STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK R. SMITH,

Defendant-Appellant.

UNPUBLISHED
July 25, 2006

No. 260160
Wayne Circuit Court
LC No. 2004-001586-FH

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317,[1] felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 30 to 50 years for the murder conviction, one to five years for the felon in possession conviction, and to a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Underlying Facts

On May 6, 2002, Carl Davis entertained several friends, including the victim, defendant, and Darrell Collins. Some were allegedly using marijuana and alcohol. Collins testified that he and the victim left Davis' residence on foot between 2:00 and 3:00 a.m. Defendant subsequently caught up with Collins and the victim and joined them. Shortly thereafter, Collins went a short distance from the two men to use the bathroom. Collins explained that as he zipped up his pants he turned back and saw defendant shoot the victim in the back of the head. He saw the victim remove his hand from his coat pocket, and raise it in an attempt to block the shot. Collins ran from the scene but could hear defendant calling his name and telling him to come back. Collins eventually entered a secured industrial plant where he told a security guard about the incident. The security guard testified that Collins asked her to call the police and told her that "[t]hey or he killed [his] friend[.]" The victim died from a single close-range gunshot to the back of the head.

[1] Defendant was charged with first-degree murder, MCL 750.316.

II. Effective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to adequately cross-examine witnesses, failing to object to prosecutorial misconduct, failing to "fully explore defendant's decision not to testify," and for calling a damaging defense witness.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson,* 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Cross-Examination of Collins

Defendant claims that defense counsel was ineffective for failing to question Collins about a written statement that he *may* have made to the police. According to defendant, during defendant's first trial, Collins indicated that he gave both an oral statement and a written statement, but no written statement was produced. Defendant contends that defense counsel should have questioned Collins about the written statement to establish either that he lied about its existence, or that the police lost it.[2]

Defendant has failed to provide any record support for his claim that Collins testified that he made a written statement, or what, if any, conflicting, inconsistent, or helpful information was in the alleged statement. Without any information regarding the exculpatory value of the statement, defendant cannot prove that defense counsel was ineffective in this regard. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted).

B. Failure to Object to Prosecutorial Misconduct

Defendant also contends that the prosecutor impermissibly bolstered a police officer's credibility during the following exchange, and that defense counsel was ineffective for not objecting to the prosecutor's conduct:

[2] Defendant contends that the "loss of the statement by police or perjury that he made such a statement, if in fact he had not, would have gone a long ways toward impeaching Mr. Collins' testimony."

Q. During the course of your investigation, did any witness come to you and give you any information to the contrary? For example, that Mr. Darnell Collins is the one who had done the shooting?

A. No.

Q. If they would have, would you have talked to them?

A. Yes.

Q. Why would that be?

A. Because I follow all leads.

Q. During the course of your investigation did you receive any information in regard to any contrary statement that might have been given by Mr. Collins to lay persons?

A. No.

Q. During the course of your investigation did you ever come in contact with a person by the name of Gregory Berry?

A. No.

Q. Or any other witnesses to step forward and give you some statements to the contrary as to who had done the shooting?

A. No.

Improper bolstering of the credibility of a prosecution witness may constitute prosecutorial misconduct. See *People v Malone,* 180 Mich App 347, 361; 447 NW2d 157 (1989). However, the prosecutor's questions must be considered in light of defense counsel's comments. See *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Viewed in context, the prosecutor was not suggesting that the jury convict defendant on the basis of "the integrity of the police department." Rather, the questions were focused on refuting defense counsel's assertions made during opening statement and trial that Collins was not credible and was possibly the shooter. In opening statement, defense counsel noted that Collins had gunshot residue on him, had "other" motivations for his testimony, and would try "to fool" the jury. Also, during cross-examination of the security guard, defense counsel established that Collins possibly said "they" had killed the victim, although Collins maintained that no other person beside himself, the victim, and defendant were at the scene. Under these circumstances, the prosecutor's questions were not improper. Consequently, defense counsel was not ineffective for failing to object. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

C. Defendant's Right to Testify

Defendant asserts that defense counsel was ineffective for failing to "fully explore" defendant's exercise of his right not to testify. A criminal defendant has a fundamental constitutional right to testify at trial, US Const, Am XIV; Const 1963, art 1, §§ 17, 20, but there is no requirement that there be an on-the-record waiver of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *People v Simmons*, 140 Mich App 681, 684; 364 NW2d 783 (1985). The record does not disclose what advice counsel may have given regarding whether defendant should testify. Defendant does not claim that he was ignorant of his right to testify, that he would have testified, or what testimony he would have provided had he testified. See *id.* at 685-686. On this record, defendant has failed to demonstrate that counsel was constitutionally ineffective for failing to "adequately discuss" the matter or for failing to call him to testify.

D. Calling Wayne Wallace

Defendant maintains that defense counsel was ineffective for calling Wallace as a defense witness to impeach Collins. Wallace testified that Collins talked to him about the shooting and gave several different versions of what occurred during the offense. On cross-examination, Wallace indicated that Collins identified defendant as the shooter and that Collins never implicated himself.

The record provides no support for defendant's assertion that defense counsel did not adequately investigate Wallace's proposed testimony before trial. Although Wallace testified that Collins identified defendant as the shooter, defense counsel used other parts of his testimony to support the defense theory that Collins was not credible. During closing argument, defense counsel noted that Collins denied knowing Wallace or having any connection to him. Defense counsel maintained that Collins denied knowing Wallace to avoid the revelation that he had given other inconsistent descriptions regarding the shooting. Defense counsel's decision to call Wallace as a witness was a matter of trial strategy that we will not second-guess on appeal. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The fact that the strategy did not work does not constitute ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

III. Prior Conviction

Defendant argues that the trial court abused its discretion in ruling that proposed defense witness Gregory Berry's prior conviction for murder was admissible as evidence of bias.[3] In ruling that Berry's conviction was admissible, the trial court stated:

[3] Berry did not testify at trial and defendant acknowledges that "the record is silent as to what happened to Mr. Berry and why he failed to testify." Both Berry and Wallace were with Collins when he purportedly made comments about the shooting. Apparently, Berry would have testified regarding that conversation.

> We had a discussion in chambers. It is my understanding Mr. Berry, who is going to be testifying, has recently within the last month been convicted by a jury of armed robbery and first degree murder.
>
> * * *
>
> And I am mindful of Michigan Rule of Evidence 609 which does place a restriction in terms of impeachment, but I don't believe that 609 governs the admissibility of evidence in this particular case as it goes to motive of bias for testifying.
>
> In this particular case we have a defendant [sic] who went to trial very recently in this building where a member of the Wayne County Prosecutor's Officer prosecuted Mr. Berry.
>
> Mr. Berry was convicted of first degree murder and armed robbery, and I do think that that goes to a possible motive or bias for testifying in this particular case.
>
> And I say that so that the record is clear . . . That I'm not admitting this evidence for any purpose that has to do with impeachment, but rather as it goes to a witness's bias or motive for testifying.
>
> The recency [sic] of the conviction and the fact that the conviction came out of this particular County where it was the Wayne County Prosecutor's Office who convicted him, I think does in fact go to that issue of the witness's bias for any motive for testifying.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Sabin (After Remand)*, *supra* at 67.

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. 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 or less probable than it would be without the evidence. MRE 401. But even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

A trial court has wide discretion regarding the admissibility of evidence of bias. *People v Layher,* 464 Mich 756, 768; 631 NW2d 281 (2001). Here, the trial court did not abuse its discretion by finding a possibility of bias toward the prosecutor's office and a willingness to help defendant, given that Berry was recently convicted by the same prosecutor's office of the same type of offense for which defendant was charged. "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony." *Id.* at

763.[4] Defendant has failed to demonstrate that the evidence was unfairly prejudicial. Furthermore, because Berry did not testify at trial and there is no indication in the record that he did not testify because of the trial court's ruling, reversal is not warranted on this basis.

IV. Right to Cross-Examination

Defendant contends that his constitutional right to confront witnesses was violated when the trial court prohibited defense counsel from asking Collins about his conversation with his federal attorney regarding possible sentencing considerations for testifying in this case. We disagree.

An unrelated federal charge was pending against Collins at the time of the preliminary examination in this case. At trial, the prosecutor and defense counsel both elicited that, during that time, the prosecutor agreed to advise the federal prosecutor of Collins's assistance in this case if he testified truthfully. Defense counsel cross-examined Collins regarding his expectation of a sentence reduction as a result of his testimony in this case. In response to defense counsel's inquiry, Collins acknowledged that his attorney advised the federal court before his sentencing that he had cooperated with the authorities in this case and was expected to testify again. Defense counsel elicited that Collins was sentenced before defendant's trial to a term at "the bottom of the guidelines." Collins indicated that he did not recall his attorney advising him that he would return after he testified in this case. Defense counsel then asked, "Your lawyer never talked to you about filing a special kind of motion for you?" The prosecutor objected, arguing attorney-client privilege, and the trial court sustained the objection. In response to subsequent inquiries on cross-examination, Collins admitted that, after his sentencing, the prosecutor and his federal attorney spoke to the court about returning after his testimony in this case. Collins indicated that he might be resentenced after his testimony, but there was "no deal made."

