STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 5, 2009
v	No. 280323 Wayne Circuit Court
GHALIB MUNTAQIM-BEY, Defendant-Appellant.	LC No. 07-007792-01

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant was found guilty by a jury of second-degree murder, MCL 750.317, and he was sentenced by the trial court as an habitual offender, fourth offense, MCL 769.12, to 336 to 500 months' imprisonment. Defendant appeals his conviction and his sentence. We affirm.

The victim in this matter was Richard Taylor III, who was beaten with a baseball bat late in the evening of August 20, 2006, in Inkster. Taylor died of his injuries in October 2006. Donnell Erquhart, an eyewitness to the beating and a friend of Taylor's, identified defendant as Taylor's assailant. A second eyewitness, Anthony Hasley, identified a photograph of defendant as looking like the person who beat Taylor, but Hasley testified that defendant was not the assailant. Defendant presented an alibi defense witness who testified that defendant and the witness had been at a party in Detroit when the beating occurred. In rebuttal, the prosecutor called defendant's wife, who testified that defendant was with her most of the day on the date of the offense, but then left the family home shortly before the offense and did not return until sometime the next morning.

Defendant argues that his wife's testimony was inadmissible for two reasons: first, it was in violation of the marital privilege; and second, the prosecutor failed to provide timely notice of her intent to testify as a rebuttal alibi witness. We disagree with both assertions.

The only privilege at issue is the criminal testimonial privilege: MCL 600.2162(2) provides that in a criminal prosecution, "a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent," except as otherwise provided in the statute. Thus, the privilege belongs to the witness, not the defendant. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Here, defendant's wife approached the prosecutor and agreed to cooperate and testify against defendant; clearly, she did waive her privilege. Because she did not testify regarding any communication between

herself and defendant, the communications privilege, MCL 600.2162(7), does not apply. Defendant contends that trial counsel was ineffective for failing to object, but any objection would have been futile, so trial counsel cannot be ineffective for failing to raise it. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

A defendant is required to notify the prosecution of any witnesses and facts regarding an alibi defense. Pursuant to MCL 768.20(2) and (3), the prosecution must provide to the defense similar notice regarding rebuttal to any such alibi defense; the purpose of the rebuttal notice requirement is to prevent surprise at trial. *People v Bell*, 169 Mich App 306, 308; 425 NW2d 537 (1988). However, the trial court may, at its discretion, admit rebuttal testimony even after commencement of trial if it finds that, under the particular facts and circumstances of the case, the prosecution undertook all reasonable efforts to obtain the name of its rebuttal alibi witness. *People v Travis*, 443 Mich 668, 678-680; 505 NW2d 563 (1993). In making that assessment, the trial court must consider and weigh "(1) the amount of prejudice that resulted from the failure to disclose, (2) the reason for nondisclosure, (3) the extent to which the harm caused by nondisclosure was mitigated by subsequent events, (4) the weight of the properly admitted evidence supporting the defendant's guilt, and (5) other relevant factors arising out of the circumstances of the case." *Id*., 681-683.

The record discloses that the prosecutor did not learn that defendant's wife had information to rebut defendant's alibi testimony until the day she was called to testify. Defendant's wife testified that she approached the prosecutor on the morning that she testified. She gave a statement to the officer in charge while the prosecution was still presenting its case in chief.[1] Any earlier notice would have been a matter of hours, not days. The trial court also explained that it allowed defendant an opportunity to discover his wife's proposed testimony before she was called to testify. Defendant contends that had he known sooner that his wife would testify, he might not have presented an alibi defense. However, defense counsel had previously informed the jury in his opening statement that defendant would be presenting an alibi defense. This occurred well before the prosecutor learned of defendant's wife's testimony. Under these circumstances, the trial court did not abuse its discretion in allowing defendant's wife to testify in rebuttal.

Defendant next argues that the prosecutor committed misconduct by misrepresenting evidence during closing argument. We disagree.

The test for prosecutorial misconduct is whether defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is free to argue the evidence and any reasonable inferences that may arise from the evidence. *Bahoda, supra* at 282;

[1] The record does not support defendant's assertion that his wife gave her statement to the officer in charge the day before she was called to testify. The testimony established that she did not give her statement until after she came forward, which was on the same day she testified.

People v Ackerman, 257 Mich App 434, 450; 669 NW2d 818 (2003). Because defendant did not preserve this issue with an appropriate objection at trial, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant specifically asserts that the following remarks from the prosecutor during oral argument were improper:

> Counsel is going to get up and say, ah, he [Erquhart] was smoking weed and he was drinking gin. Well let's see if he's accurate vis a vis other people.
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> Time. Anytime you're five sheets to the wind one of the first things you lose track of, you been tipping it, time seems to slip away. What did Mr. Erquhart say? 11:45ish. Store closes at midnight he says. Sometimes they cheat on it a little bit. Some party store they might know. Not that that would happen. But the lady EMS tech told you what time a dispatch was. The officer in uniform this morning told you. So Erquhart is accurate. He's oriented, as the EMS tech would say, times four. Talked about, you know, his knowledge that Rick, Mr. Taylor, Richard Taylor, III, worked over at Harrison. And we know the relationship of the two locations. According to the Exhibit 4 half hours walk, short bike ride. *The corroboration we gained from the testimony of the tall, slender man.* When I saw him I commented to the detective he has a body like Jaylyn Rose. All arms and legs. I don't know if any of you are Michigan basketball fans, but unbelievable spans of humanity that was here. Mr. Hasley.
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> Now understand what's going on with Mr. Hasley's head, cause you got to understand that. He comes in at a point in time when what? This be the pot, and his can's in the soup, or so he thinks. Don't want to get crude, but he's thinking he's in the soup when he comes and sees that man in November. November 6. Not in a whole lot of hurry to help out Unc, nephew ain't. Okay. *And he fills out a statement, and identifies from the lineup my man, the defendant.* The only thing he says that day from his testimony and from the detective's testimony is, you know the beard is a little different color. *That face, you got to age it some, and the beard is a little bit more like the color of my man in the third spot but the face is the same.* [Emphasis added.]

The testimony at trial revealed that, in the photographic lineup that Hasley viewed, the photograph of defendant was approximately six years old. Hasley identified defendant's photograph as resembling the person who assaulted Taylor. Hasley noted at the photographic lineup and at trial that the facial hair in the photograph was different and not as gray as the person Hasley saw beat Taylor, and as a consequence he was not certain of his identification, although the suspect "looked like" the photograph of defendant. We find that the prosecutor's argument that Hasley had identified defendant in the photographic lineup was based on the evidence and reasonable inferences therefrom. The prosecutor's argument was not improper, so it would have been futile for defense counsel to object. Again, trial counsel is not ineffective for failing to raise a futile objection. *Chambers, supra* at 11.

Finally, defendant argues that the trial court improperly applied MCL 777.50 when scoring 50 points for prior record variable (PRV) 1 of the sentencing guidelines. We disagree. A trial court's application of the statutory sentencing guidelines is reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). If a statute is unambiguous, this Court will apply the language as written. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007).

Under MCL 777.51, PRV 1 is to be scored at fifty points if the offender has two prior high severity felony convictions, which defendant does not dispute that he has. However, under MCL 777.50, any such conviction must be excluded if there has been "a period of 10 or more years between the discharge date from a conviction" and the "commission of the next offense resulting in a conviction." A "conviction" is explicitly defined as including "Assignment to youthful trainee status under sections 11 to 15 of chapter II [MCL 762.11 to MCL 762.15]" and "A conviction set aside under 1965 PA 213, MCL 780.621 to 780.624." MCL 777.50(4).

Defendant argues that the discharge date of his most-recent high-severity conviction was, in fact, more than ten years before the instant offense, and the trial court erroneously found no such gap on the basis of an intervening misdemeanor conviction. However, nothing in the statute contains any indication that the Legislature intended to differentiate between felonies and misdemeanors. To the contrary, the inclusion of assignment to youthful trainee status and expunged convictions of record indicates that MCL 777.50(4) was intended to broadly apply to all criminal convictions of record and, therefore, would encompass misdemeanor convictions for purposes of calculating the time between convictions under MCL 777.50.

Defendant asserts that his misdemeanor conviction was a traffic offense, which the Youthful Trainee Act (YTA), MCL 762.11 *et seq.*, excludes. MCL 762.11(2)(c) and (4)(b). However, the relevant consideration is whether defendant's conviction is subject to MCL 777.50, not whether it was subject to the YTA. Defendant also asserts that MCL 777.50 conflicts with MCL 777.55. However, MCL 777.50 specifically provides in subsection (1) that it applies to the scoring of PRV 1 through 5, whereas MCL 777.55 expressly applies only to PRV 5, which specifically scores misdemeanor convictions only. Thus, MCL 777.55 does not apply here and there is no basis for finding that this statute renders MCL 777.50 ambiguous. The trial court properly scored PRV 1.

Affirmed.

/s/ Henry William Saad
/s/ Alton T. Davis
/s/ Deborah A. Servitto