

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRIUS ALPHONZO HAYNES,

Defendant-Appellant.

UNPUBLISHED

July 15, 2010

No. 291576

Wayne Circuit Court

LC No. 08-008833-FC

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

After a jury trial, defendant Derrius Alphonzo Haynes was convicted of one count of second-degree murder, MCL 750.317, one count of assault with intent to commit great bodily harm less than murder, MCL 750.84, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of 40 to 80 years' imprisonment for the second-degree murder conviction, 20 to 40 years' imprisonment for the assault conviction, and one to five years' imprisonment for the felon in possession conviction, and to a consecutive term of two years' imprisonment for the felony-firearm conviction. He now appeals as of right. We affirm.

Defendant's convictions arise from a drug transaction gone awry. Defendant purchased \$3,200 worth of cocaine from Emmitt Rodgers and Cordell McCaroll, but was unsatisfied with the quality. Rodgers and McCaroll agreed to a refund, and Rodgers took back the cocaine, but the men were not prompt in returning defendant's money. Shortly after midnight on May 19, 2008, as Rodgers and McCaroll exited the elevator in Rodgers' apartment building and began walking to Rodgers' apartment, defendant stepped out from behind a wall and pulled a gun from his pocket. Rodgers and McCaroll fled in different directions as defendant pointed the gun at them. Defendant then shot the gun, hitting McCaroll in the chest and killing him.

Defendant did not deny his involvement in the underlying drug transaction and admitted at trial that he was present during the shooting. However, he claimed that Rodgers initiated the shooting by pulling a gun on him, and that the gun went off accidentally as he and Rodgers struggled for control of it.

Defendant's original attorney filed notice that defendant planned to assert the defense of alibi, naming Kabira and Jaamia Wadud of 2047 Marx, Detroit, Michigan, as alibi witnesses and

naming 12311 Laing in Detroit, Michigan, as the place of alibi. A couple months later, defendant received new counsel. At some point, prosecutors also acquired defendant's cellular telephone records, which indicated that defendant placed a call in the vicinity of the shooting shortly after the shooting occurred. Before trial began, defendant's attorney withdrew the notice of alibi.

At trial, FBI agent Christopher Hess testified that defendant made a telephone call at 1:12 a.m. on May 19, a few minutes after the shooting. He determined that when defendant made this telephone call, he was in the vicinity of the shooting. Defendant's cousin, Darian Smith, who lived in another apartment on the floor where the shooting occurred and was also involved in the drug transaction, testified that defendant called to ask about the shooting.

Defendant testified in his own defense at trial, and the prosecutor attempted to use the notice of alibi to impeach him. When questioned at trial, defendant agreed that he was concerned about the contents of his cellular telephone records and tried to contact his cellular telephone carrier to recover them. He also agreed that he told his former attorney that he did not want the prosecution to get his cellular telephone records. Immediately after defendant gave this testimony, the prosecutor asked, "You had [your former attorney] file a notice of alibi, didn't you?" At this point, the defense attorney objected and requested that the jury be excused.

The defense attorney moved for an immediate mistrial, which the trial court refused to grant. However, the trial court expressed concern regarding the prosecutor's use of the term "notice of alibi," fearing that it would confuse the jury or suggest the existence of an inconsistent trial strategy on the part of the defense. The court permitted the prosecutor to inquire into the fact that while defendant testified at trial that he was at the scene at the time of the shooting, he had stated months before that he was not even at the scene. However, the court ordered that the prosecutor not use the term "notice of alibi" in his questioning.

When the prosecutor continued his cross-examination of defendant, no mention was made of a notice of alibi. Instead, the prosecutor established that although defendant had testified the day before that he was present at the shooting, he had indicated months earlier that he was at a house at 12311 Laing Street at the time of the shooting. He also agreed that he was aware that the prosecutor was pursuing his cellular telephone records and that he did not want the prosecutor to have access to them.

On appeal, defendant argues that the trial court erred when it denied his motion for a mistrial in light of the prosecutor's elicitation of testimony from defendant concerning the previously filed notice of alibi. We review a trial court's denial of a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "An abuse of discretion occurs only 'when the trial court chooses an outcome falling outside [the] principled range of outcomes.'" *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

On appeal, it appears that defendant contends that that the prosecutor's use of defendant's previously filed, and then withdrawn, notice of alibi to attempt to impeach defendant constituted such a gross deprivation of defendant's right to a fair trial that a mistrial was warranted. "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich

App 699, 704; 542 NW2d 921 (1995). Defendant argues that because he did not put forth an alibi defense at trial, the prosecutor could not mention the notice of alibi; the fact that defendant merely testified to being at the scene when the shooting occurred did not justify mention of the withdrawn notice of alibi.

In *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001), this Court addressed this particular question. In *McCray*, the defendant was charged in relation to his involvement in a series of assaults arising from a robbery attempt. *Id.* at 633-634. The defendant filed a notice of alibi claiming that he was not at the scene, but at another location in Detroit with three other individuals. *Id.* at 635. However, when he testified in his own defense at trial, he acknowledged that he was present at the scene of the robbery but claimed that his companions committed the assaults in question. *Id.*

On appeal, the defendant in *McCray* argued that because he did not pursue an alibi defense at trial, the trial court erred when it admitted his notice of alibi as impeachment evidence. *Id.* In addressing this question, the *McCray* Court considered this Court's earlier ruling in *People v Von Everett*, 156 Mich App 615; 402 NW2d 773 (1986), in which the defendant's notice of alibi was properly admitted as impeachment evidence after the defendant testified regarding an inconsistent alibi. *Id.* at 635.

The *McCray* Court rejected the defendant's attempts to distinguish *Von Everett* on the ground that the defendant in *Von Everett* had presented an alibi defense that was inconsistent with the notice of alibi, while the defendant in *McCray* did not rely on an alibi defense at trial. *McCray*, 245 Mich App at 636. Instead, the *McCray* Court concluded:

[T]he holding of *Von Everett* is not limited to situations where a defendant testifies regarding an inconsistent alibi. Rather, as a party-opponent admission, the notice of alibi may be used to impeach defendant's credibility at trial when his testimony is inconsistent with the contents of the alibi notice. Here, as in *Von Everett*, defendant's Fifth Amendment right not to testify was not infringed, because the court permitted the impeachment only after defendant testified that he was present at the scene, but did not participate in the attempted robbery or the shooting. Accordingly, we conclude that the trial court did not abuse its discretion in admitting statements made in defendant's notice of alibi defense for the purpose of impeaching defendant.¹ [*Id.* at 636-637.]

¹ In a footnote, the *McCray* Court stated:

We thus distinguish this situation from those where a prosecutor attempts to comment on a defendant's failure to put forth an alibi defense after he has filed a notice of alibi defense, or comment on the defendant's failure to produce a witness listed on a notice of alibi, when the defendant has not presented an alibi defense. See, e.g., *People v Holland*, 179 Mich App 184; 445 NW2d 206 (1989); *People v Hunter*, 95 Mich App 734; 291 NW2d 186 (1980); *People v Shannon*, 88 Mich App 138; 276 NW2d 546 (1979). "Such comment is tantamount to shifting the burden of proof by allowing the jury to make adverse inferences from

(continued...)

This Court's ruling in *McCray* is directly applicable to the present case. In this case, defendant testified at trial in his own defense, claiming that he was at the scene of the shooting, that Rodgers tried to threaten him with a gun, and that the gun accidentally went off as he and Rodgers struggled. This testimony is inconsistent with the notice of alibi, which indicates that defendant claimed to be at 12311 Laing Street in Detroit with two other individuals at the time of the shooting. The prosecutor brought up the notice of alibi in an attempt to impeach defendant by questioning him regarding what amounted to a previous assertion by defendant that he had been elsewhere at the time of the shooting. Such use of the notice of alibi for impeachment purposes is clearly permitted by *McCray*. Accordingly, the prosecutor's mention of the notice of alibi did not constitute an irregularity in the trial that was so prejudicial to defendant's rights that it impaired his ability to receive a fair trial. *Lugo*, 214 Mich App at 704. The trial court did not abuse its discretion when it denied defendant's request for a mistrial.

Defendant also argues that the trial court erred when it failed to give a curative instruction to the jury regarding the notice of alibi. However, because there is no error associated with the use of the notice of alibi, no curative instruction is necessary.²

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens

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defendant's or the alibi witness's failure to testify." *Holland*, [179 Mich App] at 190. Where, as here, the alibi notice is used to impeach a defendant's credibility, burden shifting is not implicated. [*McCray*, 245 Mich App at 637 n 1.]

² We also note that although defendant claims that the trial court agreed to provide a curative instruction regarding the admissibility of the notice of alibi and its contents, the court's references to giving the jury a curative instruction referred solely to its concern that the phrase "notice of alibi" might confuse and prejudice the jury. Further, although the trial court did not provide a specific instruction telling the jury to disregard the reference to the phrase "notice of alibi," when questioning resumed, the trial court instructed the jury that the prosecution had the burden of proof and had to prove guilt beyond a reasonable doubt. The court also instructed the jury that the questions posed by the attorneys were not evidence, and defendant's attorney stated that he was satisfied with the instructions provided. To the extent the use of the term "notice of alibi" could be considered improper or prejudicial, the trial court's instructions were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).