

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONTRELL YUVELLE SMITH,

Defendant-Appellant.

UNPUBLISHED

May 20, 2003

No. 235211

Genesee Circuit Court

LC No. 01-007626-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAROY LINZY DAVIS,

Defendant-Appellant.

No. 235212

Genesee Circuit Court

LC No. 01-007622-FC

Before: Murray, P.J., and Neff and Talbot, JJ.

PER CURIAM.

In these consolidated appeals, defendants were tried together before separate juries. In Docket No. 235211, defendant, Dontrell Yuvelle Smith, appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, conspiracy to commit first-degree murder, MCL 750.157a, MCL 750.316, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Smith was sentenced to thirty-five to fifty years' imprisonment for the second-degree murder conviction, life imprisonment for the conspiracy conviction, thirty-five to fifty years' imprisonment for the assault conviction, and two years' imprisonment for the felony-firearm conviction. In Docket No. 235212, defendant, Jaroy Linzy Davis, appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, and felony-firearm, MCL 750.227b. Davis was sentenced to 375 to 600 months' imprisonment for the murder conviction, forty to sixty years' imprisonment for the assault conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts Pertinent to Docket Nos. 235211 and 235212

The complainant, Richmond Lewis, testified that, during the early morning hours of February 18, 2001, he and his friend Herbert Cleaves, Jr., were in the parking lot of a club when Lewis saw defendants, who were looking at Lewis in a menacing manner. Defendants were in a white Lumina. Lewis had had a sexual relationship with the mother of Davis' child. Defendants followed Lewis and Cleaves out of the parking lot. Smith was driving and Davis was in the passenger's seat. At one point, defendants' car drove so close to Lewis' car that the two vehicles nearly touched. Lewis drove around town in an effort to lose defendants. Lewis finally parked his car at a location near his house so that defendants would not find out where he lived. Lewis and Cleaves jogged to Lewis' house. As Lewis started to unlock the front door of his house, defendants' white Lumina drove slowly down the street without headlights. The Lumina was followed by a Ford Explorer. When defendants' car was in front of the house, Lewis saw a gun pointed out of the passenger window of the Lumina. He heard shots, and he and Cleaves fell to the ground. Lewis was not injured, but Cleaves was fatally shot in the abdomen.

II. Docket No. 235211

A. Great Weight of the Evidence

Defendant Smith first argues that the trial court improperly denied his motion for a new trial brought on the ground that his conviction for conspiracy to commit first-degree murder was against the great weight of the evidence. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). A trial court "may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id.* (citation omitted).

Defendant claims that several pieces of compelling evidence greatly weighed against the conviction. First, he asserts that the lighting conditions and the tinted windows of the Lumina that he had in his possession made it impossible for Lewis to identify him as the perpetrator. At trial, Smith presented the testimony of an engineer who testified that it was impossible for anyone to see persons through the tinted windows of the white Lumina even under daylight conditions. However, the record shows that the prosecutor thoroughly challenged the engineer's findings on cross-examination that cast doubt on the engineer's testimony. The record also shows that Lewis had seen defendants earlier that night at the club parking lot, and he testified that he saw defendants in the Lumina. This presented an issue of witness credibility. Questions of credibility and intent should be left to the trier of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Defendant also asserts that two witnesses testified that Lewis was not certain who had shot at him. Again, this presented an issue of credibility that this Court will not resolve anew. *Id.*

Defendant also asserts that it was impossible to turn off the headlights of the Lumina that was in his possession while the car engine was running. Lewis and another eye-witness to the shooting testified that the car from which the shooting occurred did not have the headlights on. While the prosecutor did not challenge this evidence, he "need not negate every reasonable theory consistent with innocence." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000)

(citation omitted). Instead, the prosecutor “is bound to prove the elements of the crime beyond a reasonable doubt” and “need only convince the jury ‘in the face of whatever contradictory evidence the defendant may provide.’” *Id.* (quotation omitted).

Defendant also asserts that he had no motive to kill Lewis or Cleaves and that there was no evidence of an agreement to murder the two men. In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). To prove a conspiracy to commit murder,

it must be established that each of the conspirators have [sic] the intent required for murder and, to establish that intent, there must be foreknowledge of that intent. Foreknowledge and plan are compatible with the substantive crime of first-degree murder as both the crime of conspiracy and the crime of first-degree murder share elements of deliberation and premeditation. Prior planning denotes premeditation and deliberation. [*People v Hammond*, 187 Mich App 105, 108; 466 NW2d 335 (1991) (citation omitted).]

“[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties.” *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997).

Smith’s act of following Lewis and Cleaves from the club to Lewis’ house, along with the circumstantial evidence that two weapons were used and that the shots came only from the Lumina, provide an inference beyond a reasonable doubt that Davis and Smith were in agreement in their planned actions, denoting premeditation and deliberation. *Hammond, supra*.

Defendant also asserts that there was evidence that the police and the prosecutor ignored Lewis’ involvement with drugs because Lewis was “a crucial witness in this high profile case.” However, defendant does not claim that such evidence affected Lewis’ testimony, and he fails to explain how this evidence factors into his claim that the conspiracy conviction was against the great weight of the evidence. Therefore, we do not address it. *Kelly, supra* at 640-641.

Defendant also argues that codefendant Davis’ separate jury acquitted Davis on the charge based on the same evidence that was presented to defendant’s jury. This argument is without merit. The “no one-man conspiracy” rule is inapplicable “where alleged co-conspirators are separately tried because there is no inherent defect when the separate juries return different verdicts in the separate trials.” *People v Anderson*, 418 Mich 31, 38; 340 NW2d 634 (1983).

In light of the above, we conclude that the jury’s verdict was not against the great weight of the evidence. Accordingly, the trial court did not abuse its discretion in denying Smith’s motion for a new trial.

B. Admissibility of Evidence

Defendant next argues that the trial court abused its discretion by excluding certain evidence that defendant claims was necessary for his defense. We review decisions regarding

the admissibility of evidence for an abuse of discretion. *People v Washington*, 251 Mich App 520, 524; 650 NW2d 708 (2002).

Defendant asserts that the trial court abused its discretion when it excluded testimonial evidence by Officer Shawn Ellis, offered to discredit Lewis's testimony that his home was not a drug house. Defendant also argues on appeal that the trial court improperly excluded the testimony of the an evidence technician on the drugs she found in Lewis' house. Defendant asserts that the testimony was necessary to demonstrate that the motive in the shootings was drug-related, and it was offered to challenge Lewis' credibility by connecting Lewis with illegal drugs at his home. Specifically, defendant argues that "the fact" that Lewis was operating a drug house at his residence made it more probable that someone involved in drug-related activities had shot at Lewis.¹

We conclude that the trial court did not abuse its discretion in finding that the issue whether Lewis' home was a drug house was irrelevant. There was nothing to indicate that Ellis actually raided and determined that the house was a drug house. There was nothing in evidence to show that Lewis' house was "in fact" a drug house, as defendant claims. Further, the trial court properly denied the testimony with respect to defendant's plan to somehow "impeach" Ellis with the testimony of the officer in charge of the case, Sergeant Alan Barron, who had previously testified that Lewis was not offered any consideration in exchange for his trial testimony. With respect to the proposed testimony of the evidence technician, we conclude that it would have been speculative. She did not examine the alleged powdery substance on a scale that she discovered in the house. Further, Lewis, himself, testified at trial that there were several packets of controlled substances in his house at the time of the shooting. Accordingly, defendant's argument is without merit.

C. Sufficiency of the Evidence

Smith next argues that there was insufficient evidence to support his convictions of second-degree murder, assault with intent to murder, and felony-firearm. When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt. *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999).

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.* at 464.

¹ We note that the trial court excluded pursuant to MRE 609 evidence of Lewis' prior drug-related convictions. Our review of the lower court record shows that the court subsequently barred several attempts by defendants to introduce, albeit through the back door, evidence of Lewis' prior drug-related convictions. Defendant Smith does not challenge the trial court's initial decision to exclude the evidence, but defendant Davis does. In Docket No. 235212, *infra*, we concluded that the trial court properly excluded the evidence.

Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *Avant, supra* at 505.

In reviewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence from which the jury could find that the essential elements of second-degree murder were proved beyond a reasonable doubt. In addition to the evidence previously discussed in this opinion, there was testimony that two weapons were used and that no shots were fired from the Explorer. The act of discharging a gun at people evidences an intent to kill or cause great bodily harm, thus satisfying the element of malice. There was no evidence of excuse or justification for the shootings. Accordingly, there was sufficient evidence to support Smith's conviction for second-degree 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 Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The intent to kill may be proven by inference from any facts in evidence. *Id.*

Here, there was evidence regarding the discharge of a gun at Lewis, which meets the element of assault. Lewis testified at length regarding the incident, and positively identified the occupants of the Lumina, and stated that he saw a gun come out of the passenger's side window firing shots at Lewis and Cleaves. The act of discharging a gun at people evidences an intent to kill. Further, if Lewis had been shot, such act would make the killing a murder. Accordingly, we find that a rational jury could find that the essential elements of assault with intent to commit murder were proved beyond a reasonable doubt.

Smith next argues that there was no evidence that he possessed a firearm or assisted Davis in the possession of a firearm to support the felony-firearm conviction. Smith concedes that Lewis testified that there was evidence that two weapons were used, but indicates that there was no evidence presented regarding who had fired the second gun. "To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis in original).

Lewis testified that as he saw Smith and Davis drive past his house in a white Lumina, a gun came out of the passenger's side window and was angled toward the house. Additionally, there was evidence that two separate weapons were involved, and Lewis did not see any shots come from the Explorer. Thus, the jury may infer that both shots came from the Lumina and that Smith fired one of the weapons. Accordingly, after reviewing this evidence in a light most favorable to the prosecution, we find that a rational jury could find that the essential elements of felony-firearm were proved beyond a reasonable doubt.

D. Defendant's Supplemental Brief on Appeal

Defendant asserts in his supplemental brief on appeal that the trial court erred in denying his motion to permit a jury view of the crime scene and the Lumina that was in Smith's possession at the time the crime was committed. Specifically, Smith contends that the jury should have been allowed to view the crime scene in order to see that it was impossible for Lewis to determine the identity of the vehicle and its occupants.

Permitting the jury to view a crime scene is within the trial court's discretion. *People v King*, 210 Mich App 425, 432; 534 NW2d 534 (1995). MCL 768.28 and MCR 6.414(D) both permit a trial court to allow the jury to visit a place where an event connected with the crime occurred. *People v Herndon*, 246 Mich App 371, 418; 633 NW2d 376 (2001).

Here, a jury view of the Lumina and the crime scene would have provided evidence cumulative to that presented at trial because numerous photographs of the crime scene were presented to the jury. Further, there was ample testimony from Lewis, Officer Esther Bernritter, and defendants' expert witness, Robert Kerchaert, regarding the crime scene. Kerchaert testified that the Lumina could not be operated with the headlights off. Accordingly, we find that the trial court did not abuse its discretion in denying Smith's motion to permit a jury view.

Defendant next argues that he was deprived of the effective assistance of counsel because his trial attorney failed to call three known alibi witnesses. Because Smith failed to preserve the issue by bringing a motion for a new trial or *Ginther*² hearing, our review of the issue is precluded unless the appellate record contains sufficient detail to support the defendant's claim. *People v Sabin (on Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). In claiming that his trial counsel was ineffective, a defendant must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *Id.* at 659.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 76-77.

Smith has failed to overcome the presumption that he received effective assistance of counsel. The lower court record does not show how defense counsel's failure to call the alibi witnesses was anything other than a strategic decision. Accordingly, we conclude that Smith was not denied the effective assistance of counsel.

Defendant next argues that he was deprived of due process of law because the prosecutor failed to acknowledge the existence of a promise of leniency to Lewis in exchange for his trial testimony. This Court generally reviews allegations of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis and this Court examines the pertinent portion of the record to evaluate the prosecutor's remarks in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999).

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

Smith contends that Lewis must have had some sort of deal or a promise of leniency in this case. Here, Lewis testified that he had not been promised anything in exchange for his testimony. Sergeant Barron testified that he did not promise Lewis anything in exchange for his testimony. Further, the trial court held a pretrial *Brady*³ hearing over the matter. At the hearing, the prosecutor indicated that there was no promises made or consideration provided in exchange for Lewis' trial testimony. The prosecutor also stated that the circumstances did not warrant filing of charges because Sergeant Barron had determined that the amount of drugs found were trace amounts. Thus, Smith's argument relies on a speculative theory for which he has offered no proof in support thereof. We conclude that the prosecutor did not commit misconduct in failing to disclose a "de facto" agreement of leniency in exchange for Lewis' testimony. See *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976).

II. Docket No. 235212

A. Evidence of Prior Convictions

Defendant Davis first argues that the trial court abused its discretion in determining that the evidence of Lewis' prior drug convictions was inadmissible pursuant to MRE 609, and that he was denied the opportunity to cross-examine the witnesses who may have provided Lewis with consideration in exchange for his testimony. We review decisions regarding the admissibility of evidence for an abuse of discretion. *Washington, supra*.

MRE 609 provides, in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs the prejudicial effect.

In *People v Parcha*, 227 Mich App 236; 575 NW2d 316 (1997), this Court stated:

As interpreted, Rule 609 requires that the prior conviction first be examined to determine whether the conviction contained an element of dishonesty

³ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

or false statement. If so, the evidence is automatically admissible. If not, the court must determine whether the conviction contained an element of theft. If so, the court must then examine the conviction to see if the crime was punishable by more than one year in prison, and, if the witness is a criminal defendant, whether the probative value of the evidence outweighs its prejudicial effect. [*Parcha, supra* at 241-242 (citations omitted).]

Lewis' prior convictions were drug related. MRE 609 precludes evidence of Lewis' prior drug convictions because such crimes do not contain an element of dishonesty or false statement, or theft. Thus, Davis' argument that the evidence was admissible and that he should have been able to impeach Lewis' credibility with evidence of the prior convictions is without merit. Accordingly, the trial court did not abuse its discretion in excluding the evidence. As previously discussed in the opinion, Davis' argument that Lewis may have been provided consideration for his testimony, relies on speculation, and is without merit. *Atkins, supra*.

B. Discovery

Davis contends that he was denied his due process of law right to timely discovery. Because defendant failed to preserve the issue for appellate review, *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001), our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

"Under due process principles, the prosecution is obligated to disclose evidence that is both favorable to the defendant and material to the determination of guilt or punishment." *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). If the discovery requirements of MCR 6.201 have been violated, the trial court has discretion to fashion an appropriate remedy after balancing the interests of the court, the parties, and the public. *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997). This balancing includes the consideration of the reasons for noncompliance and the resultant actual prejudice, if any. *Id.*

Davis contends that his defense counsel requested the production of the drug paraphernalia found in Lewis' home. Davis fails to show a discovery violation. Prior to trial, Davis demanded to inspect only the physical evidence that the prosecution intended to *introduce* at trial. The drug paraphernalia evidence found within Lewis' home was not introduced at trial. Further, the record does not show that defense counsel was precluded from inspecting the drug paraphernalia prior to trial. Accordingly, Davis has failed to demonstrate a plain error affecting his substantial rights.

Davis next argues that the trial court abused its discretion in excluding the testimony of Officer Harlon Green to the effect that Davis was cooperative with the authorities. *Washington, supra* at 524. In order to be relevant, evidence must be material and probative to the case, and must be related to any fact that is of consequence to the action. *People v Mills*, 450 Mich 61, 67; 537 NW2d 909, modified and remanded on other grounds 450 Mich 1212; 539 NW2d 504 (1995); see also MRE 401. Davis contends that Green's testimony was relevant to rebut the testimony of Davis' girlfriend, Kimono Cager, who testified on her efforts to suborn perjury in this case.

It is unclear how such evidence could be used to rebut Cager's testimony. At trial, Cager did not indicate that Davis requested that she lie for him; instead, she testified that she did not discuss the matter with him. Cager's friend, Wyvonna Strong, testified that Cager asked her to lie to the police about Davis' whereabouts at the time the crime was committed. However, she also testified that Davis did not ask her to do so. Accordingly, the trial court did not abuse its discretion in excluding the evidence.

Finally, Davis contends that the trial court erred in scoring OV 10 at fifteen points rather than at zero points. A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Under MCL 777.40(1)(a), the trial court must assign fifteen points to this variable if "predatory conduct was involved." *People v Kimble*, 252 Mich App 269, 274; 651 NW2d 798 (2002). The statute defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization." *Id.*, citing MCL 777.40(3)(a).

The record shows that defendants looked menacingly at Lewis in the parking lot of the club. They followed Lewis and Cleaves from the club to Lewis' home, and drove closely to Lewis' car. Lewis parked his car away from his house so that defendants would not find out where he lived. However, defendants drove slowly down the street of Lewis' house and took aim at Lewis and Cleaves before the two men succeeded in finding refuge in the house. Accordingly, the trial court did not abuse its discretion in scoring OV 10 at fifteen points for predatory conduct.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff
/s/ Michael J. Talbot