STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2007
v	No. 262371 Berrien Circuit Court
EDWIN DANTREL MERIDY, Defendant-Appellant.	LC No. 2004-404680-FC

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

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant as an habitual offender, second offense, MCL 769.11, to prison terms of 35 to 75 years for the second-degree murder conviction, 3 to 10 years for the felon in possession conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant argues that the evidence was insufficient to sustain the second-degree murder conviction. We review de novo challenges to the sufficiency of the evidence to determine whether, when viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the elements of the charged crime to have been proven beyond a reasonable doubt. *People v Cox*, 268 Mich App 440, 443; 709 NW2d 152 (2005). To prove second-degree murder, the prosecutor must prove: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of a crime. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). And, positive identification by witnesses may be sufficient to support a conviction of a crime. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Witnesses testified at trial that defendant fired shots at the victim while chasing him behind a building, where more shots were fired. Defendant subsequently returned carrying a gun and, within minutes, the victim was found dead due to gunshot wounds. Considering the evidence concerning an earlier argument between defendant and the victim, as well as the

witnesses' testimony, the evidence was sufficient to sustain a finding that there was a death caused by defendant's act of shooting. The evidence was also sufficient to support a finding of malice. Defendant left the scene of an argument with the victim, returned with a gun, and chased and repeatedly shot the victim. The evidence did not support a finding of justification or excuse for the shooting. Viewed in the light most favorable to the prosecution, the evidence was sufficient to support the second-degree murder conviction.[1]

Defendant also argues that the verdict was against the great weight of the evidence. We review for an abuse of discretion a trial court's decision on a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). We will find an abuse of discretion only where the denial of the motion was manifestly against the clear weight of the evidence. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). 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. *McCray*, *supra* at 637. "'[T]he hurdle a judge must clear to overrule a jury is unquestionably among the highest in our law . . . [and] is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation.'" *People v Lemmon*, 456 Mich 625, 639; 576 NW2d 129 (1998), quoting *People v Bart (On Remand)*, 220 Mich App 1, 13; 558 NW2d 449 (1996) (Taylor, J.). Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. *McCray*, *supra* at 638. "Unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable facts or defied physical realities, the trial court must defer to the jury's determination." *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003) (internal citations and quotations omitted).

The trial court rejected defendant's claim that the verdict was against the great weight of the evidence. Although the prosecution witnesses offered somewhat inconsistent accounts of the events surrounding the murder, witnesses testified that they saw defendant fire shots at the victim just before the victim's dead body was found. The testimony of another witness contradicted defendant's testimony that he left the scene before shots were fired. The testimony of the key prosecution witnesses was not so far impeached that it was deprived of all probative value, and their testimony was not contradicted by the result of the autopsy. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial where the denial of the motion was not manifestly against the clear weight of the evidence.

II

Defendant argues that the trial court abused its discretion in admitting five autopsy photographs of the victim. However, defense counsel expressly acquiesced to the admission of

[1] Although defendant challenges the credibility of the prosecution witnesses, we will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of the witnesses. *Williams*, *supra* at 419. Moreover, the prosecutor was not required to disprove defendant's theory that the victim continued running away from him after they were out of sight of the witnesses. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

four of the photographs. Thus, defendant is precluded from raising the issue on appeal. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). With regard to the remaining photograph, defendant objected at trial on relevance grounds, but he now objects on appeal on the ground that it was unfairly prejudicial. An objection based on one ground at trial is insufficient to preserve an attack based on a different ground. *Bulmer, supra* at 35. Thus, the MRE 403 argument is not preserved for appeal. We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only if the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*.

MRE 403 provides that "[a]lthough relevant, evidence may be excluded if 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." Here, the trial court admitted the photograph over a relevancy objection, and defendant does not now argue the photograph was irrelevant. The photograph at issue here depicted the victim's fully-clothed body before the autopsy, and provided the only clear picture of the victim. Thus, the photograph was relevant. Because there has been no showing of unfair prejudice under MRE 403, plain error affecting defendant's substantial rights in the admission of the photograph was not established. Reversal is not required. *Carines, supra* at 763.

III

Defendant asserts that the prosecutor engaged in various instances of prosecutorial misconduct. Because defendant failed to make contemporaneous objections and request curative instructions concerning the alleged instances of prosecutorial misconduct, this issue is unpreserved. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review unpreserved claims of prosecutorial misconduct for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). To avoid forfeiture of an unpreserved claim, defendant must demonstrate plain error that was outcome determinative. *Id*. Issues of prosecutorial misconduct are decided on a case-by-case basis by examining the record and evaluating the prosecutor's remarks in context. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The propriety of a prosecutor's remarks depends on all the facts of the case. *Id*. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*.

Defendant first argues that the prosecutor engaged in misconduct by asking prospective jurors during voir dire whether they would agree that the police officers in the area where the crime occurred were "brave individuals who [we]re trying to do a very difficult job," and whether they could think of any reasons why civilian witnesses would be reluctant to testify, with the example that witnesses have to return to their community. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury. In voir dire, meaning 'to speak the truth,' potential jurors are questioned in an effort to uncover any bias they may have that could prevent them from fairly deciding the case." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (internal citations omitted). The purpose of the prosecutor's questions regarding whether the jurors had a favorable perception of local law enforcement, and whether they could empathize with reluctant witnesses, was to identify those jurors who had divergent sentiments and who would not be able to render a

decision employing those views. The prosecutor's questions were properly designed to uncover bias that would have prevented the jurors from fairly deciding the case. Defendant has failed to demonstrate that the prosecutor's questions amounted to plain error that was outcome determinative. *Watson*, *supra* at 586.

Defendant next argues that the prosecutor denigrated the defense and defendant by asking prospective jurors during voir dire whether they thought that people who are guilty and are charged with crimes should "step up and take responsibility for their actions," or whether "they should always just drag out the process and see what they can get." Defendant argues that the prosecutor's inquiry effectively implied that defendant was guilty and should have pleaded accordingly, instead of wasting the jury's time. However, the prosecutor's inquiry was made in the context of an exchange in which a prospective juror stated that he pleaded guilty to a civil infraction because he was, in fact, guilty, but that he would have "fought it" if he was not guilty. While a prosecutor may not vouch for a defendant's guilt, *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995), the prosecutor's questions here were not directed specifically at defendant. Rather, they were a general query as to whether the jury believed that people should assume responsibility for their actions. Taken in context, the prosecutor's inquiry did not denigrate defendant or the defense. *Rodriguez*, *supra* at 30.

Defendant also argues that the prosecutor engaged in misconduct by improperly eliciting certain testimony on various occasions at trial. Specifically, defendant takes issue with the prosecutor's elicitation of testimony that it was common for local residents to give false information to the police and that the local residents involved in this case were not initially cooperative with the investigation. However, this challenged information was, contrary to defendant's argument, highly relevant to the jury's credibility determination of the witnesses, and there has been no showing that the evidence was unfairly prejudicial. A prosecutor's good faith effort to admit evidence cannot constitute misconduct. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because the evidence was properly admitted, there is no basis to conclude that the prosecutor acted in bad faith. *Id*.

Defendant also takes issue with the elicitation of testimony that a witness told the police that the victim was not known for carrying a weapon and that he preferred to resolve disputes with his fists instead of a gun. This information was highly relevant to the credibility of the witness, who denied making some statements to the police, but confirmed, among others, the above-referenced statement. There has been no showing that the evidence was unfairly prejudicial. A prosecutor's good faith effort to admit evidence cannot constitute misconduct, and because the evidence was properly admitted, there is no basis to conclude that the prosecutor acted in bad faith. *Id*.

Defendant also challenges the prosecutor's elicitation of testimony, and his comment during closing argument, that defendant failed to call the police after the incident. However, it is not improper for a prosecutor to comment on a defendant's failure to report the crime. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992), quoting *People v Collier*, 426 Mich 23, 35; 393 NW2d 346 (1986), where our Supreme Court approved the prosecutor's argument that "'if defendant's version [of the events in question] were true he would have reported the crime.'" Because evidence of defendant's failure to call the police was proper, there was no misconduct by the prosecutor in offering that evidence. *Ackerman*, *supra* at 448.

Defendant also takes issue with the prosecutor's elicitation of testimony that a prosecution witness received threats in anticipation of her testimony at trial. Evidence of a threat against a witness by someone other than a defendant may be admissible to assist in a credibility determination. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995); *People v Clark*, 124 Mich App 410, 412-413; 335 NW2d 53 (1983). "If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact." *Mills*, *supra* at 72. Because evidence of threats was proper, there was no misconduct by the prosecutor in offering that evidence. *Ackerman*, *supra* at 448. Additionally, the threats were not hearsay, because they were not assertions, and thus not statements under MRE 801(a). *People v Jones (On Rehearing, After Remand)*, 228 Mich App 191, 205; 579 NW2d 82 (1998). Finally, defendant's argument that his right to confrontation, US Const, Am VI; Const 1963, art 1, § 20, was violated where the person who lodged the threats against the prosecution witness was not produced at trial is meritless inasmuch as defendant subpoenaed the person who made the threats and the person actually appeared at trial.

Defendant also challenges the prosecutor's comment during the closing argument that defendant "fled out" of the projects. A prosecutor may not argue facts that are not in evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, they may argue the evidence and reasonable inferences, *id*., and are not constrained to use bland terms when doing so. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Contrary to defendant's assertion that the challenged statement was a "fact not in evidence," a prosecution witness specifically testified that, when she was walking into the projects, defendant came running out. The prosecutor's argument was therefore based on the evidence and reasonable inferences.

Defendant next objects to the prosecutor's comment during the closing argument that "contrary to defendant's trial testimony that he was not involved in the argument leading up to the murder, several witnesses testified that defendant was involved in the argument." Several witnesses testified that defendant was involved in the argument and, therefore, the evidence supported the prosecutor's comment.

Defendant further challenges the prosecutor's comment during closing argument regarding the convenience of defendant's assertion that one of the eyewitnesses possessed a gun, where the only two witnesses able to refute that assertion were unavailable. While it appears that the prosecutor mistakenly argued his point, defendant was not harmed by the error. The trial court instructed the jury that the attorney's arguments were not evidence and could not be considered in reaching a verdict. Jurors are presumed to follow their instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). No plain error has been established.

Defendant next argues that the prosecutor improperly shifted the burden of proof by commenting during closing argument that defendant did not call his girlfriend to testify as an alibi witness. Defendant raised an alibi defense when he testified that he was at his girlfriend's house during the shooting, and his girlfriend was listed on his witness list. "[W]here the defendant presents an alibi defense at trial, the prosecutor's questions and arguments regarding the defendant's failure to produce the alibi witnesses listed in the notice of alibi is permissible to

highlight the weakness of the defense." *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989). There was no improper shifting of the burden of proof.

Defendant next challenges the prosecutor's comments during closing argument reiterating his impeachment of a particular witness. This argument was based on the evidence. *Bahoda*, *supra* at 282. Thus, it was not improper for the prosecutor to attack the credibility of a witness during closing argument by reiterating that the witness was impeached at trial.

Defendant also argues that the prosecutor fabricated testimony and misled the trial court. The prosecution admits on appeal that the prosecutor misread a trial transcript and incorrectly stated the facts when responding to defendant's motion for a new trial. However, because the trial court did not rely on the prosecutor's misrepresentation of the record, defendant cannot demonstrate that the prosecutor's argument affected the outcome of the new trial motion, and therefore, reversal is not required. *Carines*, *supra* at 763-764.

Finally, defendant argues that the cumulative effect of the various instances of alleged prosecutorial misconduct constitutes error requiring reversal. However, "[t]he key test in evaluating claims of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Watson*, *supra* at 594. Where the prosecutor's conduct did not deny defendant a fair and impartial trial, reversal is not warranted. *Id*. There has been no showing of any instances of misconduct, which viewed cumulatively, denied defendant a fair trial. Reversal on the basis of prosecutorial misconduct is not required.

IV

Defendant argues that he was denied the effective assistance of counsel. Specifically, defendant argues that defense counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct discussed previously, for failing to properly investigate the case, and for failing to move to reopen proofs or move for a mistrial upon learning of a witness' alleged statements that she testified under duress. A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). To prove ineffective assistance of counsel, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 58.

On the record, it appears that defense counsel made a strategic decision not to move to reopen proofs or move for a mistrial on the basis of statements allegedly made by a prosecution witness after trial. Even assuming the alleged statements were true, the witness did not recant her trial testimony, but merely stated that she was remorseful for testifying as she had. At that point, during deliberations, there was no indication that the witness would offer different testimony if the proofs were reopened. Further, an attempt to impeach the witness with her alleged statements would have provided the prosecutor with an opportunity to elicit additional testimony detrimental to defendant, including more information that the threats against the witness were made at defendant's behest. Defendant has failed to overcome the strong presumption that counsel's performance in handling the allegations constituted sound trial strategy.

To the extent defendant argues that defense counsel was ineffective for failing to object to the various instances of prosecutorial misconduct, defendant's allegations of prosecutorial misconduct are meritless, and counsel is not ineffective for failing to raise meritless or futile objections. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). To the extent defendant argues that defense counsel provided ineffective assistance at sentencing for various reasons, defendant's claims of sentencing error are meritless (see discussion *infra*), and defense counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Defendant's final argument that defense counsel was ineffective for failing to adequately investigate the case is a reiteration of his assertion that defense counsel failed to challenge the credibility of certain witnesses. However, the record refutes this assertion. The credibility of the witnesses was challenged. Defendant has failed to demonstrate that his counsel's performance was deficient. Accordingly, he is not entitled to relief from his convictions based on the alleged ineffective assistance of his counsel.

V

Defendant maintains that error occurred in the imposition of his sentence. Because defendant expressed satisfaction with the presentence investigation report at sentencing, did not raise any allegations of error concerning sentencing in his motion for a new trial, and did not move to remand for resentencing in this Court, he is precluded from raising issues on appeal challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining his sentences, which were within the appropriate guidelines sentence ranges. MCL 769.34(10); MCR 6.429(C); *People v Kimble*, 470 Mich 305, 309-314; 684 NW2d 669 (2004). Defendant's argument that the trial court erred in failing to state reasons for departing from the recommended sentencing guidelines range is meritless because there was no sentencing departure. To the extent defendant argues that he is entitled to resentencing under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), we are bound to follow the decisions of our Supreme Court and this Court concluding that *Blakely* and its progeny do not apply to sentencing imposed in Michigan. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Endres*, 269 Mich App 414, 423; 711 NW2d 398 (2006).

VI

Defendant argues that the trial court erred in denying his motion for an adjournment so that he could locate a witness to testify in support of his motion for a new trial. However, defendant has abandoned this issue by failing to cite any authority in support of his claim. *Watson*, *supra* at 587.

VII

Defendant contends that the trial court abused its discretion in denying his motion for a new trial on the basis of newly discovered evidence. We review for an abuse of discretion a trial court's decision whether to grant a new trial on the basis of recanting testimony. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). We review for clear error a trial court's findings of fact. *Id.*; MCR 2.613(C). For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, is newly discovered; (2) the newly discovered evidence is not cumulative; (3) defendant could not, with

reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. *Cress*, *supra* at 692; MCR 2.611(A)(1)(f).

Defendant's motion for a new trial on the basis of newly discovered evidence was based, in part, on the sworn statement of a prosecution witness recanting her trial testimony and averring that she falsely testified against defendant in exchange for favorable treatment on pending charges. Defendant's motion was also based in part on statements that another prosecution witness claimed that he planned to testify against defendant in exchange for favorable treatment for charges that were pending against him, despite the fact that he was in his home at the time of the murder and never saw the shooter. Where newly discovered evidence takes the form of recantation testimony, it has been traditionally regarded as suspect and untrustworthy. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). "Generally, too, where the new evidence is useful only to impeach a witness, it is deemed merely cumulative." *Id*. "Newly discovered evidence is not ground[s] for a new trial where it would merely be used for impeachment purposes." *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993); *People v Bradshaw*, 165 Mich App 562, 567; 419 NW2d 33 (1988). However, the discovery that testimony introduced at trial was perjured may be grounds for a new trial. *Barbara*, *supra* at 363. "The problem for defendant becomes, then, how he or she goes about demonstrating that perjury was committed when the newly-discovered evidence consists of a new witness or of an old witness's revised story." *Id*.

The alleged recantation at issue here was suspect and untrustworthy. Further, there was no evidence that the other witness perjured himself at trial. And, more importantly, defendant has failed to demonstrate that a new trial was warranted based on newly discovered evidence. *Cress*, *supra* at 692. There has been no showing that the new evidence would make a different result probable on retrial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

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