The trial court's evidentiary ruling did not deprive defendant of his constitutional right to present a defense. A defendant's constitutional right to present a defense and confront his accusers is secured by the right of cross-examination guaranteed by the Confrontation Clause. US Const, Am VI; Const 1963, art 1, § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). But the right to present a defense is not absolute. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984); *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. *Adamski, supra*. The accused must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict. *Hayes, supra*.

The trial court's general indication that attorney-client privilege prohibited cross-examination concerning Collins's conversation with his attorney was incorrect. A defendant's constitutional right to cross-examination may supercede common law and statutory privileges.

[4] In *Layher*, the Supreme Court ruled that evidence of bias arising from past arrest without conviction is admissible if relevant, as long as its probative value is not substantially outweighed by the danger of unfair prejudice. *Id.* at 768.

Adamski, supra at 137-138. However, defendant was able to effectively cross-examine Collins without delving into the privileged communications between him and his attorney. Defense counsel was allowed to cross-examine Collins at length regarding his understanding of possible sentencing consideration for testifying in this case. Defense counsel presented the transcript of Collins's federal sentencing proceeding wherein his cooperation in this case and possible resentencing were discussed. Thus, the jury was aware of this possible motive for Collins's testimony against defendant. Accordingly, reversal is not warranted on this basis.

V. Sufficiency of the Evidence

Defendant also argues that the trial court erred by denying his motion for a directed verdict on the charge of first-degree murder because there was no evidence of premeditation and deliberation. We disagree.

This Court reviews a trial court's decision on a motion for a directed verdict de novo to determine whether the evidence, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997).

A conviction for first-degree premeditated murder requires proof that the defendant intentionally killed the decedent and that the killing was premeditated and deliberate. *People v Abraham,* 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id*. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: (1) the previous relationship between the decedent and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted. *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). "Proof of motive is not essential." *Abraham*, *supra* at 657.

Viewed in a light most favorable to the prosecution, a rational trier of fact could have found the required elements of first-degree murder, including premeditation and deliberation. As the trial court observed, the evidence showed "that the defendant in the absence of any kind of hot blood circumstance drew a gun while standing next to [the victim] and essentially executed him." The evidence showed that Collins and the victim left the residence, and defendant caught up and joined them. Collins went approximately three feet away to use the bathroom, and when he turned around, he saw defendant point a gun at the victim's head, and shoot him. Collins saw the victim take his hand out of his pocket in an attempt to block the shot. The medical examiner testified that this was a close-range firing. This evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to reasonably infer that defendant had "sufficient time to . . . take a second look." *Anderson*, *supra*. The trial court did not err by denying defendant's motion for a directed verdict on the charge of first-degree murder.

VI. Removal of a Juror

Defendant argues that reversal of his convictions is required because the trial court removed a juror during deliberations and replaced the juror with an alternate juror.

During voir dire on November 3, 2004, the trial court indicated that it did not believe the jurors would be required to serve beyond November 8. Juror Doyle indicated that she was scheduled to have surgery on November 10, 2004. The court indicated that she should not be concerned. The trial lasted longer than anticipated, and the jurors were not instructed until November 9, 2004, and did not reach a verdict by the end of the day. Juror Doyle advised the court that she could not return the following day because of her scheduled surgery, and she was removed. On the morning of November 10, 2004, the following occurred:

> [*The trial court*]: Just to summarize we had a circumstance at the end of the day yesterday where the juror, Ms. Doyle, indicated that she had to go in for surgery this morning and that she was not going to be able to continue.
>
> My clerk, Ms. Gray, contacted Ms. Huber, who was one of the alternates whose name was blind drawn, and Ms. Huber is here. So what I intend to do is call out Ms. Huber initially. Question her to make sure that she has not been exposed to or has not talked with anyone regarding this particular case.
>
> Then what I will do is then bring out the other jurors and tell them that because Ms. Doyle is no longer participating in the jury deliberation process, they have to start their deliberations from the beginning.
>
> All right.
>
> *Anything from either side?*
>
> [*Defense counsel*]: *No.* [Emphasis added.]

The trial court thereafter called out the alternate juror, and then the entire jury. Defense counsel did not object. Given defense counsel's affirmative approval of the trial court's handling of the matter, defendant cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Accordingly, any objection in this regard was waived, and there is no error to review. *Id.* at 214-216.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad