STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2008
v	No. 272939 Wayne Circuit Court
KEVIN LONELL HARRINGTON, Defendant-Appellant.	LC No. 02-013495-01

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and he was sentenced to life imprisonment without parole. He appeals as of right. We affirm.

Defendant's conviction arises from the fatal shooting of Michael Martin, whose body was discovered in a field near an apartment complex where he lived. Martin died from two gunshot wounds, one to the abdomen and one to his head. Defendant allegedly committed the offense along with codefendant George Clark.

At trial, the prosecution's principal witness, Bearia Stewart, a resident of the apartment complex where the victim was killed, denied witnessing the shooting or hearing any gunshots. Stewart admitted, however, that she previously testified at defendant's and Clark's preliminary examinations that she saw defendant and Clark arguing and fighting with the victim about money and drugs, after which Clark dragged the victim into the field behind the apartment complex, and then she heard three or four gunshots. At trial, Stewart claimed that the police threatened her if she would not cooperate and forced her to testify at the preliminary examinations. However, the prosecution also introduced evidence that Stewart was threatened by defendant and others associated with this case.

Defendant first argues that the trial court erred in denying his motion for a new trial on the basis of juror misconduct. In support of his motion, defendant submitted affidavits indicating that a juror failed to reveal during voir dire that she had a nephew who had pending criminal charges in a case assigned to the same judge who presided over defendant's trial and also failed to reveal that she had a relative who had been killed by a drunk driver.

This Court reviews a trial court's decision denying a defendant's motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). "To be entitled to a new trial on the basis of juror misconduct, defendant must 'establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.' " *Id*., quoting *People v Daoust*, 228 Mich App 1, 9 n 3; 577 NW2d 179 (1998). In *Daoust*, this Court stated that this test does not apply in situations where it is discovered that a juror lied during voir dire. However, this Court has viewed that statement as dicta and defendant relies only on a dissenting opinion in support of his argument that *Daoust* governs this case. See *People v Benny Johnson, Jr*, 245 Mich App 243, 267; 631 NW2d 1 (2001) (Whitbeck, J., dissenting).

In *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998), this Court held that in order for a defendant to be entitled to a new trial due to juror misconduct, "[p]rejudice must be shown, or facts clearly establishing the inference that it occurred from what was said or done." In *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960), the Court quoted 39 Am Jur, New Trial, § 70, p 85, and observed:

> "[I]t is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice."

Defendant argues that he need not establish prejudice because the juror purposely lied. Even if an intentional lie could support an inference of prejudice under *Fetterley*, the record does not support defendant's argument that the juror intentionally lied.

As the trial court observed, the affidavits that defendant submitted in support of his motion failed to show that the juror was aware of her nephew's pending criminal matter, nor was there any evidence that the juror was aware that her relative's death by a drunk driver was something that she should have revealed when asked whether she or a family member had been the victim of a crime. Because defendant's offer of proof failed to show that the juror purposely lied, the trial court did not abuse its discretion in denying defendant's motion for a new trial and request for an evidentiary hearing on this issue.

Next, defendant argues that the trial court erred in ruling that he would be required to waive the attorney-client privilege before he could call his former attorney, Marlon Evans, as a witness at trial. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. Any preliminary questions of law are reviewed de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

The record discloses that defendant sought to call Evans as a witness to rebut another witness's testimony regarding allegations of bribery and witness tampering. The trial court ruled that defendant would be required to waive the attorney-client privilege if Evans was called as a witness. Defendant was unwilling to waive the privilege, so Evans was not called.

Relying on *People v Squire*, 123 Mich App 700; 333 NW2d 333 (1983), defendant argues that he should not have been required to waive the attorney-client privilege, because Evans did not intend to testify regarding communications between himself and defendant. In *Squire*, this Court stated:

> Michigan has long recognized that a party does not waive the attorney-client privilege by presenting his or her attorney as a witness to testify regarding matters not communicated by the client. *Steketee v Newkirk*, 173 Mich 222, 232; 138 NW 1034 (1912); *In re Dalton Estate*, 346 Mich 613, 620-621; 78 NW2d 266 (1956). Here, defense counsel sought the testimony of attorney Minock to rebut the prosecutor's argument that the testimony of the defendant's sister and her two friends was a recent fabrication, dreamed up for the trial. Given the fact that the three were eyewitnesses to the shooting and that their testimony directly contradicted the testimony of witness Hudson Ray, Jr., we find that the error cannot be harmless. [*Id.* at 706.]

However, as explained in *Kubiak v Hurr*, 143 Mich App 465, 473; 372 NW2d 341 (1985) (citations omitted):

> Although either can assert the privilege, only the client may waive the privilege. . . . Professor Wigmore instructs that the client's offer of his own testimony in the case at large is not a waiver of the privilege. Otherwise the privilege of consultation would be exercised only at the cost of closing the client's mouth on the stand. Nor will the client's offer of his own testimony as to specific facts which he has happened to communicate to the attorney operate as a waiver of the privilege. It is only where the client offers his own or his attorney's testimony as to a specific communication to the attorney that the privilege is waived as to all communications to the attorney on the same matter. This is to ensure that the privilege is used only as an incidental means of defense and not as a means of attack. For the same reason, the client's offer of his own or his attorney's testimony to a part of any communication is a waiver as to the whole of that communication. 8 Wigmore, Evidence, § 2327, p 637 (McNaughton rev ed, 1961).

Furthermore, the attorney-client privilege protects communications regarding past wrongdoing, but does not apply to ongoing or future wrongdoing. Where the attorney-client privilege advances a criminal enterprise or fraud, the privilege will not apply. *People v Paasche*, 207 Mich App 698, 705-706; 525 NW2d 914 (1994). The crime-fraud exception applies where the prosecution shows "that there is a reasonable basis to (1) suspect the perpetration or attempted perpetration of a crime or fraud and (2) that the communications were in furtherance thereof." *Id.* at 707.

Here, we agree that the trial court erred in stating that defendant would be required to waive the attorney-client privilege, regardless of the substance of Evans's proposed testimony. As the foregoing authorities indicate, waiver depends on the purpose and nature of the testimony. However, considering the purpose for which Evans's testimony was offered, the trial court correctly determined that the privilege would be waived. We will not reverse where the trial

court reaches the correct result. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

According to both the trial record and counsel's arguments when discussing this issue at sentencing, counsel sought to call Evans as a witness only to testify regarding the allegations of witness tampering and bribery. Because these allegations involved ongoing criminal matters, the crime-fraud exception to the privilege would have applied and defendant could not call Evans as a witness without waiving the attorney-client privilege. We note that defendant filed a motion for a new trial in which he offered additional reasons for calling Evans as a witness that would not have required waiver of the privilege. However, he did not identify these other reasons on the record at trial. Moreover, the trial court agreed to allow defendant to make a separate record on this issue, but he did not do so. Under these circumstances, appellate relief is not warranted.

Defendant next argues that the trial court erred by allowing Ronald Wade to testify that while Stewart was testifying at Clark's preliminary examination, a woman in the courtroom looked at Stewart and made a slashing motion with her hand across her throat. Defendant argues that it was improper to allow this testimony because there was no evidence connecting him to the woman who made the threat. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); *People v Long*, 144 Mich 585; 108 NW 91 (1906).

The prosecutor did not offer the evidence to prove defendant's consciousness of guilt, but instead to explain the change in Stewart's testimony after the threat was made. "A witness' motivation for testifying is always of undeniable relevance and a [party] is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). Because the testimony was highly probative to show a possible influence on Stewart's testimony, and it was established that another woman, not defendant, was responsible for the threat, the probative value of this testimony was not substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000).

Next, defendant argues that the prosecutor engaged in misconduct throughout the trial. The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Defendant concedes that he did not preserve many of his clams of misconduct with an appropriate objection at trial. Unpreserved claims of misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Although defendant raises several claims of misconduct, he does not identify the specific factual basis for each claim asserted. He merely provides a list of citations to the record, but without identifying the specific remarks or conduct that he believes were improper, and without linking any specific remarks or conduct to his individual claims of misconduct. A defendant may not leave it to this Court to search for factual support to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). Further, a party may not

simply announce a position or assert error and leave it to this Court to discover and rationalize the basis for his claims. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

To the extent that defendant argues that the prosecutor improperly offered argument or evidence that Marlon Evans was involved in witness tampering while representing defendant, and offered testimony from Demetria Brue, the prosecutor at defendant's first trial, we find no error. "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). But prosecutorial misconduct may not be predicated on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecutor is entitled to attempt to introduce evidence that he legitimately believes will be accepted by the trial court, so long as it does not prejudice the defendant. *Id*. at 660-661. The evidence of witness tampering was admitted by the trial court and the prosecutor had a good-faith reason for offering the evidence, because a witness testified that she was told by defendant's former attorney to testify falsely in order to discredit Stewart. Further, as explained previously, the evidence of the threats against Stewart was admissible to show an attempt to influence her testimony. Thus, the prosecutor properly could comment on this evidence at trial.

Brue's testimony about her observations of Stewart at defendant's first trial was not improper prosecutorial vouching. Brue was acting as a witness, not as an attorney for the state in this case. Her testimony properly was limited to matters of which she had personal knowledge as a witness.

We find no merit to defendant's claim that the prosecutor offered the evidence of possible witness tampering and threats against Stewart for the improper purpose of attempting to inflame the jurors' passions or appeal to their sympathies. As discussed previously, the evidence was offered for a proper purpose and its admission did not constitute misconduct.

Defendant next argues that the trial court erroneously admitted Stewart's testimony from defendant's first trial, because defendant was not afforded an opportunity to cross-examine Stewart at the first trial.

In *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998), this Court explained:

> A defendant has a constitutional right to confront the witnesses against him, US Const, Am VI; Const 1963, art 1, § 20. If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). Yet, there are limits to this right to confront witnesses. The Confrontation Clause " 'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993) (Boyle, J.), quoting *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985). Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). [Emphasis in original.]

"The Confrontation Clause is violated when a defendant is 'prohibited from engaging in otherwise appropriate cross-examination designed . . . "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' " *Cotto v Herbert*, 331 F3d 217, 249 (CA 2, 2003), quoting *Delaware v Van Arsdall*, 475 US 673, 680; 106 S Ct 1431; 89 L Ed 2d 674 (1986), and *Davis v Alaska*, 415 US 308, 318; 94 S Ct 1105; 39 L Ed 2d 347 (1974).

But violations of the Confrontation Clause are subject to a harmless error analysis. *Cotto, supra* at 253. The following series of factors should be considered in deciding if the error was harmless:

> [T]he importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case. [*Van Arsdall, supra* at 684.]

Initially, we note that this Court previously decided in a prior appeal that Stewart's testimony from defendant's first trial was admissible as substantive evidence. *People v Harrington*, unpublished order of the Court of Appeals, entered October 6, 2005 (Docket No. 265614). Accordingly, that decision is the law of the case. See *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 37-38; 536 NW2d 815 (1995).

Furthermore, it is apparent that any error in admitting Stewart's testimony from defendant's first trial was harmless beyond a reasonable doubt. Stewart's testimony from the first trial was generally cumulative of Stewart's testimony from the preliminary examinations. Defendant and codefendant Clark were afforded the right to cross-examine Stewart when she testified at the preliminary examinations. The only distinction was that, at the first trial, Stewart reached a point where she refused to testify any further. Stewart's refusal to cooperate was likewise cumulative of her testimony in this trial. Stewart was available for cross-examination by defense counsel at this trial and defendant had the opportunity to fully question Stewart about her previous testimony before this jury and any other matters he wanted to explore. He was given the opportunity to fully test her testimony in this case. Accordingly, any error was harmless.

Defendant next argues that the trial court improperly precluded him from attacking the credibility of the officer in charge. A trial court's limitation on cross-examination is reviewed for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). The trial court has broad discretion in imposing reasonable limits on cross-examination in order to avoid the harassment of witnesses, confusion of the issues, repetitive questioning, or the admission of marginally relevant evidence. *Adamski, supra* at 138. "Cross-examination may be denied with respect to collateral matters bearing only on general credibility . . . , as well as on irrelevant issues." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

Defendant failed to establish the relevancy to this case of the evidence regarding Towanda Moore and the registration card at the Rancho Motel. Further, the trial court did not completely foreclose examination regarding the officer's alleged misconduct in another case. Rather, the court expressed a willingness to allow inquiry if a proper foundation could be

established during the officer's testimony. Defendant did not revisit the issue later. On this record, no error has been shown.

Defendant next argues that the trial court erred by admitting Stewart's entire videotaped police statement. Contrary to what defendant asserts, the record discloses that the statement was admitted only for impeachment, not as substantive evidence. In *People v Jenkins*, 450 Mich 249; 537 NW2d 828 (1995), the Court explained that when a statement is offered to impeach a witness and the statement contains other prejudicial information, only that portion of the statement that is inconsistent should be admitted. *Id*. at 264. Defendant was offered the opportunity below to explain how portions of the statement would be unduly prejudicial and should not be admitted, but he failed to do so. Similarly, on appeal, defendant has not provided examples of any portions of the statement that he believes were unduly prejudicial. Defendant has failed to establish that the trial court abused its discretion by admitting Stewart's police statement.

Lastly, 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 reviewed in a light most favorable to the prosecution. *Id*. at 514-515.

To convict defendant of first-degree murder, the prosecution was required to prove that 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).

Stewart's prior testimony under oath properly could be considered as substantive evidence. The evidence indicated that defendant and Clark were involved in an argument with the victim during which Clark threatened to kill the victim if he did not give him money. Thereafter, both defendant and Clark physically fought with the victim. While the evidence showed that Clark had possession of a gun just before the victim was shot, the prosecutor argued that defendant was guilty as an aider and abettor. To prove aiding and abetting, the prosecutor was required to prove the following:

> (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*Carines, supra* at 768, quoting *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995).]

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant assisted Clark with knowledge of

Clark's intent to kill the victim. The evidence was sufficient to support defendant's conviction of first-degree murder.

Affirmed.

/s/ Patrick M. Meter
/s/ David H. Sawyer
/s/ Kurtis T. Wilder