

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 13, 2011

v

JEREMY AUSTIN LOPEZ,

Defendant-Appellant.

No. 300928
Kent Circuit Court
LC No. 10-002809-FC

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right his first-degree felony murder conviction, MCL 750.316(1)(b). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to life in prison without the possibility of parole, MCL 791.234(6)(a). We affirm.

Defendant first argues that the trial court erred in denying his motion for a directed verdict. In reviewing the denial of a motion for a directed verdict of acquittal, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The prosecution's theory of the case was that defendant and his codefendant robbed and beat the victim. During the robbery, the codefendant shot and killed the victim, and defendant aided and abetted first-degree felony murder by acting as the getaway driver. Defendant does not dispute that the essential elements of first-degree felony murder were proven beyond a reasonable doubt. Rather, he argues that the trial court erred in denying his motion for a directed verdict because his identity was not established beyond a reasonable doubt because the prosecution's primary eyewitness testified that the getaway driver had bushy hair and spoke Spanish. Defendant had short hair and did not speak Spanish.

Testimony adduced at trial from numerous witnesses indicated that defendant spoke very little, if any, Spanish; however, the codefendant spoke English, fluent Spanish, and a combination of English and Spanish. The victim emigrated from a Spanish-speaking country and spoke very little English. Thus, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that an argument in Spanish occurred between codefendant and the victim, and that defendant did not verbally participate in the argument. Testimony adduced at trial from numerous witnesses also indicated that defendant always had

short hair. But the issue of credibility is not for the trial court to resolve on a motion for directed verdict. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Viewed together with other circumstantial evidence and in the light most favorable to the prosecution, the jury was entitled to accept the identification testimony as credible notwithstanding that it contained a minor inconsistency.

Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime, *Schultz*, 246 Mich App at 702, and identification may be established by direct or circumstantial evidence, *People v Northey*, 231 Mich App 568, 575; 591 NW2d 227 (1998). A review of the record reveals that the prosecution presented substantial evidence from which a rational trier of fact could identify defendant as the driver of the getaway vehicle. Defendant was identified as the driver of the suspect vehicle who was with the codefendant in and around the neighborhood where the murder occurred several hours before the murder and motioned what appeared to be gang signs at another vehicle before the passenger shot at it. Undisputed cellular telephone evidence placed defendant near the murder scene around the time of the murder and showed a tremendous volume of calls placed to friends and family members following the murder. Defendant called his former girlfriend (codefendant's sister) and stated that he was going to come to Texas, where she lived at the time, because they had killed somebody. Defendant told his sister the morning following the murder that "some crazy stuff happened last night" and told her to watch the news. That same morning, defendant was seen driving the suspect vehicle, a vehicle he was known to drive. Following the murder, defendant told his former girlfriend that "they" had burned the wallet of the "guy they killed," and said that he would shoot and kill anyone who snitched on him regarding the murder. Defendant's juvenile cousin confessed to the murder because defendant and the codefendant told him to "take the rap" for it and because defendant threatened to kill him if he snitched. Many months after the murder, defendant made a toast to "[p]oppin' the King" and stated that "no one will ever find out about that night." Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that defendant's identity as one of the perpetrators of the murder was proven beyond a reasonable doubt. *Gillis*, 474 Mich at 113. Accordingly, the trial court properly denied defendant's motion for a directed verdict.

Defendant next argues that the prosecutor engaged in misconduct when she stated during rebuttal closing argument that the prosecution did not have to prove that defendant spoke Spanish. Defendant did not object contemporaneously to the prosecutor's statement and did not request a curative instruction; therefore, this issue is not preserved for review. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). We review unpreserved claims of prosecutorial misconduct to determine whether plain error affected the defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Prosecutors are "generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236.

Contrary to defendant's assertion, the prosecutor's argument was wholly consistent with the evidence adduced at trial: the primary eyewitness testified that three persons were present—the victim and two assailants, one of whom was the getaway driver. As discussed already, a rational trier of fact could reasonably infer that an argument in Spanish occurred between the codefendant and the victim and that defendant did not verbally participate in the argument.

Further, “[a] prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.” *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). During closing argument, defense counsel argued that if the jury believed that the driver was fluent in Spanish, then defendant could not be the driver. When considered in context, the prosecutor’s comments addressed an issue raised by defense counsel during closing argument. Moreover, the prosecutor need not negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Rather, the prosecution is only bound to prove the elements of the crime beyond a reasonable doubt. *Id.* Therefore, the prosecutor’s statement that she only had to prove that defendant aided and abetted first-degree felony murder and did not have to prove that the defendant spoke Spanish was a correct statement of law. Additionally, the prosecutor’s statement was responsive to defense counsel’s closing argument. Accordingly, the prosecutor’s argument did not constitute misconduct, and defendant is unable to demonstrate plain error affecting his substantial rights.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello