

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HYROSHA RENOD WILSON,

Defendant-Appellant.

UNPUBLISHED

November 15, 2007

No. 271738

Muskegon Circuit Court

LC No. 05-052364-FC

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to 25 to 40 years' imprisonment for the assault conviction and 5 to 7½ years' imprisonment for the felon-in-possession conviction. These sentences are to be served concurrently to each other and consecutively to two concurrent terms of two years' imprisonment for each of the felony-firearm convictions. We affirm.

In the early morning hours of August 20, 2005, the victim, Kenyatta Jones, was standing outside his van with Eddie Bradford, III, Marquise Stewart, and Rodriquez McGhee. An individual wearing a black hooded sweatshirt approached the group and brandished a gun, causing the group to scatter. The assailant chased the victim and McGhee followed.¹ The assailant shot at the victim several times, hitting him in the back and arm. The victim fell to the ground and the shooter came and stood above him, firing additional shots into his hand, arm, and head.² The eyewitnesses were unable to identify the shooter because his hooded sweatshirt was

¹ McGhee was implicated in the crime. Even though he was armed, he did not fire at the shooter, and after the victim was wounded, he rifled through the victim's pockets, apparently searching for the substantial quantity of crack cocaine found on the victim. Cellular phone records revealed that a call was made from defendant to McGhee around the time of the shooting. Defendant's cellular phone was registered to Derrick Hunter, the brother of defendant's girlfriend, Lakesha Rankin.

² The injuries were life-threatening and, at the time of trial, the victim still needed the assistance of a wheelchair and walker.

drawn tightly around his face. The victim initially told a responding police officer that he did not know who shot him; however, the victim was severely wounded and semi-conscious at that time. In fact, the victim did not recall talking to the police or medical personnel that arrived at the scene. Later, however, the victim unequivocally identified defendant as the shooter. He had known defendant for many years, and testified that, as defendant stood over him and shot him, “[i]t was like he wanted me to see his face so I could take it [to] my grave with me, know he [sic] the one that killed me if I would have died.” At trial, two jail inmates corroborated the victim’s account of events, testifying that defendant described and claimed responsibility for the shooting.

Defendant argues that the trial court abused its discretion by granting the prosecution’s motion in limine to exclude evidence that the victim had been shot on a previous occasion. We review for an abuse of discretion a trial court’s decision to admit or exclude evidence. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion is found if the trial court’s decision falls outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. Generally, all relevant evidence is admissible. MRE 402. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403.

Before trial, the prosecutor argued that evidence that the victim had been previously shot was irrelevant, in that it did not bear on whether defendant shot the victim in this case. The perpetrator in the earlier shooting had been convicted and was incarcerated at the time of the shooting at issue here. The prosecutor also argued that, even if relevant, the evidence was unfairly prejudicial and would confuse or mislead the jury, in that it would distract the jurors from focusing on the shooting at issue and whether defendant committed it.

Defendant argued that the evidence was relevant to his theory of the case, i.e., that defendant was not the shooter, because the jury should be apprised that the victim was previously shot, lived an inherently dangerous lifestyle, and was likely to be shot by any number of people. Defendant argued that the probative value of the evidence substantially outweighed the danger of unfair prejudice.

The trial court ruled that the evidence was irrelevant because there was not a sufficient nexus between the previous shooting and the shooting at issue, especially given the fact that the perpetrator in the previous shooting had been convicted and was incarcerated at the time of the shooting at issue here. The trial court granted the prosecution’s motion in limine, and it ruled that defendant was prohibited from introducing any evidence that the victim was previously the victim of another shooting.

Defendant’s theory of the case was that he was not the shooter, and that, because the victim was involved in the drug culture, he was likely to be shot by any number of people. However, as found by the trial court, the shooter in the previous case had been convicted and was incarcerated at the time of the shooting. Therefore, that evidence did not have a tendency to make the existence of any fact that was of consequence to a determination of this particular action more or less probable than it would be without the evidence. Conversely, substantiated

evidence that a person or persons other than defendant had a motive to shoot the victim, and had the opportunity to do so, would have been relevant. See *People v Holliday*, 144 Mich App 560, 572-574; 376 NW2d 154 (1985). However, defendant did not come forward with any specific evidence regarding the identity of other individuals who may have shot the victim. He failed to tie the previous shooting or shooter with anyone in particular who may have been following up on the prior shooting. Defendant failed to substantiate his general assertion that someone involved in the drug scene was responsible for shooting the victim. This broad allegation, without more, did not meet the level of specificity required to make evidence of a prior shooting relevant to the shooting at issue here. Thus, this evidence was not relevant to the charges against defendant, and the trial court did not abuse its discretion in excluding the evidence.

Defendant also argues that the trial court's failure to admit the evidence about the previous shooting violated his constitutional rights to due process, to compulsory process, and to present a defense. We review de novo constitutional questions. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002). A defendant in a criminal case has the right to due process, US Const, Ams V, XIV; Const 1963, art 1, § 17; *People v Walker*, 234 Mich App 299, 303-304; 593 NW2d 673 (1999); the right to compulsory process for obtaining witnesses in his favor, US Const, Ams VI, XIV; Const 1963, art 1, § 20; *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1988); and the right to present a defense, US Const, Ams VI, XIV; Const 1963, art 1, § 13; *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002).

"[E]vidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator." *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987). Evidence of third-party guilt may be introduced by the defendant when it is inconsistent with, and raises a reasonable doubt about, the defendant's guilt. *Holmes v South Carolina*, 547 US 319, 327; 126 S Ct 1727; 164 L Ed 2d 503 (2006). However, such evidence should be excluded where it does not sufficiently connect the other person to the crime, such as where the evidence is speculative or remote, where it does not tend to prove or disprove a material fact in issue, where it has no effect other than to cast a bare suspicion upon another person, or where it raises a conjectural inference regarding the commission of the crime by another person. *Id.* at 327-328. "Before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." *Id.* (citations and quotations omitted).

Evidence that the victim had been shot on a previous occasion to support defendant's theory that other unidentified individuals in the drug community may have had reason to shoot the victim constituted mere conjecture, was tenuous, and lacked substantive facts connecting anyone to the shooting at issue here. The proposed testimony did not constitute competent evidence that someone other than defendant was responsible for the shooting. Defendant's rights to due process, compulsory process, and to present a defense were not violated.

Defendant next argues that the trial court's ruling excluding evidence that the victim had been shot before, coupled with its ruling allowing evidence that the victim previously robbed defendant, denied his right to a fair trial. US Const, Ams VI, XIV; Const 1963, art 1, §20; *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). Defendant preemptively moved to exclude testimony that the victim previously robbed defendant on the basis that it would be improper character evidence. The prosecution responded that it did not seek to introduce the

evidence as character evidence, but rather, to demonstrate defendant's motive for shooting the victim. The trial court ruled that the evidence fell under MRE 404(b). The trial court opined that the evidence was offered for the proper purpose of proving motive, that it was relevant, and that there was no risk that the probative value of the evidence would be substantially outweighed by the danger of unfair prejudice. The trial court ruled that the evidence was admissible and noted that it would consider a limiting instruction if requested. At trial, the victim testified regarding the prior incident in which he pointed a gun at defendant's head and forced him to relinquish his winnings from a dice game.

MRE 404(b)(1) provides, in pertinent part:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b)(1) applies to the admissibility of evidence of other acts of *any* person, such as a defendant, a victim, or a witness. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995); *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). Thus, evidence of the victim's prior bad act toward defendant was admissible under MRE 404(b) to prove motive, where defendant's motive for shooting the victim was material to the case and the evidence satisfied the test set out in *People v Vandervliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

First, the prosecutor offered the evidence for a proper purpose, i.e., to show defendant's motive for shooting the victim. *Id.* at 74. Second, the evidence was relevant to an issue or fact of consequence at trial, i.e., to create a context for the shooting and to reveal defendant's motive to harm the victim. *Id.* Third, the probative value of the evidence was not substantially outweighed by its potential for unfair prejudice, i.e., although the challenged evidence was damaging to defendant's case, the probative value of the evidence substantially outweighed any danger of *unfair* prejudice. *Id.* at 75. Fourth, the trial court indicated at the pretrial hearing that it would consider defendant's request for a limiting instruction, and defendant later acquiesced in the jury instructions and did not reiterate a request for a limiting instruction. *Id.* The trial court did not abuse its discretion in admitting the evidence, and defendant was not denied a fair trial when the evidence was admitted.

Defendant also argues that the prosecutor engaged in misconduct. We review de novo preserved claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *Id.* at 451. When reviewing claims of prosecutorial misconduct, we examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.*

During rebuttal argument, the prosecutor attempted to discredit the veracity of Ramon Grissom, a defense witness. The prosecutor argued that, while Grissom testified at trial that he

did not own a cellular phone, his testimony was untruthful because he did, in fact, have a phone which rang in the courtroom, outside the presence of the jury. Defense counsel objected on the ground that the argument constituted facts not in evidence, and the trial court sustained the objection and instructed the jury to disregard the statement. On appeal, defendant argues that the prosecutor's argument constituted facts not in evidence and that it constituted improper vouching.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but is free to argue the evidence and any reasonable inferences that may arise from the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Although Grissom's cellular phone rang outside the presence of the jury, the prosecutor called a detective to testify as to the event. Thus, the fact that Grissom's cellular phone rang in court was admitted into evidence, and the prosecutor's argument was proper. Additionally, the trial court's curative instruction alleviated any prejudicial effect. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) ("[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction").

A prosecutor may not vouch for the credibility of a witness or suggest that the government has some special knowledge that a witness is testifying truthfully. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, a prosecutor is permitted to argue from the facts that defendant or defendant's witnesses are unworthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). Defendant's claim of improper vouching lacks merit, given that the challenged comments reflected arguments from the facts and evidence that Grissom was unworthy of belief. No plain error occurred.

Also during rebuttal argument, the prosecutor commented on the weakness of defendant's alibi defense, as well as defendant's failure to produce his grandmother as an alibi witness. Defendant argues that the prosecutor's comments improperly denigrated defense counsel by intimating that he arranged for the defense witnesses to lie under oath. A prosecutor may not suggest that defense counsel is intentionally trying to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, once a defendant presents an alibi defense, a prosecutor is permitted to attack the alibi by commenting on the weakness of the alibi testimony, as well as a defendant's failure to produce corroborating witnesses. *People v Holland*, 179 Mich App 184, 190-192; 445 NW2d 206 (1989). There was no error.

The prosecutor also commented that defendant and his girlfriend, Lakesha Rankin, discussed having her brother, Derrick Hunter, acknowledge possession of defendant's cellular phone at the time of the incident. However, defendant's girlfriend admitted as much on cross-examination, and the prosecutor was permitted to argue the evidence and any reasonable inferences arising from the evidence. *Ackerman*, *supra* at 450. The prosecutor's remarks were proper in light of the evidence and defense theory presented.

Defendant next argues that he was denied his right to a fair trial when, during voir dire, he traversed the courtroom in the presence of the assembled venire, and the prospective jurors may have been able to detect that he was wearing a leg brace designed to prevent escape underneath his clothing. Freedom from shackling of a defendant during trial is an important component of a fair and impartial trial because having a defendant appear shackled before a jury

negatively affects the defendant's constitutionally guaranteed presumption of innocence. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). We review unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

In order to justify reversal based on the presence of shackles or restraints during trial, the defendant must show that prejudice resulted. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). Defendant argues that he was prejudiced by walking in front of the venire with a staggered gait in light of the prosecutor's elicitation of testimony that a witness told a detective that he thought defendant was the shooter based on the way the shooter walked. However, if anything, defendant's limited mobility weighed in his favor, where evidence was presented that the shooter ran after the victim and shot him during the ensuing chase. Further, the prosecutor specifically commented during opening statements that he would not expect the jury to find a person guilty based on an identification made based on the way someone walks, and that it was merely an additional piece of evidence to consider. The possible inadvertence of the jury venire's exposure and defendant's lack of objection to wearing the brace before or during trial also mitigate against a finding of prejudicial error. See *Robinson*, *supra* at 654 (noting that no objection was made to the presence of the restraints during trial). Defendant has failed to establish prejudice, and no plain error occurred.

Defendant next argues that his double jeopardy rights were violated where one of his felony-firearm convictions was predicated on his felon-in-possession conviction. We review de novo a challenge under the double jeopardy clauses of the federal and state constitutions. US Const, Am V; Const 1963, art 1, § 15; *People v Calloway*, 469 Mich 448, 449-450; 671 NW2d 733 (2003). This issue was specifically addressed in *Calloway*, where our Supreme Court noted that "[b]ecause the felon in possession charge is not one of the felony exceptions in the statute, it is clear that defendant could constitutionally be given cumulative punishments when charged and convicted of both felon in possession, MCL 750.224f, and felony-firearm, MCL 750.227b." *Calloway*, *supra* at 452. The Court concluded that dual convictions for both felony-firearm and felon in possession of a firearm do not violate double jeopardy protections. *Id.*; see also *People v Dillard*, 246 Mich App 163, 167; 631 NW2d 755 (2001). Felon in possession of a firearm can be the predicate felony for felony-firearm. Based on *Calloway*, *supra*, defendant is not entitled to relief on this issue.

Finally, defendant argues that the trial court violated the principles enunciated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), by engaging in judicial fact-finding to score offense variable (OV) 7, MCL 777.37, in order to calculate his recommended minimum sentence range under the legislative sentencing guidelines. Our Supreme Court specifically addressed this issue in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), and determined that as long as the defendant receives a sentence within the statutory maximum, a trial court may use judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict. This holding was reaffirmed by our Supreme Court's recent decisions in *People v Harper*, 479 Mich 599; ___ NW2d ___ (2007), and *People v McCuller*, 479 Mich 672; ___ NW2d ___ (2007), which reiterated that Michigan has a true indeterminate sentencing scheme that requires the trial court to score both the offense and prior record variables before determining the defendant's minimum sentence. Because a trial court scores the OVs only to

calculate the recommended range for the minimum portion of the defendant's sentence, and not to arrive at the defendant's statutorily-set maximum sentence, a court's fact-finding in scoring the OVs does not increase the defendant's statutory maximum under *Blakely*. *McCuller, supra*, at 677-678. No error occurred, and defendant is not entitled to relief on this issue.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter