STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2004
v	No. 247037 Wayne Circuit Court
TIMOTHY L. BARNES, Defendant-Appellant.	LC No. 02-010098-01

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant Timothy L. Barnes was convicted in a jury trial of second-degree murder,[1] nine counts of assault with intent to commit great bodily harm,[2] felon in possession of a firearm,[3] and possession of a firearm during the commission of a felony.[4] He was sentenced to forty to seventy-five years' imprisonment for his second-degree murder conviction, ten to fifteen years' imprisonment for each assault conviction, five to seven-and-a-half years' imprisonment for his felon in possession conviction, and two years' imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Facts

Darnel Wilkins lived with his aunt, Cynthia Wilkins, near defendant on Patton Street in the city of Detroit. The Wilkins home was a known "drug house." On the evening of March 7, 2002, Mr. Wilkins fired his gun during a verbal altercation with defendant and Rodney Green. A few hours later, a barrage of gunfire struck the Wilkins house. Ms. Wilkins's four-year-old daughter, Shania Salter, was fatally shot in the head. Nine other people were in the house during the shooting, but no one else was hit. Outside the house, police found eleven spent 7.62 by 39 casings and one spent nine-millimeter casing. All of the 7.62 by 39 casings, as well as the bullet

[1] MCL 750.317.

[2] MCL 750.84.

[3] MCL 750.224f.

[4] MCL 750.227b.

that killed Shania, were fired from an AK-47, SKS automatic rifle or similar weapon. However, the police never recovered any weapon used in the attack.

Following the altercation with Mr. Wilkins, Tamara Bennett overheard defendant call his brother, Robert Borns, and ask him to come immediately. Mr. Borns's testimony was the prosecution's strongest evidence against defendant. Mr. Borns testified that defendant called him, drunk and angry, on the night of the shooting demanding that he bring defendant's nine-millimeter semiautomatic pistol, which was located at Mr. Borns's house. When Mr. Borns arrived, defendant and Mr. Green were enraged over the earlier altercation, and talked of either "shooting up" or burning down the Wilkins home. Mr. Borns gave defendant the gun, but encouraged him to forget about the incident. When Mr. Borns left, defendant was holding the nine-millimeter weapon, Mr. Green was holding an "SK" rifle, and the two continued to discuss their plans for the Wilkins house. Mr. Borns later called defendant who indicated that his plans had not changed. The next day, after Mr. Borns had heard about the shooting on the news, defendant called Mr. Borns and admitted that he and Mr. Green committed the shooting.

II. Admissibility of Mr. Green's Conviction

Defendant contends that his constitutional right to cross-examine prosecution witnesses was violated when he was denied the opportunity to question Eric Perryman regarding his knowledge of Mr. Green's earlier convictions related to this offense.[5] Defendant's theory is that Mr. Perryman, who is not a member of the criminal justice system, was motivated to see multiple convictions for this offense. Generally, a trial court's decision to admit or exclude evidence will be reversed only for an abuse of discretion.[6] However, when a trial court's decision regarding the admission of evidence involves a preliminary question of law, this Court reviews the issue de novo.[7]

Mr. Perryman was in the Wilkins house during the shooting. He testified that he looked out the window during a brief lull in the shooting and saw two people standing in the street, although he could not see if they had guns. This testimony was slightly inconsistent with Mr. Perryman's statements to the police, in which he noted that "some people" fired on the house, rather than specifically mentioning two people.[8] When defense counsel attempted to cross-examine Mr. Perryman regarding his knowledge of Mr. Green's conviction, the trial court disallowed any reference to Mr. Green's trial and conviction.

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[5] Although not disclosed to the jury, Mr. Green was tried and convicted of first-degree murder and nine counts of assault with intent to murder. This Court affirmed Mr. Green's convictions in *People v Green*, unpublished opinion per curiam of the Court of Appeals, issued August 12, 2003 (Docket No. 239989). Defendant remained at large until July of 2002, when he was found in Tennessee and returned to Michigan for trial.

[6] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[7] *Id.*

[8] Trial Transcript, December 4, 2002, pp 39-42.

It is well established that "the conviction of another person involved in the criminal enterprise is not admissible at defendant's separate trial."[9] The rule protects a defendant from the unfair prejudice that would inure from evidence that a coparticipant has already been adjudicated guilty. The rationale behind the *Lytal* rule is inapplicable to the instant case, however, as defendant sought to use his alleged coparticipant's conviction as part of his defense.[10] It thus appears that the trial court erroneously excluded this evidence as defendant attempted to elicit it in his *favor*. However, an error in the admission or exclusion of evidence is harmless unless the failure to reverse appears inconsistent with substantial justice.[11] Defendant must show that it is more probable than not that the error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence.[12]

Defendant's theory that Mr. Perryman's motive was to belatedly fabricate a second shooter is inconsistent with the evidence. Ms. Wilkins, Mr. Wilkins and Ms. Bennett all testified to hearing gunfire from two different weapons. The police found spent casings from two different weapons.[13] Mr. Borns testified that both defendant and Mr. Green were poised to commit the offense, and that defendant took steps to procure a second weapon for that purpose. Furthermore, Mr. Perryman's testimony failed to link defendant to the shooting. Defendant was able to use the testimony to impeach Mr. Perryman with his statement to the police; wherein Mr. Perryman stated that he believed the shooting was associated with a prior robbery at the Wilkins house, suggesting that someone other than defendant was to blame.

