STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2012
v	No. 305097 Wayne Circuit Court
CEDRIC DONTEZ DOBBS, Defendant-Appellant.	LC No. 11-000251-FC

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Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

In these consolidated appeals, defendant challenges his jury-trial convictions of three counts of assault with intent to commit murder, MCL 750.83,[1] two counts of felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 25 to 40 years' imprisonment for the assault convictions, three to ten years' imprisonment for the felon-in-possession convictions, and two years' imprisonment for the felony-firearm convictions. We affirm.

[1] Defendant was also convicted of other assault-based crimes arising out of the same events; however, the trial court vacated those convictions on double jeopardy grounds.

Defendant was charged with shootings that took place on two separate dates, September 16 and October 29, 2010. In the first incident, defendant maneuvered his car in an attempt to block a vehicle driven by Martez Graham from backing out of a driveway. Defendant then uttered some hostile words before firing a weapon at Graham's vehicle as Graham was taking evasive action. Graham was struck by gunfire in the neck and chest and crashed into a tree. An elderly man in the neighborhood, Juan Muckleroy, drove Graham to the hospital after Graham had stumbled out of his car and knocked on Muckleroy's door yelling for help. Graham, who definitively identified defendant as the shooter, testified that defendant was angry at Graham relative to a dispute concerning a sexual relationship between Graham and the mother of defendant's children. The two men had previously engaged in arguments before the shooting. With respect to the second incident slightly over a month later, Graham was driving a vehicle accompanied by his cousin, Jannissares King, when defendant pulled alongside in his own vehicle at a stop sign and began shooting at Graham and King with an assault rifle. Graham was not injured, but King suffered a bullet wound to his left shoulder. Graham again identified defendant as the shooter. King twice identified defendant as the shooter before trial; however, King refused to testify at trial after taking the stand and answering some preliminary questions, leading to King being jailed for contempt of court. There was some police testimony about King's pretrial identifications of defendant as the shooter in the second incident. As to both shootings, there was police testimony regarding gunfire damage to the vehicles driven by Graham.

Defendant first argues that he was denied his constitutional right to present a defense, where the trial court did not permit him to introduce evidence that numerous third parties had a motive to shoot or harm Graham. This evidence consisted of a videotape that purportedly depicted Graham and other individuals committing an assault on a third party, a statement made by Graham at the preliminary examination that "I guess somebody hater trying to get me locked up,"[2] details about alleged disputes between Graham and several other men that were denied by Graham during his examination, personal protection orders (PPOs) issued against Graham involving a female, and an argument between Graham and some individual that led to Graham's arrest relative to a stolen truck.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes admi[ssion] of the evidence." *Id.* These preliminary questions of law are reviewed de novo, and when such questions "'are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.'" *Id.* (citation omitted). A criminal defendant has a fundamental constitutional right to present a defense through the introduction of supporting evidence, but "an accused's right to present evidence in his defense is not absolute." *People v Unger*, 278 Mich App 210, 249-250; 749 NW2d 272 (2008). The state can establish rules that exclude the presentation of

[2] Graham gave this testimony in response to a question regarding the presence of an invalid license plate on a vehicle driven by Graham and whether Graham knew anything about the invalid plate.

evidence in criminal trials, and such rules do not abridge a defendant's right to present a defense unless they are arbitrary or disproportionate to the purposes the rules are designed to serve. *Id.* at 250.

In *People v Kent*, 157 Mich App 780; 404 NW2d 668 (1987), the defendant was convicted of arson of a dwelling house, a trailer, and the male owner of the trailer, who was allegedly having an affair with the defendant's wife, died as a result of the fire. The defendant claimed that the trial court infringed on his right to present a defense when it excluded evidence of other fires that occurred at or around the same time as the fire giving rise to the charges brought against the defendant. One of these other fires also occurred at a trailer and on the same night as the fire at issue, and the trailer was the home of a woman who was allegedly having an affair with the same man who was killed in the fire supposedly set by the defendant. The defendant argued that the woman's boyfriend, Timothy Johnson, had the motive and opportunity to set the fire for which the defendant had been charged. However, the defendant offered no facts linking Johnson to the burning of the trailers. *Id.* at 783, 792-793. This Court observed that "evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another was the perpetrator." *Id.* at 793. The *Kent* panel, in affirming the trial court's ruling, concluded that absent facts suggesting that Johnson set his girlfriend's trailer on fire, there could be no more than a mere suspicion that it was Johnson who set the fire at issue and not the defendant. *Id.*; see also *People v McCracken*, 172 Mich App 94, 98-99; 431 NW2d 840 (1988) (third party's defensive mannerisms in response to questions posed by defense counsel at a meeting before trial were irrelevant where it would not disprove the defendant's involvement in the crime and would require speculation that the mannerisms reflected guilt).

Relying on *Kent* and *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727; 164 L Ed 2d 503 (2006), this Court in *People v Hill*, 282 Mich App 538, 542; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009), stated:

> Applying this . . . test in the context of evidence proffered to show that someone else may have committed the crime charged, evidence may be introduced when it is inconsistent with, and raises a reasonable doubt of, the defendant's own guilt, but not when the evidence is remote and lacks a sufficient connection with the crime. Accordingly, evidence tending to inculpate another may be introduced when it tends to prove that another person may have committed the crime, but it may be excluded where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial. [Citations, internal quotations, and alteration brackets omitted.]

Here, assuming for the sake of argument that there are no problems with authentication or other threshold evidentiary matters, defendant presented no evidence, circumstantial or otherwise, made no offer of proof, and failed to even argue that the third parties who allegedly had a motive to shoot Graham could otherwise be linked to the crimes and the crime scenes. Defendant's argument relies solely on previous altercations and disputes involving Graham that only give rise to a mere suspicion of a third party's involvement in the shootings; the evidence is speculative, remote, lacks a sufficient connection to the instant crimes, and does not raise a

reasonable doubt regarding defendant's guilt. There is no indication in the record that any of the third parties were at or near the crime scenes, that any of them resembled defendant in appearance such that a mistaken identification may have occurred, that any of the third parties made a confession or incriminating/inculpatory statements, that any of them actually threatened Graham's life, or that there was any other link between the third parties and the crimes. Defendant was not free to introduce evidence of any and all persons who had ever had a dispute or altercation with Graham absent minimal evidence connecting them to the crimes. Graham emphatically and unequivocally identified defendant, a person with whom Graham was familiar, as his assailant.

The cases relied on by defendant are all easily distinguishable, as they involved facts connecting the third parties to the crimes. See *Holmes*, 547 US at 323 (evidence that a third party was in the victim's neighborhood at the time of the assault, that he acknowledged that the defendant was innocent of the assault, and that he had actually admitted to committing the assault); *Chambers v Mississippi*, 410 US 284, 287; 93 S Ct 1038; 35 L Ed 2d 297 (1973) (evidence that a third party gave a sworn confession and had confided in a friend that he committed a murder for which the defendant had been charged); *People v Barrera*, 451 Mich 261, 265; 547 NW2d 280 (1996) (statement by a third party codefendant that he stabbed the murder victim to death); *United States v Armstrong*, 621 F2d 951, 953 (CA 9, 1980) (evidence that a third party matched the description of a bank robber and that he had used bait money taken in the robbery to purchase a car). Under these circumstances, and despite defendant's assertions to the contrary, the excluded evidence appeared more in the nature of inadmissible character evidence, MRE 404(a). The trial court did not abuse its discretion or otherwise err in excluding evidence allegedly showing that various third parties had a motive to shoot Graham.[3]

Defendant next argues that police testimony concerning King's pretrial identifications of defendant as the shooter in the second incident constituted inadmissible hearsay and violated the Confrontation Clause of the Sixth Amendment. Defendant also bootstraps an argument that counsel was ineffective to the extent that the issue was waived or not properly preserved. Assuming that testimony regarding King's out of court statements violated defendant's rights under the Confrontation Clause as interpreted in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), we find that the presumed error was harmless beyond a reasonable doubt. *People v Shepherd*, 472 Mich 343, 347-348; 697 NW2d 144 (2005) ("Harmless error analysis applies to claims concerning Confrontation Clause errors . . . [;] [however][,] a reviewing court must . . . evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error."). The assumed error had no direct bearing on the first shooting that occurred on September 16, 2010, given that Graham was the lone victim and King was not present, and any possible tangential impact on Graham's

[3] In the context of his argument that he was denied the right to present a defense, defendant also presents a claim regarding Juan Muckleroy, the elderly man who took Graham to the hospital, and the failure of the trial court to grant an adjournment or to give a missing-witness instruction when Muckleroy did not testify at trial due to the fact that he was hospitalized. This argument also forms a separately framed issue in defendant's appellate brief and, therefore, we shall address the issue below.

credibility relative to the initial shooting is not sufficient to find prejudice. With respect to the second shooting in which King was present and was struck by gunfire, Graham, who knew defendant and was familiar with his appearance, emphatically and unequivocally identified defendant as the gunman, and the two men had an ongoing dispute in regard to the mother of defendant's children. Accordingly, it is clear beyond a reasonable doubt that the verdict would have been the same as to the second shooting even had the jury not heard the testimony about King's identifications. For these same reasons, and in relationship to the ineffective assistance claim, defendant has failed to show the requisite prejudice. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant next maintains that the trial court erred in denying his motion to adjourn the proceedings in order to allow defendant an opportunity to elicit the testimony of Muckleroy upon his release from the hospital.[4] Defendant claims that Muckleroy was a res gestae witness and that he informed police that he previously knew Graham from the neighborhood, which evidence would impeach Graham's claim that he did not know Muckleroy before the shooting. Defendant also argues that, in the alternative, he was entitled to a missing-witness instruction, which would have allowed the jury to infer that Muckleroy's testimony was unfavorable to the prosecution. See CJI2d 5.12; *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003).

An adjournment may be granted on the basis that a witness is unavailable if the court finds that the witness's testimony is material and that diligent efforts were made to produce the witness. *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003), quoting MCR 2.503(C)(2). A defendant must establish good cause and due diligence in order to invoke a court's discretion to grant a continuance or adjournment. *Coy*, 258 Mich App at 18. "Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion." *Id.* at 18-19.

We initially question defendant's characterization of Muckleroy as a res gestae witness considering that he did not witness "some event in the continuum of the criminal transaction." *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). Rather, Muckleroy answered his door and transported Graham to the hospital after the criminal transaction had ended. Regardless, given the reason cited by defendant for wishing to call Muckleroy to the stand, i.e., to impeach Graham's claim that he did not previously know Muckleroy, we find that the testimony would not have been sufficiently material, nor was defendant prejudiced as a result of the court's ruling denying the motion to adjourn. Based on Muckleroy's statement to police, which was not admitted into evidence, he did not see who shot Graham, nor did Graham mention the identity of the shooter to Muckleroy. Muckleroy did inform the police that he knew Graham from the neighborhood. A police officer testified that she took the statement from Muckleroy, and while the court did not permit the officer to testify before the jury regarding whether Muckleroy specifically indicated that he knew Graham, the officer was able to testify that Muckleroy identified the person he took to the hospital as "Taz," which the officer testified was

[4] There is no dispute that Muckleroy remained hospitalized during the entire trial. We note that Muckleroy's hospitalization was not associated with the criminal events that transpired.

short for Graham's first name. This would suggest some previous familiarity with Graham, and indeed defense counsel made that very argument in his closing, stating:

> Now, if I don't know you, maybe I just learned your name, I think that Mr. Graham would be sufficient, Martez maybe, but Taz? That's somebody who knows this individual. Again, why would Mr. Graham lie? Obviously, he had something to hide. It's clear.

Thus, defendant was able to make an impeachment argument to the jury on the basis of the testimony, which is the argument he now claims on appeal he was precluded from making because the court refused to adjourn the proceedings until a date upon which Muckleroy could testify. We recognize that it would have been much easier and more convincing to impeach Graham with direct testimony by Muckleroy that he knew Graham before the shooting; however, the whole issue in our view, as well as the trial court's view, was very collateral to resolution of the central question whether defendant was the shooter. Moreover, we question the strength of defendant's impeachment argument, where it is easily conceivable that Graham did not know Muckleroy yet Muckleroy knew of Graham from the neighborhood. Materiality and prejudice has not been sufficiently demonstrated, and reversal is therefore unwarranted. Finally, a missing-witness instruction would not have been appropriate as Muckleroy's failure to appear at trial was due to his hospitalization and not to any failure on the part of the prosecutor to proceed in a diligent manner, to provide reasonable assistance to defendant, or to otherwise comply with MCL 767.40a. *Perez*, 469 Mich at 420-421.

Defendant next argues that it was improper for King to be called and permitted to take the stand where he refused to testify, which gave the jury the impression that defendant had threatened King, thereby resulting in prejudice to defendant. It is error to place on the stand a witness who is intimately connected to the crime at issue when the judge and prosecutor *know* that the witness will invoke, validly or invalidly, his or her Fifth Amendment rights. *People v Gearns*, 457 Mich 170, 203; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999); *People v Giacalone*, 399 Mich 642, 645-648; 250 NW2d 492 (1977); *People v Poma*, 96 Mich App 726, 733; 294 NW2d 221 (1980).

While King was somewhat reluctant and uncooperative before trial, he did identify defendant as the perpetrator in the second shooting and he appeared at trial, answering a few preliminary questions before refusing to testify any further. There is nothing in the record indicating that the prosecutor or the trial court knew beforehand that King would refuse to testify. The trial court quickly dealt with the issue of King's refusal to testify by having the jury removed, questioning King, and charging him with contempt of court outside the jury's presence. Moreover, defendant has failed to show that it is more probable than not that a different outcome would have resulted had King not taken the stand. *Lukity*, 460 Mich at 495. Defendant's assertion that the jury was left with the impression that defendant had threatened King is purely speculative. It is just as likely that the jurors believed that King had something to hide, thereby potentially damaging the prosecution's case rather than harming the defense. Reversal is unwarranted.

Finally, defendant contends that he is entitled to resentencing due to scoring errors with respect to offense variables (OVs) 4, 6, and 13. Defendant preserved his appellate challenge to the scoring of these variables by objecting to the scoring during the sentencing hearing. MCL 769.34(10); *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *Endres*, 269 Mich App at 417, citing *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence," and "[w]e review for clear error a court's finding of facts at sentencing." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), citing *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006), and *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). "Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines." *Endres*, 269 Mich App at 417.

Defendant argues that OV 6, MCL 777.36, was improperly scored at 50 points because there was no evidence of premeditation. A 50-point score is proper for purposes of OV 6 when "[t]he offender had premeditated intent to kill." MCL 777.36(1)(a). A sentencing court must score OV 6 "consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a). Premeditation requires a showing that "sufficient time . . . elapsed to allow the defendant to take a 'second look.'" *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (citation omitted). Premeditation can be established by circumstantial evidence and reasonable inferences drawn therefrom, taking into consideration such matters as the prior relationship of the parties, the defendant's actions before the assault, and the circumstances of the assault itself, including the type of weapon used and the location of the wounds. *People v Abraham*, 234 Mich App 640, 656-657; 599 NW2d 736 (1999); *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991). Here, there was evidence that Graham and defendant knew each other before the shootings, that defendant was angry at Graham because Graham had a sexual relationship with the mother of defendant's children, that Graham and defendant engaged in arguments prior to the shootings, that defendant approached Graham's vehicles in his own car before opening fire, suggesting that he had been tailing the victims, that defendant made hostile remarks to Graham right before the first shooting, that an assault rifle was used in the second shooting incident, that there were multiple bullets fired in both instances, that Graham suffered a chest and neck wound, and that King sustained a shoulder wound. This evidence more than sufficed to support the trial court's finding that the shootings were premeditated for purposes of OV 6.

Defendant next argues that the trial court erred in scoring OV 13, MCL 777.43, at 25 points instead of zero points, where defendant engaged in felonious criminal activity against a person on only two occasions. Defendant suggests that it is error, for purposes of MCL 777.43, to count more than one offense arising out of a single criminal action that ultimately results in multiple convictions. A score of 25 points is proper for OV 13 when the offense committed by a defendant "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). In scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a

conviction." MCL 777.43(2)(a). Here, there were three crimes against a person within a five-year period, i.e., the assault against Graham on September 16, 2010, the assault against Graham on October 29, 2010, and the assault against King on October 29, 2010. While the assaults on October 29 arose out of a single criminal episode when defendant discharged the weapon at Graham's vehicle, numerous bullets were fired and two "crimes" were nonetheless committed. See *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001) (finding that the trial court properly scored OV 13 at 25 points because of the defendant's "four concurrent convictions" that arose out of the defendant's actions in taking four nude photographs of two 15-year-old girls on two separate occasions). Defendant entirely ignores the term "crime" as used in MCL 777.43 in making his argument. Moreover, defendant argued in the trial court for a score of ten points for OV 13 and, for the reasons expressed and elaborated on below in our discussion of OV 4, a reduction of 15 points in the total OV score would not alter the minimum sentence range.[5]

Defendant also argues that OV 4, MCL 777.34, should have been scored at zero points instead of ten points. A score of ten points is proper for OV 4 when a victim suffers a serious psychological injury. MCL 777.34(1)(a). There is no need for us to address this argument because even were we to assume that OV 4 should have been scored at zero points, it would not impact or alter the minimum sentence guidelines range. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006) ("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required."). Defendant's total OV scores were 125 and 135 in the two criminal cases; the 125 score pertained to the first shooting and the 135 score regarded the second shooting, which entailed two victims and thus the additional ten points. Both total OV scores placed defendant at OV level VI, which for a class A offense such as assault with intent to commit murder, MCL 777.16d, is the appropriate level when the total OV score is 100 or more points, MCL 777.62. Defendant would still remain at OV level VI even with a ten-point reduction in his total OV scores (115 and 125), and thus there would be no change in the minimum sentence range of 225 to 750 months, which was the guidelines range scored for both shootings and the applicable range for a fourth habitual offender who committed a class A offense. MCL 777.62; MCL 777.21(3)(c). Furthermore, returning to and in connection with our comments regarding OV 13, even if 15 additional points were subtracted from defendant's total OV scores, giving him scores of 100 and 110, he would still remain at OV level VI with scores of 100 or more points.

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ William C. Whitbeck

[5] Although defendant argues on appeal that OV 13 should have been scored at zero points, a score of ten points under MCL 777.43(1)(d) is fully supported by the record, considering defendant's criminal history as reflected in the presentence investigation report (PSIR).