STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC ROMAN POWELL,

Defendant-Appellant.

UNPUBLISHED
December 18, 2003

No. 239310
Kent Circuit Court
LC No. 00-005302-FC

Before: Smolenski, P.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury, of assault with intent to murder in violation of MCL 750.83, armed robbery in violation of MCL 750.529, and possession of a firearm in the commission of a felony in violation of MCL 750.227(b). The trial court sentenced him as a third habitual offender under MCL 769.11 to two concurrent terms of 16 1/2 to 75 years for the assault and robbery convictions and to a consecutive term of two years for the felony firearm conviction. We affirm.

The instant case stems from allegations that defendant, after purchasing some marijuana, robbed and shot the man from whom he purchased the drugs.

Defendant first contends that trial court erred in allowing the prosecutor to make an improper civic duty argument during her closing statements. A claim of prosecutorial misconduct is a constitutional issue that we review de novo. *People v, Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). In *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), our Supreme Court stated that prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id.*, citing *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). But they must not "resort to civic duty arguments that appeal to the fears and prejudices of the jury members." *Id.* If prosecutors include such comments in their closing arguments, the statements "will be reviewed in context to determine whether they constitute error requiring reversal." *Id.* at 283. Even where the remarks standing alone may be improper, they do not constitute reversible error where they are "based upon the evidence presented" or made in response to "matters raised by the defendants in their proofs and closing arguments." *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

While prosecutorial misconduct is generally reviewed de novo, the claim that a prosecutor engaged in a "civic duty" argument must be raised at trial so that court may try to eliminate any prejudice through a curative jury instruction. *People v Abraham*, 256 Mich App 265, 247; 662 NW2d 836 (2003), citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to object at trial, we review the issue for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002), citing *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

At trial, the complainant, Jonathan Bowman, admitted to being a drug dealer. He stated that he initially lied to police about who shot him because he wanted to retaliate on his own. The prosecutor's comment that the jury should decide the case based on the facts and the law and that otherwise "the law of the street wins" was based on this evidence. She attempted to explain why defendant chose Bowman as a victim. And she provided a rationale for Bowman's inconsistent reports of the incident. Rather than an appeal to the jury's fears and prejudices, the prosecutor argued that the jurors must not be swayed by the fact that the victim was a drug dealer.

In addition to being related to the evidence, the prosecution's closing argument responded to issues raised by the defense. Defendant placed Bowman's credibility at issue by cross-examining him concerning his initial false statements to the police. The prosecutor chose the "law of the street" argument to explain the victim's inconsistent testimony. Based on the ruling in *Duncan*, the prosecutor's remarks do not constitute error.

Defendant next argues that he was denied the right to a jury drawn from a venire representing a fair cross section of the community. The Sixth Amendment entitles a criminal defendant to an "impartial jury drawn from a fair cross section of the community." *People v Hubbard* (*After Remand*), 217 Mich App 459, 472; 552 NW2d 493 (1996), citing *Taylor v Louisiana*, 419 US 522; 96 S Ct 692; 42 L Ed 2d 690 (1975). The petit jury does not have to mirror the community, but distinct groups cannot be systematically excluded from the venire. *Id.* citing *United States v Jackman*, 46 F3d 1240, 1244 (CA 2, 1995).

Despite the existence of this right, we find that defendant in the instant case is precluded from raising the issue on appeal. In *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), our Supreme Court stated that a defendant cannot waive an objection to an issue at trial and then make a claim of error on appeal. The Court found that because the defendant's counsel had expressed satisfaction with the trial court's jury instructions, the defendant had waived the issue. *Id.* Waiver is presumed to be "available in 'a broad array of constitutional and statutory provisions.'" *Id.* at 217-218, citing *New York v Hill*, 528 US 110; 120 S Ct 797; 145 L Ed 2d 560 (2000). Defendant must personally waive "certain fundamental rights such as the right to counsel or the right to plead not guilty." But attorneys have full authority to "manage the conduct of the trial" and determine trial strategy. *Id.* at 218-219. Concerning such issues, waiver can be "effected by the action of defense counsel." *Id.* Waiver "*extinguishes* any error" and precludes appellate review. *Id.* at 216, emphasis in original.

This Court has noted that decisions regarding the selection of jurors generally involve matters of trial strategy. *People v Johnson*, 245 Mich app 243, 259; 631 NW2d 1 (2001), citations omitted, and therefore, defendant's lawyer had the authority to waive this right on behalf of his client. In the instant case, after defense counsel had exercised several peremptory

challenges, the trial court inquired whether he wished to excuse any more of the potential jurors. He replied, "We're satisfied with the jury." This constituted an express waiver of the issue.

This Court has previously granted review of the composition of a jury array even where the defendant's counsel has expressed satisfaction with the jury selected. *Hubbard, supra*, 466. But such situations have only occurred where the "record demonstrated that the party was not satisfied with the jury" and the expression of satisfaction was "a necessary part of trial strategy designed to avoid alienating prospective jurors." *Id.* at 467, citing *Leslie v Allen-Bradley Co, Inc*, 203 Mich App 490, 493; 513 NW2d 179 (1994). In *Hubbard*, the defendant challenged the jury array before the jury was impaneled. *Id.* at 465. This Court found that a later expression of satisfaction with the jury did not constitute a waiver of the issue. *Id.* at 467.

Unlike the situation in *Hubbard*, defendant in the instant case never communicated any dissatisfaction with the jury array. Nothing in the record indicates that defendant's counsel expressed satisfaction merely to avoid alienating members of the jury. Therefore, we find that the exception to the rule concerning waiver does not apply and the issue is not subject to review.

Defendant argues that he could not have challenged the composition of the jury array earlier, because the error in the selection process did not become known until after his trial. He cites *Amadeo v Zant*, 486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1988), for the proposition that the error is neither waived nor forfeited in such situations. However, *Amadeo* is factually distinct from the instant case.

In *Amadeo*, the district attorney and the jury commissioners of Putnam County, Georgia, engineered and concealed a scheme to cause the underrepresentation of African-Americans on the county's juries. *Id.* at 217-218. After exhausting his state court remedies, the defendant challenged the racial composition of his jury array in a federal habeas corpus action. *Id.* at 219. Because he had waived the issue under Georgia state law, the federal district court held that the case could only proceed if he established "cause and prejudice within the meaning of *Francis v Henderson*, 425 US 536, 542; 96 S Ct 1708; 48 L Ed 2d 149 (1976)." *Id.* The Supreme Court stated that the existence of cause ordinarily requires a "showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials made compliance impracticable." *Id.* at 222, citing *Murry v Carrier*, 477 US 478, 488; 106 S Ct 2639; 91 L Ed 2d 397 (1986). The district court found that "interference by officials" and the fact that the defendant's attorneys did not make a tactical decision to forgo a challenge to the jury satisfied this standard. *Id.* at 222. The Supreme Court held that this finding was not clearly erroneous. *Id.* at 228-229. Given our obligation to follow the mandates of these decisions, defendant's failure to raise the issue below precludes us from revisiting it on appeal.

The standard set forth in *Amadeo* was applied to a collateral attack on a conviction initiated in federal court. That standard has no bearing on whether this Court may review a claim. Even if we were to apply the federal cause and prejudice test, defendant has not established cause. Unlike in *Amadeo*, no evidence has been presented to show that the basis for defendant's claim was not reasonably available to his attorney, or that Kent County officials somehow interfered to keep the underrepresentation from coming to light. In the absence of any evidence of wrongdoing, this Court does not have a record which justifies remand on this issue.

Defendant next seeks review of this Court's denials of his motions to remand for an evidentiary hearing. He asserts that new evidence showing his innocence has come to light. This evidence consists of an affidavit from the complainant. In it, Bowman states that he made up the story about defendant shooting him in order to mislead the police. And although he was shot, he cannot identify the gunman.

Decisions concerning whether to grant remands are within the discretion of this Court. *People v Hernandez* 443 Mich 1, 15; 503 NW2d 129 (1994). Because the two previous orders denying defendant's motions to remand expressed no opinions on the merits, the law of the case doctrine does not apply and we may review the earlier decisions de novo. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

Under MCR 7.211(C)(1)(a), an appellant may move to remand to the trial court within the time provided for filing the appellant's brief. This Court may grant such a motion if the issue is one that should initially be decided by the trial court. MCR 7.211(C)(1)(a)(i). Remand is also proper if a factual record is required for appellate consideration of the issue. MCR 7.211(C)(1)(a)(ii).

MCR 7.212(1)(a)(3) gives appellants 56 days from the later of the time that the claim of appeal is filed or the time that the transcript is filed with the trial court to file their briefs with this Court. In the instant case, the claim of appeal was filed on January 25, 2002. And notice of the filing of the transcript was received on March 22, 2002. Defendant's first motion for remand was not filed until 178 days after the later of these dates on September 23, 2002. Therefore, we decline to remand the instant case because defendant failed to bring a timely motion under MCR 7.211(C).

Even if defendant had filed his request in a timely manner, we would have denied his request on the merits. New evidence in the form of a witness' recantation testimony has traditionally been regarded as suspect and untrustworthy. *People v Barbara***,** 400 Mich 352, 362-363; 255 NW2d 171 (1977), citations omitted. And this Court has expressed reluctance to grant new trials on the basis of such evidence. *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). In *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), our Supreme Court stated the grounds for granting a new trial because of newly discovered evidence.

> A defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered;" (2) "the newly discovered evidence was not cumulative;" (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial;" and (4) the new evidence makes a different result probable on retrial.

In the instant case, it is unlikely that Bowman's new testimony would make a difference in the probable results at retrial. While his recantation may impeach his original testimony, this evidence did not provide the sole basis for defendant's conviction. Bowman's trial testimony was corroborated by that of Seals. And under *Canter*, his new testimony is deemed untrustworthy. Even if defendant successfully established this new evidence on remand, he would not be entitled to a new trial under the standard set forth in *Cress*.

Defendant also asserts that the trial court abused its discretion by allowing hearsay testimony. At trial, Nicholas Seals testified extensively concerning the events surrounding the shooting. He also stated that he did not remember asking defendant to tell the police that he was not involved in the crime. But Detective Erika Clark testified that Seals had previously stated that he had posed such a question.

Decisions on whether to admit evidence are reviewed for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), citing *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). But preliminary questions of law, such as whether a rule of evidence precludes admissibility, are reviewed de novo. *Id.* A trial court abuses its discretion if it admits evidence that is inadmissible as a matter of law. *Id.*

MRE 801(c) defines hearsay as a declarant's out of court statement offered to prove the truth of the matter asserted. But a previous inconsistent statement made by a witness is not hearsay. *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998), citing *People v Rodgers*, 388 Mich 513; 201 NW2d 621 (1972). It is offered as proof that the witness made the statement rather than as substantive evidence of the statement's truth.. *Id.*

However, our Supreme Court has set forth an exception to this general rule. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). In *Stanaway*, a witness was only questioned concerning an admission allegedly made by the defendant. *Id.* at 689. After he denied hearing such an admission, a police officer was called to testify that that the witness had previously stated that the defendant had admitted to the crime. The Court found as follows:

> The substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. [*Id.* at 992-693.]

Since *Stanaway*, the Court clarified this rule stating that impeachment evidence is improper only where two factors are present. *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997). First, the substance of the statement purportedly used to impeach the witness must concern a central issue in the case. *Id.* Second, the witness gave no other testimony for which his credibility is relevant. *Id.*

In the instant case, defendant contends that the substance of the statement used to impeach Seals was relevant to defendant's guilt or innocence. Detective Clark testified that Seals had stated that defendant could not help him out by telling the police he was not involved in the shooting. Defendant claims that this creates a strong inference that he was the actual perpetrator of the crime. While the statement is open to this interpretation, it equally supports other inferences, such as that defendant could not help him because he was not present at the scene of the crime. But this Court need not decide whether this concerns the central issue of the instant case because the impeachment testimony does not meet the second prong of the *Stanaway* test.

In *Kilbourn*, the substance of the statements used to impeach the witness was relevant to the central issue of the case. But the witness "testified about a number of events that took place

before the shooting, and indeed was a key actor in some of these events." *Id.* at 683-684. Because of this, the Court allowed the impeachment testimony and reversed this Court's opinion vacating the defendant's conviction. *Id.* at 685. Similarly, in the instant case, Seals testified to much more than whether he discussed his innocence with defendant after the shooting. Like the witness in *Kilbourn*, he testified to the events leading up to the shooting and played a key role in these events. Because Seals' credibility was relevant to other testimony, the *Stanaway* exception does not apply. Under the general rule, Detective Clark's testimony impeaching Seals is admissible. Therefore, we find that the trial court did not abuse its discretion in admitting the evidence.

Defendant also contends the trial court abused its discretion in allowing Detective Clark to testify concerning statements made by the complainant. Detective Clark testified that Bowman had initially told her that he did not want to testify or pursue the matter of his shooting any further.

An abuse of discretion exists where "an unprejudiced person would find no justification for the ruling made." *People v Rice* (*On Remand*), 235 Mich App 429, 439; 597 NW2d 843 (1999). But "a trial court's decision on a close evidentiary decision does not amount to an abuse of discretion. *People v Sabin* (*After Remand*), 463 Mich 43, 67; 596 NW2d 888 (2000).

In *Sabin,* the trial court admitted evidence that the defendant had previously done acts similar to the charged offense to show a common scheme. *Sabin, supra*, 61. Our Supreme Court stated that "reasonable persons could disagree on whether the charged and uncharged acts contained sufficient common features to infer the existence of a common system." *Id.* at 67. Because of this, the Court concluded that the trial court did not abuse its discretion in determining that the evidence was admissible. *Id.*

In the instant case, the trial court overruled an objection to Detective Clark's testimony on the grounds that it was offered to explain her actions rather than for the truth of Bowman's statements to her. This Court upheld a similar evidentiary ruling in *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1995). In *Westland,* the trial court admitted the tape recording of a 911 telephone call that resulted in the police responding to a disturbance. *Id*. at 77. This Court held that it did not abuse its discretion in admitting the tape. *Id*. Rather than being hearsay, the recording showed why the police responded. *Id.*

Plaintiff argues that Bowman's statements concerning his intent do not constitute hearsay because rather than being offered to prove his intent at the time of the statements, they were presented to show their effect on the investigators.

Defendant, on the other hand, asserts that the facts in *Westland* are distinguishable from those in the instant case. Detective Clark testified that Bowman provided her with the nicknames of three people involved in the shooting, but he refused to press charges or pursue the matter any further. After taking Bowman' statement, Detective Clark testified that she compiled a photo lineup based on the names provided. Defendant contends that she took this course of action based solely on the names provided by Bowman, and that the statement concerning his desire to pursue the matter does not provide an explanation for the detective's actions or a rationale for how the investigation was conducted. Therefore, argues defendant, unlike the tapes in *Westland*, the prosecution offered the statement solely for the truth of the matter asserted.

Resolution of this issue depends on the purpose for which Bowman's out of court statements were presented. The trial court determined that they were offered to explain the investigators' actions. Reasonable minds may disagree as to whether this was the proper result. But as in *Sabin*, it constitutes a close call on an evidentiary decision. Therefore, it cannot rise to the level of an abuse of discretion and we decline to overrule the trial court's decision.

Affirmed.

/s/ Michael R. Smolenski
/s/ David H. Sawyer
/s/ Stephen L. Borrello