

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JUMOKE D. MARTIN,

Defendant-Appellant.

UNPUBLISHED
October 17, 1997

No. 195533
Recorder's Court
LC No. 95-009003

Before: Bandstra, P.J., and Murphy and Young, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to thirteen to thirty years in prison on the second-degree murder conviction, to be served consecutive to a two year prison sentence for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his motion to suppress his statement to the police because it was obtained in violation of his right to counsel. We review the trial court's decision on a motion to suppress evidence for clear error. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996). A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *Id.*

Defendant alleges that he requested an attorney during questioning and that the police did not honor his request, thereby making any statement obtained inadmissible pursuant to *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981). The issue at the suppression hearing was whether the testimony of defendant's witnesses or the prosecution's witnesses was believable. There is no question that, if defendant's story is believed, his statement should have been suppressed. *Id.* at 484-485. However, the trial court found that defendant's story was not believable and instead gave credence to the testimony of the officers, who stated that defendant never requested an attorney. We defer to the trial court's assessment of the witness' credibility. *People v Marshall*, 204 Mich App 584,

587; 517 NW2d 554 (1994). Having reviewed the testimony at the suppression hearing, we cannot say that the trial court's decision was clearly erroneous.

Defendant next argues that he was denied a fair trial when the trial court refused to allow the jury to review the testimony of one of the prosecution witnesses. Because defendant did not object below to the trial court's handling of the jury's request, this issue has not been preserved for appellate review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). In any event, we find no abuse of discretion because the trial court specifically left open the possibility of the jury reviewing the testimony if it could not resolve its problems after further deliberations. *People v Robbins*, 132 Mich App 616, 621; 347 NW2d 765 (1984).

Finally, defendant challenges the trial court's exclusion of testimony by a police officer that one of the prosecution's witnesses initially named someone other than defendant as the shooter.¹ Defendant contends that the evidence was admissible under MRE 801(d)(1)(C) as a "statement . . . of identification of a person made after perceiving the person." A trial court's decision regarding the admission of evidence is reviewed for an abuse of discretion. *People v Kurzawa*, 202 Mich App 462, 465; 509 NW2d 816 (1993).

We agree that the officer's testimony should have been admitted pursuant to MRE 801(d)(1)(C) because it was third-party testimony concerning the witness' statement of identification. *People v Malone*, 193 Mich App 366, 370; 483 NW2d 470 (1992), affirmed 445 Mich 369; 518 NW2d 418 (1994). In any event, reversal is not required because defendant cannot demonstrate any prejudice from the trial court's ruling. *People v Mateo*, 452 Mich 203, 215; 551 NW2d 891 (1996). Prior to the officer's testimony, the witness admitted in her own testimony that she told police that a "Shaun" had shot the decedent and that she gave the police a description of Shaun. The witness also admitted that she did not tell the investigating detectives about Shaun in her subsequent interview, stating that she lied to the first police officers about who shot the decedent because she was afraid. Thus, the jury heard all the evidence that could have been presented about the witness' identification of someone other than defendant. At most, defendant was denied the opportunity to present cumulative testimony.

Affirmed.

/s/ Richard A. Bandstra

/s/ William B. Murphy

/s/ Robert P. Young, Jr.

¹ This issue was raised by defendant in a supplemental brief filed in propria persona under Standard 11 of the Approved Minimum Standards for Indigent Criminal Appellate Defense Attorneys, AO 1981-7. However, we note that Standard 11 conflicts with the Supreme Court's recognition in *People v Dennany*, 445 Mich 412, 442; 519 NW2d 128 (1994), a plurality opinion, that "a defendant has a constitutional entitlement to represent himself or to be represented by counsel - but not both."

Dennany was endorsed by a majority of the Court in *People v Adkins*, 452 Mich 702; 551 NW2d 108 (1996).