

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 22, 2011

v

BRIAN LEE WHITE,

No. 301593
Kalamazoo Circuit Court
LC No. 2009-002168-FH

Defendant-Appellant.

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant was convicted by a jury of felon in possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; discharge of a firearm from a vehicle, MCL 750.234a; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

On May 24, 2009, there was a shooting in the parking lot of Lesman’s Market in Kalamazoo, Michigan. A vehicle pulled into the parking lot, and a tall black man wearing a colorful hooded sweatshirt got out of the vehicle and shot a gun into the air. According to a witness, the gun appeared to be a .45-caliber. The man then got back into the car, stood up through the sunroof, and fired three or four more shots. At trial, there was testimony that at least one other person at the scene had a gun.¹ A Kalamazoo Department of Public Safety lab relief technician called to collect evidence at the scene found a bullet, several spent .45 caliber casings, and a magazine round.

On June 10, 2009, a detective with the Kalamazoo Department of Public Safety interviewed defendant. The detective testified at trial that there were two rival gangs on the north side of Kalamazoo, C Block and D Block. There had been conflicts between the two gangs for several years, and the conflicts had led to shootings. During his interview with the detective, defendant initially denied any role in the May 24 shooting. The detective employed a “ruse” by telling defendant that he had a surveillance video from Lesman’s Market that captured defendant

¹ The witness to the shooting saw one other person with a gun, and defendant testified at trial that five other individuals had guns.

discharging a gun. While a surveillance video did exist, it did not capture defendant discharging a gun. Defendant then told the detective that he did the shooting because other people had guns, and he relayed a detailed account of the event. A video of defendant's interview with the detective was admitted as evidence at trial, and segments were played for the jury. Defendant testified at trial that while he was at Lesman's Market on the night of the shooting, he had lied to the detective during the interview, and that members of a rival gang did the shooting, not him.

The surveillance video contains freeze-frame images that, although separated only by a small number of seconds, do not provide a continuous, uninterrupted depiction of the events at the scene. Thus, it is unclear what is happening except that many people are moving through the area. At one point, a man wearing a white t-shirt and holding a gun is visible. During trial and outside the jury's presence, defendant sought to have the video admitted as evidence; the prosecution opposed its admission. The prosecution identified the man with the gun as a person other than defendant, and indicated that the man was charged separately. The trial court did not allow the video to go to the jury, finding it "questionably relevant" and concluding that any small amount of relevance was negated by the danger of confusion of the issues by the jury.

The only issue before this Court is whether the trial court erroneously excluded the surveillance video. We conclude that it did not.

We review a trial court's decision to either admit or exclude evidence for an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (citation omitted). A trial court abuses its discretion when it reaches a decision that falls outside the range of principled outcomes. *Id.*

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." MRE 401. However, relevant evidence may be excluded under MRE 403 when "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "[E]vidence is unfairly prejudicial when there exists a danger that *marginally* probative evidence will be given undue or preemptive weight by the jury." *Feezel*, 486 Mich at 198 (quotation omitted).

In this case, defendant does not appear in the surveillance video. Defendant's absence from the video does not have any tendency to make the absence of a firearm from defendant's possession while defendant was at the scene more probable. The numerous people at the scene and the possession of a firearm by another person at the scene also do not have any tendency to make the absence of a firearm from defendant's possession while defendant was at the scene more probable. Simply put, the surveillance video does not make the existence of any fact of consequence more or less probable. Therefore, we conclude that the surveillance video is not relevant. See MRE 401. Moreover, even assuming that the surveillance video was marginally relevant, we conclude that it could confuse the jury because it showed a man other than defendant holding a firearm at the scene of the criminal acts. See MRE 403. The central question for the trier of fact in the present case was whether defendant possessed and discharged a firearm; images of the other man possessing a firearm would only divert attention from the

central issue. Accordingly, the trial court's decision not to admit the surveillance video did not fall outside the range of principled outcomes. See *Babcock*, 469 Mich at 269.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering