

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON DARNELL LOTTS,

Defendant-Appellant.

UNPUBLISHED

October 23, 2007

No. 270254

Muskegon Circuit Court

LC No. 04-050357-FC

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant argues that the identification evidence presented at trial was insufficient to sustain his convictions, based on discrepancies between his testimony and the testimony of eyewitnesses. Specifically, defendant points to his testimony that, at the time of the shooting, he was wearing a gray jacket and white tennis shoes and had a goatee, versus the testimony of the eyewitnesses that the shooter was wearing a black leather jacket and tan boots and was clean-shaven. Defendant also argues that the security tape of the club did not support the eyewitnesses' description of him.

We review de novo challenges to the sufficiency of the evidence to determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). We will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Regarding the eyewitness description of the shooter, the jury was free to attribute whatever weight and credibility it believed warranted to the two eyewitnesses. *Id.* One eyewitness testified that she was able to see the shooter's face when he stopped to retrieve his black leather jacket as he was fleeing the scene of the shooting: he had light eyes, light hair, a very light complexion, was clean-shaven, and was short. The other eyewitness testified that she saw the shooter's face as he fled the scene: he was clean-shaven and had a light complexion. Both eyewitnesses testified that the shooter was wearing a white t-shirt, denim jeans, and brown

or tan Timberland boots. Both eyewitnesses identified defendant as the shooter. Defendant testified that on the night of the shooting, he wore a light gray nylon jacket, blue pants, and white sneakers; he denied wearing a black leather jacket. He also testified that he had a mustache and goatee that evening. The security tape of the club where the victim, the eyewitnesses, and defendant were before the shooting was inconclusive regarding the color of defendant's various items of clothing, due to its poor quality. This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Id.* Further, all conflicts in the evidence must be resolved in favor of the prosecution. *Id.*

Regarding the initial statement made by one of the eyewitnesses to the 911 operator and a detective that she did not see the shooter's face, she admitted that she had been untruthful, but explained that she did not originally tell the truth because she did not want to be involved in the case because she feared retaliation. Contrary to defendant's assertion that the eyewitness identified another man as the shooter, the record reveals that in the first photographic lineup, she selected two men who had features similar to the shooter, but made it clear that she was not saying that either of the men were the shooter. In the second photographic lineup, she immediately identified defendant as the shooter. In fact, she actually met defendant on one or two previous occasions. The other eyewitness also participated in two photographic lineups. In the first lineup, she indicated that she recognized one of the men. In the second lineup, however, she identified defendant as the shooter. In fact, she had seen defendant around town on previous occasions.

The prosecution need not negate every reasonable theory consistent with innocence. *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006). Instead, "it need only convince the jury 'in the face of whatever contradictory evidence the defendant may provide.' " *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), quoting *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995). The eyewitnesses identified defendant as the shooter, and their testimony convinced the jury that defendant was guilty of the charged offenses, in the face of defendant's testimony that he was not the shooter. Viewing the evidence in the light most favorable to the prosecution, sufficient evidence was presented from which the jury could find beyond a reasonable doubt that defendant was the shooter.

Defendant also argues that a question posed to defendant by the prosecutor on cross-examination constituted misconduct. We review unpreserved issues of prosecutorial misconduct for plain error affecting substantial rights.¹ *People v Rodriguez*, 251 Mich App 10, 32; 650

¹ At trial, defendant objected to the prosecutor's allegedly improper question on relevancy grounds. On appeal, defendant objects to the prosecutor's allegedly improper question on a different basis. "An objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Although defendant moved for a new trial on the same grounds he asserts on appeal, the issue is not properly preserved for appeal because "a defendant must 'raise objections at a time when the trial court has an opportunity to correct the error . . . ' " *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006), quoting *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and *specifically* objects, except when an objection could not have cured the error, or a

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NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 24.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Prosecutorial misconduct issues are decided on a case-by-case basis, and we must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *Id.* at 272-273. During cross-examination of defendant, the prosecutor inquired regarding the route defendant took to North Carolina following the shooting. The prosecutor then asked if defendant would be surprised to learn "that a certain law enforcement agency had actually tapped phone calls from [him] in all those cities after December 16th, 2002: Las Vegas, New York, New Orleans?," to which defendant responded "I don't know nothin' about it."

Defendant argues that his credibility was severely damaged by the prosecutor's hypothetical question. It is well-settled that "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence," and that "[t]he prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Here, defendant concedes that the prosecutor acted in good faith, and defendant has failed to demonstrate, aside from general allegations that his credibility was damaged, that he was prejudiced by his answer to the prosecutor's question. Further, any prejudice to defendant resulting from his answer that he did not know anything about certain law enforcement agencies tapping phone calls from him in various cities after the murder could have been cured by a timely objection on the ground defendant asserts on appeal, followed by a curative instruction. Moreover, the trial court instructed the jury that it could only consider properly admitted evidence, and specifically noted that the questions made by the attorneys to witnesses were not evidence. The trial court also instructed the jury to only accept the things the attorneys said that were supported by the evidence. Because juries are presumed to follow their instructions, any prejudice was eliminated by the instructions given by the trial court at the end of trial. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). No plain error occurred, and defendant is not entitled to relief on this unpreserved issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray

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failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003) (emphasis added).