

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELBERT HUGHES,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 301332

Wayne Circuit Court

LC No. 09-022390-FC

Before: MURRAY, P.J., and WHITBECK and RIORDAN, JJ.

PER CURIAM.

Defendant, Delbert Hughes, appeals as of right his September 22, 2010, jury convictions for felony-murder, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On October 8, 2010, defendant was sentenced, as a second habitual offender, MCL 769.10, to concurrent terms of life in prison for felony-murder and 22 to 60 months' imprisonment for felon in possession of a firearm, to run consecutive to two years' imprisonment for felony-firearm. We affirm.

This case arises from a shooting that occurred at a gas station on East Seven Mile in Detroit. On May 29, 2009, Delores Baker, the mother of defendant's child, drove defendant and defendant's brother, Darius Hughes, to the gas station. Defendant walked away from the car and, a few seconds later, witnesses heard two gunshots. Defendant then got back in the car and Baker, defendant, and Darius drove away. The victim, Lee Flewellyn, stumbled toward the gas station entrance with a gunshot wound to his abdomen and fell before he could reach the door. Police arrived and EMS took Flewellyn to the hospital, but he died just as the ambulance arrived.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that the prosecution did not present sufficient evidence that he

was guilty of attempted larceny or attempted robbery as the predicate felony for his felony-murder conviction, that he possessed a firearm, or that he shot Flewellyn.¹

This Court reviews a claim of insufficient evidence de novo, in the light most favorable to the prosecution, and determines whether a rational trier of fact could find the elements of the crime were proved beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). In conducting this review, this Court will not disturb the factfinder's determinations of the credibility of witnesses or the weight of the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007), citing *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of felony murder are:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [the statute . . .]. [*People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), quoting *People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999).]

Larceny is included as an underlying felony in the felony-murder statute. MCL 750.316(1)(b). Accordingly, attempted larceny may serve as a predicate felony. *Nowack*, 462 Mich at 401. Larceny is the taking of goods or property of another, without the owner's consent, and a carrying away of that property with felonious intent. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999), quoting *People v Anderson*, 7 Mich App 513, 516; 152 NW2d 40 (1967). To prove a defendant is guilty of felony-firearm, the prosecution must show he possessed or carried a firearm while committing or attempting to commit a felony. *People v Johnson*, 293 Mich App 79, 82-83; 808 NW2d 815 (2011). Possession can be shown with circumstantial evidence. *Id.* at 83. With respect to defendant's felon-in-possession conviction, MCL 750.224f provides, in relevant part:

(1) . . . [A] person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:

(a) The person has paid all fines imposed for the violation.

(b) The person has served all terms of imprisonment imposed for the violation.

¹ Defendant's argument heading indicates that he is arguing insufficient evidence relative to attempted robbery, while his argument focuses on attempted larceny. The trial court instructed on both crimes.

(c) The person has successfully completed all conditions of probation or parole imposed for the violation.

There was sufficient evidence presented at trial for a rational jury to conclude that the prosecution proved beyond a reasonable doubt that defendant was guilty of attempted larceny and that he shot and killed Flewellyn with a firearm during that attempt. Both defendant's brother, Darius, and the mother of his child, Baker, testified that they dropped defendant off at a gas station in Baker's blue Buick, parked at a gas pump and, a few minutes later, defendant came over to the car and mentioned "hitting a lick," meaning to steal something or rob someone. ATM records showed defendant unsuccessfully used the ATM inside the gas station, and surveillance footage showed defendant inside the gas station. According to Darius, when defendant returned to the car he said he already "had a lick," apparently meaning he had already found a target. Darius and Baker testified defendant then walked off again and they almost immediately heard two gunshots. Baker started to drive off, but heard defendant calling to her. She saw defendant coming from the area where a white Cherokee that belonged to Flewellyn was parked. Detroit Police Lieutenant Sabatini saw Flewellyn when she arrived on the scene, injured and lying near the gas station door. Flewellyn told Sabatini he had been shot by a black male, about 28 years old, with a medium build and facial hair, and that he had not given anything to the man that shot him. Flewellyn later died of his gunshot wound. Finally, the parties stipulated that defendant had a prior felony conviction and was ineligible to possess or carry a firearm as of May 29, 2009. This evidence, when viewed in the light most favorable to the prosecution, would allow a rational jury to find that the prosecution proved beyond a reasonable doubt that defendant attempted to take goods or property from Flewellyn without his consent, that defendant intended to carry away that property feloniously, that defendant was a convicted felon ineligible to possess a firearm, that defendant had a gun, and that he shot and killed Flewellyn during the attempted larceny. Vacation of defendant's convictions is not required on this ground.

Defendant also argues that the prosecution did not lay a proper foundation to admit Sabatini's testimony about Flewellyn's statements made to her as a dying declaration and that, without Flewellyn's statement that he did not give anything to his shooter, the prosecution could not prove defendant was guilty of attempted larceny. The challenged testimony came in without objection. When reviewing a claim of insufficient evidence, even hearsay that was technically inadmissible, but was admitted without objection, must be considered. *People v Maciejewski*, 68 Mich App 1, 3; 241 NW2d 736 (1976). The purpose of the inquiry is to determine whether the jury acted rationally based on the evidence before it, not whether improperly admitted evidence violated a defendant's due process rights. *McDaniel v Brown*, 558 US ___, ___; 130 S Ct 665, 672-673; 175 L Ed 2d 582 (2010). Accordingly, we may consider Sabatini's testimony about Flewellyn's statements regardless of whether it was technically admissible. However, even if this testimony were not taken into account, the evidence was still sufficient to allow a rational jury to find that the prosecution proved each element of attempted larceny beyond a reasonable doubt. Taken in the context of the other evidence presented, the jury could have easily inferred from Darius and Baker's testimony regarding defendant's statement about "hitting a lick" that defendant had been trying to steal from or rob Flewellyn.

Because there was sufficient evidence to find defendant was guilty of attempted larceny, we need not reach the question of whether sufficient evidence existed on attempted robbery.

II. OPINION TESTIMONY OF DEFENDANT'S GUILT

We also disagree with defendant's argument that the trial court erred by allowing Detroit police officer Christine Thomas to testify directly on the subject of defendant's guilt, violating defendant's right to a fair trial.

This Court reviews a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A trial court's decision on a close evidentiary question cannot be an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001), citing *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982).

To preserve for appeal an issue of evidentiary admissibility, a party must object at trial and assert the same ground for objection as he asserts on appeal, unless the ground is apparent from the context. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); MRE 103(a)(1). Defense counsel objected to the testimony at issue, but did not articulate the basis of her objection, and the ground cannot be discerned from the context. In fact, the only objection even slightly suggested by the context was a hearsay objection based on a lack of foundation to admit a dying declaration under MRE 804(b)(2), but defendant argues on appeal that the testimony was improper opinion testimony with respect to defendant's guilt and, therefore, an improper invasion of the jury's province and a violation of defendant's right to a fair trial. There is no suggestion that this was the basis for any objection made. Accordingly, this issue is not preserved on appeal, and unpreserved errors are reviewed for plain error affecting a defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011), citing *Carines*, 460 Mich at 764. Even if a defendant can show plain error, reversal is warranted only if the error resulted in conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Kowalski*, 489 Mich at 506 (quotations omitted), quoting *Carines*, 460 Mich at 763.

Evidence is admissible if it is relevant and not unduly prejudicial. *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010), citing MRE 402-403. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. All relevant evidence is prejudicial, but the prejudice is unfair only when it outweighs the probative value of the evidence substantially or, in other words, "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Novak*, 489 Mich 941, 942; 798 NW2d 17 (2011), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Although expert "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact" under MRE 704, a witness may not testify regarding her opinion of a

defendant's guilt or innocence. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985).

The exchange at trial to which defendant objects is as follows:

Q. Did the victim tell you how he was shot?

A. Yes.

MS. REED: Objection, your Honor.

THE COURT: There's nothing wrong with the question.

Q. (By Ms. Screen, continuing): Did his statement relate to the defendant?

A. Yes. He [said] that he was shot by--

MS. REED: (Interposing) Objection, your Honor.

THE COURT: He said he was shot what?

THE WITNESS: By the defendant.

THE COURT: He said he was shot by the -- Those were his words—

THE WITNESS: (Interposing) By a black male.

THE COURT: His exact words [were] that he was shot by the defendant?

THE WITNESS: No.

THE COURT: Okay.

Thomas was not actually offering her opinion that defendant was the shooter, but rather she may have misspoken regarding the statement Flewellyn gave her before he died. Thus, this situation is distinguishable from the cases defendant cites because in those cases the witness was specifically asked to comment on a defendant's guilt or the reliability of the testimony offered by those who testified against the defendant. See *People v Smith*, 158 Mich App 220, 230-231; 405 NW2d 156 (1987) (the prosecution improperly elicited testimony from police witnesses bolstering the innocence and credibility of a conspirator, who was the only other person that could have committed the crime besides the defendant); *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995) amended 450 Mich 1212 (1995) (court upheld a ban on expert witness testimony regarding the truthfulness of victims' accusations that a particular defendant had sexually abused them because it went directly to the issue of the defendant's guilt); *Cooper v Sowders*, 837 F2d 284, 287 (CA 6, 1988) (prosecution erred when it asked a police witness to

opine whether the evidence supported a finding of guilt on behalf of any other suspects, and the witness testified the only person linked to the crime by the evidence was the defendant).

The testimony by Thomas does not even approach the impropriety of the testimony in the aforementioned cases. Thomas was not testifying as an expert witness, the prosecution did not attempt to elicit opinion testimony from her regarding defendant's guilt, and Thomas was not even testifying regarding her own thoughts on defendant's guilt; she was merely relaying what Flewellyn had told her. And, even if Thomas's testimony was improper, the trial court immediately interrupted to clarify, at which point Thomas explained that Flewellyn did not actually say defendant shot him, merely that he had been shot by a black male. Thus, any implication that the victim identified defendant as the shooter was immediately retracted. Further, as noted above, even without testimony regarding Flewellyn's statements, there was sufficient evidence to convict defendant. Defendant has not established plain error affecting his substantial rights and, therefore, a new trial is not warranted on this ground.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that his trial counsel was ineffective for failing to move to strike Thomas's testimony, seek a curative instruction, or move for a mistrial.

An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* A trial court's findings of fact are reviewed under a clearly erroneous standard. *Id.*, citing MCR 2.613(C); MCR 7.211(A)(3)(a). Constitutional law questions are reviewed de novo. *Id.*

To preserve for appeal a claim of ineffective assistance of counsel, a defendant must move the trial court for a new trial or *Ginther*² hearing. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009), citing *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant did not do so. Because defendant failed to preserve this issue, and no evidentiary hearing was held, this Court's review is "limited to mistakes apparent on the record." *Payne*, 285 Mich App at 188.

To prove ineffective assistance of counsel, a defendant must show counsel's performance was deficient and that the deficiency resulted in prejudice to the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, the defendant must demonstrate a reasonable probability of a different outcome were it not for counsel's deficiency. *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004), citing *Strickland*, 466 US at 694. There is a "strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Mich at 600, citing *Strickland*, 466 US at 690. Counsel's performance must be evaluated without the benefit of hindsight. *Grant*, 470 Mich at 485, citing *Strickland*, 466 US at 689.

As noted, immediately after Thomas testified that Flewellyn had told her that he was shot by defendant, the trial court interrupted to question her, and Thomas clarified that Flewellyn told her he was shot by a black male, not by "defendant." Because the purportedly improper testimony was immediately corrected, it was well within the realm of trial strategy for defense counsel not to move to strike the testimony, seek further curative instruction, or move for a mistrial. Additionally, it is unlikely these motions would have been successful, since Thomas was not actually opining on defendant's guilt but, instead, merely mischaracterized Flewellyn's statement. Further, as explained above, there was ample evidence to convict defendant even without police testimony regarding Flewellyn's statements. Therefore, defendant has not established a reasonable probability that the outcome of his trial would have been different if counsel had sought further remedy in relation to Thomas's statements.

IV. PRESENTATION OF PURPORTEDLY FALSE TESTIMONY BY THE PROSECUTION

Finally, in his Standard 4 brief, defendant argues on appeal that his right to a fair trial was denied by the prosecution's presentation of false testimony both at trial and at the preliminary examination.

The elicitation of false testimony is a due process issue presenting a question of constitutional law which this Court reviews de novo. *People v Herndon*, 246 Mich App 371, 416-417; 633 NW2d 376 (2001). An issue that was not raised in the trial court is not preserved on appeal. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010). Defense counsel never objected to any of the purportedly false testimony, so we review this for plain error affecting a defendant's substantial rights. *Kowalski*, 489 Mich at 505. Again, even if a defendant can show plain error, reversal is warranted only if the error resulted in conviction of an innocent defendant or "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 506 (citation and quotations omitted).

"[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Prosecutors cannot knowingly use false testimony, and have a duty to correct false evidence. *Herndon*, 246 Mich App at 417, quoting *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). The focus of a false-testimony inquiry is not on the culpability of the trial court or the prosecutor, but on the fundamental fairness of the trial. *Aceval*, 282 Mich App at 390. Knowledge of the falseness of a witness's testimony will not be imputed to a prosecutor merely because it is inconsistent with other testimony. *Lester*, 232 Mich App at 278-279, citing *United States v Lopez*, 985 F2d 520, 524 (CA 11, 1993). The prosecutor's disclosure obligation may be satisfied by a thorough exploration of inconsistencies in a witness's testimony through cross-examination. See *People v Mumford*, 183 Mich App 149, 152-153; 455 NW2d 51 (1990) (holding that a prosecutor's duty to disclose the grant of immunity or a plea bargain in exchange for testimony may be satisfied when the jury learns of such facts through cross-examination).

A. DARIUS HUGHES'S TESTIMONY AT TRIAL

In his statement to police on June 4, 2009, Darius said that, during the incident at the gas station, he exited the car to pump gas and purchased a cigarette from someone outside the station. At trial he testified that he never actually pumped gas and that, rather than buying a cigarette from anyone, Baker had given him one. Darius admitted that he lied to the police about these two details and omitted other information from the statement he gave, but maintained that the rest of his testimony was true.³

The inconsistency of Darius's trial testimony with that of his prior statements or Baker's testimony does not imply the prosecutor had actual or constructive knowledge that the testimony was false. *Lester*, 232 Mich App at 278-279, citing *Lopez*, 985 F2d at 524. The only additional argument defendant makes to support this contention is that, because Darius told the police that defendant asked him about hitting a lick while he was pumping gas, and Darius later revealed that he never actually pumped gas, Darius's entire story is false. This is not a logical conclusion. Finally, even if the prosecutor did know of the falsity of the testimony, the inconsistencies in Darius's testimony were explored on cross-examination, satisfying the disclosure requirement. Defendant has not shown that the prosecution's presentation of Darius's trial testimony constituted plain error affecting his substantial rights.

B. DARIUS HUGHES'S TESTIMONY AT PRELIMINARY EXAMINATION

Preliminary examination in Michigan is a statutory right, not a constitutional one. *People v Apgar*, 264 Mich App 321, 328; 690 NW2d 312 (2004). Error made at the preliminary examination stage in binding over a defendant is generally rendered harmless by the presentation of sufficient evidence to convict the defendant at a fair trial. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010), citing *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). However, a prosecutor is still prohibited from knowingly presenting false testimony at a preliminary examination, and such error may warrant reversal. *People v Thornton*, 80 Mich App 746, 749; 265 NW2d 35 (1978).

Here, defendant was convicted based upon sufficient evidence at trial. Additionally, nothing has been presented to establish that the prosecution presented false testimony. Accordingly, defendant has not shown that the prosecution's presentation of Darius's preliminary examination testimony constituted plain error affecting defendant's substantial rights.

C. OFFICER SABATINI'S TESTIMONY AT TRIAL

³ Defendant claims that these were not the only untrue statements made by Darius and that, in fact, the entirety of Darius's trial testimony was untrue. Defendant claims "there was evidence to prove it," and points generally to video evidence and Baker's testimony. However, defendant does not explain how the video evidence proves Darius's testimony was false.

In support of defendant's contention that Sabatini gave false testimony, he attaches her police report, from which she refreshed her recollection during trial. However, the police report was never admitted at trial, and defendant cannot expand the record on appeal. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998) aff'd in part, rev'd in part on other grounds 462 Mich 415 (2000), citing *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990). Defendant offers no other factual basis upon which this Court can conclude that Sabatini lied on the stand. Further, defendant's only ground for arguing that the prosecutor knew Sabatini's testimony was false was that the prosecutor also had a copy of the police report. Defendant has not shown that the prosecution's presentation of Sabatini's trial testimony constituted plain error affecting defendant's substantial rights and, accordingly, relief is not warranted on this ground.

Affirmed.

/s/ Christopher M. Murray

/s/ William C. Whitbeck

/s/ Michael J. Riordan