STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2007
v	No. 270091 Saginaw Circuit Court
KEVIN TROY BOND, Defendant-Appellant.	LC No. 05-025511-FC

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree premeditated murder, MCL 750.316(1)(a) and MCL 750.157a, four counts of assault with intent to commit murder, MCL 750.83, carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because the trial court properly admitted the challenged evidence, sufficient evidence existed to sustain defendant's first-degree premeditated murder conviction, no plain error existed regarding the prosecution's conduct, defendant received effective assistance of counsel, and defendant has not established cumulative error warranting reversal, we affirm.

I

This case stems from the shooting death of Nicholas Green on July 19, 2004 in Saginaw. Green was fired on from a van containing six men including defendant. The six men are identified as Tradell Feagin, Marcus Clemmons, Tommy Keels, Andre McKnight, Dilanjan Miller, and defendant. Green was shot and killed allegedly as retaliation for the death the night before of Omar McKnight, brother of one of the men in the van and best friend of defendant.

II

Defendant first asserts that the trial court erred in admitting the videotape of a statement made by Dilanjan Miller, one of the other men in the van. We review the admission or exclusion of evidence by a trial court for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). We also review for an abuse of discretion a trial court's decision

regarding the appropriate remedy for a discovery violation. MCR 6.201(J); *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). A trial court abuses its discretion when its decision "results in an outcome falling outside the principled range of outcomes." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 404; 729 NW2d 277 (2006). Defendant bears the burden to show that the violation caused him actual prejudice. *People v Greenfield*, 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006).

Defendant specifically argues that the trial court erred in admitting the videotape of an interview with Miller because the videotape amounted to a surprise since the defense was not provided with a copy of the tape. Defendant further asserts that it is irrelevant that the prosecution did not discover the tape until after Miller had already begun to testify. The prosecution counters that the trial court properly admitted the videotape as a prior consistent statement to rebut the implication that Miller had changed his testimony after he was given immunity. The prosecution also asserts that defense counsel was able to adequately prepare for Miller's cross-examination because he had a transcript of the interview and so there was no surprise or prejudice.

Our review of the record reveals that the prosecutor offered the videotape evidence after defense counsel questioned whether Miller had tailored his testimony after receiving immunity.[1] In response, defendant argued that introduction of the videotape during Miller's redirect examination constituted unfair surprise because it was not timely provided pursuant to a discovery order of the court. The prosecutor then explained to the trial court that it was unaware of the existence of the videotape before the lunch break taken after defendant's initial cross-examination of Miller.

Indeed, the prosecution has a duty to disclose impeachment evidence favorable to a defendant. *Banks*, *supra* at 254. However, the term "favorable" does not stretch to include evidence "whose utility lay only in helping a defendant contour a portion of his cross-examination of a key state witness." *Id*. at 255. Further, there is no affirmative duty to disclose "material that supports . . . [the] witness' testimony and thus undermines a charge of recent fabrication." *Id*. at 254. Moreover, defense counsel already had a transcript of the testimony that was presented by way of videotape, which he effectively used in his initial cross-examination of Miller. Thus, defendant fails to establish that he was prejudiced by the late discovery of the videotape. *Greenfield, supra* at 456 n 10. While there are advantages to viewing a videotape of a statement, the circumstances of this case support the conclusion that the trial court's admission of the video evidence was not an abuse of discretion.

III

Defendant next claims that there was insufficient evidence in the record to convict him of first-degree premeditated murder. Defendant challenges the premeditation element of the crime

[1] MRE 801(d)(1)(B) specifically permits prior consistent statements "offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

arguing that Miller's testimony alone could not establish the element of premeditation especially when only one witness, Miller, implicated him in the crime and that no fingerprint evidence existed tying defendant to the shooting. The prosecution counters that there is sufficient evidence in the record to sustain defendant's first-degree premeditated murder conviction because both scientific and eyewitness evidence showed defendant was carrying a gun with a plan to shoot and kill anyone he and his companions saw on the North side of town on the night in question. The prosecution also asserts that the evidence also established that the victim was shot and killed as a result of gunfire coming from the van occupied by defendant and his companions.

This Court reviews de novo claims of insufficient evidence, viewing the evidence in a light most favorable to the prosecution to determine if a reasonable jury could find the evidence satisfied each of the elements beyond a reasonable doubt. *People v Sherman-Hufman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). To sustain a conviction of first-degree premeditated murder, there must be evidence that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation can be established through "(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." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). To prove that the defendant was an aider and abettor to the crime, the prosecutor was required to show that, at the time of the killing, he either had the premeditated and deliberate intent to kill the victim or that he participated in the crime knowing that the principal possessed this specific intent. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). Premeditation and deliberation, for purposes of a first-degree murder conviction, require "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). Conflicting evidence should be resolved in favor of the prosecution. *People v Fletcher*, 260 Mich App 531, 561-562; 679 NW2d 127 (2004).

Our review of the record shows that defendant and Omar McKnight, who had been killed the night before the incident, were close friends. Testimony showed that the six men in the van stopped and visited the Omar McKnight's grieving family. Then they drove to the North side of Saginaw with the intent to retaliate for Omar McKnight's death, fueled in part by animosity existing between East side and North side residents. Miller testified that he sat next to defendant in the van, and that defendant had either a .22 or .25 caliber handgun. Miller recounted that while on the ride to the North side, defendant stated "if we see anybody, we [are] going to shoot them because they killed Omar."

The men drove around the North side neighborhood, but initially did not see anyone outside. But they continued to drive around and eventually saw a group of men[2] outside fixing a car with its hood open. After the van drove by the group of men, the van turned into a driveway, turned around, and deliberately returned to pass the group a second time. Miller stated that on the second pass, as they closed in on the group of men, defendant told him to lie down and then

[2] The group of men included the victim Green, Jamal Young, Dontae Bell, Terrence Jones, and Larry Darden.

defendant shot over him out the passenger side window in the direction of the men fixing the car. Miller testified that as the van sped away from the scene, defendant continued to shoot out the rear window of the van at the group of men. Miller further testified that Tommy Keels also shot at the group of men from the van.

Michigan State Police Sergeant Ryan Larrison testified that police found a total of 35 spent cartridge casings and an unspecified number of bullets at the scene of the shooting and inside the van. From the casings and bullets recovered, Larrison opined that four guns were used in the shooting: a .40 caliber, a .380 automatic, a 9-millimeter Luger, and a .22 caliber. Police found the .22 caliber casings inside the van. Larrison stated that police recovered five ".22 long rifle caliber cartridge cases" in the van. Larrison also testified that .22 caliber long rifle bullets can be fired from several types of firearms, not just rifles. The physical evidence and testimony indicated that all the shots were fired from the passenger side and rear of the van. Dr. Kanu Virani, the forensic pathologist who performed the autopsy of Green testified that he was killed by a .40 caliber gunshot to the right side of the lower chest.

Multiple facts elicited from testimony and scientific evidence support the verdict. The evidence shows that defendant had a motive to shoot and kill the victim and that he intended that particular result. The evidence illustrated that defendant and his companions were motivated by retaliation for the death of Omar McKnight, that they drove to the North side armed and in search of potential victims, that once they located victims they had time to take a second look while they turned around and took a second pass in the van as they drove back toward the victims, and that defendant shot at the group out of the passenger window of the van and continued to shoot at the group of men out the rear of the van as it sped away from the scene. The record evidence established that defendant participated and encouraged a precast plan amongst his group in the van to victimize persons from the North side. There is evidence from which the jury could conclude beyond a reasonable doubt that defendant engaged in the criminal enterprise by stating the purpose, giving instructions, and then executing the plan resulting in the shooting death of Green. All of this evidence taken together, if accepted by the jury, proves premeditated murder as an aider and abettor. As such, when viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could find beyond a reasonable doubt that defendant was guilty of first-degree premeditated murder as an aider and abetter. *Sherman-Hufman, supra* at 265.

Defendant's argument that the only evidence that he actually fired a weapon was Miller's testimony does not require a different result. We will not interfere with the jury's role of "determining the weight of the evidence or the credibility of witnesses." *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000). Plainly, the jury was free to find Miller's testimony more credible than defendant's testimony or any other testimony and draw all reasonable inferences from that evidence as it related to the element of premeditation. "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

IV

Defendant next asserts that during the redirect examination of a Dontae Bell, a prosecution witness, the prosecutor essentially testified that the murder was a "gang–related" retaliation in direct violation of a court order. We review this forfeited issue for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Only if the plain error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings" is reversal warranted. *Id.*

In response to a motion in limine, prior to the opening proofs, the court instructed the prosecutor to "[t]ell your witnesses not to use" the word "gang." But the court also instructed the parties that they could refer to the existence of "East Side" and "North Side" groups in Saginaw, and about how a member of the former group had been killed prior to the instant shooting, which was directed at a group of men who were members of the latter group. The record displays that during trial Bell did use the word gang, but the singular reference was nonresponsive to a question the prosecutor asked regarding whether territorial disputes existed in the city.

Our review of the context of the questioning and the prosecutor's word choices during the line of questioning at issue reveals that the prosecutor tried to abide by the court's ruling. Specifically, the prosecutor asked about the existence of "territorial neighborhood disputes" and referenced "associates" of Omar McKnight. While the terms used by the prosecutor were somewhat transparent, there is really no way to avoid these references when the trial court allowed the prosecutor to address the subject matter but circumscribed the terminology the parties could employ. Moreover, the answers supplied—not the questions posed—are the evidence of the existence of the two territorial groups and a state of animosity between the groups. After reviewing the pertinent testimony, we conclude that defendant has not established misconduct on the part of the prosecutor, and accordingly, defendant fails to establish plain error affecting substantial rights.

V

Defendant also argues that the prosecutor committed misconduct in violation of defendant's Fifth Amendment right to remain silent, US Const, Am V, because the prosecutor referenced an alibi defense despite the fact that defendant had never referenced an alibi and had not filed a notice of alibi. In response, the prosecution argues that defendant's earlier statement to police was relevant and admissible, and therefore the prosecution was entitled to introduce the statement and comment on the evidence as an alibi as well as a reflection on defendant's credibility. We review this forfeited claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Callon, supra* at 329.

The record reveals that defendant initially told police he was with his godmother all day on the day of Green's murder, and had never seen the van. During trial, however, defendant testified that he was in the van when the shooting took place. Because defendant's statement to police is both relevant and non-hearsay,[3] it is admissible unless "its probative value is

[3] "[A]ny out-of-court statement made by a defendant which is offered against that defendant is an admission." *People v Brown*, 120 Mich App 765, 782; 328 NW2d 380 (1982). If the (continued…)

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403. In particular, defendant argues that the prosecutor's questioning about his statement was unfairly prejudicial because it was akin to the prosecution commenting on a defendant's filing of an alibi notice before the defendant testifies or to the failure to call a listed alibi witness when the defendant has filed a notice of alibi but presents no alibi evidence, thus violating his right to remain silent. *People v Hunter*, 95 Mich App 734, 738-739; 291 NW2d 186 (1980); *People v Shannon*, 88 Mich App 138, 141-143; 276 NW2d 546 (1979).

Black's Law Dictionary (7th ed) defines the term "alibi" either as "[a] defense based on the physical impossibility of a defendant's guilt based on location" at another scene when the crime was committed, or "[t]he fact or state of having been elsewhere when an offense was committed." Here, it appears that the term "alibi" was being used in the second sense. MCL 768.20(1) requires a defendant to file a written notice of intent to present an alibi defense. Defendant admits that he filed no notice of alibi. All of the cases cited by defendant involved an improper reference to an absence of evidence when a notice of an alibi defense had been filed.

But defendant has not provided, and we have not located any cases requiring the omission of any statement referring to an alibi if a defendant has not filed a notice of alibi defense. While not binding on us, we find persuasive the holding of a panel of this Court in *People v Davis*, unpublished opinion per curium of the Court of Appeals, issued June 14, 2007 (Docket No. 273422), p 3, wherein faced with similar circumstances, the Court stated as follows: "in cases where the defendant does not file notice, he cannot expect the same heightened levels of protection, given that there is no case law or statute that holds that it is error requiring reversal for a prosecutor to enter into evidence a defendant's relevant statements that happen to mention an alibi." For these reasons, we conclude that defendant has not established plain error in the prosecutor's references to an alibi.

VI

Defendant asserts that the prosecution violated his Fifth Amendment, US Const, Am V, right against self-incrimination by commenting on, and eliciting testimony concerning, his silence during his initial contact with the police, as well as after his arrest after police provided him his *Miranda*[4] rights. The prosecution argues in response that use of defendant's statements to police prearrest and pre-*Miranda* was proper, and post-*Miranda*, post-arrest, post-waiver silence is admissible as substantive evidence. Again, we review this forfeited claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Callon*, *supra* at 329.

(…continued)

statement is offered against a party and is the party's own statement, the admission is not hearsay. MRE 801(d)(2)(A); *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Exculpatory statements made to police that are shown to be false have independent probative value as circumstantial evidence of a guilty conscience. *People v Wackerle*, 156 Mich App 717, 720-722; 402 NW2d 81 (1986), referencing *People v Dandron*, 70 Mich App 439; 245 NW2d 782 (1976).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

With respect to defendant's prearrest behavior, at trial, the prosecutor elicited testimony that when questioned by a police officer about the van the day after the shooting, defendant did not want to give his name, said he did not have to talk with the officer, and walked away. Because defendant was not under arrest in the face of an accusation at the time he was questioned, his silence, demeanor, and refusal to provide his name were properly admissible. See *People v Collier*, 426 Mich 23, 39; 393 NW2d 346 (1986). See also *People v Cetlinski* (*After Remand*), 435 Mich 742, 746; 460 NW2d 534 (1990) (observing that "the critical events took place prearrest and pre-*Miranda* and thus there could be no due process claim that the state unfairly used defendant's silence or omission against him at trial . . . .").

Regarding defendant's postarrest, post-*Miranda* silence, defendant is correct that in general, the use of such silence to impeach a defendant's exculpatory story at trial is prohibited by the Due Process Clause of the Fourteenth Amendment. *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Vanover*, 200 Mich App 498, 500; 505 NW2d 21 (1993). But, in the circumstance where a defendant creates the false impression that he cooperated with law enforcement when, in fact, he has not, the defendant opens the door to full development of that issue. *Vanover*, *supra* at 503. Here, defendant testified that he turned himself in and talked with the police as soon as he heard from his grandmother that the police wanted to speak with him. Thus, he opened the door to the prosecution's calling a police witness to rebut his inference of cooperation. *Id*. Further, given that the prosecutor properly elicited the testimony regarding these issues, commenting on them during closing arguments was also permissible. See *People v Bahoda*, 448 Mich 261, 282-284; 531 NW2d 659 (1995). Therefore, it was not plain error for the prosecution to reference defendant's prearrest, or post-arrest, post-*Miranda* silences.

VII

Defendant's next claim is that the prosecutor improperly bolstered Miller's testimony during his closing arguments by indicating that Miller's testimony at trial was consistent with his testimony in the videotape. A prosecutor may not vouch for the credibility of his witnesses by implying he has some special knowledge concerning the witness's truthfulness. *Bahoda*, *supra* at 276. "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor in this case did not imply to the jury he had special knowledge about the witness's truthfulness, but merely referred to the consistency of the testimony as a reason that Miller was worthy of belief. After reviewing the record, we conclude that the prosecutor's comments do not amount to improperly vouching for the credibility of a witness, and thus were not error.

VIII

Next, defendant argues that he received constitutionally ineffective assistance of trial counsel. Because defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to errors apparent in the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Trial counsel's performance must fall below an objective standard of reasonableness and, but for those errors, there must be a reasonable probability that the outcome of trial could be different in order to establish a claim of ineffective assistance of counsel. *Id*. Defendant must overcome the strong presumption that his

counsel's assistance was based on sound trial strategy. *People v Rice* (*On Remand*), 235 Mich App 429, 444; 597 NW2d 843 (1999).

A

Defendant argues that counsel was ineffective for failing to object to the interjection of the term "gang" into the proceedings, the prosecution's references to defendant's alibi statements, the admission of the videotape, and the references to defendant's silence during police interrogation. As discussed at length above, defendant has failed to establish error from any of the alleged errors underlying these claims of ineffective assistance. Trial counsel cannot be faulted for failing to raise a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

B

Defendant also argues that his counsel's lack of knowledge that witness Larry Darden had died, and that witnesses Terrance Jones and Dontae Bell were incarcerated evidences a lack of investigation and preparation for trial. With respect to Darden, there is no indication in the record of when Darden died. Moreover, it is not unreasonable that defense counsel would be unaware of Darden's killing in Detroit given that counsel's law office is located in Saginaw. Thus defendant has not established the presumption that not knowing of Darden's death evidences a lack of preparation on this record. In any event, Darden had previously given testimony that was read into the record at trial at the request of both the prosecution and defense counsel. Thus, knowledge of Darden's death would not have changed what occurred at trial. Accordingly, defendant fails to establish the requisite prejudice.

Regarding Jones and Bell, defense counsel's itemized list of services rendered to defendant indicates that he reviewed unspecified witness statements prior to trial. Moreover, both Jones and Bell were present at trial, testified in court, and defense counsel effectively cross-examined both witnesses. Under these circumstances, defendant fails to establish that defense counsel was unprepared for trial.

C

Defendant next points to counsel's failure to object when the trial court stated the nature of defendant's underlying felony while reading the felony information to the jury during voir dire. Counsel for both parties had stipulated to the prior conviction making the trial court's reading of that information to the jury unnecessary. *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997). It appears from the record that the trial court's mention of the prior felony conviction was inadvertent, and it was not mentioned at any other time in the proceedings. Defense counsel may have reasonably decided not to object to the court's mentioning of the prior felony in order to avoid calling the jury's attention to that fact. This Court does not second-guess a counsel's reasonable trial strategy. *Rice, supra* at 444-445. Also, the trial court instructed the jury to decide the case based on the evidence adduced, and that the court's "comments, rulings, questions and instructions are . . . not evidence." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

D

Defendant next argues that counsel was ineffective for failing to object when the prosecutor improperly requested that defendant comment on the testimony of Feagin and Miller, two other men who were in the van the night of the shooting. Specifically, the exchange at issue is as follows:

> *Q*. Okay. Now just so that the jury understands what you're telling them right now.
>
> *A*. Right.
>
> *Q*. Basically, what Tradell Feagin said and Dilanjan Miller, all of that's accurate except that you're saying you didn't shoot?
>
> *A* I would say . . . Miller's statement is not accurate regarding me saying, let's get someone, or something like that, or . . . me telling him to lean back to shoot. . . .

As premised by the prosecutor, the question was designed to frame the areas of agreement and disagreement between defendant's account and the accounts of the other two men. This is a wholly different question than whether defendant believed the other two men were lying, which would be an improper question. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Even if this question is viewed as an improper request, *Buckey* counsels that such a question can be harmless error if the defendant was not harmed by the questions. *Id*. Here, as in *Buckey*, defendant responded to the question "rather well" by indicating specific inaccuracies he found in their statements. *Id*. Moreover, the jury would have been well aware of the varying versions of the shooting given by these witnesses. Defendant has not established error.

E

Defendant's next claim is that his trial counsel effectively took second-degree "off the table" when he told the jury in closing arguments that he agreed with the prosecutor that this was not a case of second-degree murder. But defendant omits that his trial counsel went on to say, "as it pertains to [defendant], it wasn't first-degree murder, either." In any event, the trial court instructed the jury on second-degree murder.[5] Because the jury was given the opportunity to find defendant guilty of second-degree murder, the charge was not "off the table," notwithstanding trial counsel's closing argument.

F

Finally, defendant asserts that counsel was ineffective for failing to present a viable defense. However, defendant fails to assert what type of defense trial counsel should have

[5] In support, defendant cites *Keeble v United States*, 412 US 205; 93 S Ct 1993; 36 L Ed 2d 844 (1973), a case in which a requested instruction on a lesser included offense was not given. *Id*. at 206. Thus, defendant's reliance on *Keeble* is misplaced.

provided. "'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'" *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Our review of the record reveals, however, that trial counsel did present a viable defense, i.e., that defendant was present but did not take part in the shooting. That this defense failed does not mean it was not viable, especially given that it was in keeping with defendant's sworn testimony. Thus, defendant fails to establish ineffective assistance of trial counsel.

IX

Finally, we reject defendant's cumulative error argument. In determining whether the aggregate impact of argued errors denied a defendant a fair trial, "only actual errors are aggregated to determine their cumulative effect." *Bahoda*, *supra* at 293 n 64. Because defendant has not established error on the part of the trial court, the prosecutor, or defense counsel, defendant's cumulative error argument fails.

Affirmed.

/s/ Pat M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey