STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2008
v JERMEY JERMAINE LLOYD, Defendant-Appellant.	No. 277172 Saginaw Circuit Court LC No. 05-025881-FC

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree premeditated murder, MCL 750.316(1)(a), and of one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two years' imprisonment for felony-firearm, consecutive to life in prison without parole for first-degree murder. We affirm.

I. FACTS

On Sunday, July 18, 2004, Omar McKnight and Desiree Whittington went out on their porch with their six-day-old baby where they were approached by a couple of individuals. One was Deonte Quinn, who pulled out a small chrome colored handgun, declaring that he had 17 shots for McKnight. Whittington testified that Quinn, a member of the "north side gang," had problems with McKnight, an "east side gang" member. After this confrontation, McKnight and Whittington hurried back into their townhouse. Lacreda Whittington, Desiree Whittington's cousin, and her friend, Antonia Watson, were inside the townhouse.

Upon hearing about the confrontation, Lacreda testified that she came out of the townhouse and confronted Quinn, who was walking up to a white Neon driven by defendant Jermey Jermaine Lloyd. She testified that Quinn ran off after she said that she would call the police. Then Lacreda, Whittington, and McKnight went to Lacreda's vehicle. Watson remained in the townhouse to watch McKnight and Whittington's children. Lacreda sat in the driver's seat, Whittington sat in the front passenger seat, and McKnight sat in the right rear passenger seat. Whittington testified that someone named "Cell" drove up in his vehicle in front of Lacreda's vehicle, and Lacreda got out of her car to pass "Cell" a lighter. She further testified that she saw defendant approaching Lacreda's vehicle with a chrome gun shooting at the vehicle. Lacreda testified that as she was handing "Cell" a lighter, she heard four shots. Whittington

testified that she saw defendant run away. Watson heard shots and looked outside and saw defendant run one way and McKnight run in the other. McKnight had been shot five times and later died.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence produced below to support his convictions because the only evidence against him was eyewitness testimony and that testimony, under the circumstances, was unreliable and was tainted by an impermissibly suggestive photo identification. He also argues that there was insufficient evidence of premeditation. We disagree.

A. Standard of Review

To determine whether there was sufficient evidence to support a conviction, we review the evidence de novo, in the light most favorable to the prosecution, to decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

B. Analysis

The heart of the case against defendant centers on eyewitness testimony. Even if defendant is correct that eyewitness testimony can be problematic, he cites no legal authority to support the notion that this evidence, once admitted, is insufficient to support a conviction. Here, two witnesses testified that they saw defendant shoot the victim. A rational fact-finder could find those witnesses credible, which in the light most favorable to the prosecutor, is sufficient to establish defendant's identity as the shooter beyond a reasonable doubt. See *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) ("It is the province of the jury to determine questions of fact and assess the credibility of witnesses.").

Defendant also argues that there was insufficient evidence of premeditation, given the lack of evidence of any personal motive for defendant to shoot the victim and of any past confrontations between the two. However, the lack of any evidence of personal animosity between the shooter and the victim does not equate to a lack of premeditation. The jury can infer premeditation and deliberation from the circumstances of the crime that occurred, *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993), not the crime that did not occur. Moreover, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). Here, the evidence established that shortly before the shooting, another man used a similar looking gun to threaten the victim and also that defendant had been seen with this other man at the time. A reasonable jury could infer that defendant was involved in the initial threat and that during the time lapse between the initial threat and the shooting, defendant had sufficient time to reflect on and comprehend what he was going to do. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Thus, there was sufficient evidence to support defendant's conviction of first-degree murder and felony-firearm. *Johnson*, *supra* at 723.

III. EVIDENTIARY MATTERS

Defendant next argues that the trial court abused its discretion when it kept defendant's expert from testifying about the weaknesses and fallacies of eyewitness identification, when it allowed the eyewitness testimony itself to be admitted, when it denied defendant's requested eyewitness identification jury instructions, and when it allowed 911 tapes to be admitted into evidence. We disagree.

A. Standard of Review

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.* Alleged jury instruction errors are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The relevant instructions are then examined in their entirety to determine if reversal is required. But reversal is not required "as long as they fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

B. Analysis

Defendant makes a reasoned argument regarding the need for expert testimony to instruct a jury on the pitfalls of eyewitness identification, including the need for this to be explained by an expert referencing peer-reviewed scientific research. But there is nothing in the law compelling the admission of such evidence. To the contrary, the admission of expert testimony is left to the discretion of the trial court. *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995). As it is, there are already extensive standard jury instructions given regarding matters to consider concerning eyewitness testimony—instructions that were given in this case. Much of what concerns defendant is already addressed in those instructions, including the issue of how well a witness knows defendant and the circumstances at the time of the alleged crime. Further, even though there was no expert testimony, defendant was able to bring up various problems with all of the eyewitnesses, including the fact that none of them really knew defendant or had seen him very many times before the shooting, and the fact that all of them were more focused on the gun and escaping harm than they were on trying to identify the shooter. Thus, the trial court did not abuse its discretion when it held that defendant's expert on eyewitness identification in general could not testify. And because the jury instructions given fairly presented the issues to be tried and sufficiently protected defendant's rights, no reversal is required on that basis. *Aldrich*, *supra* at 124.

Defendant further argues that the eyewitness testimony should have been suppressed as unreliable based on suggestive photo lineups given to all of them. "A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An improper suggestion often arises where a witness is shown only one person or is shown a group where one person stands out in some way. *Id.* Defendant claims the photo array was unreliable based on the fact that of the six

photos included, only two of the pictures were of young-looking teens. The victim's girlfriend testified that she thought "one in four" of the pictures in the photo array looked too old to be the shooter. Her cousin testified that picture numbers 1, 3, 4, and 5 did not match her description to police of a "very young" shooter who looked much "like a little boy." Another witness testified that numbers 1, 4, and 5 looked too old.

While it may be that some of the individuals in the photo array looked older than defendant (despite their actual ages), there was nothing in the array that approaches the level of taint addressed in *People v Kachar*, 400 Mich 78, 90; 252 NW2d 807 (1977) (the photos shown were labeled with names and the witness had heard the name of defendant before the lineup), or that in *Gray*, *supra* at 110-111 (the witness was shown a picture of the defendant and given assurances by police that they had the right person before being shown the array). The witnesses in this case were given six photos. Arguably, two, three, or four of them looked older than defendant. However, there is no dispute that all of the pictured men were of approximately the same age. Moreover, the fact that some of the individuals pictured may have looked too old, thereby eliminating them from consideration by the eyewitnesses, does not mean that the witnesses were thereby forced to misidentify defendant. Thus, defendant has not established that the photo array was so tainted that it required finding an independent basis for identification. Further, the jury was made aware of these deficiencies. There is no basis for relief on that part of this issue.

Defendant next contends that the 911 tapes should not have been admitted into evidence because they contained nothing but impermissible hearsay. Statements by callers to 911 operators could indeed generally be hearsay. See MRE 801. However, they could also potentially fall into the hearsay exception of "excited utterances," which allows "[a] statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition." MRE 803(2). But this would only be the case if there is sufficient evidence that the startling event actually occurred and that she was still under the stress of it. *People v Barrett*, 480 Mich 125, 133-134; 747 NW2d 797 (2008). The statement itself may be part of the evidence that establishes the underlying exciting event. *Id*. at 139. Such statements could also potentially fall under the "present sense impression" exception. MRE 803(1).

Here, all but one of the 911 calls fall within MRE 803(1) or (2). It is clear from the context of the calls that most of the callers were relating what was happening or had just happened, and that there was much confusion and turmoil going on at the time. For example, the first caller referenced in trial exhibit 19 makes the unresponsive remark "Oh my God" and also is heard, over screaming and hollering, telling someone to "get a towel." The transcript of the fourth call also indicates that "a lot of screaming and hollering" can be heard through the phone. The eighth caller indicates that the victim was not breathing.

However, trial exhibit 20 includes a fourth caller who identifies his or her purpose for the call as being "to report who done the killing just a few minutes ago." This caller identified the shooter as "Little Calio," and a police officer had testified that defendant's street name was Cali or Calio. Nonetheless, this portion of the 911 tapes is not so prejudicial as to undermine confidence in the outcome of the case. "If an error is found, defendant has the burden of establishing that, more probably than not, a miscarriage of justice occurred because of the error." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). In light of the weight of the

other evidence adduced, particularly that of the testifying eyewitnesses, defendant cannot show "'that it is more probable than not that the error was outcome determinative.'" *Id.*, quoting *Lukity*, *supra* at 495.

Defendant also complains that it was error for the trial court to have allowed the police to testify about witnesses who talked to them but refused to come in and testify, which allowed the prosecutor to imply that those witnesses were afraid. But there was at least some relevance to mentioning that there were other witnesses who saw what happened. That makes the explanation why they were not called as witnesses relevant. The reason provided was because they would not come in and testify. There was no mention of the reason why they did not testify. While one could draw an inference that it was related to fear regarding gangs, that is mitigated by the fact that two of the people who ought to feel the most fear, the two witnesses who were right in the midst of the shooting, still came to testify. Thus, the failure of other people to testify who were not so centrally involved could be considered by the jury to be more an indicator of the general desire many perhaps feel not to get involved, as opposed to a specific fear of reprisal. Thus, the trial court did not err when it admitted these statements. And in any event, it is unlikely that a short statement that some witnesses would not testify had any effect on the outcome of the case in light of the other evidence. *Lukity*, *supra* at 495. Thus, there is no basis to reverse for any of the trial court's evidentiary rulings complained of by defendant.

IV. PROSECUTORIAL MISCONDUCT

Defendant next complains that the prosecutor committed misconduct by making two statements during closing arguments that shifted the burden of proof to defendant, by arguing facts unsupported by the evidence, by denigrating defense counsel, by implying that there were other witnesses who would not come forward out of fear, and finally, by the cumulative effect of all of the listed misconduct. Again, we disagree.

A. Standard of Review

Prosecutorial misconduct claims are reviewed on a case-by-case basis, looking at the prosecutor's comments in context and in light of the defense arguments and their relationship to evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

B. Analysis

A prosecutor may not argue facts not entered into evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but may otherwise argue the evidence and all reasonable inferences it creates, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

During closing argument, the prosecutor stated, "You can't get around the fact that the evidence in this case is uncontradicted. Nobody came in here and said it was someone else that shot and killed" the victim. Defense counsel objected, but before the trial court could rule, the prosecutor then stated, "Well, I didn't hear anybody else come in and testify to that," at which point the trial court sustained the objection, defense counsel pointed out it was an impermissible shifting of the burden of proof, and the trial court again reiterated that it sustained the objection.

These statements by the prosecutor were improper because they tended to shift the burden of proof to defendant. "An argument by a prosecutor which infers that a defendant must prove something may tend to shift the burden of proof, resulting in error." *People v Heath*, 80 Mich App 185, 188; 263 NW2d 58 (1977). However, any impact it may have had was effectively countered by both the court twice sustaining the objections raised, as well as by the charge to the jury. Specifically, the court instructed the jury that the burden of proof is on the prosecution and "[t]he defendant is not required to prove his innocence or do anything." The court also instructed the jury that defendant has an "absolute right not to testify" and the fact that he did not testify "must not effect your verdict in any way." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

The other prosecutorial conduct complained of by defendant does not rise to the level of misconduct. The prosecutor's remarks during his opening statement regarding a north side versus south side rivalry were based on the prosecutor's reasonable belief that this was what would come out of the testimony. The prosecutor admitted this, and admitted his error in this regard, during his closing when he stated:

> I think that my opening statement was a good example of why what I say is not evidence. I said that the defendant was shot four times. . . . I said the victim was from the south side. The testimony here clearly was during the course of the evidence or case that he was from the east side, and that was the difference, or what led to the problems down here . . . .

Given this acknowledgement, it cannot be said that the prosecutor's opening statement was misconduct. And even if it were, it was clearly cured by the prosecutor's own statements, as well as the trial court's later instruction that the statements of counsel are not evidence. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Defendant's complaints about various pieces of evidence the prosecutor introduced through testimony are also without merit. "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003). The prosecutor asking a police officer if the results of an investigation caused him to focus on a suspect was not improper as it described what the officer did. This is not asking about guilt, as defendant implies, but is instead showing how the investigation led to defendant.

The prosecutor's statements that there was no doubt why the victim was killed and that defendant drove up after another man's initial confrontation with the victim were also not misconduct, because that lack of doubt was based upon witness testimony and the reasonable inferences that stems from it. A prosecutor is allowed to argue based on the evidence presented, and is not required to state inferences and conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant claims that the prosecutor denigrated the defense by asking the jury before the presentation of proofs to listen carefully to the testimony and not to be fooled by any deception, and then asserted that the defense attorney's statements about the victim's girlfriend being an unwed mother were deceptions. It is certainly troubling that the word "deception" was used, as it implies that defense counsel is trying to trick or deceive the jury, something which is clearly

improper for a prosecutor to even imply. "When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence." *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984) (citation omitted). This could be particularly troubling when combined with the prosecutors burden-shifting statement during closing argument discussed above. But in this case, the use of the word "deception" during the opening statement was clearly referring to testimony, not to defense counsel, and while the later statement in closing could be implied to refer to defense counsel, taken in context, it still seems to be referring to deceptions by witnesses, not defense counsel. So there was no misconduct here.

Defendant urges reversal based on the cumulative effect of misconduct. But, as noted above, there was only a single instance of actual misconduct that alone does not merit reversal.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he received ineffective assistance of counsel at trial. We disagree once again with defendant's contentions.

A. Standard of Review

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id*.

B. Analysis

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). There is a strong presumption of effective counsel when it comes to issues of trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant's ineffective assistance of counsel claim is predicated on the notion that defense counsel was ineffective for every other issue complained of on appeal that was not preserved by defense counsel at trial. But other than a general, blanket statement, defendant has provided no analysis of which issues would have come out differently (and why they would have done so) had defendant preserved them for appeal. One cannot simply announce a position or

assert an error and leave it up to the Court to research and develop the arguments and then accept or reject the position. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

As it was, every issue raised by defendant was preserved except for some of the claimed prosecutorial misconduct, and none of those unpreserved complaints were misconduct. "There is no obligation for a defense attorney to object where such objection would be futile." *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007). Thus, defendant was not denied the effective assistance of counsel and so is entitled to no relief on that basis.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette