STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON ARMOUR,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 161081
LC No. 92-004949

Before: Griffin, P.J., and Bandstra and M. Warshawsky,* JJ.

PER CURIAM.

Following a consolidated jury trial in which defendant was tried along with codefendant Lloyd Hicks, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to two years in prison for felony-firearm and life in prison for first-degree felony murder. Defendant now appeals as of right, and we affirm.

First, defendant argues that he was denied a fair trial because the trial court told the jury that the victim was killed during the commission of a robbery. We disagree. The challenged remarks were made during voir dire, well before the jury was impaneled. Any error which resulted from the rather innocuous comments was cured by the instructions which followed.

Next, defendant contends that the trial court committed reversible error by omitting the malice aforethought element of felony murder during preliminary instructions to the venire. This issue is not preserved for review because defendant failed to object to the instruction at trial. *People v Vaughn*, 200 Mich App 32, 39-40; 504 NW2d 2 (1993). Further, considering the facts that the malice aforethought requirement was provided to the jury for final instructions, the trial court's fleeting and isolated remark to the contrary during preliminary instructions did not cause manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next argues that the trial court failed to conduct voir dire in a manner sufficiently probing to uncover potential juror bias resulting from pretrial publicity. We disagree. There is nothing in the record which would indicate that this case received pretrial publicity similar in scope to that which occurred in *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). Of the twenty-eight individuals who constituted the jury pool, only one prospective juror admitted that he had been exposed to media reports concerning the case. In contrast, all but two of the thirty-seven prospective jurors called in *Tyburski* acknowledged that they were aware of the case due to media coverage and eleven of the twelve jurors who decided the case admitted to such exposure. *Id.* at 611, n 1 (opinion by Mallet, J.).

Furthermore, the manner in which the trial court conducted the voir dire differed significantly from the procedure utilized in *Tyburski*. Here, the court allowed defense counsel to interrogate the prospective jurors at length without interruption. When confronted by the only prospective juror who acknowledged having heard about the case, the court questioned the juror regarding the extent of his exposure to pretrial publicity. Although that juror was ultimately selected to decide this case, there is nothing in the record which would suggest that he was incapable of being impartial. The juror stated that his ability to fairly decide the case would not be affected by anything that he had read. "Knowledge of publicity concerning a case does not automatically make a prospective juror unfit to serve, if that juror does not have a preconceived notion concerning the defendant's guilt or innocence which cannot be set aside." *People v Sawyer*, 215 Mich App 183, 188; 545 NW2d 6 (1996). Accordingly, reversal is not warranted on this basis.

Next, defendant argues that the trial court erred in refusing to suppress evidence seized at the time of his arrest. A trial court's decision regarding a motion to suppress will not be reversed on appeal unless it is clearly erroneous. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994). The right against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. Absent probable cause and exigent circumstances, an arrest without a warrant in the home is prohibited. *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). "The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched, or from a third party who possesses common authority over the premises." *People v Grady*, 193 Mich App 721, 724; 484 NW2d 417 (1992) (citations omitted).

Probable cause to arrest exits if the facts available to the police officer at the moment of the arrest would justify a fair-minded person of average intelligence to believe that the suspect has committed a felony. *People v Oliver*, 417 Mich 366, 374; 338 NW2d 167 (1983). Here, the police had information that a triple homicide occurred at the Red Wing Party Store. A witness to the homicide provided the police with a detailed description of the vehicle used by the alleged perpetrators. The police spotted a vehicle matching that description and obtained a license plate number establishing that the car was registered to defendant. Defendant's address was approximately 1/4 mile from the party store. The witness was taken to defendant's address where he positively identified the car as being the same one used during the robbery. On these facts, we find that probable cause existed sufficient to justify the arrest.

Defendant's next issue is whether the warrantless entry into defendant's house was consensual. The consent exception allows a search and seizure when consent is unequivocal and specific, freely and intelligently given. *People v Malone*, 180 Mich App 347, 355; 447 NW2d 157 (1989). The validity of a consent depends on the totality of the circumstances, and the prosecutor has the burden of proving that the person consenting was authorized to do so and did so freely and voluntarily. *Id.* at 355-356. Here, Sergeant Robert Carroll testified that he would have been unable to enter the premises had Gerald Green, the teenager standing outside, not secured defendant's dog. According to Carroll and Officer Douglas Blanchard, Green voluntarily moved the dog upon Carroll's request. Although Green never explicitly authorized the warrantless entry, Carroll testified that it was his impression that Green gave the officers permission to enter the house. Blanchard testified that Green "opened the door and put the dog up and let us in." Based on these facts, we find that the trial court's determination that Green consented to the entry was not clearly erroneous. Conduct itself can, under proper circumstances, be sufficient to constitute consent. *People v Brown*, 127 Mich App 436, 441; 339 NW2d 38 (1983).

Although consent must ordinarily be obtained by the individual whose property is searched, a third party may consent to the search when the consenting party has an equal right of possession or control of the premises. *Grady*, *supra* at 724. Moreover, a third party without actual authority to consent to a search may render a search valid if the police officer's belief in the authority to consent was reasonable under the circumstances. *Id.* at 726. The reasonableness of the officer's belief must be judged against an objective standard. *Illinois v Rodriguez*, 497 US 177; 110 S Ct 2793, 2800; 111 L Ed 2d 148, 162(1990). After reviewing the record, we find that the facts available to the officers at the time would "warrant a man of reasonable caution in the belief" that Green had authority over the premises. *Id.* at 111 L Ed 2d 161. Accordingly, it was not clearly erroneous for the trial court to have determined that Green had actual authority to consent to the warrantless entry. Further, even if there was error, it was harmless in light of the overwhelming evidence of defendant's guilt, apart from the evidence resulting from the contested search. *People v Jordan*, 187 Mich App 582, 593; 468 NW2d 294 (1991).

Defendant next contends that he was denied a fair trial by the prosecutor's remarks during opening and closing argument. Defendant failed to preserve this issue by making the appropriate objection in the trial court. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Even if preserved, we find no error requiring reversal. *People v Hall*, 435 Mich 599, 609, n 8; 460 NW2d 520 (1990); *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992).

We also reject defendant's contention that the trial court abused its discretion in allowing three witnesses to testify that they saw defendant rob Cheng's Garden two days before the incident giving rise to the instant prosecution. In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), the Supreme Court clarified the standard under which bad acts evidence may be admitted. The Court in *VanderVliet* held that the similarity requirement set forth in *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982), applies only where the proponent is utilizing a modus operandi theory to prove identity. *VanderVliet*, *supra* at 67, 69-70. Where bad acts evidence is offered and the basis for the relevancy of the evidence is not similarity, it may be admitted under MRE 404(b) as long as (1) it is

relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *Id*. at 74-75; *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

Here, testimony concerning the prior robbery was relevant, not to defendant's character or propensity, but to show that the witnesses' identification of defendant was credible and accurate. See *People v Fuqua*, 146 Mich App 250, 257; 379 NW2d 442 (1985). Defendant's identity was in dispute and the prosecution introduced other evidence to establish that defendant was one of the perpetrators of the robbery for which he was charged. In his closing argument, the prosecutor relied on the evidence only for the purpose for which it was offered, and the trial court issued a cautionary statement with regard to this testimony during final instructions. Under these circumstances, the bad acts evidence was not "given undue weight by the jury." *People v McMillian*, 213 Mich App 134, 139; 539 NW2d 553 (1995).

Next, defendant contends that he was denied a fair trial because Kin H. Yee, the interpreter, was not qualified as an expert as required by MRE 604. Defendant failed to preserve this issue by making the necessary objection below. We also reject defendant's argument that reversal is required because Yee failed to accurately translate the testimony of three prosecution witnesses. Although Yee may have deviated from the rule requiring a verbatim translation, see *People v Cunningham*, 215 Mich App 652; 654-657; 546 NW2d 715 (1996), defense counsel did not move for a mistrial on the basis of Yee's conduct, nor did he seek an inquiry into the accuracy of the translation or ask for a different interpreter. Rather, he merely concurred in codefendant Hicks' request to have the trial court instruct Yee to provide a word for word translation. The request was granted. Because defendant accepted the trial court's resolution of this dispute, we find that any issue regarding the accuracy of the translation arising prior to the objection has been waived. To the extent that defendant challenges Yee's conduct after Yee was warned by the trial court, this issue is not preserved for review because defendant raised no further objections to the translation.

Finally, defendant argues that the trial court abused its discretion in admitting into evidence a box of .38 caliber ammunition and a spent .38 caliber shell casing seized from defendant's house. We disagree. Generally, all relevant evidence is admissible. MRE 402; *VanderVliet*, *supra* at 60-61. Evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Here, Assistant Medical Examiner Kalil Jiraki testified that Steven Cheng died as a result of a gunshot wound to the chest and that a .38 caliber bullet was recovered from his clothing after the shooting. Sergeant Dale Johnson testified that the bullet found on Cheng was consistent with the type of ammunition seized from defendant's bedroom. The fact that the ammunition was found near a wallet containing defendant's identification tends to show that the ammunition belonged to defendant. Given the fact that the ammunition and shell casing were highly probative to show that defendant had access to the type of weapon used in the killing, we find that the trial court did not abuse its discretion in admitting the items into evidence.

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Meyer Warshawsky