Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI v SHAMON LYNN BEAVERS

Docket No. 264178

LC No. 04-198633-FC

DEBORAH A. SERVITTO
Presiding Judge

E. THOMAS FITZGERALD

MICHAEL J. TALBOT
Judges

On the Court's own motion, the November 21, 2006 opinion is hereby AMENDED. The opinion is amended to correct the following clerical error: the word "waved" will replace the word "waived" throughout the opinion.

In all other respects, the November 21, 2006, opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 12 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAMON LYNN BEAVERS,

Defendant-Appellant.

UNPUBLISHED
November 21, 2006

No. 264178
Oakland Circuit Court
LC No. 04-198633-FC

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

PER CURIAM.

Defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a, and armed robbery, MCL 750.529. He was sentenced to 5 ½ to 20 years in prison on each of his convictions. He appeals as of right. We affirm.

Defendant first argues that the trial court erred when it denied his motion to suppress his statements to the police. We disagree. We review de novo issues of law pertaining to a motion to suppress. *People v Hawkins*, 468 Mich 488, 496; 668 NW2d 602 (2003).

A prosecutor generally may not use custodial statements as evidence unless he demonstrates that, before any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to retained or appointed counsel. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384, 395; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A custodial interrogation is questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances. *Id.* The key question is whether the accused could reasonably believe that he was not free to leave. *Id.* "The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned." *Id.*

Defendant testified that he felt he was not free to leave and that if he attempted to leave police would have prevented him from doing so and would have arrested him. The police detective testified that once defendant admitted his participation in the robbery, in the detective's

mind, defendant was no longer free to leave and if defendant had attempted to leave police would have arrested him. However, the determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Zahn, supra*, p 449. Defendant voluntarily went to the police station and asked to speak with detectives. Defendant was never told that he was under arrest or could not leave, was not restrained in any way, and was left alone on more than one occasion in an unlocked, unguarded room. Before defendant spoke with police, he verbally acknowledged his understanding that he was not under arrest. Defendant's written statement also establishes that he knew he was not under arrest when the statement was given. Thus, viewing the circumstances objectively, we conclude that the trial court did not err when it found that defendant could not have reasonably believed that he was not free to leave, and thus, was not in custody. *Id.* Therefore, even though it is undisputed that defendant was never informed of his *Miranda* rights before he gave the challenged statements, the trial court properly denied defendant's suppression motion. *Hill, supra*, pp 384, 395; *Zahn, supra*, p 449.

Defendant next argues that the trial court erred when it allowed jurors to submit questions to the witnesses. Defendant failed to object to the trial court's instruction informing the jurors that it would allow them to ask the witnesses questions, and furthermore, failed to object to any specific question submitted by the jurors. Because this argument is not properly preserved for appeal, *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), we review defendant's argument for plain error affecting substantial rights, *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999).

"The practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972).[1] Defendant does not claim any abuse of discretion, or challenge any specific question that was asked, but argues that the practice of permitting jurors to ask questions should be deemed "structural error . . . as a matter of law reform." This Court is bound to follow our Supreme Court's decision in *Heard*, which holds that the practice of allowing jurors to ask witnesses questions is within the trial court's discretion. See *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987) (holding that it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until the Supreme Court takes such action, the Court of Appeals and all lower courts are bound by that authority).

In the instant case, the trial court instructed the jurors that if they had questions after a witness was done testifying, they could write down questions and submit them to the court, and if the prosecution, defense counsel and the court deemed the question to be appropriate, the court would ask the witness the question that was submitted. Thus, the trial court employed a procedure that ensured that inappropriate questions were not posed to witnesses, and allowed the parties the opportunity to object to any questions. Hence, defendant has failed to show that the

[1] We note that recently enacted MCR 6.414(E) codifies *Heard* by stating that "[t]he court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions."

trial court erred by permitting jurors to ask questions. *Carines, supra*, p 763; *Heard, supra*, p 187.

Defendant next argues that the trial court abused its discretion when it refused to instruct the jury on "attempt" and "abandonment." We disagree. We review a trial court's determination whether a jury instruction was applicable to the facts of the case for an abuse of discretion. *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005), rev'd on other grounds 474 Mich 1108 (2006). Because defendant failed to reference his "attempt" argument in his statement of questions presented, we will review that argument for plain error affecting substantial rights. MCR 7.212(C)(5); *Carines, supra*, p 763; *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

A trial court must instruct the jury regarding the applicable law. A criminal defendant has a right to a properly instructed jury, and a requested instruction that is supported by the evidence must be given. MCL 768.29; *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000). "A criminal defendant has a state and federal constitutional right to present a defense," and thus, "[i]nstructional errors which directly affect a defendant's theory of defense can infringe a defendant's due process right to present a defense." *People v Kurr*, 253 Mich App 317, 326-327; 654 NW2d 651 (2002). "Conversely, an instruction that is without evidentiary support should not be given." *People v Wess*, 235 Mich App 241, 243; 597 NW2d 215 (1999). "A defendant asserting an affirmative defense must produce some evidence on all elements of the defense before the trial court is required to instruct the jury regarding the affirmative defense." *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). In *People v Droste*, 160 Mich 66, 80; 125 NW 27 (1910), our Supreme Court held that where a defendant denied the crime altogether rather than arguing that he committed the crime but only did so out of self-defense, the trial court did not err when it denied the defendant's request to have the jury instructed on self-defense. Similarly, in *People v Trammell*, 70 Mich App 351, 355; 247 NW2d 311 (1976), this Court held that where the defendant argued that his actions were an accident, the trial court did not err when it did not instruct the jury on self-defense.

The trial court denied defendant's request for an attempt instruction, finding that it was not supported by a rational view of the evidence because defendant did not present an attempt theory, but rather, argued that he was not criminally involved whatsoever in the events. In *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002), our Supreme Court held that, pursuant to MCL 768.32(1),[2] a lesser offense instruction may be given only if it is a necessarily included lesser offense *or an attempt*, and the instruction is supported by a rational view of the evidence.

The evidence presented by the prosecution establishes that defendant and five other men discussed robbing a store before defendant drove two of the men to a building adjacent to a wine

[2] The statute reads as follows: "Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense." MCL 768.32(1).

store where they met up with the other three men. The evidence established that the men carried out their plan to rob the wine store by sending one man in to the store to check out the store, who subsequently called three other men in to the store to help rob the store. One of these men was armed. At trial, defendant testified that he was never involved in any discussion about a robbery and knew nothing about a robbery. Defendant contended that he merely drove a couple of friends to an apartment complex in Southfield, and when he exited the car, "Rat" waived a gun in his face and told him to wait in the car. Defendant argued that he was completely innocent, not that an armed robbery was attempted, but not completed. Thus, the evidence presented established either that defendant was innocent or that he aided and abetted an armed robbery. *People v Moore*, 470 Mich 56, 67; 679 NW2d 41 (2004); *People v Ford*, 262 Mich App 443, 458; 687 NW2d 119 (2004); *People v Coomer*, 245 Mich App 206, 223; 627 NW2d 612 (2001). A rational view of the evidence did not support an instruction on attempted armed robbery. Therefore, the trial court did not abuse its discretion, or commit plain error, when it declined defendant's request to instruct the jury on attempted armed robbery. *Cornell, supra*, pp 357-358; *Droste, supra*, p 80; *Wess, supra*, p 243.

The trial court also denied defendant's request for an abandonment instruction on the ground that such an instruction is a proper defense only to an attempt charge. It has been established that "voluntary abandonment is an affirmative defense to a prosecution for criminal attempt. The burden is on the defendant to establish by a preponderance of the evidence that he or she has voluntarily and completely abandoned his or her criminal purpose. Abandonment is not 'voluntary' when the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances which increase the probability of detention or apprehension." *People v Kimball*, 109 Mich App 273, 286-287; 311 NW2d 343 (1981), mod on other grounds 412 Mich 890 (1981). The evidence presented did not support an attempted armed robbery instruction, and accordingly, defendant was not charged with attempted armed robbery, nor was an attempt instruction given. Thus, an abandonment defense was not available. *Id*. Moreover, the evidence presented by defendant sought to establish that he was completely innocent, not that he abandoned an armed robbery. In contrast, the prosecution's evidence established that defendant aided and abetted the armed robbery and left the scene only because he heard a commotion. Therefore, the trial court properly denied defendant's request for an abandonment instruction. *Droste, supra*, p 80; *Crawford, supra*, p 620; *Trammell, supra*, p 355.

Defendant's final argument is that the prosecutor committed misconduct that denied him a fair and impartial trial. We disagree. Defendant failed to properly preserve this argument by objecting to the prosecutor's alleged instances of misconduct on the same ground that he asserts on appeal. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) (holding that an objection based on one ground is insufficient to preserve an appellate argument on a different ground). Thus, we review defendant's claim for plain error affecting his substantial rights. *Carines, supra*, pp 763, 773.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A reviewing court examines the record to evaluate the challenged prosecutorial remarks within the context of the evidence, issues and defense arguments. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct

1354; 158 L Ed 2d 177 (2004). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). "A prosecutor may not imply in closing argument that defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983).[3] However, a prosecutor is entitled to fairly respond to issues raised by a defendant. *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003). Under the "fair response" doctrine, unless the prosecutor's comments burden the defendant's right not to testify, or shift the burden of disproving an element of the offense to the defendant, the comments are not improper. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995). A prosecutor's comments on a defendant's failure to call witnesses in support of a defense theory advanced at trial does not shift the burden of proof to the defendant, but simply are proper comments on the weakness of the defense theory. *Id*., pp 111-112, 115.

Defendant testified that the bullets that were found in the trunk of his car belonged to "Grant," and that when he attempted to get out of the car, "Rat" waived a gun in his face and told him to stay in the car. On cross-examination, the prosecutor asked defendant if he planned on calling "Grant" and "Rat" as witnesses to corroborate his testimony. During defense counsel's closing argument, defense counsel stated that it was not defendant's "duty or obligation" to produce "Rat." During the prosecutor's rebuttal argument, the prosecutor reminded the jury that defendant, through his attorney, had the power to subpoena "Rat." MCL 775.15; *People v Duff*, 165 Mich App 530, 547; 419 NW2d 600 (1987).

Defendant presented a theory of duress when he testified that "Rat" waived a gun in his face and told him to stay in the car. Defendant denied ownership of a box of bullets when he testified that the bullets in his car's trunk belonged to "Grant." Thus, we conclude that the prosecutor's questions posed to defendant during cross-examination regarding whether he intended to produce certain witnesses, were proper questions that were strictly in response to defense theories. Accordingly, the prosecutor's questions did not shift the burden of disproving an element of the crimes charged and did not deny defendant his right to a fair and impartial trial. *Jones, supra*, pp 352-353 n 6; *Fields, supra*, pp 111-115.

We further conclude that the prosecutor's rebuttal comments that defendant had the power to subpoena witnesses was also in response to defendant's testimony that "Rat" waived a gun in his face and was a proper statement of Michigan law. *Duff, supra*, p 547. The prosecutor's rebuttal comments did not shift the burden of disproving an element of armed robbery or conspiracy to commit armed robbery and did not deny defendant his right to a fair and impartial trial. *Jones, supra*, pp 352-353 n 6; *Fields, supra*, pp 111-115; *Duff, supra,* p 547.

[3] In *Green, supra*, this Court held that the prosecutor's closing argument, which consisted of 11 questions the prosecutor felt the defendant should have to answer, was improper because it improperly shifted the burden of proof to the defendant by suggesting that the defendant had to explain the evidence against him. *Green, supra*, p 237.

Therefore, the prosecutor's aforementioned actions do not amount to prosecutorial misconduct or plain error. *Carines, supra,* pp 763, 773; *Watson, supra*, p 586.

Affirmed.

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