STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 1999
v	No. 207678 Recorder's Court
CHARLES KNIGHTON, JR., Defendant-Appellant.	LC No. 97-500859

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Defendant Charles Knighton, Jr. appeals as of right following his jury trial convictions for assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced Knighton, a fourth habitual offender, MCL 769.12; MSA 28.1084, to fifteen to twenty-five years' imprisonment for the assault with intent to murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts And Procedural History

This case arises out of the apparently drug-related shooting of the victim, Ngozi Bell, on February 12, 1997. At Knighton's trial, Officer Douglas Potts testified that he responded to a shooting on that date but that Bell had already been taken to the hospital. According to Officer Potts, there was a small pool of blood on the street where Bell was shot, but the police did not recover a gun or other physical evidence from the scene. Officer Potts later phoned Bell at the hospital and went to visit him the next day, where Bell made a statement and chose Knighton's photograph from an array. Bell also told Officer Potts that the man who shot him was the one who was always with "Leshia." Later in February, Officer Potts interviewed Knighton but Knighton denied any involvement in the shooting and stated that he was with his girlfriend, Leshia Singleton, when he noticed police cars and ambulances on Florence Street.

Steffan Turner, age fifteen, testified that the day of the shooting he was on his way home from a party store when he saw Bell, Knighton, and Singleton on Florence Street. Turner stated that he was an

acquaintance of Bell and knew Singleton through his older sister; he recognized Knighton as someone who was always with Singleton, but was not sure of his name. Turner recalled that both Knighton and Singleton were carrying grocery bags when Bell called to Knighton who then handed his bags to Singleton and approached Bell. Turner heard Bell say something about "boulders," which Turner understood to be a reference to drugs and Knighton responded, "don't check into me like that." Bell then reminded Knighton that "you in a drug zone." Next, when Turner was walking away, he heard approximately five shots and then saw Bell lying in the street.

Singleton testified that Knighton was the father of her daughter, that she was friends with Evanni Turner, Steffan Turner's older sister, and that she also knew Bell. Singleton testified that on the day of the shooting she and Knighton were walking on Florence Street and saw Steffan Turner and Bell. She saw Bell call Knighton over to him and assumed that Bell was pushing drugs. Knighton went over to Bell, but they did not appear to be arguing. Knighton then left the area without incident; Singleton never heard any shots or saw anyone shot. Only later did she learn that Bell had been shot.

Bell testified that he was on Florence Street visiting friends on the day of the shooting. Bell, who admitted to smoking a cigar laced with marijuana earlier in the day but denied being a drug dealer, went to the corner grocery store to buy another cigar. On the way, he saw Steffan Turner on the street and asked for the money that Turner owed him. Bell also saw Knighton and Singleton across the street. Bell did not know Knighton and had never seen him before. Nevertheless, Bell testified, Knighton called to him. When Bell, who was unarmed, realized that he did not recognize Knighton, he started to walk away, but Knighton crossed the street, said something, and then shot him twice from approximately twelve feet away, striking his face. After the shooting, Knighton stood over him and simply looked at him.

Officer John Marasco responded to the shooting and found Bell lying on the ground. Officer Marasco observed only two other people at the scene: Evanni Turner and a man calling for help on a cellular phone. According to Officer Marasco, Bell told him that the man who shot him was wearing a black leather coat and had a mustache. Bell told him that the shooter simply said, "you don't know me" before firing the gun. Officer Potts took a photograph of Knighton at the police station after his arrest. That photograph showed Knighton in a black leather coat and also revealed that he had a mustache.

Following the prosecution's case, Knighton moved for a directed verdict. The trial court denied the motion, finding that there was sufficient evidence to submit the case to the jury. As a result, Knighton proceeded with his defense and called Evanni Turner as a witness. She testified that her younger brother, Steffan Turner, told her that someone had been shot. Evanni Turner, who claimed to know that Bell was a drug dealer, recalled that Steffan told her that he and Bell were walking together when they spotted two people whom Bell thought were "crackheads." Steffan recognized them and knew better than to approach them, but Bell persisted in trying to sell drugs to Knighton even though Knighton indicated that he was not a "crackhead." She recounted that Steffan told her that Bell shoved Knighton and that Knighton then shot Bell; Steffan told her that the man who shot Bell was the one who was always with Singleton.

Knighton testified on his own behalf and explained that he and Singleton were walking to her house when they saw Steffan Turner. Turner and Singleton began talking when Bell crossed the street and approached them. Knighton assumed that Bell thought Turner was trying to sell drugs to Singleton because Bell said that "mines are bigger." Knighton then approached Bell and asked what he meant by that statement. He stated that Bell was trying to show him drugs and that he said "you don't even know me . . . I could be a police officer . . . do I look like a crackhead?" Knighton testified that Bell then got defensive and reminded him that he was in a drug zone. The two of them then got into an argument when he told Bell that he was near his daughter's school, suggesting that was not a proper place to sell drugs. Knighton stated that Bell then pulled up his coat and showed him his gun, prompting Knighton to leave. When Knighton turned around to go he heard a scream, Bell hit him on the head, and the two began to struggle. During the struggle, Bell had the gun in his left hand when they fell over, the gun fired, Knighton fell on top of Bell, and thought Bell had hit his head on the ground. At that point, Knighton got up and walked away from the scene.

Following his jury conviction, Knighton filed a motion for new trial. At the hearing, Knighton argued that the verdict was against the great weight of the evidence. In addition, Knighton contended that the prosecutor impermissibly shifted the burden of proof in his closing argument by calling to the jury's attention the fact that Knighton's counsel mentioned nothing regarding self-defense in his opening statement. The trial court ruled that the circumstances of the shooting permitted the jury to infer an intent to kill and denied Knighton's motion as it related to the great weight of the evidence argument. The trial court also determined that the prosecutor did not shift the burden of proof because the jury was well instructed that Knighton was under no obligation to prove anything.

II. The Great Weight Of The Evidence

A. Preservation Of The Issue And Standard Of Review

Knighton argues that the trial court erred in failing to order a new trial because the jury's verdict was against the great weight of evidence. Knighton preserved the issue for appeal because he moved for a new trial on this basis in the lower court. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). The standard of review applicable to a denial of a motion for a new trial is whether the trial court abused its discretion. *People v Simon*, 174 Mich App 649, 653; 436 NW2d 695 (1989).

B. Elements Of Assault With Intent To Commit Murder

The elements of assault with intent to commit murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). "The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempt to commit a felony." *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Circumstantial evidence and reasonable inferences arising therefrom may constitute satisfactory proof of the elements of a crime, including the intent to kill. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995).

C. Witness Credibility

Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon*, *supra* at 627. This issue usually revolves around credibility questions or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), but if there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder, *Lemmon*, *supra* at 642-643.

Here, there is no question that Knighton shot Bell. However, Knighton contends that the evidence demonstrated that there was no intent to kill. He argues that he was acting in self-defense when the gun went off accidentally. However, Knighton's argument centers around the credibility of the many witnesses presented at trial. As we have noted above, questions of credibility and intent should be left to the trier of fact to resolve. *Lemmon*, *supra* at 642-643. There was evidence presented which would allow a jury to infer an intent to kill on the part of Knighton. While it is true that no direct physical evidence was recovered from the scene, there was certainly enough eyewitness testimony to allow the jury to conclude that Knighton was guilty of assault with intent to murder and felony-firearm. Steffan Turner testified that he saw Knighton and Bell exchanges words and as he walked away he heard gunshots and then saw Bell lying in the street. Bell testified that Knighton simply came up to him and shot him. Officer Marasco testified that he arrived at the scene and that Bell gave him a physical description of his assailant, indicating that the assailant was wearing a black leather coat and had a mustache. Officer Potts testified that the photograph taken of Knighton showed that he was, in fact, wearing a black leather coat and had a mustache. Further, Bell chose Knighton's picture from a photo array at the hospital. We conclude, therefore, that it cannot be said that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

III. Admissible Evidence

A. Preservation Of The Issue And Standard Of Review

Knighton contends that the trial court abused its discretion in admitting two letters that Knighton wrote to the mother of two witnesses. Knighton properly preserved the issue for review because he objected to the introduction of the letters, and raises the same grounds for the objection in this appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 546, 553; 520 NW2d 123 (1994).

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Lugo*, *supra* at 709. An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). Error requiring reversal may not be predicated on an evidentiary ruling unless a substantial right was affected, MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993), which depends on "the nature of the error" and its "effect" on the trial "in light of the

weight and strength of the properly admitted evidence." *People v Huyser,* 221 Mich App 293, 299; 561 NW2d 481 (1997). Accordingly, Knighton must show a reasonable probability that the alleged error affected the outcome of trial to prevail. *People v Sykes,* 229 Mich App 254, 273-274; 582 NW2d 197 (1998).

B. Admissibility Generally

Generally, all relevant evidence is admissible and irrelevant evidence is not. MRE 402; *People v Starr,* 457 Mich 490, 497; 577 NW2d 673 (1998). Evidence is relevant if it has any tendency to make the existence of a fact of consequence to the action more or less probable than it would be without the evidence. MRE 401; *People v Crawford,* 458 Mich 376, 388; 582 NW2d 785 (1998). Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. See generally *People v Kozlow,* 38 Mich App 517, 524-525; 196 NW2d 792 (1972). To be material, evidence need not relate to an element of the charged crime or an applicable defense; evidence associated with the relationship of the elements of the charge, the theories of admissibility, the defenses asserted, *People v Brooks,* 453 Mich 511, 518; 557 NW2d 106 (1996), and witness credibility is admissible, *People v Mills,* 450 Mich 61, 72; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995).

C. Witness Credibility

We conclude that the letters were admissible to explain the actions of two of the prosecution's witnesses, Steffan and Evanni Turner. While the prosecutor did not directly ask the two witnesses whether they interpreted Knighton's letters as threatening, the prosecutor did ask each witness if, after reading the letters, he or she did not want to go to the police. Both Steffan and Evanni Turner testified that they would not have gone to the police after reading the letters. The prosecutor was, therefore, implying that the contents of the letters caused the witnesses to be fearful about coming forward with information. The prosecutor may have been trying to explain to the jurors why the witnesses failed to come forward immediately with the information they had about the shooting. Because such a delay may have reflected poorly on the witnesses' credibility, the prosecutor saw fit to explain the delay and we find this to have been both logical and permissible under the rules of evidence.

D. Foundation

Knighton also claims that the prosecutor failed to establish a proper foundation for the letters. We disagree. Clearly, there was substantial evidence given regarding the letters before they were actually received into evidence and the prosecutor only introduced the letters into evidence after the testimony concluded. By that time, both Evanni and Steffan Turner testified that they had read the letters their mother received. Singleton also testified that she personally delivered one of the letters to their mother at Knighton's behest. Knighton, himself, acknowledged that he sent two letters to the mother. Therefore, there was no question regarding the authenticity of the letters or the fact that the witnesses had read the letters. MRE 901. We conclude that the trial court did not abuse its discretion in admitting the letters into evidence.

IV. Prior Bad Acts Evidence

At trial, Bell testified that he still did not have full control of the right side of his body and that he was not a drug dealer. Knighton hoped to introduce evidence that Bell was accused of a sexual assault on a thirteen-year-old girl just three months prior to trial. Knighton apparently wanted to show that Bell's injuries were not as bad as he claimed and also wanted to prove that Bell was a drug dealer to support Knighton's theory of the case. The trial court did not permit Knighton to introduce this other acts evidence, and Knighton contends that the court erred in that respect.

A. Preservation Of The Issue And Standard Of Review

A party seeking admission of excluded evidence must make an offer of proof to provide the trial court with an adequate basis on which to make its ruling and to provide this Court with the information it needs to evaluate the claim of error. MRE 103(a)(2). Knighton properly preserved the issue for appeal because he requested admission of Bell's prior bad acts and revealed their substance in doing so.

Admissibility of bad acts evidence falls within the discretion of the trial court. *People v Catanzarite,* 211 Mich App 573, 579; 536 NW2d 570 (1995). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Ullah, supra* at 673.

B. The *VanderVliet* Tests

Bad acts evidence under MRE 404(b) applies not only to criminal defendants, but also to victims and witnesses. *Catanzarite, supra* at 579. However, when a defendant seeks to introduce bad acts evidence, he must still show that it is offered for a proper purpose and is relevant to a material issue. *People v Vandervliet*, 444 Mich 52, 72, 74; 408 NW2d 114 (1993). A proper purpose is one other than establishing the propensity to act in conformity with character. *Id.* at 74.

We conclude that Knighton lacked a "proper purpose" in attempting to admit the evidence. The evidence would have been admitted for the sole purpose of demonstrating Bell's bad character. Knighton claims that the assault was probative of the fact that Bell was a drug dealer and was not as physically disabled as he claimed to be. However, evidence that Bell may have been a drug dealer was already admitted through other witnesses' testimony. Therefore, Knighton's theory of the case—that he shot Bell because of Bell's attack on him when he refused to purchase drugs—was already set forth for the jury to consider. As for Knighton's claim that the evidence was relevant to show the true extent of Bell's injuries, the extent of those injuries was not relevant to the case. Thus, under the *VanderVliet* test, Knighton failed to show failed to show that the evidence of the alleged sexual assault was relevant and offered for a proper purpose. Instead, rather transparently, Knighton proffered the evidence in an attempt to cast aspersions on Bell's character. The trial court did not abuse its discretion when it refused to admit the prior bad acts evidence.

V. Prosecutorial Misconduct

A. Preservation Of The Issue And Standard Of Review

Knighton claims that the trial court erred in failing to grant him a new trial based on the prosecutor's misconduct. However, Knighton failed to preserve the issue for appeal. Although he moved for a new trial based on counsel's alleged misconduct, he failed to object during trial and did not request a curative instruction. Appellate review of allegedly improper conduct is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Only if the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction may this Court reverse the lower court on this matter. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995).

B. Examining Alleged Prosecutorial Misconduct

Prosecutorial misconduct requires reversing a conviction when the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Yet, prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks to determine if they denied the defendant a fair trial. *People v LeGrone*, 205 Mich App 77, 82; 517 NW 2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case; prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

C. The Prosecutor's Statements

During closing arguments, the prosecutor stated:

> And that's why the defense, as I told you to read between the lines, has kind of shifted here. You didn't hear a word about self-defense in the opening statement. That's because if it's just Ngozi Bell up here to testify, maybe you can develop a lot of contradictions, maybe you can develop a number of things going on and maybe you an [sic] argue that it's not the defendant that did the shooting, but you're left in a far different position once Ngozi Bell gets up there and then he's followed by Steffan Turner and then he's followed by Lele [Singleton] and they all say that the defendant was out there.
>
> And then for you to get up there and say no, it wasn't me, you got the wrong guy, the jury's going to say are you crazy, wait a minute, even you're [sic] own girlfriend puts you out there when you deny being at the scene. That's why you have to read between the lines when the defense has shifted.

D. Defense Counsel's Opening Statement

At the beginning of trial, defense counsel made the following opening statement:

> I thank you for listening very carefully, especially late in the day, to all the questions, the instructions from the Judge. I know that because you have listened so attentively, because I've watched you, I don't have to repeat myself.
>
> And one thing that I think that all of you also have established by your body language is that you each understand how serious your job is here and it will be for the next couple of days.
>
> I think personally I prefer you hear from the witnesses in terms of what they're going to say. Mr. Hutting has already explained to you what he expects that proofs will be. So far already I think you know at least somebody's lying.
>
> When the witnesses come into testify throughout this trial I'm asking you and this Court will expect you to challenge the testimony and listen very carefully. The questions that I ask and Mr. Hutting asks of the witnesses is to try to bring out to you what clearly must be what is true and what is not true.
>
> The Judge has instructed you and she will again instruct about how you can Judge someone's credibility by their demeanor and how they respond to questions and how reasonable their answers do seem to you.
>
> There is only one conclusion that you will reach at the end of this trial, and that it, that what Mr. Bell wants you to believe is unreasonable and not true, and at the end of this trial I will be asking you to return a verdict of not guilty and I'm certain that you will.

E. Shifting The Burden

Clearly, defense counsel gave a very general opening statement. She did not expound on any particular theory, but merely asked the jury to scrutinize the credibility of all of the witnesses. Thus, it is not as though defense counsel stated that Knighton denied being at the scene of the crime and had nothing to do with the shooting. Rather, counsel left open the theory of the case and focused exclusively on credibility.

Nevertheless, we conclude that the prosecutor did not impermissibly shifted the burden of proof onto Knighton. "[A]lthough a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof." *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Here, the prosecutor pointed out the fact that Knighton was able to tailor his testimony to accommodate the previous witnesses' testimony. This is not improper. A prosecutor may argue from the facts that the defendant's testimony is not "worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460

(1996). In addition, a prosecutor's comment in closing argument that the defendant's presence at trial gives the defendant the opportunity to fabricate or conform his testimony does not, per se, constitute error warranting reversal; rather, it may be proper comment on credibility. *People v Buckey*, 424 Mich 1, 14-16; 378 NW2d 432 (1985).

Even if the prosecutor's comments in her closing arguments were inappropriate, these comments were harmless because the jury was properly instructed that Knighton was under no obligation to prove his innocence and that it was the prosecutor's burden to prove Knighton's guilt beyond a reasonable doubt. Therefore, after reviewing the prosecutor's statement, we are not convinced that Knighton was denied a fair and impartial trial. *Paquette, supra* at 342.

Affirmed.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Brian K. Zahra