STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2009
v	No. 282325 Calhoun Circuit Court
PRESTON EMMANUEL JACKSON, Defendant-Appellant.	LC No. 2007-002059-FC

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial for second-degree murder, MCL 750.317; two counts of possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. We affirm.

Testimony established that defendant shot and killed Daniel Birmingham after Birmingham failed to pay a drug debt owed to defendant. More specifically, according to witnesses, defendant "had run up on" and attacked Birmingham; defendant placed Birmingham in a headlock, hit him in the head with a gun, forced him around the corner of a house, out of general view, and fatally shot him in the face, before running away from the scene and disposing of the weapon and his clothing. Testimony further indicated that on more than one occasion, defendant admitted to having shot Birmingham. Defendant was acquitted of first-degree murder, but was found guilty of second-degree murder and of the associate weapons charges.

On appeal, defendant first argues that the trial court erred in admitting the videotape recording of witness Terry Heatherly's testimony at an investigative subpoena hearing because admission of that testimony violated defendant's Confrontation Clause rights and it constituted inadmissible hearsay. We disagree.

We review de novo defendant's assertion that admission of Heatherly's prior testimony violated defendant's constitutional right to confront the witnesses against him, to determine whether any constitutional error occurred and, if so, whether that error was harmless beyond a reasonable doubt. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). We review the trial court's evidentiary decision to admit the challenged evidence for a clear abuse of discretion. *People v Jones*, 270 Mich App 208, 211; 714 NW2d

362 (2006). The trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

It is axiomatic that a defendant has a constitutional right to confront the witnesses against him. US Const, Ams VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004). That said, however, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, *supra* at 59 n 9, 68. That is, the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id*. at 59 n 9.

Turning to the evidentiary issue, hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible unless otherwise provided by the rules of evidence. MRE 802. See also *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999), overruled on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). Nevertheless, a prior statement of a witness is not considered hearsay, and may be admitted to establish the truth of the matter asserted, where "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . ." MRE 801(d)(1)(A). Testimony given at an investigative subpoena hearing is given under oath and the witness is subject to perjury charges; such testimony has been likened to grand jury testimony. MCL 767A.5(2); MCL 767A.9; *People v Farquharson*, 274 Mich App 268, 275; 731 NW2d 797 (2007). Thus, where the witness is present and testifies at trial, where he is subject to cross-examination, prior testimony given at an investigative subpoena hearing after the witness was sworn in and testified subject to the penalty of perjury, meets the criteria set forth in MRE 801(d)(1)(A), and is not considered hearsay.

Here, the record reflects, and defendant does not dispute, that Heatherly was sworn by the prosecutor at the investigative hearing and that Heatherly testified inconsistently at trial. Therefore, Heatherly's prior testimony was admissible as a prior inconsistent statement under MRE 801(d)(1)(A). Defendant claims he was denied the right to cross examine Heatherly at the investigative hearing and thus, that Heatherly's testimony from that hearing was inadmissible. However, MRE 801(d)(1)(A) requires that the witness be available for cross-examination at trial, not at the time the previous testimony was given. *People v Malone*, 445 Mich 369, 375-378; 518 NW2d 418 (1994). Further, "[w]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements[,]" and, as previously noted, the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Crawford*, *supra* at 59 n 9. Heatherly was clearly available for cross-examination at trial, and defense counsel did in fact cross-examine Heatherly regarding his prior testimony. Therefore, the videotape recording of Heatherly's investigative subpoena testimony was properly admitted by the trial court, and its admission did not present a Confrontation Clause violation.

Defendant next asserts on appeal that the trial court erred in failing to instruct the jury on voluntary manslaughter as a lesser-included offense of first and second degree murder. Defense counsel expressly approved the jury instructions with the affirmative statement that he had no objection to them after they were given. Therefore, defendant has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Even were this not the case, defendant's assertion lacks merit, as a rationale view of the evidence did not support the giving of a voluntary manslaughter instruction. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

Generally, manslaughter is a necessarily included lesser offense of murder, and an instruction on manslaughter "must be given if supported by a rational view of the evidence." *Id*. at 541. Voluntary manslaughter requires a showing that "(1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005).

Although the record reflects that the victim owed defendant $200 for drugs, this fact does not support a finding that defendant killed the victim in the heat of passion. Rather, the record reflects that defendant was contemplating the fact that the victim owed him money well before the fatal encounter; he told others that he had a "beef" with the victim and was "going to handle his business" if he was not paid. He displayed a gun in his waistband while talking about his "beef." An eyewitness observed defendant approach the victim, hit him in the head with a gun, and then put his arm around the victim and walk around the corner of a house, out of sight, at which point the eyewitness heard a gunshot. The record clearly reflects that defendant was not impassioned; he was merely "disgruntled" because the victim owed him $200. There is no record evidence that the victim provoked defendant at all before the shooting, much less that he provoked defendant to act out of passion. The evidence also did not support that there was not a sufficient lapse of time for a reasonable person to control his passions where defendant knew of the debt and had plans related to it before he saw the victim on the night of the shooting. A rational view of the record therefore did not support a voluntary manslaughter instruction.[1]

[1] Defendant correctly notes that that both voluntary and involuntary manslaughter are lesser-included offenses of murder and that "a manslaughter instruction must be given if supported by a rational view of the evidence." However, defendant does not specifically argue that he was entitled to an instruction on involuntary manslaughter, and he presents no factual basis for an involuntary manslaughter instruction. Defendant's argument on this issue is that the jury could have determined that defendant shot Birmingham in the heat of the moment, during an argument, as a result of adequate provocation. Defendant did not assert at trial, and does not argue on appeal, that there was any basis for the jury to find that the gun discharged unintentionally, such as during a struggle, or that the victim was killed as the result of negligent conduct or with an absence of malice. Nor do we find any basis in the record for defendant to make such assertion. Thus, there was no basis for an instruction on involuntary manslaughter. *People v Holtschlag*, 471 Mich 1, 6-10; 684 NW2d 730 (2004).

Lastly, defendant raises several discovery errors, which he maintains violated his discovery requests and impinged upon his constitutional due process rights. We review defendant's assertion of constitutional error de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004); *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). We review the trial court's decisions regarding discovery matters for an abuse of discretion, examining all the relevant circumstances regarding the cause of any noncompliance by the prosecutor and the defendant's showing of actual prejudice. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003); *People v Davie (After Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997).

"'There is no general constitutional right to discovery in a criminal case . . . .'" *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994), quoting *Weatherford v Bursey*, 429 US 545, 559; 97 SCt 837; 51 L Ed 2d 30 (1977). However, a defendant has a constitutional right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20; *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006). This right is a "fundamental element of due process . . . ." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). And, where evidence is exculpatory and material, defendant has a due process right to the evidence. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Carter*, 415 Mich 558, 593; 330 NW2d 314 (1982), overruled in part on other grounds, *People v Robideau*, 419 Mich 458, 355 NW2d 592 (1984). Thus, discovery violations are nonconstitutional errors, unless they violate defendant's right to present his defense.

As regards the constitutional component of defendant's claim of error, this Court has explained,

> 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. 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. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005) (citations omitted).]

Non-constitutional discovery errors are reviewed to determine whether it is more probable than not that the error was outcome determinative. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000), citing *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). This Court considers the weight and strength of the admissible evidence in performing this analysis. *Id*. at 766. MCR 6.201, which controls discovery in criminal cases, *Phillips*, *supra* at 588, provides in relevant part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
>
> (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and

> make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial;
>
> (2) any written or recorded statement pertaining to the case by a lay witness whom the party may call at trial, except that a defendant is not obliged to provide the defendant's own statement;
>
> * * *
>
> (6) a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial, including any document, photograph, or other paper, with copies to be provided on request. A party may request a hearing regarding any question of costs of reproduction. On good cause shown, the court may order that a party be given the opportunity to test without destruction any tangible physical evidence.
>
> * * *
>
> (J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.

"When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance." *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002); see also *Davie, supra* at 598; *People v Taylor*, 159 Mich App 468, 486-487; 406 NW2d 859 (1987). "It requires inquiry into all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'" *Davie, supra* at 598, quoting *Taylor, supra* at 482. "[E]xclusion of otherwise admissible evidence is an extremely severe sanction that should be limited to egregious cases." *People v Greenfield*, 271 Mich App 442, 456 n 10; 722 NW2d 254 (2006). Defendant bears the burden of furnishing this Court with a record to verify the factual basis of his argument. *Elston, supra* at 762.

Defendant first claims the trial court erred in permitting the late endorsement of a witness for the prosecution, Michael Stevens. The prosecutor is permitted to add to its witness list "at any time upon leave of the court and for good cause shown or by stipulation of the parties." MCL 767.40a(4). However, "[a] violation of § 40a does not require automatic dismissal. Rather, the trial court must exercise its discretion in fashioning a remedy for noncompliance with a discovery statute, rule, order, or agreement." *People v Lino*, 213 Mich App 89, 92; 539 NW2d 545 (1995), overruled on other grounds *People v Carson*, 220 Mich App 662; 560 NW2d 657

(1996). Whether to permit a late endorsed witness is within the trial court's discretion. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003).

We conclude that the trial court did not abuse its discretion in permitting Stevens to testify and requiring the prosecutor to promptly provide a witness statement to defense counsel as soon as it became available. The record does not support, and defendant fails to show, any basis upon which to conclude that the prosecutor willfully failed to list Stevens as a witness earlier. Further, defense counsel was given some time to review Stevens' potential testimony. On appeal, defendant fails to sustain his burden of establishing that he was prejudiced.[2] *Lino*, *supra* at 93. Moreover, Stevens's testimony was not nearly as damaging as that of the eyewitness who saw defendant walk around the corner with the victim immediately before the gunshot was heard, Heatherly's statement that defendant shot the victim, or another witness's testimony that defendant confessed to her on the day after the shooting that he shot the victim. Defendant has failed to demonstrate that it was more probable than not that any error in permitting Stevens to testify was outcome determinative. *Elston*, *supra* at 765-766. Defendant is not entitled to relief. And, we further conclude that because Stevens's testimony was not favorable to defendant, the prosecutor's late disclosure that Stevens would testify did not implicate the protections afforded by *Brady*, *supra*. *Cox*, *supra* at 448.

Defendant complains that he did not receive a ballistics report or a diagram or sketch of the scene of the crime. However, the record reflects that these items were unavailable to both the prosecutor and defense counsel at the time of the motion hearing wherein discovery was discussed, and therefore there was no error in failing to produce them beforehand. MCR 6.201. In fact, no ballistics test was performed because a weapon was never recovered, and there is no indication that a diagram or sketch of the scene was prepared. Rather, the record reflects that the prosecutor introduced a GIS mapping of the streets surrounding the scene, which would have been publicly available to defendant as well. This map was provided to defense counsel and used, but not admitted, without objection at trial.

Defendant further claims error regarding the contamination list.[3] The record reflects that the prosecutor furnished the list on the morning of the second day at trial. The list was tangible physical evidence subject to disclosure, MCR 6.201(A)(6), and two weeks before trial the prosecutor informed defense counsel that all documents were available for inspection upon request. Considering these circumstances, the trial court did not abuse its discretion in allowing the contamination list where the prosecutor provided it at the trial court's direction after the hearing where discovery was discussed and where there is no indication that the prosecutor willfully withheld the evidence. We note that defense counsel did not request more time to

[2] We note that, although defendant requested discovery in this case and it was the subject of discussion with the trial court, defense counsel never expressly argued in the trial court that the prosecutor violated discovery, and therefore the trial court never made any specific findings regarding noncompliance or prejudice.

[3] In his appellate brief, defendant refers to this document as the "containment list," however, it is referred to as the "contamination list" in the lower court transcript.

review the evidence after receiving it, and defendant provides no support for his assertion on appeal that there was inadequate time to review the list. Further, there is no indication that there were any issues regarding that list that caused prejudice to defendant because of its late disclosure. *Davie*, *supra* at 598. Moreover, the record does not support that any of this evidence was exculpatory, and therefore defendant's due process rights were not violated. *Brady*, *supra* at 87; *Cox*, *supra* at 448.

Next, defendant argues that the prosecutor failed to provide the photographs of the crime scene and of the photographic lineups that were conducted. MCR 6.201(A)(6) provides that tangible physical evidence, such as photographs, be made available for inspection. Again, two weeks before trial the prosecutor formally indicated that the photographic evidence was available for inspection upon request. The parties and the trial court later agreed that defense counsel would inspect the photographs after the motion hearing, which was the day before trial. Defense counsel never indicated that more time was needed to review the photographs or prepare to address them at trial, and he did not object to the admission of any photographs at trial. Defendant fails to provide any basis upon which to conclude that the photographs were inadmissible or that he was prejudiced because additional time for review was necessary and not provided. We find that the trial court did not abuse its discretion in allowing the photographs. Further, defendant has not demonstrated that any of the photographs constituted favorable evidence, and therefore defendant's due process rights were not violated by the manner and timing of their disclosure. *Brady*, *supra* at 87; *Cox*, *supra* at 448.

The recording of Heatherly's 911 telephone call also constituted tangible physical evidence subject to disclosure. MCR 6.201(A)(6). As with other tangible physical evidence, the prosecutor's response to defendant's discovery requests two weeks before trial specifically provided that the recording was available for inspection upon defense counsel's request. At the subsequent motion hearing, the parties and the trial court agreed that defense counsel would visit the prosecutor's office that day to listen to the cassette tape recording of the 911 call, and the record reflects that defense counsel actually did so. We conclude that there was no abuse of discretion where the prosecutor indicated the tape was available for review, the trial court required disclosure of the tape before trial, and defense counsel actually listened to the version of the recording that was played at trial before trial, albeit in a different format.[4] *Davie*, *supra* at 598. In addition, the 911 call was not exculpatory because Heatherly implicated defendant during the call, and therefore defendant has not established a *Brady* violation. *Cox*, *supra* at 448.

Lastly, defendant briefly argues that the trial court erred in admitting the videotape recording of Heatherly's investigatory subpoena testimony because defendant did not get a transcript. The record clearly indicates that defense counsel was aware of the testimony and used it during the preliminary examination. Defense counsel never objected to the recording at trial on this basis. Upon reviewing the limited record available with respect to this claim, we

[4] There was also discussion about an enhanced or "cleaned up" digital version of the 911 call. However, the record reflects that no such version was created, and that the 911 recording that was played at trial was merely a DVD recording of the original cassette tape.

conclude that defense counsel was aware of Heatherly's prior testimony and thus, that defendant has failed to fulfill his burden of establishing the factual predicate for his claim. *Elston, supra* at 762. Further, Heatherly clearly implicated defendant as the victim's murderer during the hearing, and therefore this evidence was not exculpatory. Thus, even if no transcript was provided, we find that no violation of defendant's due process rights occurred. *Cox, supra* at 448.

We affirm.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro