STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KHALIL TALAL CHAHINE,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 263429
Wayne Circuit Court
LC No. 04-007133-01

Before: Hoekstra, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his conviction following jury trial of second-degree murder, MCL 750.317, assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant argues that he was denied a fair trial and that he was denied his constitutional right to present a defense by (1) the exclusion from evidence for substantive purposes of an accomplice's out-of-court statement that was exculpatory as to defendant, and (2) by the trial court's not ordering discovery of certain audio tape recordings federal authorities seized from a business of defendant's father. We affirm.

This case involves the shooting death of the victim on May 16, 2004 in the city of Dearborn. There was enmity between the victim and defendant arising out of their affection for the same woman, Salwa Ali. Ali was defendant's former girlfriend, but she married the victim three months before his death. The shooting followed an incident at a Detroit nightclub earlier in the evening in which defendant "jumped" the victim inside the nightclub. Ali El-Ozeir, who is married to defendant's sister, Leila Chahine, accompanied defendant. Catherine Hallis, the victim's cousin, Amar Alkhafaji, Ibrahim Chahrour, and Ziad Souidan accompanied the victim on the evening of the fatal shooting. After nightclub security ejected the fighting parties, the altercation continued outside where the police restrained the victim, who had removed his belt to use against defendant. Defendant and El-Ozeir fled in a black Mercedes. The victim's party, with the victim driving his Suburban, attempted to locate defendant.

Later in the evening, the victim located the black Mercedes and started to follow it. The Mercedes stopped or started to back up, and someone stood up through its open sunroof and fired several shots at the Suburban. The victim was fatally wounded. At trial, defendant disputed two issues related to the shooting itself: (1) did anyone riding in the victim's vehicle possess or fire a weapon and (2) was defendant the person who fired the fatal shots while standing up through the open sunroof of the black Mercedes?

All of the four surviving occupants of the Suburban denied having or firing a gun. Three of the four identified defendant as the shooter in the black Mercedes. One bystander witness called 911 and reported shooting between two vehicles. But at trial, he testified that he actually only saw shots being fired from one vehicle; he did not see shots fired from the Suburban. The prosecutor also presented the testimony of a reluctant jailhouse witness who testified defendant admitted he was the shooter.

Defendant first argues that the trial court erred by excluding from evidence for substantive purposes a statement made by defendant's brother-in-law in Lebanon that he, not defendant, was the shooter. We disagree.

The trial court ruled before trial that Ali El-Ozeir 's statement to defendant's father, Talal Chahine, made while he was apparently in custody in Lebanon, was admissible under MRE 804(b)(3). In the statement, El-Ozeir claims he, not defendant, was the shooter in the incident resulting in the victim's death. In the prosecutor's application for leave to appeal, this Court peremptorily reversed the trial court, opining,

> The trial court abused its discretion in granting defendant's motion in limine to admit a confederate's statement under MRE 804(b)(3). Although the declarant is unavailable, his statement did not tend to subject him to criminal liability. He admitted firing the gun at issue but stated both that he lacked the specific to intent commit either crime[1] and that he acted in self-defense. The declarant is out of the country and due to the absence of an extradition treaty between the United States and Lebanon, he is unlikely to be prosecuted here. While defendant contends that the declarant is being prosecuted for the same offense in Lebanon, the only evidence of this is hearsay that has not been shown to be admissible. Therefore, the declarant's statement did not tend to subject him to criminal liability that a reasonable person in his position would not have made it unless believing it to be true. *People v Barrera*, 451 Mich 261, 270-272; 547 NW2d 280 (1996). In addition, the declarant's statement has not been shown to be trustworthy. Although there is no dispute that the declarant made the statement voluntarily, all other factors relevant to corroboration preponderate against a finding of trustworthiness. *Id*. at 273-275, 289. [*People v Chahine*, unpublished order of the Court of Appeals, issued March 15, 2005 (Docket No. 260932).]

During the trial, the trial court ruled that the prosecutor "opened the door" to use El-O'Zeir's out-of-court statements only for impeachment after the following question and answer during the prosecutor's direct examination of Detective Kenneth Muscat:

> *Q*. You have any evidence that suggests that someone else besides Mr. Khalil Chahine did the shooting?
>
> *A*. None, sir.

[1] The two crimes were the murder of the victim and assault with intent murder Ms. Hallis.

Defense counsel argued that the trial evidence further corroborated El-Ozeir's statement so as to permit its admission as substantive evidence. But the trial court ruled it was precluded from doing so by this Court's prior order.

On appeal, defendant again argues El-Ozeir's statement was admissible under MRE 804(b)(3). He also asserts the error denied him his due process right to present a defense.

Generally, this Court will review a trial court's evidentiary rulings for an abuse of discretion. *People v Katt*, 468 Mich 272, 278, 290; 662 NW2d 12 (2003). But where the evidentiary issue involves a question of law, as here, whether the law of the case doctrine applies or whether the evidentiary ruling denied defendant his constitutional rights, appellate review is de novo. *Id.*; see also, *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001), and *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Defendant's arguments on this issue fail. The circumstances under which El-Ozeir made his third statement (January 17, 2005) have not changed, nor has El-Ozeir's credibility improved since this Court's order of March 15, 2005 (Docket No. 260932). In addition, corroboration of El-Ozeir's statement regarding some of the events leading up to the shooting do not enhance the credibility of the essential claims contained in the statement that are favorable to defendant: (1) that the shooting was in response to shots fired from the vehicle the victim occupied, and (2) that El-Ozeir was the shooter. In sum, there is no reason to avoid applying the doctrine of the law of the case, which precludes this Court from reviewing again an issue that it has previously decided on the merits when there has been no material change in the facts since the prior appeal. *People v Freedland*, 178 Mich App 761, 770; 444 NW2d 250 (1989).

El-Ozeir, defendant's brother-in-law, accompanied defendant on the evening of the shooting. Thereafter, El-Ozeir purportedly fled to his native Lebanon. He allegedly was taken into custody by Lebanese authorities in connection with the death of the victim, who was also a Lebanese citizen. El-Ozeir gave three contradictory statements regarding the shooting.

On September 9, 2004, El-Ozeir purportedly confessed to a Lebanese military investigator that after defendant and the victim fought inside and outside a Detroit nightclub, El-Ozeir obtained a handgun from a person named Escot. El-Ozeir also stated that later in the evening, he and defendant were driving to El-Ozeir's house when the victim surprised them and began chasing them in his vehicle. El-Ozeir stated he saw that the victim "was holding a fire gun," so El-Ozeir came out of the sunroof and fired three shots at the victim's vehicle. El-Ozeir stated the next morning the police came to his house, but he jumped out of a window and fled to Canada. He then went from Canada to Syria, and then to Lebanon.

El-Ozeir's gave a second statement on September 11, 2004, before an examining magistrate, by then he had legal counsel. In this second statement, El-Ozeir denied he shot the victim. Now, El-Ozeir stated there was conflict between the victim and defendant over a woman in whom they both had a romantic interest. He described the altercations inside and outside the Detroit nightclub. El-Ozeir stated that he was driving with the defendant riding as a passenger when the victim in a large vehicle "like a Hummer" began chasing them and shooting at them. Defendant came out of the car's roof and started shooting a "military gun" at the vehicle the victim was driving. El-Ozeir stated that he gave his first statement that was not true because military police beat him.

El-Ozeir gave a third statement after defendant's father, defendant's trial counsel, a court reporter, and a retired judge traveled to Lebanon. In response to defense counsel's questioning, El-Ozeir stated that both he and defendant were drunk on the evening in question. Defendant was driving and El-Ozeir was riding as a passenger. Later, in Hamtramck, a person named Scott gave El-Ozeir a gun. El-Ozeir and defendant went to various places until El-Ozeir saw what he believed to be the victim's truck parked the wrong way. El-Ozeir stated defendant was still driving the car. The truck followed them and that the window of truck came down and shooting started. El-Ozeir then said:

> "I hear two bullets. As soon as they shot the two bullets, I out of control. All I know, I went out of the sunroof, I start shooting to scare those people. I wasn't trying to shoot nobody. In my head, I was too drunk.

In the third statement, El-Ozeir claimed the first statement he gave was not coerced and was the truth. El-Ozeir repeated that he was drunk and thought the victim wanted to hurt his family, to hurt him, and to kill defendant. He stated, "Right now he [the victim] is shooting on us, so believe it is too serious at this point, I got to save my life, save my family. At that second, I was too drunk, okay, this guy is trying to hurt me right now, going to hurt my family."

"'[I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.'" *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995), quoting *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454, 302 NW2d 164 (1981) (citations omitted). Normally, the law of the case doctrine will apply regardless of the correctness of the prior determination. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). The doctrine specifically applies in criminal cases when evidentiary issues have already been decided on interlocutory appeal. *Freedland*, *supra* at 770. A court may decline to apply the law of the case, however, when the facts have materially changed, *id*., or to avoid injustice, such as where the prior determination was clearly erroneous. *Herrera*, *supra* at 340-341; *People v Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981).

The issue previously decided by this Court was whether El-Ozeir's third statement was admissible under an exception to the rule against hearsay for a statement by an unavailable declarant when the

> . . . statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. [MRE 804(b)(3).]

Here, defendant has failed to establish that El-Ozeir's third statement would tend to subject him to criminal liability in a real and tangible way. So, defendant has failed to establish that this Court's prior determination was clearly erroneous. We decline to revisit this issue.

Next, contrary to defendant's argument, the trial record does not provide any basis for concluding El-Ozeir's statement was trustworthy, so defendant has again provided no basis for concluding that this Court clearly erred in its prior order. Nor has defendant provided any basis for concluding that an injustice has occurred as a result of the exclusion of El-Ozeir's statement as substantive evidence. This is especially so in light of the fact that the trial court ruled during the course of the trial that the prosecution had open the door to placing before the jury for impeachment purposes El-Ozeir's statements that he was the shooter, not defendant. Thus, there is no reason not to apply the law of the case doctrine. *Herrera, supra* at 340-341; *Freedland, supra* at 770.

Next, defendant argues that the trial court erred by precluding evidence regarding the circumstances surrounding El-Ozeir's third statement after the court permitted Detective Muscat to testify that he did not believe El-Ozeir's statements were credible. Defendant argues that it is improper for one witness to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Defendant also argues he was denied his constitutional right to present a defense and to confront through cross-examination witnesses that testify against him. Defendant again asserts the ruling denied his constitutional right to due process because El-Ozeir's statement bore assurances of trustworthiness and was critical to the defense. *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). We disagree.

Because El-Ozeir was not a witness, and his out-of-court statements were not admitted to prove the truth of the matters asserted, the general rule prohibiting one witness from commenting on the credibility of another witness is inapposite. That rule is premised on the fact that the determination of the credibility of witnesses is the function of the trier of fact. *Buckey, supra* at 17. Accordingly, such testimony is not relevant. *Id.* Here, the officer's testimony that he did not find that El-Ozeir's statements credible was admitted only to explain his answer that there was no evidence of someone other than defendant who was the shooter. Moreover, the trial court limited the jury's consideration of the evidence to the credibility of Detective Muscat. Thus, the credibility of the El-Ozeir's statements was not before the fact finder. As the *Buckey* Court observed, a proper limiting instruction by the trial court will alleviate any potential prejudice even when improper testimony regarding the credibility of another witness is received. *Id*. at 18.

Likewise, the trial court did not abuse its discretion denying defendant's request to admit evidence of the circumstances surrounding El-Ozeir's third statement. Because the trial court did not admit El-Ozeir's statements for substantive purposes, attacking and supporting his credibility was not relevant and was a collateral issue.[2] Thus, the trial court properly excluded the proposed evidence under both MRE 402 ("Evidence which is not relevant is not admissible."), or MRE

[2] Defendant does not argue that MRE 806 might apply. That rule provides in part: "When a hearsay statement . . . has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness." MRE 801(c) defines "hearsay" as "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." So, MRE 806 must be limited to situations where "hearsay" has been admitted as substantive evidence of the truth of the matter asserted.

403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). "[G]enerally a party may not introduce extrinsic evidence to contradict a witness regarding collateral, irrelevant, or immaterial matters." *People v Lester*, 232 Mich App 262, 275; 591 NW2d 267 (1998), citing *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

For the same reasons, the trial court did not deny defendant his constitutional right to present witnesses in his defense or confront witnesses against him. "Neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject." *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). The right of confrontation "does not include a right to cross-examine on irrelevant issues and may bow to accommodate other legitimate interests of the trial process or of society." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The Confrontation Clause, however, does guarantee an accused a reasonable opportunity to test the truth of a witness' testimony. *Id*. Here, the trial court afforded defendant that opportunity.

Defendant's final argument on this issue, that the exclusion of El-Ozeir's third statement violated his constitutional right to due process is based on two false premises: (1) that the statement bore assurances of trustworthiness and (2) that the statement was critical to the defense. As more fully discussed above, El-Ozeir's statements in Lebanon were correctly determined as a matter of law to bear insufficient indicia of trustworthiness to be admissible under MRE 804(b)(3). The very process of deciding admissibility of hearsay under that rule takes into consideration the accused's constitutional right to present a defense. *Barrera*, *supra* at 279. Further, defendant was not precluded from presenting his own testimony regarding whether El-Ozeir was the shooter, or whether shooting was an act of self-defense. Additionally, defendant was able to spread before the jury, albeit for impeachment purposes, that El-Ozeir had made statements that he, not defendant, was the shooter. Under these circumstances, defendant was not denied a fair trial. See *Chambers*, *supra* at 303 (the facts and circumstances of each case must be examined to determined if an evidentiary ruling denies an accused a fair trial).

Last, defendant argues he was denied a fair trial when the trial court denied his requests for discovery of certain audiotapes federal authorities seized from defendant's father's business during the course of the trial. He argues that due process required the prosecutor to disclose any evidence favorable to him, including evidence usable for impeachment purposes. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). Defendant asserts the audiotapes that were turned over to the prosecutor were discoverable because the prosecutor stated in court that at least one of the tapes would have been useful in cross-examining witness Salwa Ali.

This Court reviews a trial court's decision whether to grant discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). Generally, an appellate court will defer to the trial court's judgment, but if the court's ruling is outside the range of principled outcomes, the court has abused its discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 372 (2006). Defendant's constitutional claim is a question of law this Court reviews de novo. *Phillips*, *supra* at 587; *Beasley*, *supra* at 557.

MCR 6.201, not MCL 767.94a, governs discovery in a criminal case. See Administrative Order No. 1994-10, 447 Mich cxiv; *Phillips*, *supra* at 587. Because the record indicates the audiotapes at issue were recorded conversation's between defendant's father and individuals who were potential defense witnesses, not prosecution witnesses, the audiotapes do not fall within the specific provisions of MCR 6.201 for either mandatory discovery or discovery upon request. The only provision that arguably applies to the audiotapes in this case is MCR 6.201(B)(1), which provides that the prosecuting attorney must provide on request, "any exculpatory information or evidence known to the prosecuting attorney."

It is unclear whether the prosecutor's obligation under MCR 6.201(B)(1) is greater, less, or co-extensive with the prosecutor's obligation to accord an accused due process under *Brady* and its progeny. See *Elston*, *supra* at 763 (drawing a distinction between "exculpatory" under MCR 6.201(B)(1), and "favorable to an accused" under *Brady*, *supra*). Under *Brady* and its progeny, "[a] criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005) (citations omitted). Nevertheless, "[t]here is no general constitutional right to discovery in a criminal case." *Elston*, *supra* at 765. Consequently, even if the trial court abused its discretion in its discovery rulings, or the prosecutor failed to comply with MCR 6.201(B)(1), a violation of the discovery rule is nonconstituional error. *Id*. at 765. In order to merit reversal, defendant must establish that it is more probable than not that the violation was outcome determinative. *Id*. at 766. An error is outcome determinative if it undermined the reliability of the verdict, which is determined by considering the nature of the error in light of the weight and strength of the untainted evidence.

Granting deference to the trial court, we cannot find that the court's rulings regarding defendant's discovery requests were an abuse of discretion. The only suggestion in the record that the tapes contained material exculpatory to defendant is defense counsel's equivocal representation of double or triple hearsay attributable to a federal prosecutor that the tapes either contained evidence exculpatory to defendant or evidence of an effort to obstruct justice. One of defense counsel's intervening sources for this information was a news reporter. When the trial court asked defense counsel if he had even spoken directly to the federal prosecutor, counsel admitted he had not. Further, defense counsel acknowledged that a newspaper article regarding the tapes seizure did not support counsel's claim the tapes contained exculpatory material.

Rather, than containing exculpatory material, the record indicates that defendant's father prepared the tapes in anticipation of his son's trial. Further, up until the time that the federal authorities seized the tapes, the same attorneys represented defendant and his father. There is nothing to indicate any prosecution witnesses were tape recorded. Indeed it appears that only potential defense witnesses from whom defendant's father sought to elicit or solicit testimony provided tape recorded statements. The prosecutor noted the tapes were the focus of an investigation into an effort to obstruct justice, and acknowledged the tapes might be usable to impeach the testimony of persons recorded if they were called to testify at the trial. Under these circumstances, the trial court's denial of defendant's discovery requests but ordering the prosecutor to disclose any exculpatory information and precluding the prosecutor from using the tapes for impeachment purposes was a result within the range of principled outcomes, and thus, not an abuse of discretion.

Even if we assume that the prosecutor violated MCR 6.201(B)(1) because the audiotapes contained exculpatory information, defendant cannot establish the violation was outcome determinative so as to warrant reversal. *Elston, supra* at 766. On the basis of available information, the audiotapes would be hearsay to which no recognized exception applied, and therefore, inadmissible to prove the truth of any matters asserted. MRE 801; MRE 802. Moreover, defendant had access through his father to the identity of the recorded individuals and the substance of whatever they might be able to testify about at trial. Indeed, the record indicates defense counsel was aware of the identity of the potential witnesses who were recorded and expressed concern that the prosecutor might impeach those witnesses with the tape recordings. Yet any concern the defense may have had regarding these potential witnesses' being impeached with the content of recorded conversations in the hands of the prosecutor was eliminated by the trial court's ruling that the prosecutor could not use the tapes for that purpose. Thus, the tapes themselves could not be admitted into evidence, and the prosecutor's possessing the tapes did not prevent defendant from presenting evidence of any assertions they might contain through the testimony of the persons whose conversations had been recorded. In sum, any alleged error regarding discovery has not undermined the reliability of the verdict in light of the nature of the error and the weight and strength of the evidence supporting guilt. *Elston, supra* at 766.

For many of the same reasons, a *Brady* violation cannot be established.

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Cox, supra* at 448; see also *Lester, supra* at 281.]

Here, the audiotapes at best contained material that the prosecutor could use to impeach defense witnesses. Such evidence is not favorable to the accused under *Brady*. In *Brady*, the Supreme Court held that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady, supra* at 87. In *Bagley, supra* at 676, the Court held that the *Brady* rule extended to a prosecutor's failure to disclose evidence that the defense might have used to impeach the government's witnesses. "Impeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule." *Bagley, supra* at 676. In this case, there has been no showing the tapes would be useful to impeach the prosecution's witnesses; therefore, defendant has not shown the tapes were "favorable to the accused" within the meaning of the *Brady* rule.

But, even assuming the audiotapes contained evidence favorable to defendant, defendant had access to the tapes before their seizure through his father, and even after the tapes were seized by federal authorities, defendant through the exercise of reasonable diligence could have produced the substance of the audiotapes' contents through testimony by the persons whose conversations had been recorded.

Moreover, it cannot be said that the prosecutor suppressed evidence, whether favorable or not to defendant. The audiotapes themselves would be inadmissible hearsay. Defendant could

easily have produced the substance of whatever relevant matters were discussed in the recorded conversations by calling as witnesses the persons whose conversations were recorded. Additionally, under the trial court's ruling, defendant would have been able to present these potential witnesses without fear that they would be impeached with the content of audiotapes.

Finally, because the prosecutor's possession and retention of the audiotapes did not preclude defendant from presenting as admissible testimony the substance of whatever they contained, defendant cannot establish "that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Cox, supra* at 448; *Lester, supra* at 281.

In conclusion, no error warranting reversal occurred with respect to the audiotapes that came into the prosecutor's possession mid-trial.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder