STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2008
v COREY ALLEN DOTSON, Defendant-Appellant.	No. 276394 Wayne Circuit Court LC No. 06-011003-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DAVID WILLIAMS, Defendant-Appellant.	No. 276595 Wayne Circuit Court LC No. 06-011003-01

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

In Docket No. 276394, defendant Corey Allen Dotson appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony, MCL 750.227b, assault with intent to commit murder, MCL 750.83, and felon in possession of a firearm, MCL 750.224f. He was sentenced as a third-offense habitual offender, MCL 769.11, to 50 to 120 years' imprisonment for the murder and assault convictions and three to five years' imprisonment for the felon-in-possession conviction, to be served consecutively to a five-year term of imprisonment for the felony-firearm conviction. In Docket No. 276595, defendant David Williams appeals as of right from his jury trial convictions for the same offenses. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 100 to 120 years' imprisonment for the murder and assault convictions and three to five years' imprisonment for the felon-in-possession conviction, to be served consecutively to a five-year term of imprisonment for the felony-firearm conviction. We affirm in both appeals.

Defendants' convictions arose from a shooting at the Brewster Projects in Detroit on July 29, 2006. Bennie Robinson, one of the victims, had known both defendants since childhood and

had grown up with them at the Brewster Projects. He was on cordial terms with defendants until the Brewster Projects reunion in 2001, at which three of Williams's friends and relatives were shot and killed. Thereafter, defendants blamed an associate of Robinson for the shooting and had no further interactions with him. Robinson left the Detroit area in 2002 and returned in 2006.

In the early morning hours on the day of the shooting giving rise to this case, Robinson was sitting in the passenger seat of his mother's Dodge Magnum at the Brewster Projects while Denetrice Self, a childhood friend of Robinson, was sitting in the driver's seat. Robinson heard gunshots and saw Williams firing a gun into the driver's side of the car at close range. Robinson got out of the car and saw Dotson standing toward the back of the vehicle, also holding a gun. Both defendants fired at Robinson as he ran away, but he was not struck. Self died from multiple gunshot wounds. The night before the shooting, Williams called Robinson's cellular telephone and left a message threatening to kill Robinson and his associates. Robinson theorized that defendants were trying to kill him but shot Self by mistake.

Defendant Dotson first argues that the trial court erred by failing to instruct the jury that evidence regarding defendant Williams's threatening telephone message could not be used against Dotson. Because Dotson failed to preserve this issue by requesting a cautionary instruction in the trial court, our review is limited to determining whether a plain error occurred that affected Dotson's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). Reversal is warranted only if a clear or obvious error resulted in conviction despite Dotson's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Carines, supra* at 763-764.

Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). "If the jury instructions, taken as a whole, sufficiently protect a defendant's rights, reversal is not required." *People v Huffman*, 266 Mich App 354, 371-372; 702 NW2d 621 (2005).

Dotson contends that the evidence of Williams's threatening telephone message constituted inadmissible hearsay as used against him. The prosecutor, on the other hand, argues that Williams's statement was admissible against Dotson under MRE 801(d)(2)(E), as a statement by a coconspirator. Under that evidentiary rule, "a statement is not hearsay if [it] is offered against a party and is 'a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.'" *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006), quoting MRE 801(d)(2)(E). In order for a statement of a coconspirator to be admissible, "the proponent must establish that [it] was made during the course of the conspiracy." *Martin, supra* at 317. Here, there exists no evidence that Williams left the threatening message during the course of a conspiracy. Rather, the evidence shows that Williams left the message at approximately 9:30 or 10:00 p.m. the night before the shooting and that Dotson participated in the shooting at approximately 5:00 a.m. the following morning. Williams's message did not refer to Dotson and no evidence indicates that Dotson and Williams conspired to commit the shooting at the time that Williams left the threatening message.

Therefore, Williams's statement was not admissible against Dotson as a statement by a coconspirator.

Nevertheless, even if the statement was inadmissible hearsay against Dotson, he has not shown that the trial court's failure to provide a limiting instruction constituted plain error affecting his substantial rights. Dotson concedes that Williams's message implicated only Williams and did not mention him or refer to him in any fashion. Williams's threatening message was as follows:

> N----r, this is Black Dave. N----r, if you want to soldier up and go against me, that's what you do, N----r, but everybody dying, N----r. And now, if you want to rat against me, that's what you do, N----r, but all you N----rs are dying. Now, you could tell Fat Face, to whoever, to Jab or whoever, C.C. or whoever, N----r, I'm killing everybody, man. You hopped on the wrong squad.

Thus, Williams referred only to himself as the prospective perpetrator. Therefore, notwithstanding that the trial court failed to provide a cautionary instruction, Dotson cannot establish prejudice. For the same reason, he cannot show that counsel's failure to request a cautionary instruction denied him the effective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Next, both defendants argue that the trial court denied them their constitutional right to confrontation by impermissibly limiting their questioning of Robinson. In addition, Williams argues that the trial court's rulings in this regard also violated the rules of evidence as well as his constitutional right to present a defense. We disagree. We review a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). The abuse of discretion standard acknowledges that there may be more than one reasonable and principled outcome in a particular situation. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado*, *supra* at 388; *Babcock*, *supra* at 269. Further, we review de novo whether a trial court's evidentiary rulings implicated a defendant's right to confrontation or to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002); *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

"A primary interest secured by the Confrontation Clause is the right of cross-examination." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). "A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). In other words, "[a] defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *McGhee*, *supra* at 637 (quotation marks and citations omitted). However, "neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject." *Adamski*, *supra* at 138. A defendant does not have a right to cross-examine regarding irrelevant matters, and trial court judges have wide discretion to impose reasonable limits on cross-examination based on concerns such as harassment, prejudice, and marginally relevant or repetitive questioning. *Id*. Likewise, "the right to assert a defense may permissibly be limited by 'established rules of

procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence[.]'" *Toma*, *supra* at 294, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Defendants sought to question Robinson regarding whether he was a drug dealer, whether he was shot at on a previous occasion, and whether he had ever been convicted of and served time for a drug-related offense. Defendants' theory was that, because of Robinson's drug activity, any number of persons may have had a motive to commit the shooting. The trial court did not abuse its discretion by excluding the evidence, and the court's rulings did not violate defendants' right to confrontation or to present a defense.

In *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006), the United States Supreme Court recognized the broad latitude of state and federal lawmakers to establish rules, such as those contained in the Michigan Rules of Evidence, that exclude evidence from criminal trials. The Court cautioned, however, that such latitude has limits and must not deny a defendant "a meaningful opportunity to present a complete defense." *Id*. (quotation marks and citations omitted). The Court acknowledged that rules such as those barring evidence if its probative value is outweighed by unfair prejudice, confusion of the issues, or the potential to mislead the jury have been applied with respect to "evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." *Id*. at 326-327. The Court recognized that these types of rules have pertained to evidence that is speculative or too remote and opined that such rules are widely accepted. *Id*. at 327.

The trial court properly excluded evidence regarding Robinson's previous drug-related convictions because such crimes do not contain elements of theft, dishonesty, or false statement, and the convictions were thus inadmissible under MRE 609. See *People v Parcha*, 227 Mich App 236, 241; 575 NW2d 316 (1997). Further, defendants' theory that evidence involving Robinson's drug-related activity would have shown that others may have committed the shooting was purely speculative. In *People v McCracken*, 172 Mich App 94, 98-99; 431 NW2d 840 (1988), this Court upheld a trial court ruling excluding evidence of third-party culpability on the basis that it was merely speculative. Further, this Court has previously held that evidence tending to incriminate another person is admissible if it creates more than a mere suspicion that someone else was the perpetrator. *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987). Here, defendants point to no one in particular as the true perpetrators. Rather, they argue that evidence of Robinson's drug activity would expand the number of persons who may have wanted revenge against him. Accordingly, defendants' argument posits nothing more than a mere suspicion that others committed the shooting.

Although Dotson argues that Robinson's alleged drug activities would have established bias, Dotson does not explain how the fact that Robinson was involved in dealing drugs, if true, would have established bias on his behalf. To the extent that Dotson may be arguing that Robinson's parole status provided him with a motive to lie, the connection between Robinson's status as a parolee and his motive to lie is likewise unclear. It is undisputed that two men fired gunshots at Robinson, and the only issue was the identity of the shooters. We fail to see how the fact that Robinson was on parole provided a motive to lie regarding the identity of the shooters.

Williams argues that evidence of Robinson's previous convictions should have been admitted to show that Robinson perjured himself at Williams's preliminary examination when he

denied being involved in selling drugs and having ever sold drugs. Williams argues that evidence of Robinson's previous convictions was admissible under MRE 613 as extrinsic evidence of a prior inconsistent statement. To admit evidence under this rule,

> the proponent of the evidence must elicit testimony inconsistent with the prior statement, ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, allow the witness to explain the inconsistency, and allow the opposite party to cross-examine the witness. [*Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007).]

Williams was unable to satisfy the first step of this procedure because the trial court excluded inquiry regarding whether Robinson was a drug dealer on relevancy grounds. Whether the requisites of MRE 613 would have been met at Williams's preliminary examination had counsel attempted to impeach Robinson's testimony with extrinsic evidence was irrelevant during trial. Further, extrinsic evidence of Robinson's previous convictions would not have impeached his trial testimony that he did not use drugs because those convictions occurred years before trial. Merely because he may have used drugs previously did not mean that he used drugs at the time of trial. Therefore, contrary to Williams's argument, evidence of Robinson's previous convictions was not admissible under MRE 613.

Williams next argues that the trial court erroneously refused the jury's request to review the testimony of Robinson and Anthony Capers. It appears that Williams waived review of this issue by agreeing to the trial court's instruction directing the jurors to return to the jury room and use their collective memory to recall the testimony.[1] See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). In any event, Williams's argument lacks merit.

After deliberating less than 1 and 1/2 hours, the jury asked to review the testimony of Robinson and Capers, to which the trial court responded:

> Now, with respect to the testimony regarding Mr. Capers and Mr. Robinson, ladies and gentlemen, this is where your job is difficult, it gets difficult. Because now you have to – the twelve of you have to recollect the testimony of each and every witness. There isn't a written transcript available for your use, at this point.
>
> And you have just begun essentially what is considered deliberations, so you need to go back into the room, take that chalkboard and start writing down—and this is just a suggestion. You do whatever you feel is necessary and works for you. But, typically what will happen is you'll sit back and you'll say, okay, this is what I remember about the testimony. And collectively you will recollect that testimony. Utilize the chalkboard. If you don't have chalk back there, let us

[1] Counsel for Williams also stated that he had no objection when the trial court, at the prosecutor's request, declined to read back the witnesses' testimony to the jury on the Monday morning following the weekend break.

> know. Sometimes we have things back there and other times somebody takes them, so—. But, anyhow, that's what I suggest you do.
>
> It's not proper at this point to even consider a read back. There is no written testimony of the two individuals whose testimony you are seeking to have either read or given in written format. Okay? So, that's what you need to do, ladies and gentlemen.
>
> And, you know, don't be hard on yourselves, okay? Nobody remembers everything all at once. Lord knows, I have my difficulties, especially this week trying to remember everything, okay?
>
> But, what I would suggest is, seriously, all of you get together, just each of you, maybe, add a little point here and there. And it's amazing how collectively you can come up with that testimony, okay?

Thereafter, the jury recommenced deliberations. Four hours later, after the jury sent the court a note stating that it could not reach a verdict, the court provided the standard "hung jury" instruction and instructed the jury that it was free to ask any question, even if it had previously asked the same question.

MCR 6.414(J)[2] states, in pertinent part:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

The trial court's response to the jury's request to review the testimony was a proper exercise of the court's discretion. The court did not foreclose the possibility of the jury reviewing the testimony in the future, but stated that a transcript was not available "at this point." Such a response is reasonable. See *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996). In addition, the court instructed the jury that it could ask any question, even if it had previously asked the same question. Thus, the jury was aware that it could again request to review the testimony if it so desired. Further, the trial court told the parties, outside the presence of the jury, that if it received another note expressing confusion regarding Robinson's or Capers's testimony, it would read back the witnesses' testimony at that time. Thus, the record shows that the court did not foreclose the possibility that the jury could review the requested testimony at a later point.

[2] As of August 5, 2008, certain judges, under a pilot project, are to use different specific procedures concerning jury questions. See Supreme Court Administrative Order No. 2008-2.

Williams next argues that the prosecutor committed misconduct that denied him his right to a fair trial. We disagree. Because Williams did not preserve this issue by objecting to the prosecutor's conduct at trial, our review is under the plain error doctrine. *Carines*, *supra* at 763, 774; *Knapp*, *supra* at 375.

A prosecutor may challenge the truthfulness of a defendant's alibi defense "as part of the truth-seeking process that is a criminal trial." *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002). Thus, if a defendant advances an alternate theory of the case, such as an alibi defense, the prosecutor is free to explore and comment on the validity of the theory. *Id.*; see also, generally, *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995). A prosecutor may not, however, "argue facts not in evidence or mischaracterize the evidence presented[.]" *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Williams argues that the prosecutor mischaracterized his direct examination testimony regarding when he fell asleep on the morning of the shooting and improperly suggested during cross-examination that he had changed his story. It appears that Williams's argument stems from a poorly worded question posed to him on direct examination. Defense counsel questioned Williams as follows:

> *Q.* Okay. Did you ever leave your home—let me ask you this. What time did you get home, if you remember? If you know. The night before you fell asleep—the time before you fell asleep.
>
> *A.* A little bit after 2:00.

On cross-examination, Williams testified as follows:

> *A.* I didn't say exactly what time I went to bed. I went to bed around—some—after 2:00. I know that.
>
> *Q.* I believe on direct examination you said you went to sleep around 2:00.
>
> *A.* Yeah, around—a little after 2:00.
>
> *Q.* Okay. And--
>
> *A.* I got home after 2:00 so I couldn't have went to bed at 2:00.
>
> * * *
>
> *Q.* Now your testimony on direct is that you went to bed right around 2:00 when your attorney kept asking. Do you recall telling us that, sir?
>
> *A.* No, sir. No. I couldn't have went to bed at 2:00 if I got home after 2:00. I never said that.
>
> *Q.* That's what getting caught up does to you, Mr. Williams.
>
> *A.* I never said that.

MR. HARRIS: Objection.

Q. I believe your testimony was you went to bed right around 2:00 or a little bit after. Didn't you tell the jury that both on direct examination and cross?

A. No, I didn't.

* * *

Q. . . . So now, Mr. Williams, tell us last and for good, what time did you go to bed that night, sir?

A. Some time after 2:00.

Q. 2:00? 2:15? 2:30? Because you know what? You are very precise about your movements that evening. Tell me what time you went to bed, sir.

* * *

Q. . . . Tell us, sir. You're precise about the movie time and the location and what you saw. Tell me, what time did you go to bed that night, sir?

A. We got in after 2:00. I went and laid down. She gave me the phone, I know it was after 2:00. I talked to her for a minute and I'm asleep. I know it was after 2:00. I know that for sure. But it was after 2:00 when I got in the house.

Q. Again sir, can you tell me about what time it was, sir, that you went to sleep?

A. Some time after 2:00.

Q. Do you know what back peddling means, Mr. Williams?

Williams's cross-examination testimony shows that the prosecutor did not mischaracterize his testimony, but rather that the prosecutor and Williams disagreed regarding the time at which Williams claimed to have gone to bed. The prosecutor interpreted Williams's testimony as stating that he went to bed at approximately 2:00 or shortly thereafter. Williams, on the other hand, maintained that he went to bed "some time after 2:00." The prosecutor's interpretation of Williams's testimony was reasonable, and a prosecutor is free to argue the evidence and all reasonable inferences drawn therefrom. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Williams also argues that the prosecutor disparaged alibi defenses in general during closing argument and revisited her "backpeddling" theme. The prosecutor argued as follows:

> If I were to ask any of you where were you on these miscellaneous nights come on, do you think you could come up with those kind of details? Or are those details what we like to call alibi? That's the official title for it, ladies and gentlemen. But I tell you, I believe alibi really is a lie by which Defendant tries to

> escape criminal responsibility. That's what an alibi is. A lie by which the Defendant tries to escape criminal responsibility.
>
> * * *
>
> She suggests that they got home at 2:25 and she took a shower and they talked on the phone, etcetera, etcetera. Well, he claims that he went to bed right a little bit after [sic] 2:00. How does that timing work? Again, it's the details that catch you every time, ladies and gentlemen.
>
> The Defendant himself, I submit to you, ladies and gentlemen, by his own admission he's a convicted felon. . . . Mr. Williams indicates to you he's a convicted felon that goes by—with a conviction at least by the name of James Monroe. He wants to tell you that he lives in one address but when confronted with the fact that that's really not the address he lives in, he then backtracks again. Remember, when people are lying you pin them down and that's when the back peddling starts, ladies and gentlemen. I submit that's what the Defendant does. And that's what he does when he's caught by the police. He makes up a lie by which he tries to escape criminal responsibility. And that's the essence of this alibi that I submit to you the Defendant is trying to sell to you.

When read in context, the record clearly shows that the prosecutor was arguing that Williams's alibi defense and his testimony were simply not worthy of belief. A prosecutor may properly challenge the truthfulness of a defendant's alibi defense and argue that a witness, including the defendant, is not credible. *Gray*, *supra* at 48; *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Therefore, the prosecutor's comments were not erroneous.

Williams further argues that defense counsel was ineffective for failing to object to the prosecutor's questioning and comments discussed above. Because the prosecutor's line of questioning and remarks were proper, however, counsel's failure to object did not deny Williams the effective assistance of counsel; a defense attorney is not ineffective for failing to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray