

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID HUGH LOCKLEAR,

Defendant-Appellant.

UNPUBLISHED

May17, 2007

No. 267116

Mecosta Circuit Court

LC No. 04-005392-FC

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), conducting a criminal enterprise, MCL 750.159i(1), conspiracy to commit second-degree home invasion, MCL 750.157a, and receiving and concealing stolen property of \$1,000 or more, but less than \$20,000, MCL 750.535(3)(a). He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of life without parole for the first-degree felony murder conviction, 12 to 25 years for the conducting a criminal enterprise conviction, 8 to 22 years for the conspiracy to commit home invasion conviction, and 13 months to seven years for the receiving and concealing stolen property conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion and denied him his constitutional right to present a defense by refusing to allow him to call his nephew, Michael Locklear, to testify on his behalf. We disagree. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McRae*, 469 Mich 704, 720-721; 678 NW2d 425 (2004). However, to the extent the trial court's decision involves a question of constitutional law, we review the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Slocum (On Remand)*, 219 Mich App 695, 697; 558 NW2d 4 (1996).

At the conclusion of the prosecution's case-in-chief, and without the jury present, Locklear testified that he had been previously convicted by plea for his involvement in the home invasion and murder that formed the basis of the charges for which defendant was on trial. After Locklear additionally testified that, regardless of any threat of sanctions by the trial court, he would assert his privilege against self-incrimination if called upon to answer questions that he believed were incriminatory to him, the trial court refused to allow Locklear to testify before the jury on defendant's behalf. In challenging the trial court's decision in this regard on appeal, defendant acknowledges that a lawyer may not knowingly call a witness when he is aware that

the witness will claim a valid testimonial privilege. See *People v Dyer*, 425 Mich 572, 576, 581; 390 NW2d 645 (1986) (holding that, because to do so would create an adverse inference that the opposing party is powerless to combat by cross-examination, the rule that a lawyer may not call a witness he knows will claim a valid privilege not to testify applies to defense counsel as well as the prosecution). Defendant argues, however, that Locklear could not validly assert the privilege against self-incrimination because he had already pleaded and been sentenced on charges arising from the home invasion and murder. Thus, defendant argues, Locklear could properly be called to testify on his behalf. We do not agree.

In *People v DenUyl*, 318 Mich 645, 650-651; 29 NW2d 284 (1947), this Court found that the state constitutional privilege against self-incrimination protects a witness in a state proceeding from testifying to facts that could lead to incrimination in a federal prosecution for which the defendant had not exhausted his right to appeal. Although preceding the United States Supreme Court's decision in *Malloy v Hogan*, 378 US 1, 6; 84 S Ct 1489; 12 L Ed 2d 653 (1964), in which the Court held the Fifth Amendment privilege against self-incrimination applicable to the states, *DenUyl* has long-since been viewed as establishing that the privilege against self-incrimination applies when an appeal of a conviction to which the testimony might relate remains pending. See *People v Giacalone*, 399 Mich 642, 644 n 3, 250 NW2d 492 (1977); *People v Roberts*, 87 Mich App 109, 114; 273 NW2d 501 (1978); *People v Lindsay*, 69 Mich App 720, 722-723; 245 NW2d 343 (1976); *People v St Onge*, 63 Mich App 16, 18; 233 NW2d 874 (1975); *People v Thomas*, 55 Mich App 368, 370; 222 NW2d 320 (1974). Here, Locklear testified that he had been assigned and had been working with an appellate attorney who was preparing what he believed would be a successful appeal of his guilty-plea convictions. He further testified that if those convictions were overturned, he intended to defend against any decision by the prosecution to pursue the charges anew, and was concerned that testimony concerning the events for which defendant was on trial would be used against him in such a subsequent prosecution. Because Locklear would have had a valid right to invoke his privilege against self-incrimination on relevant questions that the prosecutor would ask concerning his knowledge of the events at issue, the trial court did not abuse its discretion in refusing to allow Locklear to testify.¹ *DenUyl, supra; Dyer, supra.*

Nor did the trial court's decision in this regard offend defendant's right to present a defense. "Although the right to present a defense is a fundamental element of due process, it is not an absolute right. The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Because the rule prohibiting the calling of a witness that the attorney knows will invoke his right not to testify is premised on fairness to the opposing party and reliability of the verdict regardless of whether it is

¹ That the trial court appears to have been operating under the mistaken belief that Locklear did not have a proper basis for asserting his right against self-incrimination does not affect defendant's entitlement to relief. See *People v Brake*, 208 Mich App 233, 242; 527 NW2d 56 (1994) (a trial court ruling may be upheld where a right result is reached for a wrong reason).

the defense or the prosecution that is seeking to admit the evidence, see *Dyer, supra* at 581, we find no violation of due process in the trial court's refusal to allow Locklear to testify.

Defendant also argues that the trial court abused its discretion by allowing the prosecutor to elicit testimony that defendant had allegedly solicited the murder of three individuals involved in his prosecution and that defendant was involved in drug use and dealing. We disagree. Under MRE 404(b), other acts evidence is admissible if the evidence is (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) not unduly prejudicial under the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). A proper purpose includes "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b)(1). The prosecutor bears the burden of articulating a noncharacter purpose for admitting the evidence. *People v Crawford*, 458 Mich 376, 385-386; 582 NW2d 785 (1998). A general denial of guilt puts at issue all the elements of a charged offense. *VanderVliet, supra* at 78.

As to the first alleged error, testimony that a defendant allegedly solicited for the murder of individuals intimately involved in a prosecution is admissible to show consciousness of guilt and does not involve improper MRE 404(b) evidence. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). It is for the jury to determine whether the testimony is credible and to determine the significance of the solicitation along with the other evidence presented. *Id.* Defendant maintains that the testimony should have been excluded under MRE 403. However, the probative value of defendant's state of mind was not substantially outweighed by the danger of unfair prejudice. See, e.g., *People v Sabin (After Remand)*, 463 Mich 43, 70-71; 614 NW2d 888 (2000). Even if this were a close decision, such a close decision cannot amount to an abuse of discretion. *Id.* at 67. Accordingly, the trial court did not abuse its discretion by allowing such testimony.

As to the second alleged error, evidence of drug use and drug dealing was so inextricably connected with the charged offenses that the evidence was admissible as part of the *res gestae* because it explained the circumstances of the crimes charged. *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). Moreover, contrary to defendant's argument, the trial court did not abuse its discretion by allowing such testimony because its probative value was not substantially outweighed by its prejudicial effect. MRE 403.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens