S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 26, 2000
v	No. 203436 Recorder's Court
TAHRIR KALASHO, Defendant-Appellant.	LC No. 94-011968

Before: Gribbs, P.J., and Kelly and Sawyer, JJ.

PER CURIAM.

Defendant was convicted of involuntary manslaughter, MCL 750.321; MSA 28.553, conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.157a; MSA 28.354(1) and MCL 750.84; MSA 28.279, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent prison terms of nine to fifteen years for the manslaughter conviction, five to ten years each for the conspiracy and assault convictions, and a consecutive two-year term for the felony-firearm conviction. On appeal by right, defendant raises numerous issues both through counsel and in propria persona. We affirm.

Defendant first argues that the trial court should have granted a mistrial because the prosecutor knowingly presented false testimony when it called James Mobley, a former codefendant, as a witness. There is no merit to this issue. The grant or denial of a mistrial is within the sound discretion of the trial court. There must a showing of prejudice to the defendant's rights in order for there to be error requiring reversal. The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994).

Contrary to defendant's claim, the record in this case does not establish that Mobley's testimony concerning the identity of the shooter was clearly false or that the prosecutor should have known that the testimony was false. The mere fact that a witness' testimony was inconsistent with the prosecutor's theory of the case or the accounts of other witnesses does not establish that the prosecution knowingly allowed perjured testimony to stand uncorrected. *People v Lester*, 232 Mich App 262, 278-279; 591 NW2d 267 (1998). Further, the jury was well

aware of the inconsistencies between Mobley's testimony and the accounts of other witnesses and the prosecutor did not improperly rely upon the challenged portion of Mobley's testimony in arguing that defendant was guilty. Under these circumstances, we find no prejudice to defendant. See *People v McWhorter*, 150 Mich App 826, 831-832; 389 NW2d 499 (1986).

Defendant also argues that the trial court erred in allowing the prosecutor to present Mazen Shamoon's grand jury testimony as substantive evidence. We disagree. As defense counsel acknowledged at oral argument, a witness' grand jury testimony may be admitted as a prior inconsistent statement under MRE 801(d)(1)(A). *People v Chavies*, 234 Mich App 274, 281-284; 593 NW2d 655 (1999). At the time of trial, Shamoon was unavailable as a witness due to his lack of memory regarding the incident. *Id*. at 284. Because Shamoon was called as a witness at trial and available for cross-examination, defendant was not deprived of his right of confrontation. *Id*. at 283. Thus, the trial court did not abuse its discretion in admitting the prior testimony and it also properly denied defendant's motion for a mistrial on this issue. *McAlister*, *supra* at 503, 505.

Next, defendant challenges the trial court's decision denying his motion to suppress evidence, including the murder weapon, seized from defendant's house at the time he was arrested. In reviewing a lower court's decision on a motion to suppress, this Court reviews the trial court's factual findings for clear error and reviews the court's conclusions of law de novo. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000); *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997); MCR 2.613(C).

First, we find no clear error in the trial court's determination that the police officers' initial warrantless entry into the house was proper. The officers had information that a series of shootings had occurred and that the people who ran from them into the house may have been involved. Under the circumstances, it was reasonable for the officers to believe that people in the house might pose a risk of danger, even though defendant had been taken into custody outside the house. It was therefore proper for the officers to enter the house without a warrant to conduct a protective search, and prevent the destruction of evidence. *People v Cartwright*, 454 Mich 550, 559-562; 563 NW2d 208 (1997).

Defendant also claims that the search warrant that was later obtained was invalid because of defects in the supporting affidavit. We do not agree. A reviewing court must only be sure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place before granting the warrant. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995); *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). Probable cause to search must exist at the time a warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched. *Id*.

Defendant first argues that the warrant was improperly issued because the affiant did not identify in his affidavit the source of his information about a prior shooting that the police were investigating. Personal knowledge must be demonstrated in an affidavit where information is obtained from another source. MCL 780.653; MSA 28.1259. Viewing the challenged portion of the affidavit in context, it is apparent that the affiant obtained the information about the prior

shooting from either Waad Stepho or Read Stepho. Both were victims of the prior shooting. Even where an affidavit does not explicitly say that the victim is the source of the information, the affidavit will be upheld if, upon reading it as a whole, it is apparent that the victim was the source of information. *People v Powell*, 201 Mich App 516, 521-523; 506 NW2d 894 (1993). Accordingly, defendant has not shown error.

Defendant also claims that the search warrant was not based on a proper showing of probable cause because the officers' initial entry into the home was illegal. As previously discussed, however, the officers' initial warrantless entry into the house was justified and, therefore, the information concerning that entry was properly considered.

Defendant also claims that the search warrant was based on false or misleading information because one sentence in the affidavit created the impression that defendant had also run into the house before being arrested. Where a defendant claims that false, or even misleading, information was inserted into an affidavit to procure a search warrant, he must show by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted the false material into the affidavit, and also that the false information was necessary to the magistrate's finding of probable cause. *Stumpf, supra* at 224. Even if tainted information is included in the affidavit, the search warrant will still be valid if probable cause exists without considering the false information. *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999). Here, apart from the challenged information in the affidavit, there was sufficient probable cause to issue the warrant. Accordingly, defendant is not entitled to relief on the basis of this issue.

Defendant next argues that he is entitled to a new trial because of misconduct by the prosecutor throughout these proceedings. Defendant failed to preserve his various claims of misconduct with an appropriate objection in the trial court. Therefore, appellate relief is not warranted absent a showing of clear error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). Moreover, even if these requirements are satisfied, the reviewing court, in its discretion, should not reverse unless it concludes that the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Id.*

The record does not support defendant's claim that the prosecutor played a role in presenting false or perjured testimony from Shamoon. We also reject defendant's claim that the prosecutor improperly presented false testimony from Sergeant Flanagan when it was the defense who called this witness at trial, and part of the defense's strategy was to show that Flanagan was a liar who sought to frame defendant for the charged crime. Further, notwithstanding claims by witnesses that they were beaten by the police, there is no indication in the record that the witnesses were unable to testify free of intimidation at trial. Thus, defendant has not shown that he was denied a fair trial due to police intimidation. *People v Stacy*, 193 Mich App 19, 28-30; 484 NW2d 675 (1992).

Next, the prosecutor did not have a duty to produce Romel Denha as a witness at trial, even if he was a res gestae witness, because his name was never included on the prosecutor's witness list, MCL 767.40a(3); MSA 28.980(1)(3); *People v Burwick*, 450 Mich 281, 287-289; 537 NW2d 813 (1995), and defendant never requested assistance in locating and producing him

at trial, *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996), rev'd on other grounds 456 Mich 352 (1998). Defendant also complains that the prosecutor failed to produce certain other witnesses who were endorsed on the prosecution's witness list. Because defendant does not argue the merits of this issue in his brief, the issue is considered waived. *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 705; 609 NW2d 607 (2000). Regardless, it appears from the record that the witnesses in question were struck from the prosecutor's witness list, without objection, because their testimony would have been cumulative. Thus, appellate relief is not warranted.

Defendant has failed to factually support his claim that the prosecutor violated his due process right to discovery of certain information under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See *Lester, supra* at 281-282.

We likewise find no merit to defendant's claim that he was denied the right to compulsory process. Defendant argues that the prosecution failed to provide assistance in securing witnesses pursuant to MCL 767.91 *et seq.*; MSA 28.1023(191) *et seq.*, which is the uniform act governing the procedure for securing the attendance of witnesses from without a state. See *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997). However, with respect to each of the witnesses in question, defendant has not shown that he followed the procedures required by the uniform act, nor has he otherwise shown plain error affecting his substantial rights. *McFall, supra* at 409-410; *Carines*, *supra*.

Defendant asserts that the trial court erred in ruling that the prosecution exercised due diligence in trying to locate Demetrius Crayton. The trial court did not abuse its discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The record amply supports the trial court's conclusion that reasonable efforts were made to locate Crayton. *Id*.

Next, defendant argues that the trial court erred by admitting his statements made to the police. Defendant claims that the statements were obtained as a result of physical abuse and coercion by several police officers. When reviewing a trial court's determination of voluntariness, this Court is required to examine the entire record and make an independent determination of the issue as a question of law. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997); *People v Jobson*, 205 Mich App 708, 710; 518 NW2d 526 (1994). Where the resolution of a factual question depends upon the credibility or weight of the evidence, this Court will defer to the trial court's assessment of the evidence because the trial court is in a superior position to evaluate these questions. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Here, the trial court's decision on the voluntariness of defendant's statements depended on whose version of the events was more credible. Affording deference to the trial court's assessment of credibility, we find no error in the trial court's determination that defendant's statements were voluntarily made and, therefore, admissible.

While defendant also claims that the trial court erred in denying his motion for a directed verdict, he has failed to sufficiently brief this issue and, therefore, we consider it waived. *American Transmission, supra* at 705.

Defendant also alleges error regarding the trial court's instructions. First, we find no merit to defendant's claim that the instructions improperly allowed the jury to convict him of

conspiracy based on alternative theories for a single offense. The court instructed the jury that it was to consider the crime of conspiracy to commit first-degree premeditated murder and all of the lesser offenses separately. Under the instructions given, the jury was not able to properly find defendant guilty of conspiracy to commit assault with intent to do great bodily harm without first unanimously agreeing on all of the elements. Second, the court properly instructed the jury on appropriate lesser included offenses for conspiracy to commit first-degree murder. While we agree there is no such offense as conspiracy to commit second-degree murder, *People v Hammond*, 187 Mich App 105, 107-109; 466 NW2d 335 (1991), the court did not instruct on that offense. Therefore, defendant has not established that he is entitled to reversal based on instructional error.

Defendant has also failed to show that he was denied the effective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999); *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). It is not apparent from the existing record that counsel's performance fell below an objective standard of reasonableness, or that counsel's performance prejudiced defendant in his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Further, we find that remand for an evidentiary hearing on this issue is not warranted.

Because we have found no merit to defendant's claims of error, we also reject defendant's argument that he is entitled to a new trial because of cumulative error. *People v Taylor*, 185 Mich App 1, 10; 460 NW2d 582 (1990).

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ David H. Sawyer