

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC DEON PIPPEN,

Defendant-Appellant.

UNPUBLISHED

November 17, 2009

No. 286325

Wayne Circuit Court

LC No. 07-013110-FC

Before: Hoekstra, P.J., and Murray and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of being a felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and second-degree murder, MCL 750.317. We affirm.

Defendant's convictions arose from the shooting death of Derrick Hill. On March 5, 2006, while standing outside the Brewster Projects in Detroit, Hill was shot in the head. Minutes before Hill was shot, Andre Johnson saw Hill talking with defendant and Steven Anderson. After Hill was shot, Johnson observed defendant running away with a gun in his hand.

I. Evidence of Other Crimes

On appeal, defendant argues that the trial court erred in admitting evidence relating to the murders of Capri Tolliver and Lakeshia White. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007).

Defendant first claims that statements made by him, and overheard by James Thomas, Jr., about "taking care" of or "knocking off" White were not admissible under MRE 801(d)(2)(A). Under MRE 801(d)(2), a statement is not hearsay if "[t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity" See also *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996) (the defendant's alleged threat to his mother that he was going to kill her for what she had done in court proceedings was admissible under MRE 801(d)(2)(A)). Here, defendant's statements of wanting to "take care" of or "knock off" White met the requirements of MRE 801(d)(2)(A)).

Defendant made the statements, and the statements were offered against defendant. Accordingly, the statements were admissible under MRE 801(d)(2)(A).

Second, defendant claims that White's out-of-court statements threatening to inform the police of his whereabouts were inadmissible under MRE 804(b)(6) because there was no evidence that he orchestrated the murders of White and Tolliver. MRE 804(b)(6) provides that a declarant's out-of-court statements are admissible if the declarant is unavailable as a witness and the "statement [is] offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Before admitting a statement under MRE 804(b)(6), the trial court must find by a preponderance of the evidence that the party was responsible for the declarant's unavailability. *People v Jones*, 270 Mich App 208, 215-217; 714 NW2d 362 (2006).

Sara Steiger testified that when she and White returned to their house in the early morning hours of June 27, 2007, defendant was at the house with Tolliver, his cousin and White's boyfriend. Defendant went outside to the front porch several times. According to Steiger, soon after defendant returned from the porch for the last time, another man entered the house, and this man shot Tolliver, White, and Steiger. Defendant did not render any aid to Tolliver. After Steiger ran from the house, she saw defendant and the other man leave the house and run down the street together. Steiger's testimony, along with Thomas's testimony that defendant declared that White needed to be "taken care" of, provided an inference that defendant "encouraged" the shooting of White. Accordingly, the trial court did not abuse its discretion in finding by a preponderance of the evidence that defendant was involved in White's death. White's statements were admissible under MRE 804(b)(6).

Third, defendant claims that all the evidence relating to the murders of White and Tolliver, including his out-of-court statements and the statements of White, was inadmissible under MRE 403.¹ MRE 403 provides that evidence, although relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" "All relevant evidence will be damaging to some extent. The fact that evidence is prejudicial does not make its admission unfair." *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009) (internal citation omitted). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001) (quotation omitted). Here, the risk of unfair prejudice did not substantially outweigh the probative force of the evidence of the White and Tolliver murders. White, who had been told that defendant shot Hill, threatened to inform the police of defendant's whereabouts. Defendant then declared that White needed to be "taken care" of. This evidence, along with Steiger's testimony of the killings of White and Tolliver, was highly probative regarding whether defendant was, in fact, the person

¹ The trial court admitted the evidence relating to the murders of White and Tolliver as evidence of an "admission by conduct." Defendant does not challenge this holding of the trial court on appeal.

who shot Hill. Accordingly, the trial court did not abuse its discretion in concluding that the evidence relating to the White and Tolliver murders was not unfairly prejudicial.²

II. Clothing of a Defense Witness

Defendant argues that he was denied a fair trial because defense witness, Corey Dotson, was denied the opportunity to change out of his prison clothes into civilian clothes. We disagree. A trial court's decision regarding witness attire is reviewed for an abuse of discretion. See *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002).

A defendant can be denied due process by being compelled to go to trial wearing prison clothes. *People v Lee*, 133 Mich App 299, 300-301; 349 NW2d 164 (1984). The United States Supreme Court has noted that forcing a defendant to wear prison clothing violates his presumption of innocence to the jury and violates equal protection by stigmatizing those who cannot afford to post bail. *Estelle v Williams*, 425 US 501, 504-506; 96 S Ct 1691; 48 L Ed 2d 126 (1976). None of these factors apply when a defense witness, other than a defendant, testifies. See *Banks, supra* at 259 (handcuffing or shackling of a defense witness does not affect a defendant's presumption of innocence). A witness has no presumption of innocence, and bail is not an issue for someone who is serving a prison sentence. Before the lower court and here on appeal, defendant has not cited a single authority in support of his position. Given this lack of authority, the trial court did not abuse its discretion in denying defendant's motion to allow Dotson to wear civilian clothing while testifying.

III. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial when the prosecutor made improper comments during closing argument and suggestions during the questioning of a defense witness. We disagree. We review these unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Defendant claims that the prosecutor argued facts not in evidence when she stated, "And these are the things that happened, and people were murdered" A prosecutor may not make a statement of fact that is not supported by the evidence. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). There was evidence that three people, Hill, White, and Tolliver, were murdered. Although defendant was only charged with the murder of Hill, the circumstances surrounding the murders of White and Tolliver were highly probative regarding whether defendant was the person who shot Hill. The prosecutor's statement was not improper.

Defendant also claims that the prosecutor placed the prestige of her office before the jury when she asked Dotson for what crime he was incarcerated and whether it was her office that convicted him. A prosecutor may not vouch for the credibility of a witness by implying that she has some special knowledge of the witness's truthfulness, *People v Thomas*, 260 Mich App 450,

² We note that the trial court provided the jury with a limiting instruction regarding the proper use of the evidence of the murders of White and Tolliver.

455; 678 NW2d 631 (2004), nor may a prosecutor place the prestige of her office behind the testimony of a witness, *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). With her questions to Dotson, the prosecutor was not implying that she had some special knowledge that the jury was not aware of, nor did she place the prestige of her office against Dotson's testimony. Rather, the prosecutor attempted to show that Dotson may have been biased against the prosecution because the prosecutor's office was responsible for his incarceration. A witness's bias is always relevant. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). The questioning was not improper.

IV. Sufficiency of the Evidence

Defendant claims that there was insufficient evidence to support his second-degree murder conviction. Specifically, defendant argues that there was insufficient evidence to show that Hill's death was caused by an act of defendant done with malice. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* "Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

The elements of second-degree murder are "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). Malice requires an intent to kill, an intent to cause great bodily harm, or an intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior would be to cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon." *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999) (internal citation omitted).

Andre Johnson testified³ that on March 5, 2006, he and Hill were outside Brewster Projects. Johnson's back was toward Hill, but he turned around and saw Hill talking with defendant and Anderson. There was testimony that defendant and Anderson had "problems" with Hill. Johnson did not see anybody other than defendant and Anderson in the immediate vicinity of Hill. A few minutes later, Johnson heard a gunshot. He looked to where Hill had been standing, and he saw Hill on the ground. He saw defendant with a black handgun in his hand running away. Johnson did not see anybody else with a gun. In addition, there was evidence that defendant "encouraged" the killing of White and Tolliver because White

³ Johnson testified at trial that he could not remember the events of March 5, 2006, with any absolute certainty. His testimony from defendant's preliminary examination was read into the record, and the trial court instructed the jury that it was to consider this testimony as it considered testimony given at trial.

threatened to inform the police of defendant's whereabouts. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that defendant was the person who shot Hill and that defendant shot Hill with malice. Defendant's conviction for second-degree murder is supported by sufficient evidence.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray

/s/ Michael J. Kelly