In light of the properly admitted evidence, it is unlikely that the jury would have concluded that Mr. Perryman recently fabricated a second shooter had the evidence of Mr. Green's conviction been admitted. Therefore, defendant has failed to show that the exclusion of the evidence more likely than not affected the outcome of his trial. Accordingly, any error was harmless.

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[9] *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982), citing *People v Crawl*, 401 Mich 1, 33; 257 NW2d 86 (1977) (LEVIN, J) (stating that an accomplice's guilty plea or trial conviction "is not admissible *against* another person") (emphasis added).

[10] This Court has previously recognized an exception to the exclusion of a coparticipant's guilty plea in circumstances where the prejudicial effect to the defendant could be avoided. In *People v Kincade*, 162 Mich App 80, 85-86; 412 NW2d 252 (1987), remanded on other grounds 436 Mich 883 (1990), on remand 206 Mich App 477 (1994), this Court held that the rule in *Lytal* does not apply to references to a coparticipant's guilty plea where reference to the plea is necessary to explain what consideration the coparticipant received in exchange for testifying for the prosecution.

[11] *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003), citing MCR 2.613(A); MCL 769.26.

[12] *Lukity*, *supra* at 495-496; *McLaughlin*, *supra* at 650.

[13] Defendant tried to resolve this inconsistency by suggesting that the nine-millimeter casing was ejected by Mr. Wilkins's gun during the earlier confrontation. However, the prosecution presented testimony that Mr. Wilkins's gun was a revolver, which does not eject casings.

III. Accomplice Jury Instruction

Defendant contends that the trial court erred in failing to sua sponte give an accomplice jury instruction[14] regarding Mr. Borns's testimony. Defendant failed to request the instruction or object to the trial court's failure to sua sponte give the instruction, and actually expressed satisfaction with the instructions as given.[15] A defendant affirmatively waives instructional errors by indicating that he has no objections to the instructions as given.[16] As waiver extinguishes any error and precludes appellate review,[17] we are precluded from reviewing this issue.

Defendant further argues, however, that trial counsel's failure to request the accomplice instruction constitutes ineffective assistance of counsel. Absent a *Ginther*[18] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[19] Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.[20] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[21] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[22]

In *People v Gonzalez*,[23] our Supreme Court found that failure to request the accomplice instruction constitutes forfeiture of the claimed error.[24] Forfeited error may be reviewed on appeal only if the error was plain and it affected the defendant's substantial rights.[25] The Court recognized the defendant's reliance on *People v McCoy*,[26] but found that case was not implicated under the circumstances.[27] In *People v McCoy*, our Supreme Court held that, once requested, an

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[14] CJI2d 5.6.

[15] Trial Transcript, December 6, 2002, p 98.

[16] *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

[17] *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

[18] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[19] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[20] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[21] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[22] *Id.* at 600.

[23] *People v Gonzalez*, 468 Mich 636; 664 NW2d 159 (2003).

[24] *Id.* at 642-643, citing MCL 768.29, MCR 2.516(C).

[25] *Id.* at 643, citing *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

[26] *People v McCoy*, 392 Mich 231; 220 NW2d 456 (1974).

[27] *Gonzalez, supra* at 643-644. Our Supreme Court also noted that *McCoy* may conflict with
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accomplice jury instruction should be given and that a trial court's failure to sua sponte give a cautionary instruction regarding accomplice testimony could be error requiring reversal if the credibility issue is "closely drawn."[28] "An issue is 'closely drawn' if its resolution depends on a credibility contest between the defendant and the accomplice-witness."[29] Such an issue was raised in *McCoy*, as the prosecution's case rested on the uncorroborated testimony of the defendant's accomplice.[30]

As we find that defendant would not be entitled to an accomplice instruction under *Gonzalez* and *McCoy*, defense counsel could not be shown to be ineffective in this regard by failing to make such a request. Mr. Borns's testimony was corroborated by the testimony of Ms. Bennett that defendant was enraged by the altercation with Mr. Wilkins, that he threatened to burn down the Wilkins home and that he called Mr. Borns and requested he come immediately.[31] Accordingly, the resolution of the issues presented by Mr. Borns's testimony did not depend on a credibility contest.

Furthermore, potential issues regarding Mr. Borns's credibility were plainly presented to the jury.[32] Defense counsel elicited testimony on cross-examination regarding the promises of leniency Mr. Borns received in exchange for his testimony and that Mr. Borns had been questioned several times and spent a night in the police lock-up before making his statement. Defense counsel also pointed to inconsistencies between Mr. Borns's testimony regarding his handling of defendant's weapon with earlier statements made during the investigation.

The trial court would not be required to sua sponte give an accomplice instruction under the circumstances and defense counsel adequately challenged Mr. Borns's credibility on cross-examination. Accordingly, defense counsel was not constitutionally ineffective by failing to request an accomplice instruction be given.

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MCL 768.29, which provides that the trial court's failure to instruct "on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." *Id.* at 643 n 6. The Court found it unnecessary to decide the issue as there was no evidence of an accomplice in that case. *Id.* We also decline to decide this issue as defendant has waived review of the claimed instructional error and as there is no "closely drawn" credibility issue.

[28] *McCoy, supra* at 237, 240.

[29] *Gonzalez, supra* at 643 n 5, citing *McCoy, supra* at 238-239, *People v Tucker*, 181 Mich App 246, 256; 448 NW2d 811 (1989).

[30] *McCoy, supra* at 238.

[31] Trial Transcript, December 5, 2002, pp 18-21.

[32] *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996), citing *McCoy, supra*.

IV. Prosecutorial Misconduct

Defendant contends that the prosecutor's use of a large-screen television to project a "very sympathetic picture" of Shania, even when no witnesses were testifying, improperly eliciting the jury's sympathy. Pursuant to defendant's objection, the trial court instructed the prosecutor to remove the image, and prohibited the display of exhibits unless currently in use for the examination of witnesses.

Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[33] It is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim.[34] However, this Court will not reverse where the prosecutor's conduct is isolated, and lacks a blatant or inflammatory tone.[35] Here, the unnecessarily protracted display of Shania's photograph was an isolated incident, and was neither maudlin nor inflammatory. Consequently, we find no prosecutorial misconduct.

V. Sentencing

Defendant challenges several of the trial court's decisions in scoring the sentencing guidelines. The sentencing court has discretion in determining the number of points to be scored provided that there is evidence on the record that adequately supports a particular score.[36]

Defendant first asserts that the trial court improperly scored OV 2,[37] lethal potential of weapon possessed, at fifteen points, as there was no evidence that the rifle was fully automatic or that he possessed the rifle. We disagree. MCL 777.32(1) provides that OV 2 is to be scored fifteen points for the use of "an incendiary device, an explosive device, or a fully automatic weapon," and five points for "a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon."[38] A rifle is defined for purposes of OV 2 as "fully automatic" if it loads and fires successive shots without renewed pressure on the trigger.[39]

Evidence was presented that the rifle used in the offense was an AK-47, which is a fully automatic weapon. Although the evidence tended to show that Mr. Green possessed the rifle,

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[33] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[34] *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

[35] See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999) (finding that the prosecutor's comment that the victim's wife had lost a husband and display of a prominent picture of the victim failed to amount to prosecutorial misconduct because these were isolated parts of closing argument, and were neither blatant nor inflammatory).

[36] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

[37] MCL 777.32.

[38] MCL 777.32(1).

[39] MCL 777.32(3)(a).

MCL 733.32 provides that in "multiple offender cases, if 1 offender is assessed points for possessing a weapon, all offenders shall be assessed the same number of points."[40] Consequently, defendant could be scored fifteen points for OV 2 regardless of whether he or Mr. Green possessed the rifle. As such, the trial court properly scored OV 2.

Defendant also challenges his score of fifty points for OV 7, aggravated physical abuse.[41] Pursuant to MCL 777.37(1)(a), OV 7 is to be scored fifty points when a victim "was treated with terrorism, sadism, torture, or excessive brutality."[42] Terrorism is "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."[43] The trial court found that Shania was treated with terrorism, describing her as "a four-year-old child, separated from the rest of her family members, [experiencing] rapid gunfire, the walls literally exploding . . . the plaster creating a cloud of dust, as she frantically attempts to rejoin her family and the safety of their arms."[44] This description is consistent with the testimony of others inside the home during the shooting. As there is evidence on the record to support the trial court's scoring decision, we find no abuse of discretion.

Finally, defendant challenges his score of ten points under OV 14, offender's role.[45] OV 14 is to be scored ten points if the offender "was a leader in a multiple offender situation."[46] Defendant argues that there was no evidence of his leadership in this offense. However, both Ms. Bennett and Mr. Borns testified that defendant spoke of burning down or "shooting up" the house. Defendant also obtained the weapons used in this offense. Accordingly, there was evidence that defendant, not Mr. Green, was the instigator, and therefore, the trial court properly assigned ten points for OV 14.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

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[40] MCL 732.32(2).

[41] MCL 777.37.

[42] MCL 777.37(1)(a).

[43] MCL 777.37(2)(a).

[44] Sentencing Transcript, December 23, 2002, pp 13-14.

[45] MCL 777.44.

[46] MCL 777.44(1)(a).