

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARIO COLLIER

Defendant-Appellant.

UNPUBLISHED

June 21, 2002

No. 232859

Wayne Circuit Court

LC No. 00-005675-01

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant appeals as of right his convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a mandatory term of life imprisonment without parole for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. We affirm.

Defendant first contends that the prosecution presented insufficient evidence to support his conviction of first-degree murder. In determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant begins by asserting that the testimonies of two eyewitnesses to the shooting were contradictory, and therefore that neither could be believed. We observe, however, that any contradiction between the testimonies of the witnesses is irrelevant to this appeal because “[t]his Court should not interfere with the jury’s role in determining the weight of the evidence or the credibility of the witnesses.” *People v Elkhoja*, ___ Mich App ___; ___ NW2d ___ (Docket No. 224126, issued 5/21/02), slip op. at 14. The jury’s resolution of an evidentiary contradiction in favor of the prosecution does not in and of itself warrant reversal of a defendant’s conviction.¹

¹ To the extent that defendant challenges the course of the police investigation into the victim’s murder, we note that this issue likewise has no bearing on the sufficiency of the evidence presented at defendant’s trial.

Defendant further suggests that insufficient evidence established that he was the person who shot the victim. Although no one testified to seeing defendant fire the fatal shots, defendant's brother testified that immediately before the shooting defendant was driving a Bonneville. An eyewitness to the shooting testified that the Bonneville pulled in front of the victim's vehicle and that the driver of the Bonneville approached the victim, asked "what's up, nigger?" then fired the gun at the victim four or five times. A second eyewitness to the shooting corroborated that the driver of the Bonneville was the person who killed the victim. While no one person could identify defendant as the person who shot the victim, a rational factfinder could conclude beyond a reasonable doubt on the basis of the several witnesses' testimonies taken together that defendant shot the victim. Accordingly, we find sufficient evidence to establish defendant's identity as the gunman who fired the fatal shots.

Defendant also argues that the prosecution presented insufficient evidence of premeditation to support his conviction. To convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. Premeditation and deliberation may be inferred from the circumstances surrounding the killing, including (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

Defendant describes the shooting as "spontaneous" and asserts that there was no evidence of planning. However, evidence elicited at trial supported a rational factfinder's conclusion beyond a reasonable doubt that (1) defendant's brother summoned defendant to the scene of the shooting to confront the individuals harassing defendant's brother and his friends, (2) defendant advised his brother to remain where he was and that defendant would come over, (3) ten to thirty minutes elapsed between his brother's call and defendant's arrival at the scene, and (4) on his arrival at the scene defendant learned who was harassing his brother, cut off the victim's vehicle, pointed a gun at the victim and fired several shots at the victim. This evidence and all reasonable inferences drawn therefrom amply established the elements of first-degree murder.

Defendant next asserts that the trial court erred in admitting evidence of his flight from police officers immediately before his arrest and in reading a standard jury instruction regarding flight. We find no error, however, because "[i]t is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). While defendant complains that the three-month period that elapsed between the shooting and his arrest rendered the evidence of flight too remote to show consciousness of guilt, this Court has observed that the remoteness in time between a charged crime and the occurrence of flight did not affect the admissibility of the evidence, but was relevant only to the weight of the evidence. *Id.* We therefore conclude that the trial court properly admitted the evidence of defendant's flight and correctly instructed the jury regarding the significance of the evidence, i.e., that the jury may or may not consider it as evidence of guilt. *Id.*; *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999).

Defendant next assigns error to the trial court's ruling that the prosecution exercised due diligence in attempting to produce an endorsed res gestae witness. When a prosecutor endorses a witness, he is obligated to exercise due diligence to produce the witness at trial. *People v*

Wolford, 189 Mich App 478, 483-484; 473 NW2d 767 (1991). The prosecutor may be relieved of the duty to produce the endorsed witness by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the witness' presence. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

The missing witness endorsed by the prosecution was Alfin Thibodeaux, who was one of several people that allegedly harassed defendant's brother and his friends shortly before the shooting. Thibodeaux failed to appear at a voluntary interview several days before his scheduled trial testimony. At the close of the third day of trial, the prosecution informed the court that Thibodeaux had not appeared, and the court issued a bench warrant for his arrest.

At a hearing the next day, December 7, 2000, to determine what measures the prosecution had taken to secure Thibodeaux's presence at trial, a police officer testified that after he obtained the bench warrant on December 6, he went to Thibodeaux's house but did not find Thibodeaux present. The officer left a card and note for Thibodeaux. The officer testified that that morning he had checked with the Detroit Police Department, area hospitals, and the sheriff's departments and medical examiner's offices for Oakland, Macomb, Wayne and Washtenaw counties to ascertain whether Thibodeaux had been arrested or had died. The officer had last spoken with Thibodeaux five days earlier, on December 2, and Thibodeaux then was aware that because of the subpoena he had received he would have to appear in court on Monday, December 4. When Thibodeaux did not appear on Monday, the officer left several messages on Thibodeaux's voice mail. The officer further stated that he had contacted two friends of Thibodeaux, both of whom witnessed the shooting and testified at trial, and one of whom was a neighbor of Thibodeaux, and asked them to try to contact Thibodeaux.

Defendant argues that the prosecution "waited until [it] had put in almost [its] entire case to raise the subject of the non-produced witness," and that the prosecution should have done more once it realized that Thibodeaux would not attend. Defendant suggests that the prosecution should have sought a bench warrant at the moment Thibodeaux failed to attend the voluntary interview. According to assertions by the prosecution and the officer's testimony,² however, Thibodeaux previously had been very cooperative and had not given any indication that he would not appear in court. Thibodeaux previously had appeared in court without incident on three occasions, once at defendant's brother's preliminary examination and once at his trial,³ and again at defendant's preliminary examination. Even though Thibodeaux failed to appear for his interview before defendant's trial, he had previously given no indication that he would fail to appear at trial. Due diligence does not require the prosecution, at the first hint of a witness' recalcitrance, to obtain a bench warrant to secure the witness' presence, especially when the witness has up until that time cooperated.

² We note that defendant did not challenge at trial the prosecution's assertions or the officer's testimony. Defendant did not question the police officer and did not argue against the trial court's finding of due diligence by the prosecution in securing Thibodeaux's appearance at trial.

³ Defendant's brother had been tried and acquitted on charges that he aided and abetted the first-degree murder of the victim.

In light of Thibodeaux's past cooperation and the prosecution's efforts to secure his presence, we cannot conclude that the trial court clearly erred in finding that the prosecution exercised due diligence. *Wolford, supra* at 484.

Defendant further contends that the prosecution used improper questioning of witnesses and improper argument to secure a conviction. Because defendant failed to preserve these issues for appeal by objecting at trial to the prosecution's alleged misconduct, we review them for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). After reviewing the record, we find no plain error. The prosecutor did not (1) improperly opine with respect to any witness' credibility or lack thereof, (2) "blur[] the distinction between that which is substantive evidence and that which is not," as defendant argues on appeal, or (3) successfully elicit hearsay testimony.

Defendant lastly urges that even if none of the alleged errors standing alone entitles him to a new trial, the cumulative effect of those errors warrants a new trial. Because we find no errors, however, we also find no cumulative effect. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Hilda R. Gage

/s/ Patrick M. Meter