STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK LEO WOLANIN, a/k/a MICHAEL WILCZEK,

Defendant-Appellant.

UNPUBLISHED
February 26, 2002

No. 224904
Macomb Circuit Court
LC No. 98-003017-FC

Before: Neff, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of bank robbery, MCL 750.531. The jury convicted defendant of robbing the Great Lakes Bank on August 28, 1998, in Warren. The court sentenced defendant to 20 to 40 years in prison. We affirm.

Defendant argues that the court abused its discretion in failing to accede to defendant's request to appoint two expert witnesses. We disagree.

We review a trial court's decision whether or not to allow an indigent defendant fees to hire an expert witness for an abuse of discretion. *People v Thornton*, 80 Mich App 746, 752; 265 NW2d 35 (1978); MCL 775.15.[1]

MCL 775.15 provides:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness

[1] See also *People v Herndon*, 246 Mich App 371, 398; 633 NW2d 376 (2001) wherein this Court ruled that whether a trial court erred in denying a motion to appoint an expert is reviewed for abuse of discretion.

> at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people. [Emphasis added.]

Thus, when the defendant cannot "safely proceed to trial" without an expert, the court *may* order that expert witnesses be produced. *Herndon, supra*, 399. The proper inquiry is whether defendant "was afforded an adequate opportunity to present his case at trial." *People v Miller*, 165 Mich App 32, 48; 418 NW2d 668 (1987), after remand 186 Mich App 660; 465 NW2d 47 (1991). An indigent defendant is entitled to a waiver of costs for expert witness services which are reasonably necessary for his defense. *People v Davis*, 199 Mich App 502, 518; 503 NW2d 457 (1993). A defendant must show "a nexus between the facts of the case and the need for an expert." *People v Leonard*, 224 Mich App 569, 582; 569 NW2d 663 (1996). Absent such a showing, a defendant is not *entitled* to an expert at trial. See *id*.

Here, defendant failed to establish that he could not proceed safely to trial without "identification" experts. As the court pointed out in its opinion, "testimony regarding eyewitness identification is elicited on a regular basis at trial without the need for expert witnesses" and defendant "has not identified any special issues with respect to his identification that would necessitate the need for expert testimony thereon" because "it is not beyond the purview of triers of fact to examine the circumstances under which the witnesses claimed to have seen defendant and compare his photograph with surveillance footage." In other words, expert testimony regarding identification is simply unnecessary because six eyewitnesses identified defendant as the individual who committed the bank robbery and defendant was viewed close-up by those several witnesses for more than just a brief period of time. Further, witnesses saw the perpetrator getting into a uniquely described tow-truck that was connected closely to defendant. Therefore, it cannot be said that there was an appropriate nexus between the facts of the case and the need for an expert. Furthermore, the lack of the experts did not prevent defendant from safely proceeding to trial because he presented alibi witnesses who, if believed, would have called the identification of defendant into question. Moreover, the record indicates that defense counsel attacked the credibility of each of the prosecution's witnesses. In light of the above, the trial court in this case did not abuse its discretion in ruling that the eyewitness identification was not a matter requiring expert testimony.

Additionally, defendant says that the prosecutor engaged in several instances of misconduct which deprived defendant of a fair trial. We disagree. In *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), this Court explained:

> This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Concerning preserved issues of prosecutorial misconduct, this Court evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553

NW2d 692 (1996). Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *Carines*, *supra* at 763-764; *Schutte*, *supra* at 720.

The prosecutor asked a potential juror the following question during voir dire:

MR. COURIE: Okay. If – if you heard that in addition to the Great Lakes Bank that – that the Defendant may be involved in two other bank robberies, including Michigan National Bank, then would it move to your decision at all?

PROSPECTIVE JUROR 238: No.

In the context of opening argument, when a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). Furthermore, a finding of misconduct may not be based upon a prosecutor's good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Here, at the time of voir dire, defendant had not formally responded to the prosecutor's notice of intent[2] to introduce evidence of other bank robberies, and therefore the court made no ruling on the introduction of this evidence. After counsel objected to the prosecution's comments during voir dire, the court ruled the evidence inadmissible and prohibited the prosecutor from mentioning the other bank robberies in opening argument. Thus, the initial question is whether the prosecution acted in good faith. Though it appears the prosecutor acted in good faith, the dispositive inquiry is whether defendant was prejudiced by the prosecution's remarks.

Defendant has not shown that he was prejudiced. In light of the many witnesses who identified defendant, both at the lineup and at the preliminary examination, and at trial, and given the eyewitnesses' close proximity to the perpetrator during the robbery and the chase on foot that ensued, there is substantial testimonial support for defendant's conviction, and defendant has not established that the prosecutor's comment had any effect on the verdict.

Defendant also takes issue with the following exchange between the prosecutor and Detective Jeffrey Dolsen:

Q: And did – were you assigned to at least assist in the bank robbery that occurred on August 28th?

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[2] MRE 404(b)(2)

> A: I was assigned to meet with agents of the FBI who had been given some information that they believe the suspect, who had been involved in some back [sic] robberies had been located in the city of Warren.
>
> Q: Okay. So your involvement came after the bank robbery, you were given the information?

While Dolsen's answer may have improperly referred to other robberies, the answer was not particularly responsive to the prosecution's questions and thus, Dolsen's unelicited answer cannot accurately be characterized as "prosecutorial misconduct." Also, the answer was unspecific and unclear, and we will not assume that it tainted the jury, especially in light of the prosecutor's quick attempt to redirect the testimony away from "other robberies." Moreover, the answer appears even less potentially prejudicial when it is viewed in the context of the testimony which followed.

We find that Dolsen's scant reference to other robberies was buried in the dialogue that followed, in which the prosecutor clarified that he was only referring to "the holdup on August 28th." Also, defense counsel failed to object to this question. Because defendant failed to preserve this issue, he "must demonstrate plain error that affected his substantial rights." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Again, in light of the many witnesses who identified defendant as the perpetrator, and given their proximity to defendant during the robbery and during the chase shortly thereafter, defendant cannot show that the outcome of the proceedings was affected by Dolsen's isolated reference to other robberies. Furthermore, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte, supra*, 721. Had defendant objected, a curative instruction would have eliminated any possible prejudice.

Defendant also asserts that the prosecutor insinuated that defendant used the same modus operandi on another occasion to rob a bank; specifically, when cross-examining defense witness LaRocca, the prosecutor asked several questions regarding August 6. At one point, the court interrupted the prosecution's line of questioning. The prosecutor defended his line of questioning, arguing that, in a statement LaRocca had previously given to police, the "door had been opened" for questioning about an August 6 robbery as well as another bank robbery. The prosecutor claimed that LaRocca had admitted involvement with defendant in a robbery, although the prosecutor subsequently conceded that LaRocca's statement only indicated that he had "waited for defendant in the truck." Indeed, the record indicates that LaRocca's statement to the police, at most, admitted "waiting for defendant in a truck." Therefore, the court prohibited the line of questioning, and thereafter, the prosecutor refocused his questioning on the events of August 28.

Assuming that the prosecutor's argument that the door had been opened was disingenuous, and therefore, that he attempted to admit evidence of other robberies without justification[3], defendant still has not shown that he was prejudiced. The court quickly curtailed

[3] We make no finding on the issue of the prosecutor's motivation and did not speculate as to the prosecutor's state of mind.

the prosecutor's line of questioning before it was clear why the August 6 date had any relevance. Furthermore, LaRocca's answer to the effect that police were questioning him about "a bunch of dates" is consistent with the occurrence of only one robbery on August 28. Thus, we will not assume that the outcome of the trial was affected in any way by the prosecutor's abbreviated and unsuccessful attempt to refer to August 6 and some other robbery.

Defendant further asserts that the prosecutor engaged in misconduct by referring to defendant's use of an alias at the time of his arrest. Because the court ruled that the use of such evidence was proper, the prosecutor did not engage in misconduct by introducing it. Furthermore, in opening argument, while admitting that his client was "no angel," defense counsel stated: "You'll hear that Frank used a false name when he was picked up a year ago for his arrest," thus opening the door for such evidence.

Defendant also says that the prosecutor engaged in misconduct by eliciting testimony about defendant's possession of license plates unrelated to his vehicle. The prosecutor did, in fact, argue that the extra license plates could enable defendant to conceal his identity when he robbed the bank. The prosecutor also elicited the opinions of two police officers who said a robber might have extra license plates to conceal one's identity. This argument was part and parcel of the prosecution's theory at trial.

Defense counsel did not object to such testimony. Instead, he thoroughly cross-examined both police officer witnesses about their failure to link the extra plates to any person or vehicle, let alone any illegal activity. Further, defense counsel argued that it made sense for there to be extra, unused plates in the back of defendant's tow truck, because such plates could easily and innocently have originated from vehicles being towed. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The evidence was properly admitted, and the prosecutor did not engage in misconduct by arguing that the extra plates were kept in the truck for illegal use. It was up to the jury to decide whether they were there for a legitimate purpose.

Defendant further argues that the prosecutor improperly introduced testimony regarding defendant's drug use through defense witness LaRocca and improperly referred to defendant's drug use in closing argument. In fact, the prosecutor did ask LaRocca repeated questions about his shared drug use with defendant. However, LaRocca first mentioned the drug use when he used it as an explanation for why he could not remember certain, significant events and dates, and why he gave various explanations to the police regarding the significance of August 28. The prosecutor followed up with questions about his alleged lack of memory to undermine defendant's alibi. Thus, LaRocca opened the door to such questioning. Moreover, in opening statement, defense counsel also admitted and discussed briefly defendant's drug use, thereby also opening the door for the prosecution's follow-up questions. Remarks of the prosecutor which would be improper if standing alone do not amount to error necessitating reversal when made primarily in response to matters previously raised by defense counsel. *People v Potra*, 191 Mich App 503, 513; 479 NW2d 707 (1991). Therefore the references to defendant's drug use were not improper.

Affirmed.

/s/ Janet T. Neff
/s/ Mark J. Cavanagh
/s/ Henry William Saad