STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN LAVON SMITH,

Defendant-Appellant.

UNPUBLISHED
March 13, 1998

No. 196894
Washtenaw Circuit Court
LC No. 95-004004

Before: Doctoroff, P.J., and Reilly and Allen*, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(a); MSA 28.548(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two-years' imprisonment for the felony-firearm conviction, and a consecutive term of life without parole for the murder conviction. He now appeals as of right. We affirm.

Defendant's convictions arose out of the shooting death of Albert Taylor outside of an Elks Club lodge in Ypsilanti. Defendant did not deny that he shot Taylor, but maintained that he acted in self-defense because he had seen Taylor brandishing a weapon.

I

Defendant first argues on appeal that he was denied a fair trial because the lower court allowed the admission of a large amount of damaging hearsay evidence. We disagree.

The decision to admit evidence will not be reversed on appeal absent an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Fisher*, 220 Mich App 133, 152; 559 NW2d 318 (1996). Hearsay is not admissible as evidence except where the rules of evidence provide

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

otherwise. MRE 802. *People v Watkins,* 438 Mich 627, 632; 475 NW2d 727 (1991) (Cavanagh, J.)

Defendant contests the admission of several out-of-court statements made by his alleged coconspirator, Taniesha Ford. Defendant first objects to Billy Weaver's testimony that he overheard Ford tell Albert Taylor that she planned to marry Montez Brooks. Taylor objected to the marriage and indicated that he would not let it occur. We find that these statements were not hearsay, because they were not offered to prove the truth of the matter asserted. Ford's statement was not offered to prove that she intended to marry Brooks, nor was Taylor's statement offered to prove that he objected to the marriage. Rather, both statements were offered to establish a motive as to why Ford, Brooks and defendant would conspire to kill Taylor. See *People v Eady,* 409 Mich 356, 361; 294 NW2d 202 (1980). Therefore, the trial court did not err in admitting the statements into evidence.

Next at issue was Maurice Bridges' testimony that he was riding in Brooks' truck with Brooks and defendant when Brooks received a call on his cellular phone. Brooks later indicated that the call was from Ford, who was calling to tell Brooks that Taylor was at the Elks Club lodge and that Taylor was planning to kill Brooks. Again, we find that this statement is not hearsay because it was not offered for its truth. Rather, it was offered to show that the threat was made and that Brooks was aware of it. See *Gibson v Group Ins Co,* 142 Mich App 271, 277; 369 NW2d 484 (1985). Therefore, again, the trial court did not abuse its discretion in admitting the testimony.

Finally, defendant objects to Bridges' testimony that Ford called Brooks on his cellular phone and told him who was with Taylor at the club. However, "where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay." *People v Harris,* 201 Mich App 147, 151; 505 NW2d 889 (1993). In the present case, the fact that the conversation occurred, rather than the truth of the statements made, was relevant to show that Brooks and Ford made frequent contact, in defendant's presence, before Taylor was killed. This supported a finding that a conspiracy existed between defendant, Brooks and Ford to kill Taylor. Therefore, again, the trial court did not abuse its discretion in admitting the testimony.

II

Defendant next argues that his murder conviction must be reversed because it was based on findings made by the trial court that were not supported by the record. We disagree.

In the present case, where the lower court judge sat as the factfinder, he was called upon to make both conclusions of law, which are reviewed de novo on appeal, *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995), and findings of fact, which are reviewed on appeal for clear error. MCR 2.613(C); *People v Swirles (After Remand),* 218 Mich App 133, 136, 553 NW2d 357 (1996). A finding is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *Id.*

Defendant first contests the following finding made by the court:

> In regard to the shooting, the Defendant says that he picked up Albert Taylor's gun to prove his self-defense claim, yet he disposed of his own weapon and he supposedly wiped the fingerprints off of the .357. That might have shown that Albert Taylor was, in fact, holding a gun at the time he was shot but there's no physical evidence to support that. And, in fact, it does support the Prosecution's theory that perhaps the Defendant as well as his coconspirators knew where the gun was and acquired it either before or after the shooting.

Defendant contends that such a finding has no basis in the evidentiary record. We disagree. The court's findings were reasonable based on all the facts and circumstances contained in the record, and were not based on mere speculation.

Evidence was presented at trial that Billy Weaver left the .357 Magnum under the front seat of his vehicle when he parked it in the Elks Club lot on the night of the shooting, that Weaver was uncertain whether he locked the vehicle before entering the lodge, that Weaver mentioned having the gun once inside the lodge and while in the company of others, and that Ford was present at the lodge, was keeping close tabs on Taylor, and was communicating Taylor's words and actions to Brooks, who was with defendant at the time. The record also reveals that every guest entering the lodge that evening was checked for weapons by an electronic security device and that no weapons were found. The record indicates that Taylor was shot just seconds after leaving the lodge and rounding the front corner of the building, which left him no time to get to Weaver's vehicle in the back of the parking lot to obtain the weapon. After Taylor was shot, Weaver checked his vehicle for the .357 and found that it was missing. Finally, at trial, defendant admitted that he had the weapon in his possession following the shooting, that he purposely wiped it clean of any fingerprints, and that he had asked his cousin to hide it.

Given this evidence, we conclude that the lower court did not clearly err in finding that defendant "perhaps" secured the .357 Magnum from Weaver's vehicle, and that Taylor never had it in his possession at the time the shooting took place, as alleged by defendant. Accordingly, the lower court's finding will not be set aside. See MCR 2.613(C).

Defendant also contests the lower court's finding as to the credibility of a witness, arguing that the witness' testimony was completely inconsistent and incredible. Defendant specifically notes that the witness testified that he observed defendant shoot the victim in the face, whereas the physical evidence presented proved that the victim had in fact been shot in the back of the head. However, questions of credibility are left to the trier of fact to resolve, *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988), which in this case was the court itself. Furthermore, even without the witness' testimony, the evidence was sufficient to support the court's finding that defendant did not act in self-defense, but rather, deliberately shot and killed the victim. Therefore, reversal is not required. *People v Bell*, 20 Mich App 299, 300; 174 NW2d 23 (1969).

III

Finally, defendant argues that he was denied a fair trial because the trial court permitted a lay witness to offer his opinion as to defendant's guilt or innocence. We disagree.

There is a settled and long-established rule that a witness cannot express an opinion concerning the guilt or innocence of a defendant. *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). Defendant argues on appeal that this rule was violated when a witness testified during trial that he saw defendant "pacing" alongside the lodge, and then stated that defendant acted as if "he was waiting for somebody." Defendant notes that "lying in wait" is an element establishing premeditation, and contends that the witness' testimony was therefore an opinion as to defendant's guilt. Defendant's contention is without merit.

MRE 701 provides that opinion testimony by a lay witness is admissible if it is rationally based on the perception of the witness and helpful to a clear understanding of his testimony or a fact in issue. Here, the witness' testimony was clearly based on his perception of defendant. Moreover, it was helpful in understanding his testimony, as well as understanding a fact in issue, whether defendant was the aggressor or merely acting in self-defense. The witness stated at trial that he had seen defendant pacing next to the lodge and became apprehensive because he thought defendant may attempt to rob him, or that "something was going to go down." When asked to explain his fear, the witness answered that defendant looked like he was "waiting for somebody." We find that the witness was not asked, nor did he comment on his opinion of defendant's guilt as to Taylor's death. See *People v Smith*, 152 Mich App 756, 764; 394 NW2d 94 (1986). Hence, no abuse of discretion was committed by the lower court in admitting the testimony.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maureen Pulte Reilly
/s/ Glenn S. Allen, Jr.