

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK JAY GRAY,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 229648

Kalamazoo Circuit Court

LC No. 99-001368-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment without parole for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Austin Garrett, which occurred in 1988. Defendant and his brother, Robert Gray, were charged with the victim's murder and were tried before a single jury. Robert was acquitted of all charges and is not a party to this appeal.

I

Defendant first argues that the trial court improperly permitted the prosecutor to introduce evidence that he routinely carried handguns and that he pleaded guilty to carrying a concealed weapon (CCW) on two occasions, once in 1989 and once in 1990. In 1989, defendant was in possession of a .38 caliber handgun. In 1990, he was in possession of a loaded nine-millimeter handgun. Defendant argues that the evidence should have been precluded under MRE 404(b). We review the admission of evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001).

Defendant's analysis of the evidence under MRE 404(b) is misplaced. The evidence was admissible under MRE 401, without regard to MRE 404(b). In *People v Hall*, 433 Mich 573, 583-584 (Boyle, J.), 588-589 (Brickley, J); 447 NW2d 580 (1989), a majority of our Supreme Court agreed that "[e]vidence of a defendant's possession of a weapon of the kind used in the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense.” *Id.* at 580-581. The evidence was relevant to the issue of identity. *Id.* at 581-583. Specifically, the defendant’s knowing possession and control of a weapon similar to that used in the charged crime made the defendant’s identity as the perpetrator of the charged crime more probable than it would be without the evidence. *Id.* The evidence also made eyewitness identification more credible. *Id.* It did not matter that the weapon found when the defendant was arrested was not conclusively identified as being the same gun used in the charged crime. *Id.* at 582 n 7.

In this case, the general evidence that defendant routinely possessed .38 special or .357 magnum and nine-millimeter handguns was directly relevant as evidence of defendant’s commission of the charged crime. The evidence made defendant’s identity as the shooter more probable than it would have been without the evidence. See also *People v Miller*, 141 Mich App 637, 640-641; 367 NW2d 892 (1985).

Similarly, we find that the specific evidence of the two CCW convictions was also admissible under MRE 401. The testimony established defendant’s possession and control of two weapons similar to those that may have been used in the crime. It was relevant to the shooter’s identity. *Hall, supra*; *Miller, supra*. We find no abuse of discretion in the trial court’s admission of the evidence. Moreover, the evidence of the 1989 CCW conviction was not improperly presented, in too much detail, to the jury. See *Hall, supra* at 584.

Moreover, the evidence was also admissible under MRE 404(b). In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be utilized to determine the admissibility of other bad-acts evidence:

First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b). *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

In this case, the prosecutor articulated a proper purpose under MRE 404(b), specifically that the evidence was relevant to show defendant’s opportunity to commit the crime. The evidence was also logically relevant. It established defendant’s control and possession of weapons similar to those used in the victim’s shooting, and supported the theory that defendant had the means and opportunity. See *Hall, supra* at 587-588 (Boyle, J.), citing *United States v Woods*, 613 F 2d 629, 636 (CA 6, 1980).

We also find that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Evidence is not unfairly prejudicial simply because there is a danger that an improper character inference may be drawn. Such a danger is recognized with the use of any MRE 404(b) evidence. *Crawford, supra* at 397-398. The evidence was probative of defendant’s identity through a showing that he had the opportunity, means or access to commit

the crime; it was not used by the prosecutor for improper character purposes, nor was it confusing or cumulative, and it did not result in undue delay. Moreover, the trial court gave a limiting instruction on the use of the evidence. Under the circumstances, there was no abuse of discretion.

II

Defendant next argues that the underrepresentation of African-Americans in the jury venire was cause to strike the entire venire. He complains that the trial court erred in refusing to grant his motion to strike. We review this issue de novo. *People v Williams*, 241 Mich App 519, 525; 616 NW2d 710 (2000).

To determine whether a prima facie violation of the fair-cross-section requirement of the US Const, Am VI has occurred, the court must find the following (1) the group alleged to be excluded must be a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to the systematic exclusion of the group in the jury-selection process. [*Id.*, citing *Duren v Missouri*, 439 US 357; 99 S Ct 664; 58 L Ed 2d 579 (1979) and *People v Hubbard (On Remand)*, 217 Mich App 459, 473; 552 NW2d 493 (1996).]

In this case, the first prong of the prima facie test was met. The group alleged to be excluded, African-Americans, is a distinctive group in the community. Defendant, however, failed to offer sufficient evidence that the representation of African-Americans in Kalamazoo jury venires was not fair and reasonable in relation to the number of such persons in the community, pointing only to his own panel when arguing that African-Americans were underrepresented. The second prong of the prima facie test thus was not met. *Williams, supra* at 526. Finally, defendant failed to demonstrate that any alleged underrepresentation was due to systematic exclusion. “[A] ‘bald assertion’ that systematic exclusion must have occurred is insufficient to make out a claim of systematic exclusion.” *Id.*, quoting *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Defendant also argues that the trial court abused its discretion when it failed to grant him additional peremptory challenges during jury selection. We disagree. After exhausting ten peremptory challenges each, defendant and Robert requested additional challenges. Robert’s counsel argued, in part, that there were “at least one or two more” individuals who he would like to strike based on his experience. The trial court granted two additional peremptory challenges to each. When those challenges were exhausted, defendant and Robert again requested more peremptory challenges. Defendant argued that he was still unsuccessful in securing an African-American juror on the panel and wanted more peremptory challenges in order to try and secure a juror other than white, middle class jurors.

“A trial court may grant additional peremptory challenges on a showing of good cause.” *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997). The good cause requirement is not satisfied by an assertion that more peremptory challenges are needed in order to exclude white jurors in the pursuit of obtaining an African-American juror; such discrimination on the basis of race violates equal protection considerations. See *Georgia v McCollum*, 505 US 42, 50-

55, 58; 112 S Ct 2348; 120 L Ed 2d 33 (1992). Defendant here did not have a right to request peremptory challenges solely to use them to discriminate in an attempt to secure a juror of a certain race. Moreover, there is no constitutional right to exercise peremptory challenges at all. *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). Because defendant failed to demonstrate good cause, the trial court did not abuse its discretion in denying his request for additional peremptory challenges.

III

Defendant next argues that there was insufficient evidence to support his conviction for first-degree murder and that the trial court should have granted his motions for a directed verdict in this regard. We disagree.

Where a directed verdict motion is made, a challenge to the sufficiency of the evidence is resolved by considering all of the evidence presented up to the time that the defendant moved for a directed verdict. *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988). The reviewing court “must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This Court will not interfere with the jury’s role of determining the weight of the evidence or the credibility of the witnesses. *Id.*

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing. [*People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998) (citations omitted).]

Minimal circumstantial evidence is sufficient to prove an actor’s state of mind. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

In this case, the evidence, when viewed in a light most favorable to the prosecution, was sufficient to prove that defendant shot the victim. Two witnesses testified that they saw defendant shoot the victim. Testimony about the weapon used and the type of gun defendant carried corroborated the ballistics evidence. Further, there was testimony that defendant made admissions with respect to the crime, and a detective heard defendant state, when talking to Robert after their arrest, “they got us, didn’t they dog.” This evidence was sufficient to enable a rational trier of fact to determine that defendant shot the victim.

On appeal, defendant does not contest the sufficiency of the evidence of premeditation or deliberation. Nevertheless, we find that there was sufficient evidence of those elements. There was testimony that the victim ran from defendant and another man. Defendant shouted expletives at the victim while they ran. There was a shot, followed by a short pause, and then three more shots. Further, defendant removed something from the victim’s possession after

shooting him. This evidence was sufficient to prove that defendant acted with premeditation and deliberation.

We disagree that the trial court improperly focused only on the testimony of the two eyewitnesses when ruling on the motion for directed verdict. The trial court clearly stated that its ruling was based not only on that testimony, but also on the testimony of other witnesses. More importantly, defendant's extensive argument that the trial court did not properly consider the credibility of the witnesses has no merit. It is impermissible for a trial court to determine the credibility of witnesses when deciding a directed verdict motion, no matter how inconsistent or vague the testimony is. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

IV

Defendant next raises numerous claims of misconduct by the prosecutor during trial. Most of the issues are preserved because defendant made timely objections at trial. This Court reviews preserved claims of prosecutorial misconduct case by case to determine if defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). It must examine the record and evaluate the alleged improper remarks in context. *Id.* Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Defendant first complains that the prosecutor improperly attempted to question a witness about threats that were allegedly made against the witness' girlfriend. Defendant fails to analyze or discuss how the prosecutor's question, which was never answered, constituted misconduct or denied him a fair trial. This Court is not obligated to discover and rationalize defendant's position. *Kelly, supra* at 640-641. Moreover, the prosecutor's question was not improper. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996) (evidence that a defendant threatened a witness is admissible). In this instance, defendant's objection to the prosecutor's question was ultimately sustained because the trial court found that there was no evidence that any of the alleged threats were made by defendant, Robert, or anyone acting on their behalf. Because the question was not improper per se and because it was stricken on objection, it did not deny defendant a fair trial. There was no prosecutorial misconduct.

Defendant next asserts that the prosecutor's reference to a polygraph, which occurred when he was reading an immunity letter into the record, constitutes misconduct. Again, defendant fails to properly analyze or rationalize his position that the prosecutor's reference to the polygraph denied him a fair trial. *Kelly, supra*. The inadvertent but unwise reference to the polygraph did not amount to misconduct requiring reversal. The potential prejudice was cured by a curative instruction. Where an instruction cures any prejudice resulting from the prosecutor's improper conduct, the defendant is not denied a fair trial. See, e.g., *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

Defendant also complains that the prosecutor improperly impeached his own witnesses. Like defendant's other allegations of prosecutorial misconduct, this issue is not properly presented to this Court. *Kelly, supra*. More importantly, defendant has failed to cite any authority to support his position that the prosecutor committed misconduct by calling witnesses to the stand and later impeaching them with their prior inconsistent statements; thus, the issue is abandoned. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Moreover, a

prosecutor may impeach his own witnesses with evidence of prior inconsistent statements even if the statements inculcate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). There is an exception to the rule when a prosecutor produces an incriminating statement under the guise of impeachment when there is no other testimony from the witness that causes his credibility to be an issue. *Id.* Defendant herein has not demonstrated or supported that the prosecutor's conduct fell within the exception. We find no misconduct.

Finally, defendant lists numerous statements from the prosecutor's closing argument, which he claims were improper and denied him a fair trial. This issue is improperly presented to this Court because defendant fails to analyze or rationalize how the listed arguments denied him a fair trial. *Kelly, supra*. Defendant also fails to provide any supporting authority for his positions. Thus, they are abandoned. *Piotrowski, supra*. Nevertheless, we have reviewed the challenged arguments and find that they did not constitute misconduct, and did not deprive defendant of a fair trial.

V

Defendant argues that the trial court failed to properly remedy numerous discovery violations. The trial court has discretion with respect to what remedies will be imposed for discovery violations. MCR 6.201(J). We find no abuse of discretion in this case.

Defendant first argues that the prosecutor untimely disclosed the juvenile records of one witness and that, when they were produced, his counsel could not interpret them. However, defendant has not demonstrated that the prosecutor violated any discovery order or that he was prejudiced in any way. The trial court's order, allowing defendant to recall the witness, was not an abuse of discretion.

Defendant next argues that the prosecutor failed to disclose important impeachment information with respect to the two eyewitnesses. Because defendant did not receive the information until the middle of trial, he argues that a mistrial should have been granted. We disagree that there was any discovery violation necessitating a mistrial or any other remedy.

A criminal defendant's due process right to access information possessed by the prosecution applies to evidence that might lead a jury to entertain a reasonable doubt of a defendant's guilt. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). A prosecutor is under a duty to disclose any information that would materially affect the credibility of his witnesses. *Id.* In order to establish a due process violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Id.* Even where a defendant has not made a discovery request, the suppression of material, exculpatory evidence may implicate a defendant's due process rights. *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992).

In this case, the evidence at issue was not *undisclosed*, material exculpatory evidence. The impeachment evidence at issue was produced upon request, although it was not requested or produced until trial was already underway. Even if the evidence was considered exculpatory and

even if it should have been produced earlier, reversal is not required because defendant cannot demonstrate prejudice. Defendant generally argues that he was prejudiced by a lack of proper, timely discovery because he was unable to adequately assess various strategies and properly prepare his defense. This general allegation of prejudice is insufficient to establish that reversal is required. See *People v Fox (After Remand)*, 232 Mich App 541, 549-550; 591 NW2d 384 (1998).

Defendant's general allegation of prejudice in this case also fails. Defendant was able to adequately attack the witnesses' credibility at trial. All of the alleged exculpatory information, even when disclosed in an untimely fashion, was presented to the jury for consideration. Further, the trial court offered defendant the opportunity to recall witnesses if he felt he had additional information with which to impeach them. There was simply no prejudice shown.

Defendant also complains about the disclosure of the parole records of witness Gene Tanney. There was no discovery violation with respect to these records. The file was not under the prosecutor's control or supervision, and defendant had no right to expect the prosecutor to produce it. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). The parole file was never even requested from the prosecutor until the middle of trial. The prosecutor then attempted to secure it. The parole officer claimed privilege and subsequently an in camera review was held. The prosecutor was not required to conduct defendant's investigation. *Id.* In addition, there was no due process violation with respect to the file because defendant could have, with reasonable diligence, obtained the file or obtained an in camera review of the file on his own. *Lester, supra* at 281.

Finally, defendant complains that the prosecutor failed to produce evidence that one witness was incarcerated at the time of the murder. He argues that it was exculpatory evidence, which should have been provided to him. The prosecutor was not required to conduct discovery for defendant. *Traylor, supra*. The jail records were not within the prosecutor's control or supervision. *Id.* Defendant could have obtained the records on his own with reasonable diligence. *Lester, supra*. In fact, Robert obtained the records and was able to surprise the witness with them during cross-examination. There was no discovery violation.

We further note that the testimony of that witness was not improperly allowed to stand uncorrected. Due process is offended when a prosecutor, although not having solicited false testimony from a witness, allows that testimony to stand uncorrected. *Canter, supra* at 568. In this case, the witness's testimony was interrupted at the end of the trial day and could not be resumed because she failed to return to court at any time during the remainder of the trial. The prosecutor was unable to correct any false testimony she may have given. Furthermore, the jury heard information that the witness was incarcerated at the time she claimed to have seen the murder. Her credibility in light of that conflicting evidence was squarely placed before the jury.

In conclusion, the trial court did not abuse its discretion in addressing and remedying any of the discovery issues that were raised throughout the course of trial.

VI

Finally, defendant argues that the cumulative effect of the trial errors resulted in a denial of his right to a fair trial. We find that there were no errors of consequence that cumulatively

denied defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999); *People v Miller*, 211 Mich App 30, 34; 535 NW2d 518 (1995).

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Robert J. Danhof