

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DEKHAIRA MOORE,

Defendant-Appellant.

UNPUBLISHED

August 26, 2010

No. 290256

Wayne Circuit Court

LC No. 08-007561-FC

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent prison terms of life without parole for each first-degree murder conviction, 20 to 40 years for each assault conviction, and one to five years for the felon in possession conviction. He also received a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arose from the shooting deaths of François Fields and Felicia Amerson, and the nonfatal shootings of Pierre Pulley and Mack Law, on the afternoon of September 16, 2007, on Walton Street in Detroit. Several witnesses to the shooting testified that two masked gunmen shot the victims outside a house and then fled toward Sparta Street. Two of defendant's relatives, Juanita and David Steward, heard the gunshots and then saw defendant and Edward Winston emerge from an area on Sparta Street, coming from the direction of the shooting. They were wearing clothes and carrying firearms that matched witness descriptions of the masked gunmen.

Juanita did not initially report what she saw to the police. However, she told some friends and relatives what she knew and subsequently gave a statement to the police on September 21, 2007. She gave another statement pursuant to an investigative subpoena on October 18, 2007. Juanita's brother, David Steward, testified that she reported receiving threats of harm from defendant, and Juanita's grandmother testified that Juanita told her that she had been threatened by "Mark." On the day Juanita spoke to the prosecutor in connection with the investigative subpoena, she received a telephone call from a person she identified as "Mark," who stated, "You know, bitch, you got to make it there first." Juanita reportedly received several

other threats, including a call in which the caller stated, “Bitch, you dead. Dead bitch walking.” In relation to this call, Juanita told her friend that it had “affiliation with Mark.” On December 11, 2007, Juanita was shot to death while at another friend’s house. Juanita’s friend testified that shortly after hearing two gunshots, she saw defendant emerge from her house and flee. Relying on the forfeiture by wrongdoing rule, MRE 804(b)(6), the trial court granted the prosecutor’s pretrial motions to admit Juanita’s prior statements at defendant’s trial. The court also permitted the prosecutor to introduce evidence of defendant’s threats against Juanita and involvement in Juanita’s death to show defendant’s consciousness of guilt. The defense theory at trial was misidentification.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence of his identity as one of the two shooters. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution, to justify a conviction, must prove the identity of the defendant as the perpetrator of the charged offense beyond a reasonable doubt, see *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Positive identification by a witness may be sufficient to support a conviction of a crime. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Questions concerning the credibility of the identification testimony are for the trier of fact to resolve, and this Court will not resolve them anew. *Id.*

In this case, there was ample evidence to enable the jury to find that defendant was one of the two shooters. The evidence showed that defendant and his associates had previously discussed killing Fields on at least three different occasions. There was evidence that, on the day of shooting, defendant spoke to two of his associates who were with the victims on Walton Street. After speaking with defendant, the two associates left, shortly before the shooting began. One of the associates testified that he left because he “did not want to be laying down like those other people.” During the shooting, witnesses observed two young men, dressed in black and wearing hoodies and masks, approach the victims from the side of a house. Witnesses provided descriptions of the apparent ages, heights, and weights of the men. One man had a long gun and the second, shorter man had a handgun. According to the witnesses, the men fled toward Sparta Street, with the taller man in front. Within minutes after hearing gunshots originating from Walton Street, David and Juanita Steward saw their cousin, defendant, running from the direction of Walton Street, carrying a long shotgun. David made eye contact with defendant, “could see his face clearly,” and had “no doubt” that the person was defendant. According to her statement, Juanita also was “absolutely positive” that the person was defendant, and actually spoke to him, warning him to keep running. David and Juanita then saw Winston emerge from the same area, carrying a handgun. Shortly after the shooting, a witness encountered defendant and Winston at a neighborhood drug house. Both men were dressed in black, defendant was carrying a long gun, and Winston had a handgun.

Viewed in the light most favorable to the prosecution, this evidence was sufficient to permit a rational trier of fact to reasonably infer that defendant was the taller shooter with the long gun. Contrary to defendant's argument, it was not necessary that a witness to the actual shooting identify him as one of the shooters in order for the convictions to be valid. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Further, defendant's challenges to the weight of the evidence and the credibility of witnesses do not implicate the legal sufficiency of the evidence. Indeed, this Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe*, 440 Mich at 514-515. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). There was sufficient evidence of defendant's identification to support his convictions for the charged offenses.

II. ADMISSION OF EVIDENCE

Defendant next argues that the trial court erred in admitting Juanita's prior statements at his trial, and in admitting evidence of his threats against Juanita and involvement in her death. Regarding the former, defendant argues that Juanita's prior statements were not admissible under MRE 804(b)(6) and that the introduction of the statements at trial violated his constitutional right of confrontation. Regarding the latter, defendant argues that the evidence of the threats against Juanita and his involvement in her death was not relevant to this case and was unduly prejudicial under MRE 403.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Constitutional issues are reviewed de novo. *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002).

A. JUANITA'S PRIOR STATEMENTS

Juanita's prior statements, although hearsay, were admitted under MRE 804(b)(6), which provides that a declarant's out-of-court statement is admissible if the declarant is unavailable as a witness and the "statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Juanita was unavailable to testify at defendant's trial because she had been fatally shot. However, in order to admit Juanita's statements under MRE 804(b)(6), the trial court was required to find by a preponderance of the evidence that defendant, the party against whom the statements were being offered, was responsible for Juanita's unavailability by engaging in or encouraging wrongdoing that was intended to prevent her availability as a witness. See *People v Jones*, 270 Mich App 208, 215-217; 714 NW2d 362 (2006).

Evidence established that Juanita witnessed events that could link defendant to the Walton Street shooting. Juanita did not initially report what she knew to the police, but she shared her information with friends and relatives, and eventually she came forward and gave a police statement and another statement pursuant to an investigative subpoena. During this time, she began receiving threats that were related to her willingness to provide information about

defendant's connection to the Walton Street shooting. Juanita identified defendant as the source of the threats. In December 2007, before defendant's trial, Juanita was shot to death while at a friend's house. Juanita's friend testified that shortly after hearing two gunshots, she saw defendant emerge from her house and flee.

In light of the evidence connecting defendant to the threats against Juanita, and also to Juanita's shooting death, and the evidence that the threats were related to Juanita's willingness to impart what she knew about defendant's connection to the Walton Street shooting, the trial court did not err in finding that a preponderance of the evidence showed that defendant engaged in wrongdoing that was intended to, and did, procure Juanita's unavailability as a witness at defendant's trial. Therefore, the trial court did not abuse its discretion in finding that Juanita's prior statements were admissible under MRE 804(b)(6).

Defendant also argues that the admission of Juanita's prior statements violated his rights under the Confrontation Clause. We disagree. A "[d]efendant's constitutional right to confrontation is waived under the doctrine of forfeiture by wrongdoing if hearsay testimony is properly admitted because the declarant's unavailability was procured by defendant's wrongdoing." *Jones*, 270 Mich App at 215; see also *Crawford v Washington*, 541 US 36, 62; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (the rule of forfeiture by wrongdoing extinguishes Confrontation-Clause claims on essentially equitable grounds). Here, defendant's inability to confront Juanita was due to his own acts of wrongdoing intended to procure her unavailability as a witness. Thus, defendant waived his constitutional right of confrontation.

B. DEFENDANT'S THREATS AND CONDUCT RELATED TO JUANITA'S DEATH

Defendant also argues that the trial court abused its discretion by admitting evidence that he threatened Juanita and was involved in her death. He argues that the evidence was irrelevant and unduly prejudicial. We disagree.

A defendant's threat against a witness is generally admissible because it is conduct that can demonstrate consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). For such evidence to be admissible, some evidence tending to show a connection between the threats and the defendant must be shown. *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). Here, there was evidence that Juanita had information that would be damaging to defendant at a trial, that she received initial threats of harm from defendant, and that she received a threatening telephone call from "Mark." The evidence was sufficient to establish a connection between defendant and the threats. *Id.* at 577. Further, the evidence that Juanita's friend was present when Juanita was shot and her testimony that she saw defendant emerge from her house after hearing the shots was sufficient to connect defendant to Juanita's shooting death. Defendant's actions, intended to prevent Juanita from testifying against him, were relevant because they tended to show his awareness of guilt for the charged crimes. *Sholl*, 453 Mich at 740.

We also disagree with defendant's argument that the evidence should have been excluded under MRE 403 because it was unduly prejudicial. Relevant evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403 is not intended to exclude "damaging" evidence, as any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450

Mich 1212 (1995). Instead, it “is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded.” *Id.* (emphasis in the original). Unfair prejudice exists where there is “a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury” or “it would be inequitable to allow the proponent of the evidence to use it.” *Id.* at 75-76 (internal citations and quotation marks omitted); see also *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002).

The principal issue in this case was identification. According to Juanita’s statements, she did not see the actual shooting, but she heard the gunshots. Further, Juanita indicated that shortly after hearing the gunshots, she observed defendant running from the direction of the shooting, the same area where witnesses had observed the gunmen flee, and defendant was wearing clothing and carrying a gun that matched the descriptions of one of the gunman. Juanita was “absolutely positive” that the person she saw was defendant, her cousin. Juanita’s statements indicate that she would have been able to provide significant circumstantial evidence of defendant’s identity as one of the shooters. Although there were several witnesses to the actual shooting, those witnesses were not able to identify the shooters because they were wearing masks. Under these circumstances, the evidence of defendant’s threats against Juanita and his involvement in her death to thwart her testimony was not marginally probative. Rather, it was probative of the issue of defendant’s identity, the principal issue at trial. In addition, the absence of direct evidence of defendant’s identification as one of the shooters enhanced the value of the evidence. Further, in referring to the evidence during opening statement and closing argument, the prosecutor focused on the proper purposes for which the evidence was admissible. Indeed, in her opening statement, the prosecutor advised the jury that “you are not here to render verdict on Juanita Steward’s murder.” In closing argument, the prosecutor argued that defendant threatened and killed Juanita because of her connection to this case, specifically, because defendant knew that Juanita “was willing to tell the police what she had seen that day.” The prosecutor did not use the evidence to argue that defendant should be convicted because he was a bad person or should be punished for what happened to Juanita. Under these circumstances, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Accordingly, the trial court did not abuse its discretion in admitting the evidence of the threats against Juanita and defendant’s involvement in her death.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering