility. He forced Bowman to admit on the witness stand that he had seen defendant in the newspapers before giving his testimony, and that the description he originally gave to the police about a black suspect did not match defendant. Defense counsel made it appear as if Bowman had just decided, while at the trial, to point the finger at defendant.

We also note that even if defense counsel's conduct fell below an objective standard of reasonableness, defendant has not shown with reasonable probability that a different result would have occurred had Bowman not been called. *Stanaway, supra*. In other words, defendant has failed to show that counsel's conduct was outcome determinative. Bowman's credibility was adequately called into question. And, the other evidence tying defendant to the crime, specifically a confession he made to witness Abigail Lawing and evidence of his prior possession of the .38-caliber gun that was used, was sufficient to convict defendant. Thus, even if counsel erred, that error did not rise to the level of ineffective assistance of counsel requiring reversal.

III

Defendant next argues that the testimony of witness Ann Webb was improperly admitted at trial because it was based on privileged information that Webb had obtained while counseling defendant. He also claims that her testimony was irrelevant and prejudicial, especially because it was not related to the actual homicides, but only to the police investigation of the homicides.

We review the trial court's admission of evidence for an abuse of discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

Webb's testimony was not improperly admitted, irrelevant or more prejudicial than probative. At trial, she testified that she believed defendant was capable of the crimes and that she informed the police about her impressions of the case. She also testified that she knew defendant through the Kalamazoo Probation Enforcement Program (KPEP), a program for first time offenders², and through Video Watch, where she was a customer. She had observed defendant interacting with other Video Watch employees before his termination. She heard him bragging about his ability to run the store. She testified that these statements appeared to annoy other employees, and that she was not surprised to find out that he was later fired. Her testimony was not detailed. She did not inform the jury that she had counseled defendant for drug abuse through KPEP or that defendant had ever been in drug counseling.

Webb's testimony was properly admitted because it related directly to the issue of defendant's motive and it supported other evidence regarding defendant's motive. Defendant's attitude toward Video Watch, especially his statements and attitude that the store could not run without him were significant to the prosecution's case.

The evidence was also properly admitted to show why the police focused on defendant as a suspect and why they took action against him as a suspect. Defendant fails to cite to any authority, and we find none, which prohibits testimony about why police took certain actions in a case³. In fact, numerous cases have held that the admission of evidence to show why the police responded in a certain situation is acceptable. See *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994); *People v Lewis*, 168 Mich App 255, 267; 423 NW2d 637 (1988); *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982).

We also find defendant's argument that the testimony was inadmissible on the grounds of privilege to be disingenuous. The statutes cited by defendant in support of his argument do not apply.

MCL 333.6111; MSA 14.15(6111) provides:

Records of the identity, diagnosis, prognosis, and treatment of an individual maintained in connection with the performance of a licensed substance abuse treatment and rehabilitation service, a licensed prevention service, an approved service program, or an emergency medical service authorized or provided or assisted under this article are confidential and may be disclosed only for the purposes and under the circumstances authorized by section 6112 or 6113.

42 USC 290dd-2(a) provides:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall. . . be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

Similarly, 42 CFR 2.1, *et seq.* applies to *records* of the "identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any drug abuse prevention function conducted, regulated, or directly or indirectly assisted by any department or agency. . . ." Record is defined as "any information, whether recorded or not, relating to a patient received or acquired by a federally assisted drug program." 42 CFR 2.11. Disclosure is defined as "a communication of patient identifying information, the affirmative verification of another person's communication of patient identifying information, or the communication of any information from the record of a patient who has been identified." 42 CFR 2.11.

In this case, Webb never disclosed or revealed any record information that identified defendant as being in substance abuse counseling, or that pertained to his diagnosis, prognosis, or treatment. She simply testified that she knew defendant through KPEP. And, significantly, that testimony was permissible under 42 CFR 2.13, which allows "acknowledgment of the presence of an identified patient in a facility or part of a facility if the facility is not publicly identified as only an alcohol or drug abuse

diagnosis, treatment or referral facility, and if the acknowledgment does not reveal that the patient is an alcohol or drug abuser." A thorough review of the record does not reveal that the jury knew KPEP had anything to do with alcohol or drug abuse treatment. Moreover, no information was disclosed that defendant was a former drug abuser or had ever been in counseling. In fact, defendant completely fails to identify any information from his records that was revealed to the jury. We also note that the trial court took special care to limit the inquiry put to Webb and Webb's testimony reveals no confidential, privileged or record information whatsoever.

Finally, we find it unnecessary to address defendant's general argument that any impressions formulated by Webb, which were formulated in her capacity as defendant's counselor, were necessarily privileged and could not be disclosed. We do so because Webb did not testify as to what her impressions were that led her to speak to police about the possibility that defendant was the perpetrator. She did not testify as to the substance of her conversations with the police. She only testified that she thought defendant should be a suspect and that she discussed this with police. Because Webb did not disclose what her impressions about defendant were, which were obtained in her role as his counselor, it cannot be said that she violated any privilege. The admission of her limited testimony was not an abuse of discretion by the trial court.

IV

Defendant next argues that the trial court committed error requiring reversal when it denied his constitutional right to confrontation by limiting the cross-examination of prosecution witness Abigail Lawing and limiting his ability to impeach her with rebuttal testimony. His argument has no merit.

"The allowance of cross-examination on collateral matters to impeach the credibility of a witness is generally within the discretion of a trial judge in a criminal prosecution." *People v Carner*, 117 Mich App 560, 570; 324 NW2d 78 (1982). We review whether a trial court has properly limited cross-examination for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

Defendant's argument that he was not allowed to pursue relevant and appropriate cross-examination is not supported by the record. During direct examination Lawing testified that defendant confessed to the Video Watch murders during a party in April 1995. She also testified that she was very depressed that evening about an abortion that she underwent the previous summer and that she was not under the influence of drugs, alcohol or prescription medications at the time defendant confessed to her. Defense counsel thereafter cross-examined Lawing about drinking alcohol and using marijuana on the night of the confession, which she again denied. He also questioned her about her abortion and subsequent counseling. Lawing admitted having psychological problems and attending counseling after the abortion. She also explained that she took Prozac from June 1994 to October 1994. After her testimony, witness Arthur Payne was called to testify that he saw Lawing consume alcohol on the night in question.

Defense counsel was not permitted to cross-examine Lawing about numerous instances where she became drunk and engaged in odd behavior, such as taking her clothes off. He was not allowed to

demonstrate that because she drank heavily on other occasions and acted irrationally, she was probably doing so on the evening in question. He also was not allowed to elicit information that Lawing was convicted of an alcohol related driving offense in January 1995. The trial court refused to allow defendant to question Lawing about prior drunkenness, stripping and other anti-social behavior because those actions were irrelevant to the matter being tried and had nothing to do with her credibility. We agree with these determinations of the trial court, and find that defendant was not improperly denied his right to confrontation by the limiting of cross-examination.

The trial court granted defendant sufficient leeway to call Lawing's credibility into question and reveal to the jury that she had a previous abortion, was very depressed about it, sought psychological help, and took Prozac. From that evidence, along with Arthur Payne's testimony, which contradicted her claim that she was not drinking on the night of the confession, defendant was able to adequately and properly argue that she was not a credible witness. The specific instances of behavior that defense counsel was precluded from exploring were not probative of her truthfulness. MRE 608. Because those issues were not relevant to her truthfulness or untruthfulness, the trial court properly limited cross-examination.

The trial court also correctly ruled that defendant could not inform the jury about Lawing's January 1995 drunk driving conviction. MRE 609 provides:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

- (1) the crime contained an element of dishonesty or false statement, or
- (2) the crime contained an element of theft . . .

Lawing's arrest for drunk driving does not fit within MRE 609.

The record also does not support defendant's assertion that he was unable to develop testimony, through Arthur Payne's rebuttal, that Lawing fabricated stories in other instances. Like a trial court's determination with regard to the scope of a cross-examination, we will not disturb a trial court's ruling regarding the scope of rebuttal absent an abuse of discretion. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). "Rebuttal evidence is limited to refuting, contradicting or explaining evidence presented by the opposing party." *Id.* *It should relate to substantive rather than collateral matters. Id.* (emphasis added).

Defendant wanted to ask Arthur Payne an open ended question about whether Lawing had ever fabricated any stories. This question would have led to a mini-trial over whether other stories told by Lawing were really fabricated. The trial court refused to allow the open ended question. It indicated, however, that it might allow questions about specific instances where Lawing fabricated stories. Defendant thereafter failed to ask any such questions. Defendant obviously could not offer any rebuttal evidence with regard to specific fabricated stories, which would refute, contradict or explain Lawing's relevant testimony. That is apparently why his counsel abandoned the issue. There is nothing in the record to support defendant's assertion that the trial court improperly limited rebuttal.

We also reject defendant's argument on appeal that his counsel was ineffective for failing to try to admit Lawing's prior drinking, conduct, and drunk driving conviction under MRE 404(b). MRE 404(b) does not apply to the situation presented. From the record, it is clear that defendant was attempting to admit the evidence solely to show that Lawing's behavior on the night of the confession was in conformity with her prior bizarre behavior. This is specifically prohibited by MRE 404(b). MRE 404(b) does allow the admission of prior "bad acts" testimony to demonstrate intent. Defendant, however, fails to explain his argument that Lawing's intent was an issue in the case. Moreover, while we understand that Lawing's credibility was an issue, we fail to see how Lawing's intent was relevant to this case. Because defendant has failed to explain or support his argument that her intent was at issue, the issue is abandoned.

V

Defendant next argues that there was insufficient evidence to establish that he was the perpetrator of the crimes at issue and thus, his convictions should be reversed.

In reviewing a challenge to the sufficiency of the evidence, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Here, defendant only challenges the sufficiency of the identity evidence. Based on our review of the record, we hold that there was sufficient evidence to allow a rational trier of fact to determine that defendant was the perpetrator of the crimes.

The following evidence implicated defendant. Defendant knew the layout of the store because he was a former employee. Defendant was displeased about being fired from the store and had a motive for murder. There was evidence that defendant lied to the police about his alibi. Arthur Payne testified that defendant asked him to lie to the police with regard to his alibi. Defendant is left handed and the police believed the shooter was left handed. Ann Webb testified that she informed the police that she thought defendant should be a suspect. Jerry Bowman identified defendant as being in the store shortly before the murders. A .38-caliber handgun, which was directly traced to defendant's possession around the time of the murders in 1994, was identified as being one of the weapons used in the murders. Defendant was broke on the night of the murders, and, in fact, was so broke that he apparently borrowed ten dollars from his sister to buy gasoline. Eight hundred dollars was stolen from the crime scene. A nine-millimeter Speer bullet, the same type used at the murder scene, was found under the passenger seat in defendant's car. Finally, and most compelling, Abigail Lawing testified that defendant confessed the crime to her.

Based on the aforementioned evidence, a rationale jury could, and did, determine that defendant was the perpetrator of the crimes.

VI

Finally, defendant argues numerous instances of prosecutorial misconduct. Defendant failed to object to any of the alleged improprieties at trial. Therefore, this Court's review of the issue of

prosecutorial misconduct is precluded absent a miscarriage of justice. *People v Riviera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). "A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.*

We have reviewed all of the alleged errors of prosecutorial misconduct and have determined that there were no errors requiring reversal. Moreover, a prompt curative instruction would have cured any resulting prejudicial effect resulting from the prosecutor's questionable comments. For that reason, we find no miscarriage of justice.

Affirmed.

/s/ Harold Hood

/s/ Richard Allen Griffin

/s/ Jane E. Markey

¹ The homicide mentioned within the petition is not one of the homicides for which defendant was convicted.

² The jury knew that defendant had a previous conviction because he was charged with being a felon in possession.

³ Contrary to defendant's claim, *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980) does not support that evidence, which is received only to establish the reason police took action, is irrelevant and prejudicial. In *Wilkins*, the jury heard the substance of information given to police by an informant, who was not produced in court. That testimony was hearsay and did not assist the trier of fact in establishing any of the elements of the crime or any facts at issue. It also did not simply provide information with regard to why the police responded in the manner that they did. It provided substantive information, which the jury may have relied on in rendering its verdict. Thus, the Supreme Court held that it was improperly admitted. *Id.* at 74. In this case, Webb did not reveal the substance of any conversations with police. She simply testified that she told the police that she thought defendant should be a suspect. This testimony was relevant and not more prejudicial than probative.