

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DAVID THOMPSON,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 263585

Wayne Circuit Court

LC No. 03-008772-01

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for second-degree murder (“murder”), MCL 750.317, and possession of a firearm during the commission of a felony (“felony-firearm”), MCL 750.227b. Defendant was sentenced to 15 to 23 years’ imprisonment for his murder conviction and a consecutive term of two years’ imprisonment for his felony-firearm conviction. We affirm.

On appeal, defendant asserts prosecutorial misconduct that created undue prejudice when the prosecutor questioned a witness regarding whether she had received threats in connection with her trial testimony without connecting the threats directly to defendant. We disagree.

Because defendant failed to preserve the issue by objecting to the prosecutor’s questions, we review for plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

Defendant argues that the prosecutor’s questions regarding threats made to a witness, without connecting them to defendant, caused undue prejudice to defendant during trial, and therefore, substantially affected his right of being proven guilty beyond a reasonable doubt. “The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context.” *People v Abraham*, 256 Mich App 265, 272-73; 662 NW2d 836 (2003), citing *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Evidence of threats made to a witness can demonstrate consciousness of guilt if the threats are connected to the defendant. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). The trier of fact may also use evidence of any threats made to a witness to determine the bias and credibility of

the witness. *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001); *People v Johnson*, 174 Mich App 108, 112; 435 NW2d 465 (1989).

Defendant alleges that prosecutorial misconduct occurred when a prosecution witness was under direct examination by the prosecutor. The prosecutor initially questioned the witness regarding whom she observed standing next to the victim when she heard the gunshots fired. The witness failed to respond after being asked that question twice. The prosecutor then proceeded to impeach the witness by reading the signed statement that she had provided to police investigators. The witness denied that she gave the statement to police as it was read in court, saying that the police investigator coerced her into signing the statement by threatening to place her child in protective services. The trial judge cautioned that the signed statement could only be introduced to impeach the witness and could not be used as substantive evidence. Immediately following this exchange, the prosecutor asked the witness whether there are “warrants outstanding for certain individuals that have threatened you to come to court to testify?” The witness acknowledged that she had received threats in connection with her testimony in court.

When reviewing the context of the exchange between the witness and the prosecutor it is clear that questioning the witness about the threats was solely for purpose of impeachment. The witness appeared reluctant to identify the shooter because she offered no response when she was asked whom she had observed near the victim when the shots were fired. She denied that she made the statement to police as it was presented in court. The witness proceeded to claim that she never saw defendant with a gun, despite her contrary statement to police that defendant was the shooter. In response, the prosecutor posed the question, “Is it your understanding, ma’am, that there are warrants outstanding for *certain individuals* that have threatened you to come to court to testify?” (Emphasis added.) The prosecutor made no mention of defendant in connection with the threats and his reference to “certain individuals” implied someone other than defendant had made the threats. The prosecutor questioned the witness only to establish the credibility of portions of her testimony and not to prove that defendant threatened her. As such, there was no error.

The trial judge, as the trier of fact, was aware that the prosecutor was in the process of impeaching the witness because he interjected before the comments regarding the threats and questioned the prosecutor whether the witness’s signed statement to police was being presented for its impeachment value. “A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial.” *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), quoting *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

The trial judge made no reference to the alleged threats or the witness’s signed statement during his ruling. Instead, the judge focused on the witness’s testimony regarding other individuals present, and defendant’s physical location in proximity to the victim when the shooting occurred. The witness stated in court that one of the individuals was either running into or out of her house when the shots were fired, another individual was not near the victim, and only defendant was standing in physical proximity to the victim. The judge noted that this portion of the witness’s testimony was corroborative of other witnesses’ identification of

defendant as the shooter. Therefore, there was no error and defendant suffered no undue prejudice.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot