

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LAMAR A. HAYWOOD,

Defendant-Appellee.

UNPUBLISHED

July 24, 2001

No. 222153

Wayne Circuit Court

LC No. 98-013718

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

The jury convicted defendant of first-degree murder, MCL 750.316, and possession of a firearm during commission of a felony, MCL 750.227b. The court sentenced defendant to consecutive terms of life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant argues that the trial court abused its discretion by denying his motion for new trial on the basis of newly discovered evidence. We disagree.

This Court reviews a trial court's ruling on a motion for new trial for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). After testifying at trial that she witnessed the murder, the only eyewitness wrote letters to her brother and defendant stating that she fabricated her testimony and that she did not witness the crime. In addition, her letters stated that she was incarcerated in Isabella County Jail at the time of the murder. Based on that information, defendant moved for a new trial based on newly discovered evidence. During the hearing on the motion, the witness reaffirmed that her trial testimony was the truth and stated that the letters were false. Official records established that she was not in Isabella County Jail on the relevant date.

There is no evidence of perjured testimony in this case. Both before and after she wrote the letters, the witness testified under oath that she witnessed defendant commit the murder. The witness' unsworn statements to the contrary are therefore useful only for impeachment. MRE 801(d)(1)(A). Where new evidence is useful only to impeach a witness, it is deemed merely cumulative. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977). New evidence that is merely cumulative is insufficient to merit a new trial. *Mechura, supra* at 483. Therefore, the trial court did not abuse its discretion by denying the motion for new trial.

Defendant also contends that the trial court erred by admitting evidence concerning an unrelated shooting, contrary to MRE 404(b). We agree that a portion of the evidence was improperly admitted, but we do not find the error outcome determinative.

This Court reviews the admission of other acts evidence for an abuse of discretion. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). If an error is found, the defendant has the burden of establishing it is more probable than not, that a miscarriage of justice occurred because of the error. *Id.* No reversal is required for a preserved, nonconstitutional error unless an examination of the entire record indicates that the error was outcome determinative. *Id.*

Evidence was presented to the jury concerning an unrelated shooting, including a weapon and bullet retrieved from that shooting. MRE 404(b)(1) reiterates that all relevant evidence is admissible for a proper purpose, except as otherwise provided by the United States and Michigan Constitutions and other rules. *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Evidence is relevant if it has a tendency to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without that evidence. *People v Hawkins*, 245 Mich App 439, 449; 628 NW2d 105 (2001). MRE 404(b) prohibits using evidence of specific acts to prove a person's character and to show that the person acted in conformity with that character on another occasion. *Sabin, supra* at 56. Therefore, evidence concerning to the unrelated shooting was permissible so long as it was truly probative of something other than defendant's propensity to commit the crime. *People v Watson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 218218, issued 5/4/01 slip op at p 1), citing *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

The weapon recovered in the unrelated shooting was the weapon used to kill the victim in this case. Testimony related to the officers' response to the second shooting and recovery of the weapon was relevant to connect defendant with the murder weapon. The testimony was not offered for a purpose prohibited by MRE 404(b), and it was more probative than prejudicial; therefore, its admission was proper. See *Hawkins, supra* at slip op at 5.

The prosecutor concedes that the bullet taken from the other victim in the unrelated shooting and the testimony regarding the bullet did not make any fact of consequence to this crime any more or less probable, see *Sabin, supra* at 60, and that this evidence was irrelevant and should have been excluded. *Hawkins, supra* at slip op at 5, citing *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). However, after an examination of the entire record, we conclude that defendant failed to establish that the admission of the bullet and corresponding testimony was outcome determinative because the minimal inadmissible evidence was harmless in light of the overwhelming evidence of defendant's guilt, including an eyewitness identification.

Also, defendant contends that the trial court erred by permitting the prosecutor to make improper statements regarding the presumption of innocence during voir dire. We conclude that, in context of the entire trial, defendant was not denied a fair and impartial trial.

The enforcement of the presumption of innocence lies at the foundation of the administration of criminal law. *Coffin v United States*, 156 US 432, 453; 15 S Ct 394, 403; 39 L

Ed 481 (1895). The presumption remains with a defendant throughout every stage of a trial, *Yarrington v Davies*, 992 F2d 1077, 1080 (CA 10, 1993), and is constitutionally rooted. *Mahorney v Wallman*, 917 F2d 469, 472 (CA 10, 1990). (Text deleted.). The presumption of innocence disappears only after the trier of fact convicts the defendant. *Mahorney, supra* at 471 n 2.

Despite any impropriety in the prosecutor's remarks, reversal is not required if this Court determines, after a review of the record, that a prosecutor's remarks did not deny defendant a fair and impartial trial. See *Kellogg v Skon*, 176 F3d 447 (1999); *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). When viewed in context of the entire record, the prosecution's remarks did not result in manifest injustice requiring reversal. The trial court properly instructed the jury on the presumption, and both the defense and prosecution properly stated the correct burden of proof. Moreover, there was substantial evidence of defendant's guilt.¹

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad

¹ Defendant alleges that each of the errors alleged above denied him due process. US Const Am V, XIV; Const 1963, art I, § 17. Defendant has not cited, nor have we located, any authority that supports his position. Because defendant failed to cite any authority to sustain or reject his constitutional claims, we consider the issues abandoned. A party may not leave it to this Court to search for authority to sustain or reject its position. *Speaker-Hines & Thomas, Inc v Dep't of Treasury*, 207 Mich App 84, 90-91; 523 NW2d 826 (1994).