STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERMAN WAGNER, a/k/a BOBBY WAGNER, a/k/a BOBBY WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
October 28, 2004

No. 245091
Wayne Circuit Court
LC No. 02-002648

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316, first-degree premeditated murder, MCL 750.316, armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] The trial court sentenced defendant to concurrent terms of life imprisonment without the possibility of parole for the murder convictions, and thirty to sixty years each for the robbery and assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. We remand for the limited purpose of amending the judgment of sentence to reflect that defendant was convicted of a single count of first-degree murder, supported by alternative theories, but affirm defendant's remaining convictions and sentences.

I. Basic Facts

According to the testimony at trial, Kiley Moss and Thelyus Johnson arranged to purchase drugs from Antonio Edwards in Detroit. The two men took a bus from Lansing to Detroit, where Edwards met them. Edwards did not immediately have the drugs available. Eventually, Edwards and Sol Bryant took the men to a house where they met Deshawn Lucci. The men began to set up a scale to weigh the drugs, but moved to a back room because that was the only room with a light. While the men were in the back room, another man, whom Johnson identified as defendant, came into the room, pointing a gun. Johnson claimed that defendant shot

[1] Defendant was acquitted of conspiracy to commit arson of real property, MCL 750.157a and MCL 750.73.

and robbed him, and also shot Moss. Johnson pretended to be dead and was able to leave the house after the others left. Moss, however, died from his gunshot wounds. His body was later burned when the house was set on fire.

II. Posttrial Evidentiary Hearing

Defendant argues that the trial court erred in denying his request for a posttrial evidentiary hearing on his claim that he was entitled to a new trial because Antonio Edwards had recanted his trial testimony. While this appeal was pending, this Court granted defendant's motion to remand for an evidentiary hearing in connection with this issue. When the trial court attempted to conduct the hearing, however, Edwards, on the advice of counsel, exercised his Fifth Amendment right not to testify. Because defendant has already been afforded an opportunity for an evidentiary hearing, further appellate relief is not warranted on this issue.

III. Defendant's Request to Produce a Witness

Defendant argues that he was deprived of his constitutional right to present a defense when the trial court denied his request to order the production of a witness.

We review a trial court's evidentiary rulings for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). But we review de novo preliminary questions of law, such as whether an evidentiary rule precludes admission of evidence. *Id*. Defendant asked the trial court to order the production of a county jail inmate who may have overheard the prosecutor ask Antonio Edwards to convince Sol Bryant to testify at trial that defendant was known as "Cat." The trial court refused to order the production of the witness because it believed that his testimony was only being offered on a collateral matter.

"The Compulsory Process Clause of the Sixth Amendment guarantees every criminal defendant the right to present witnesses in their defense." *People v McFall*, 224 Mich App 403, 407; 569 NW2d 828 (1997), citing *Washington v Texas*, 388 US 14, 17-18; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

> That right is not absolute, however, and must in some cases be weighed against the need for "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). The balancing of these competing interests in determining the admissibility of a witness's testimony is a matter within the discretion of the trial judge. *People v Carter*, 96 Mich App 694, 703; 293 NW2d 681 (1980), lv den 410 Mich 872 (1980). [*People v Holguin*, 141 Mich App 268, 271; 367 NW2d 846 (1985).]

As a result, the Sixth Amendment's protections only extend to relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984).

Edwards either denied or could not recall if the prosecutor had asked him to persuade Bryant to testify that defendant was the person known as "Cat." Defendant sought to call the jail inmate to impeach Edwards' testimony on this point. MRE 608(b) provides that a witness may generally not be impeached with extrinsic evidence:

> **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . .

"[A] party may introduce extrinsic evidence to contradict an adversary's answers on cross-examination regarding matters germane to the trial, but generally a party may not introduce extrinsic evidence to contradict a witness regarding collateral, irrelevant, or immaterial matters." *People v Lester*, 232 Mich App 262, 275; 591 NW2d 267 (1998). Unless the impeachment involves a matter closely bearing on the defendant's guilt or innocence, counsel is required to accept an answer given by a witness on cross-examination regarding a collateral matter. *People v LeBlanc*, 465 Mich 575, 589-590; 640 NW2d 246 (2002).

Here, the proposed witness' testimony was offered to impeach Edwards' testimony concerning a conversation with the prosecutor. Because the proffered testimony was too remote to the question of defendant's guilt or innocence to be admissible, we conclude that the trial court did not abuse its discretion. Further, because defendant has failed to show that the proposed testimony was admissible, the trial court's ruling did not deprive defendant of his Sixth Amendment right to present a defense.

IV. Hearsay and Voice Identification

Defendant argues that the trial court erroneously permitted the officer in charge to testify that the only eyewitness to the shooting, who identified defendant as the shooter, did not identify any other individuals as the shooter. Defendant also claims that the trial court erred in allowing Johnson, after hearing defendant testify in court, to testify in rebuttal that defendant's voice was the same voice as the shooter.

A nonconstitutional error, even if preserved, is not grounds for reversal unless it affirmatively appears more probable than not that it was outcome determinative. *People v Krueger*, 466 Mich 50, 54; 643 NW2d 223 (2002). Here, even if the admission of this evidence was erroneous, it did not undermine the reliability of the verdict in light of the weight and strength of the untainted evidence. *Id.*

V. Motion for Mistrial

Defendant argues that the trial court erred in denying his motion for a mistrial after evidence was received concerning his prior use of aliases, prior arrests, past mug shots, and other police records. The grant or denial of a mistrial is within the sound discretion of the trial court. There must be 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).

Given defense counsel's opening statement in which he asserted that the evidence would show that the police arrested the wrong man, and that the likely perpetrator was defendant's

brother, who was ten years younger and went by the same name as defendant, the evidence was properly admitted under MRE 404(b) for the purpose of establishing defendant's identity. *People v Crawford*, 458 Mich 376, 384-386; 582 NW2d 785 (1998). Moreover, it was not improper to admit mug shots of defendant taken over a period of years, given defense counsel's argument that the use of a ten-year-old photograph of defendant in a photographic array led to his misidentification as the perpetrator. The admission of the police records was also proper under MRE 803(6), considering that their use was limited to routine administrative matters, not substantive material prepared in anticipation of litigation. See *McDaniel, supra* at 413-414. Because the foregoing evidence was admitted for a proper purpose and the jury was instructed on the limited use of the evidence, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

VI. Sufficiency of Evidence

Next, defendant argues that there was insufficient evidence to convict him of first-degree premeditated murder. We disagree.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The evidence must be viewed in a light most favorable to the prosecution. *Id* at 514-515.

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberated. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

> The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. . . . Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. [*Id.*]

Viewed in a light most favorable to the prosecution, the evidence supported an inference that defendant, along with Edwards and Lucci, set up Johnson and Moss knowing that they possessed a large quantity of money to purchase drugs. According to Edwards, defendant went into the back room or the back of the house before the men were brought into the back room. The evidence allowed the jury to infer that defendant waited in the back because he and Lucci had planned to shoot and kill Moss and Johnson because both men could identify them. Thus, there was sufficient evidence of premeditation and deliberation to support defendant's first-degree premeditated murder conviction beyond a reasonable doubt.

VII. Prosecutor's Conduct

Defendant argues that he was denied a fair trial because of misconduct by the prosecutor. Because defendant did not object to the prosecutor's conduct on this basis at trial, he must show

that a plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Defendant argues that it was improper for the prosecutor to introduce evidence of his prior use of aliases. Prosecutorial misconduct cannot be based on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which she legitimately believes will be accepted by the court, so long as that attempt does not actually prejudice the defendant. As previously discussed in part V, the evidence of defendant's use of aliases was relevant and admissible in this case, given the defense theory that the police had arrested the wrong person, apparently confusing defendant for someone else. Defendant has failed to show that the prosecutor engaged in bad faith when offering the evidence.

Defendant further argues that the prosecutor engaged in bad faith when examining Edwards about a possible threatening letter he received, offering evidence about a .22 handgun that was discovered by the police, but which could not be connected to this shooting, and recalling Johnson to testify that he recognized Sol Bryant in the courtroom even though Bryant did not testify. Again, each of these matters involve the prosecutor's efforts to admit evidence believed to be relevant. The record does not show that the prosecutor introduced any of this evidence in bad faith. Therefore, defendant has failed to establish misconduct by the prosecutor.

VIII. Court's Statements During Voir Dire

Defendant argues that statements by the trial court during jury voir dire improperly instructed the jurors that they were required to find him guilty if it believed that the prosecutor had proved all elements of the crimes charged beyond a reasonable doubt. Defendant asserts that the court's statements prevented the jury from exercising its power of leniency toward him. Because defendant did not preserve this issue by objecting to the trial court's statements at trial, he must show that a plain error affected his substantial rights. *Carines, supra*.

Considered in context, it is apparent that the court was attempting to gauge an understanding of the jurors' abilities to understand and apply the prosecution's burden of proof. Even if the court's statements can be construed as an instruction, they did not improperly prevent the jury from exercising leniency. Juries possess the power of leniency. "However, this is a de facto power with regard to which the jury is not instructed." *People v Torres (On Remand)*, 222 Mich App 411, 420; 564 NW2d 149 (1997). "Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence." *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). A jury has the power to disregard a trial court's instructions, but it does not have the right to do so. *Id*. at 207.

Because a jury's power to exercise leniency involves ignoring the court's instructions, this jury still possessed that power despite the trial court's voir dire statements. Defendant has not established a plain error affecting his substantial rights.

IX. Double Jeopardy

We agree with defendant that his dual convictions of first-degree premeditated murder and first-degree felony murder arising from a single death violate the double jeopardy

protections. *People v John Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). The proper remedy is to modify the judgment of sentence to provide that the defendant was convicted of a single count of first-degree murder supported by two alternative theories, felony murder and premeditated murder. *People v Coomer*, 245 Mich App 206, 224; 627 NW2d 612 (2001). Accordingly, we remand for this purpose.

X. Effective Assistance of Counsel

Defendant argues that he is entitled to a new trial because trial counsel was ineffective. The standard of review regarding questions of ineffective assistance of counsel is a mixed one. First, where the trial court finds certain facts in relation to a claim of ineffective assistance of counsel, those findings are reviewed for clear error. MCR 2.613(C). *LeBlanc, supra* at 579. Second, whether the test for ineffective assistance of counsel was satisfied involves a question of constitutional law, which is reviewed de novo. *Id*.

In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The record does not establish that trial counsel was ineffective because of (1) the way he dealt with the evidence of Johnson's identification of defendant, (2) his cross-examination and impeachment of Johnson, (3) his decision not to introduce defendant's records from the Department of Corrections, (4) his failure to file a pretrial motion to exclude evidence of defendant's various aliases, (5) his decision not to challenge the prosecutor's physical contact with and taunting of defendant, and (6) his unorthodox closing argument. Counsel's decisions with regard to these matters all involved matters of trial strategy and defendant has not overcome the presumption of sound strategy. Ineffective assistance of counsel will not be found merely because a strategy backfires. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant has not shown that he was prejudiced by counsel's failure to object to a photograph of the murder victim, Kiley Moss. *Pickens, supra*. While counsel did not move for the appointment of an expert witness on eyewitness identification, defendant has not established that such an expert was necessary. *People v Tanner*, 469 Mich 437, 442-443; 671 NW2d 728 (2003). We are not persuaded that defendant was denied the effective assistance of counsel.

Affirmed in part and remanded for correction of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra