

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN ADAMS, a/k/a SHAWN ADAMS,

Defendant-Appellant.

UNPUBLISHED

December 17, 2002

No. 228034

Wayne Circuit Court

LC No. 99-007884

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317 and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to thirty-five years to life in prison for the murder conviction, and a consecutive five-year term for the felony-firearm conviction. We affirm defendant's convictions, but remand for resentencing on the second-degree murder conviction.

I. Basic Facts

The victim, Muhammad Adams, died of multiple gunshot wounds during the early morning hours on January 31, 1999. Witnesses heard arguing shortly before the shooting and observed an individual standing over and shooting at Adams who was on the ground. According to Kevin Dean, Adams' friend, defendant and Adams had a disagreement about selling drugs in a certain area, and the two were involved in a physical confrontation leading to Adams' shooting. Dean denied seeing Adams armed with a weapon during that confrontation. The defense, however, presented testimony that Adams pulled a gun on defendant and Jeano Adams. Defendant testified that he shot back in self-defense and to protect Jeano, but claimed he only intended to scare Adams.

I. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial due to numerous instances of prosecutorial misconduct. Most of the alleged instances of misconduct were not preserved with an appropriate objection at trial. We review these unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). For those matters that were preserved with an objection below, we review the prosecutor's conduct in context to

determine if defendant was deprived of a fair and impartial trial. *People v Spivey*, 202 Mich App 719, 721; 509 NW2d 908 (1993).

Defendant first challenges a number of questions and comments made by the prosecutor during jury voir dire. There was no objection to any of the questions and comments now argued on appeal. Our review of the challenged matters fails to reveal plain error affecting defendant's substantial rights. *Schutte, supra*.

Defendant argues that it was misconduct for the prosecutor to question a witness about a gun that defendant possessed about 2 ½ weeks before the charged offense. Although the court sustained defendant's objection to the questioning and instructed the jury to disregard the witness' response, we do not believe that the prosecutor's questioning amounted to misconduct. Prosecutorial misconduct cannot be based on good faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which he legitimately believes will be accepted by the court so long as that attempt does not actually prejudice the defendant. *Id.* at 660-661. In this case, the prosecutor was attempting to link defendant to the weapon involved in the shooting. The record does not demonstrate bad faith by the prosecutor and defendant was not prejudiced by the questioning. The witness testified that the gun she saw did not resemble the weapon allegedly involved in this case. In addition, the court instructed the jury to disregard the witness' response.

Similarly, the record does not demonstrate bad faith by the prosecutor in asking defendant about a prior conviction for selling drugs. Moreover, defendant was not prejudiced by the question considering that other evidence had already been received showing defendant's involvement in selling drugs. *Noble, supra*.

Nor did the prosecutor commit misconduct in presenting the rebuttal testimony of Harold Calhoun. The testimony was properly offered to rebut defendant's testimony about the circumstances of this shooting, notwithstanding that it involved other criminal acts committed by defendant. *People v Holland*, 179 Mich App 184, 193-194; 445 NW2d 206 (1989).

We agree with defendant that it is generally improper for a prosecutor to ask a witness to comment on the credibility of other witnesses. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). Here, however, defendant failed to object to any of the questions now challenged. To the extent any of the prosecutor's questions could be considered improper, they were not so egregious as to affect defendant's substantial rights. *Schutte, supra*. Reversal is not warranted on the basis of this unpreserved issue.

Next, after considering defendant's unpreserved claims involving the prosecutor's opening statement and closing argument, we find that none of the challenged remarks amounted to plain error affecting defendant's substantial rights. *Schutte, supra*. Similarly, the prosecutor's examination of the medical examiner, witness Dean, and other witnesses did not amount to plain error. *Carines, supra*.

In sum, defendant's claims of prosecutorial misconduct, whether singularly or cumulatively considered, do not require reversal.

II. Defense Witnesses

Defendant next argues that the trial court erred by precluding him from calling two witnesses. We review a trial court's decision to either admit or exclude evidence for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Defendant also argues that the trial court's decision deprived him of his constitutional right to present a defense. We review this latter issue de novo. *People v Kurr*, ___ Mich App ___, ___ NW2d ___ (2002), slip op at 5.

The trial court did not err in excluding Delma Gregory and Tamika Childress as witnesses. Neither witness was able to offer any relevant testimony in support the defendant's self-defense theory. The defense theory was linked to events that occurred inside a different house on Omira Street a few hours before this shooting. However, neither witness was present inside that house or observed any unusual matters outside the house. The court did not abuse its discretion in precluding these witnesses, and their absence did not deny defendant his constitutional right to present a defense. Const 1963, art 1, § 13; US Const, Ams VI, XIV; *Kurr*, *supra*.

III. Voir Dire

Next, defendant argues that reversal is required because the prosecutor exceeded the scope of permissible voir dire during jury selection and the trial court failed to intervene to control the proceedings. Because defendant did not object at trial to the prosecutor's voir dire, we review this unpreserved issue for plain error that affected defendant's substantial rights. *Carines*, *supra*; *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998). As the basis for his argument, defendant incorporates his previous arguments presented under the label of prosecutorial misconduct, as discussed in part I of this opinion. As we concluded previously, the prosecutor's voir dire questions did not amount to plain error. In general, the questions and comments were appropriately aimed at determining whether a prospective juror should be excused. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). Accordingly, we reject defendant's claim that the trial court erred by failing to intervene.

IV. Mistrial

Defendant argues that the trial court erred in denying his motions for a mistrial. The grant or denial of a motion for mistrial is within the sound discretion of the trial court. The motion should only be granted for some irregularity that is both prejudicial to the defendant's rights and impairs his ability to receive a fair trial. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Defendant's argument is premised on issues previously addressed in part I of this opinion, regarding alleged misconduct by the prosecutor. Consistent with our resolution of those issues, we conclude that the record does not show that defendant was prejudiced and impaired in his ability to receive a fair trial. The trial court did not abuse its discretion in denying defendant's motions.

V. Jury Instructions

Next, defendant argues that the trial court erred by refusing to instruct the jury as requested. Issues involving jury instructions are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

We find no error in the court's decision not to give CJI2d 4.5 (prior inconsistent statements). The trial court correctly observed that the instruction was not applicable where the witness in question recanted part of his prior testimony from the preliminary examination. As the use notes for CJI2d 4.5 indicate, the instruction need not be given where the earlier statement falls under MRE 801(d)(1)(A), i.e., a prior statement of the witness made under oath and subject to the penalty of perjury. In that instance, the prior testimony is not hearsay and may be used as substantive evidence.

The trial court also declined to give CJI2d 4.11, and instead fashioned its own instruction covering this matter. Although we disapprove of the instruction given by the court, the substituted instruction conveyed the pertinent points from CJI2d 4.11, and was sufficient to protect defendant's rights. *People v McFall*, 224 Mich App 403, 414-415; 569 NW2d 828 (1997).

VI. Cumulative Error

Defendant has failed to show that the cumulative effect of several errors deprived him of a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Therefore, we decline to reverse defendant's convictions on this basis.

VII. Sentencing

We agree that defendant's sentence of thirty-five years to life for second-degree murder is invalid under MCL 769.9(2). "The court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." MCL 769.9(2); *People v Foy*, 124 Mich App 107, 113; 333 NW2d 596 (1983). Accordingly, we vacate defendant's sentence for second-degree murder and remand for resentencing on that offense. However, we are not persuaded that defendant should be resentenced by another judge. See *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

Affirmed in part and remanded for resentencing on the second-degree murder conviction. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio