STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2007
v	No. 266331 Saginaw Circuit Court
MARCUS DUWON CLEMMONS Defendant-Appellant.	LC No. 05-025510-FC

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant Marcus Clemmons appeals by right his jury trial convictions for one count of second-degree murder, MCL 750.317; four counts of assault with intent to commit murder, MCL 750.83; two counts of possession of a firearm during the commission of a felony, MCL 750.227(b); one count of being a felon in possession of a firearm, MCL 750.224f; and one count of carrying a concealed weapon, MCL 750.227. We affirm.

Defendant first argues on appeal that prosecutorial misconduct deprived him of his due process right to a fair trial. Generally, we review claims of preserved prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor's remarks in context to determine whether defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Defendant argues that the prosecutor impermissibly vouched for the credibility of two accomplice witnesses by reading a term of their immunity agreements where they promised to give "truthful testimony concerning the crimes" charged against defendant in return for testimonial immunity. Prosecutors may not vouch for the credibility of their witnesses by claiming they have special knowledge that the witnesses are testifying truthfully. *Id*. at 276. However, the mere disclosure of a plea agreement with a prosecutor's witness which requires truthful testimony is not deemed improper vouching or bolstering by the prosecutor, unless the prosecutor suggests special knowledge of the truthfulness of the witness. *Id*. at 276-277; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). In this case, the prosecutor did not make additional commentary about the immunity agreements that suggested special knowledge of the witnesses' truthfulness, nor did he use the truthfulness requirement of the immunity agreements to badger a witness into contradicting prior testimony. There was no misconduct. And, we note that the trial court cured any potential prejudicial effect of the prosecutor's reference to the truthfulness requirement of the immunity agreements its instructions that the immunity agreements did not constitute judgments about the veracity of the witnesses, and that judging the credibility of the witnesses was the sole province of the jury.

Defendant next argues that the trial court abused its discretion and denied his rights to present a defense and to confront witnesses against him by excluding evidence that the murder victim had cocaine at the time of his death. We review a trial court's decision whether to admit or exclude evidence for an abuse of discretion. *Bahoda*, *supra* at 289. A decision on a close evidentiary question will typically not be an abuse of discretion. *People v Sabin, (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). We review de novo issues of law affecting the admissibility of evidence, including the constitutional right to present a defense. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). The Confrontation Clause, however, does not confer an unlimited right to admit all evidence a defendant requests. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). A defendant must still comply with established rules of evidence and procedure, allowing the trial court to exclude irrelevant evidence. *Id.*; *Hayes*, *supra* at 279. Thus, the right to present a defense does not include the right to cross-examine witnesses on irrelevant issues. *People v Hackett*, 421 Mich 338, 344; 365 NW2d 120 (1984).

The evidence of the decedent's possession of cocaine did not make any fact that was of consequence more or less probable. The decedent did not testify against defendant; therefore, his credibility was not at issue. The decedent's possible status as a cocaine dealer or cocaine user also did not increase or decrease the likelihood that defendant acted in self-defense. A person is justified in using deadly force against another in self-defense if, under the totality of the circumstances, the person honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. *People v Riddle*, 467 Mich 116, 142; 649 NW2d 30 (2002). Defendant produced no evidence that demonstrated that he or his codefendants knew that the decedent possessed cocaine at the time or the shooting, that the decedent was a cocaine dealer or user, or even that they knew the decedent. Defendant established no connection between the decedent's possession of cocaine and weapon found near the scene. Moreover, unless defendant knew that the decedent possessed cocaine, the testimony was entirely irrelevant to defendant's state of mind at the time of the shooting. In addition, defendant was not prohibited from arguing that he acted in self-defense or that the gunshot that ended the decedent's life came from someone other than the occupants of the blue van. The trial court did not abuse its discretion in precluding evidence of the decedent's cocaine possession, nor did the trial court infringe upon defendant's right to present any defense based on the preclusion of that evidence.

We also find that defendant's right to confront witnesses against him was not violated. A Confrontation Clause issue may arise when a witness asserts the Fifth Amendment, but it does not arise where a witness does not give any substantive testimony. *People v Gearns*, 457 Mich 170, 186-187; 577 NW2d 422 (1998), overruled on other grounds *Lukity*, *supra* at 494. Implicit in federal confrontation clause jurisprudence is the notion that a witness must put forth some testimony before the defendant's right of confrontation can be invoked. Because the decedent did not testify at trial, defendant's right of confrontation was not violated. *Id.*

Defendant next argues that the trial court violated his right to a properly instructed jury and his right to present a defense by declining his request to instruct the jury about felonious assault, manslaughter, and self-defense. We review for an abuse of discretion the trial court's determination whether a requested jury instruction applies to the facts of this case. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Even if there is error, reversal is only

warranted if defendant can establish that the error caused a miscarriage of justice, which means that it is more likely than not that the error was outcome determinative and the error undermined the reliability of the verdict. *Riddle, supra* at 124-125.

A jury instruction on a lesser cognate offense is not permitted. *People v Cornell*, 466 Mich 335, 353-355; 646 NW2d 127 (2002). Felonious assault is not a lesser-included offense of assault with intent to commit murder because it contains an element not found in the greater offense. *Id*.; *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006). The trial court properly refused to instruct the jury on felonious assault as an alternative to assault with intent to murder. Further, because the jury rejected the lesser-included offense of assault with intent to do great bodily harm on which it was instructed, any error arising from the trial court's failure to also instruct on felonious assault was harmless. *Gillis, supra* at 140 n 18.

Similarly, the trial court properly declined a voluntary manslaughter instruction. Both voluntary and involuntary manslaughter are necessarily included lesser offenses of murder, distinguished by the element of malice. *People v Mendoza*, 468 Mich 527, 533-534, 540-541; 664 NW2d 685 (2003). "Consequently, when a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *Id*. at 541. To show voluntary manslaughter, defendant was required to show that he killed in the heat of passion, that the passion was caused by adequate provocation, and that there was no lapse of time during which a reasonable person in defendant's position could have controlled his passions. *Id*. at 535. The degree of provocation that defendant was required to demonstrate to mitigate his offense from murder to manslaughter is the degree of provocation that would cause defendant to act out of passion rather than reason, and that which would cause a reasonable person to lose control. *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). In this case, all of the evidence presented at trial indicated that the victims were attacked in a drive-by shooting by the occupants of a blue Chevrolet van. Defendant did not present any testimony indicating that the victims antagonized, provoked or instigated an assault against the occupants of the blue Chevrolet van or that the occupants acted in the heat of passion. Two occupants of the blue Chevrolet van testified that the assault on the victims was in retaliation for an event that occurred the previous day, clearly presenting a sufficient lapse of time during which a reasonable person in defendant's position could have controlled his passions. The surviving victims testified that they did not provoke the assault, and had no warning of it. On the record before us, the trial court properly denied defendant's request for an instruction on voluntary manslaughter because a rational view of the evidence did not support the instruction.

Additionally, when a defendant requests a jury instruction on a theory or defense such as self-defense, that is supported by the evidence, the trial court is required to give the instruction. *Riddle, supra* at 124. A person is justified in using deadly force against another in self-defense if he is without fault and, under the totality of the circumstances, the person honestly and reasonably believes that because he is in imminent danger of death or great bodily harm, it is necessary for him to exercise deadly force. *Id.* at 142. Here, a self-defense instruction was not warranted. Defendant failed to offer any evidence that he honestly and reasonably believed that he was in danger of being killed or seriously injured and that it was immediately necessary to exercise deadly force to protect himself. The testimony of witnesses at the scene of the shooting demonstrated that the occupants of the van participated in a drive-by-shooting in retaliation for the death of their friend, who was killed the previous day. Investigating police officers testified

they examined the blue Chevrolet van and found no evidence that anybody fired a gun at the van, and there was no physical evidence at the crime scene that shots were fired at the van. The trial court did not err by declining defendant's request to instruct the jury about self-defense.

Defendant finally argues that the trial court abused its discretion in refusing to grant him a new trial based upon newly discovered DNA evidence indicating that the decedent's blood was present on a 9-millimeter gun found near the scene of the shooting. We review a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). In order to justify a new trial based on newly discovered evidence, a defendant is required to demonstrate that (1) the evidence itself, and not just its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) the defendant, exercising reasonable diligence, could not have discovered or produced the newly discovered evidence at trial; and, (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

Defendant cannot demonstrate that evidence that the decedent's blood was on the 9-millimeter gun found at the scene of the shooting would make a different result probable on retrial. Evidence that the gun was found at the scene of the shooting was admitted at trial, but evidence that the decedent's blood was present on that handgun does not prove that the decedent brandished the weapon or that defendant and his cohorts knew that the decedent carried a weapon. Defendant presented no evidence indicating that the shooting occurred in response to an immediate threat posed by the decedent. Thus, the "new" evidence would not have affected the verdict.

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra