

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY QUENTIN MCCALL,

Defendant-Appellant.

UNPUBLISHED
November 8, 2007

No. 267764
Berrien Circuit Court
LC No. 2005-402138-FC

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree premeditated murder, MCL 750.316(1)(a), three counts of first-degree felony-murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, armed robbery, MCL 750.529, first-degree home invasion, MCL 750.110a(2), and six counts of felony-firearm, MCL 750.227b. His convictions for armed robbery, home invasion, and their corresponding felony-firearm convictions were subsequently vacated. Defendant was sentenced as an habitual offender, third offense, MCL 769.11, to three terms of life imprisonment for the murder convictions and 356 to 800 months' imprisonment for the assault with intent to commit murder convictions, those sentences to be served concurrently, but consecutive to two-year terms of imprisonment for each of the remaining felony-firearm convictions. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence to delete a life sentence designated as corresponding to count 16, which merely reflects defendant's habitual offender status.

I

Defendant's convictions arise from the shooting deaths of Jawon Stevens, Ursulla Allen, and Rodney Stevens, and the nonfatal shooting of Johntae Stevens, at the home of brothers Johntae and Rodney Stevens. Johntae Stevens testified that he saw two men with guns enter the back door of the home. The first, whom he did not recognize, asked where the money was located. The second man, whom he recognized as "Pumpkin," took money from him. The first man took him to the basement, where he saw a third man with a gun, and Rodney laying on the floor with a fourth gunman standing over him. Pumpkin then brought Jawon and Ursulla downstairs. All four victims were made to lie with their stomachs. Johntae heard a gunshot, and saw that Rodney had been shot. Three additional gunshots followed; Johntae flinched and was

not hit by bullet. The gunmen left and Johntae observed that Jawon, Ursulla and Rodney had all been shot in the back of their heads.

The principal issue at trial was defendant's identity as the gunman located at the bottom of the basement stairs. Johntae identified defendant as that person. The parties did not dispute that Andrew Miller (a/k/a "Pumpkin") was the shooter. The prosecution's case relied heavily on Johntae's identification, but the prosecutor also presented evidence that defendant and Miller were known associates and were seen together shortly before and after the shootings, that gunshot residue was found on defendant's coat that he was seen wearing the night of the shootings, and that defendant fled the state shortly after the shootings. Through prosecution witnesses, defendant presented an alibi defense. He stated that he was at a Wal-Mart store with friends at the time of the shootings, but a police investigation discredited the testimony of one of the friends.

II

Defendant first challenges the sufficiency of the evidence.¹ In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999).

Defendant argues that there was insufficient evidence of premeditation to support the murder convictions, but does not explain why. He only states that he could not possibly be guilty of all the charged offenses. Defendant was convicted under an aiding and abetting theory. To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was deliberate and premeditated. Premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). The evidence showed that the victims were forced to lie face down on the basement floor, most were bound, and then shot once in the back of the head, execution style. This evidence was sufficient to establish premeditation.

Defendant also argues that the evidence was insufficient to identify him as one of the participants in the offenses. Defendant focuses on the inadequacies and unsatisfactory nature of the evidence, arguing that Johntae failed to identify defendant in a photo lineup, identified him only by his body type in the physical line up, and based that identification on a brief and strained observation of the gunman in the basement; there was no confession; defendant's association with Pumpkin, as well as his flight, are as consistent with innocence as with guilt, and cannot support a conviction; the gunshot residue evidence is irrelevant because all agree that defendant

¹ Defendant presents a sufficiency challenge in both his primary brief on appeal and his supplemental brief filed in propria persona.

was not the gunman; and witnesses placed defendant elsewhere during the relevant time period. Again, we disagree.

While Johntae Stevens' identification of defendant as the gunman at the bottom of the basement stairs was not as strong as his identification of Pumpkin, it was nevertheless a firm identification and this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Similarly, while defendant offers several alternative explanations for how gunshot residue might have gotten on his coat, it is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The jury reasonably could have inferred that defendant was wearing the coat at the time of the shootings.

Further, defendant was seen with the shooter shortly before and after the shootings. While defendant correctly contends this testimony alone is insufficient evidence to establish guilt, it made it more likely that Johntae was correct in his identification. Considering the evidence taken as a whole, the jury could have reasonably inferred that defendant was with Miller at the time of the shootings.

Defendant fled to Tennessee shortly after the shootings, which he asserts is not evidence of guilt, and offers an alternative explanation for his leaving the state. However, evidence of flight is admissible to show consciousness of guilt. *People v McGhee*, 268 Mich App 600, 613; 709 NW2d 595 (2005). The jury was free to reject defendant's alternative explanation for leaving the state after the shootings and, instead, reasonably infer that he left because of his involvement in the charged offenses. *Hardiman, supra* at 428.

Lastly, defendant told the police that he was elsewhere at the time of the shootings. His alibi was subsequently contradicted. Evidence that defendant gave a false alibi was admissible as substantive circumstantial evidence of guilt, *People v Dandron*, 70 Mich App 439, 442-443; 245 NW2d 782 (1976), and it was for the jury to determine what weight to give this evidence, *Carines, supra* at 757.

Accordingly, viewed in the light most favorable to the prosecution, the evidence was sufficient to support defendant's convictions. It showed that four gunmen came into Johntae and Rodney's home and forced the victims to lie face down on the basement floor. Most of the victims were bound and Pumpkin shot them execution-style, a single gunshot to the back of the head. Johntae flinched and was not directly hit by a bullet. Defendant was seen with Pumpkin shortly before and after the shootings. Johntae positively identified defendant at a physical lineup as the man at the bottom of the basement stairs and again in court. Pumpkin was also seen with a large wad of cash shortly after the shootings and had Rodney's cell phone when he was arrested. Also, gunshot residue was found on defendant's coat that he was seen wearing shortly after the shootings, he fled the state within days afterward, and his alibi was not substantiated. The evidence was sufficient to enable the jury to identify defendant as one of the gunmen involved in the offenses.

III

Defendant also argues that the verdict was against the great weight of the evidence. He raised this issue in a motion for new trial, which was denied by the trial court. This Court reviews for an abuse of discretion a trial court's decision regarding a defendant's motion for a new trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion exists if the trial court's decision falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Defendant relies on many of the same arguments he makes in challenging the sufficiency of the evidence. For purposes of this issue, he asserts that in considering the evidence presented at trial, the credibility of the witnesses must be assessed. Absent exceptional circumstances, however, issues of witness credibility are for the jury and the trial court may not substitute its view. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Exceptional circumstances exist when testimony contradicts indisputable physical facts or law, is patently incredible, has been impeached to such a degree that it was deprived of all probative value, or is so implausible that a reasonable jury could not have believed it. *Id.* at 643-644. The trial court determined that Johntae's testimony did not fit one of these exceptional circumstances. We find no abuse of discretion. Although Johntae failed to identify defendant in a photographic lineup, he explained that he was not 100 percent sure it was defendant in the photo because he could not see his entire body. He therefore requested a physical lineup and immediately identified defendant. Although Johntae only briefly viewed the gunman's profile during a stressful event, it is not implausible that he would be able to identify the person, particularly considering that he had seen defendant before in the neighborhood. Additionally, even though Johntae's identification and other testimony were challenged, it was not so impeached as to be deprived of any probative value. Therefore, considering the other circumstantial evidence of defendant's guilt, as did the trial court, we conclude that the trial court did not abuse its discretion in finding that the verdicts were not against the great weight of the evidence.

IV

Defendant next challenges the admissibility of his statements and evidence impeaching his statements. He did not object to any of the evidence or testimony that he now challenges. Therefore, these issues are unpreserved and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. Defendant argues that his statements to the police were inadmissible as impeachment evidence because he did not testify. However, the statements were not used for that purpose. Defendant argues that the statements were also inadmissible as substantive evidence because they were hearsay. We disagree. MRE 801(d)(2)(A) specifically provides that a party's own statement offered against that party is not hearsay. Such statements may be offered as substantive evidence of guilt. *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). The rule does not require that the party's own statement constitute a confession.

Defendant further argues that his statements were irrelevant and unduly prejudicial. Defendant raised this issue in his motion for a new trial and the trial court rejected it, relying on *Dandron*, 70 Mich App 439. In *Dandron*, this Court held that a defendant's statements to the police that are proven to be false are admissible as evidence of consciousness of guilt. *Id.* at 442-443. Here, defendant provided an alibi, which was contradicted by the testimony of a Wal-Mart employee. We also reject defendant's attempt to distinguish this case from *Dandron* by contending that his statements were not "closely interwoven with the elements of the charged offense." The *Dandron* Court found that the defendant's statements in that case were "closely interwoven" because they pertained to the question of who perpetrated the crime. *Id.* at 442. Similarly, in this case, defendant's statements directly related to whether he could have participated in the shootings. Accordingly, we agree with the trial court that there was no plain error in admitting defendant's statements.

V

Defendant also raises several claims of prosecutorial misconduct, most of which involve the prosecutor's alleged improper elicitation of testimony that defendant maintains was irrelevant and unduly prejudicial. Because defendant did not object to the prosecutor's conduct or the challenged evidentiary matters at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *Id.* Defendant contends that much of the testimony was irrelevant because it did not make it more likely that he committed the offenses. However, "[a] variety of factors, including the elements of the charged crimes, the theories of admissibility, and the defenses asserted all help determine whether any particular piece of evidence is relevant." *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001).

Defendant challenges the testimony pertaining to the following: (1) whether defendant had an outstanding warrant and whether he knew about it; (2) the details of the violent crime task team's execution of a search warrant; (3) a witness's statement that defendant was in a car smoking marijuana on the night the shootings occurred; (4) that an officer attempted to verify defendant's alibi; and (5) during an interview with defendant, an officer was surprised that defendant did not know what motel he was going to.

At trial, the prosecutor attempted to prove that defendant fled the state after the shootings, showing a consciousness of guilt. The information regarding defendant's outstanding warrant and his awareness of its existence was pertinent to this issue. The evidence showed that defendant knew of the warrant's existence before the shootings, and yet fled the state only after the shootings.

Regarding the violent crime task force team, the only details presented at trial were that it was a multi-jurisdictional team that quietly surrounded Evaline Allen's house in the early morning hours in an attempt to arrest Pumpkin, whom they mistakenly believed was inside. Defendant asserts that this testimony was irrelevant to whether he committed the offenses and

was unduly prejudicial because it insinuated that he associated with violent people. However, it is highly unlikely that this testimony affected the outcome of the trial. Similarly, Chennell Williams's testimony that she, defendant, and Pumpkin were smoking marijuana together, as opposed to some other substance, seems inconsequential when compared to the real substance of her testimony, which was that defendant and Pumpkin were together shortly after the shootings.

Defendant also takes issue with Detective Takemoto's testimony that he attempted to verify defendant's alibi and was surprised during his interview with defendant when defendant stated that he did not know what motel he was going to. Whether efforts were made to verify defendant's alibi was relevant. Had no efforts been made, defendant could have argued that there was no evidence to disprove his alibi, creating reasonable doubt. Regarding Detective Takemoto's surprise at defendant's answer about the motel, the thrust of the question was to highlight defendant's inconsistent answer. He had stated to Detective McGinnis the day before that he was going to the Motel 6, a fact Detective Takemoto knew. While Takemoto's surprise was irrelevant, the inconsistency was not, and would have been mentioned in closing argument in any event. Accordingly, the prosecutor's elicitation of the foregoing testimony did not constitute plain error affecting defendant's substantial rights.

Lastly, defendant argues that the prosecutor improperly appealed to the jury's sympathy during her opening statement and closing argument when she said that three lives were ruthlessly taken and many others were changed forever. It is true that a prosecutor may not appeal to the jury to sympathize with the victims or their families. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor need not use the blandest possible terms, *People v Matuszak*, 263 Mich App 42, 55-56; 687 NW2d 342 (2004). We find no plain error.

VI

Next, defendant asserts that he is entitled to a new trial due to the ineffective assistance of trial counsel. Although defendant raised this issue in his motion for a new trial, it was decided on the parties' briefs because defendant waived his right to a hearing. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. The trial court's factual findings are reviewed for clear error, but its constitutional determinations are reviewed de novo. *Id.* To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Id.*

Defendant first argues that defense counsel was ineffective because he failed to call an expert witness to testify regarding the unreliability of eyewitness identifications. However, decisions regarding what witnesses to call are matters of trial strategy for which this Court does not substitute its judgment. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant must overcome the strong presumption that defense counsel's action was sound trial strategy. *Id.* at 396. The failure to call witnesses only constitutes ineffective assistance of counsel when it deprives the defendant of a substantial defense. *Id.* at 398. Defendant asserts

that an expert witness was critical because the prosecution's case relied heavily on Johntae's identification. However, the lack of an expert witness did not prevent the jury from understanding the weaknesses of Johntae's identification. Defense counsel specifically cross-examined Johntae on these points and highlighted them in his closing argument. Defendant has not shown that defense counsel's failure to call an expert witness deprived him of a substantial defense, nor has he overcome the presumption that counsel's decision to attack the credibility of Johntae's identification testimony through cross-examination was not sound trial strategy. Defendant also argues that defense counsel was ineffective for failing to raise other issues previously discussed. However, because we have found no error affecting defendant's substantial rights, defense counsel was not ineffective for failing to make the objections.

VII

Defendant raises several additional issues in his supplemental brief filed in propria persona. He asserts that his right to be free from double jeopardy was violated by his multiple convictions. Defendant was found guilty of both first-degree felony murder and first-degree premeditated murder for the deaths of the three victims. If dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy, and the judgment must be modified to specify that the conviction is for one count and sentence for first-degree murder, supported by two theories. *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001). Defendant argues that the judgment of sentence erroneously shows six murder convictions and sentences. We disagree. The judgment of sentence reflects that counts one, two, and three were the first-degree premeditated murder convictions and counts four, five, and six were the felony-murder convictions. But the judgment clearly states that the convictions and sentences for felony murder counts are "one in the same sentence as" the corresponding first-degree premeditated murder convictions. Therefore, the judgment sufficiently reflects that defendant was convicted of and sentenced for only three murders, based on two theories.

Defendant also asserts, and plaintiff agrees, that the judgment of sentence erroneously reflects a sentence for his habitual offender status. The judgment of sentence shows that defendant received a life sentence for count 16, which merely reflects defendant's habitual offender status. Designation as an habitual offender does not create a substantive offense separate from the underlying offense. *People v Boatman (On Remand)*, 273 Mich App 405, 407; 730 NW2d 251 (2006). Because the judgment of sentence improperly reflects a separate sentence for defendant's habitual offender status, we remand this case for modification of the judgment of sentence to delete the life sentence associated with count 16.

Defendant also challenges the jury instructions as confusing. We first observe that counsel expressed satisfaction with the instructions, thereby waiving any claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Further, the court properly instructed on both forms of first-degree murder, and there is no reason to conclude that the jury was confused.

Lastly, the court did not err in admitting evidence regarding Pumpkin's activities and culpability. Such evidence was also probative of defendant's guilt. Further, the evidence was not testimonial, and defendant's right of confrontation was not compromised.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Helene N. White
/s/ Michael J. Talbot