STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2014
V	No. 314659 Wayne Circuit Court
DANA MAURICE MILLER, Defendant-Appellant.	LC No. 12-009054-FC

Before: WILDER, P.J., and SAAD and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals his bench-trial conviction of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Undisputed testimony established that defendant and the victim, his stepson, got in an argument and physical altercation on August 28, 2012. Defendant, who was armed, fired two shots, the victim fled the scene, and defendant pursued the victim and fired another shot at him. Though the victim was able to evade defendant, one of the shots hit him. He went to a nearby house, informed the residents that defendant had shot him, and died shortly thereafter.

Defendant chose to have a bench trial and testified that a group of armed men ordered him to shoot the victim, and told him that if he failed to do so, they would harm his family. Defendant further asserted that he fired the first two shots in the air as a warning to the victim, and that he fired the third shot by accident after he stumbled while chasing the victim.

Defendant's attorney built on defendant's testimony and argued that defendant was under duress during the night in question. He also claimed that a conviction for second-degree murder or manslaughter was appropriate, because defendant had been in a physical fight with the victim shortly before the murder and supposedly did not intend to kill the victim.

In rejecting defendant's version of events, the trial court repeatedly stated that his story was highly implausible. Accordingly, it found defendant guilty of first-degree murder, MCL

750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b.

On appeal, defendant says: (1) there is insufficient evidence to support his conviction of first-degree murder; (2) the trial court erred when it admitted testimony about a prior incident where he threatened the victim with a firearm; (3) the prosecution violated Michigan Rules of Evidence (MRE) 401 and 403 when it questioned him about the location of his arrest; (4) the prosecution improperly bolstered the credibility of one of its witnesses; (5) the trial court impermissibly convicted him because he presented inconsistent defenses and exercised his right to testify; and (6) he received ineffective assistance of counsel because his trial attorney failed to call an important witness and presented an invalid defense. Defendant also makes a number of arguments in his Standard 4 brief. We address each in turn.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

A claim of insufficient evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

"The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Premeditation means "to think about beforehand," and deliberation means "to measure and evaluate the major facets of a choice or problem." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation and deliberation "may be inferred from the circumstances surrounding the killing." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). These factors may establish deliberation as well. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

Here, the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant intentionally shot and killed the victim. A witness to the shooting testified that he heard three gunshots, and defendant himself testified that he fired his gun three times. It was reasonable for the trial court to infer that defendant was the only shooter. Moreover, the trial court did not believe defendant's testimony that he stumbled and accidentally discharged the gun.

The trial court also heard ample evidence that defendant killed the victim with premeditation and deliberation. He sought to use a gun against the victim on at least two prior occasions.[1] The trial court reasonably concluded that defendant's unexpected late-night phone call minutes before the shooting to the neighbor who allegedly sent the three armed men to defendant's home was a transparent attempt to preemptively support his story that armed men told him to kill the victim. Further, that defendant decided to chase the victim after firing two warning shots indicates that he had time to reflect on his actions in the moment. And, defendant fled the scene instead of staying to protect his family, which belies his claim that he feared for his family's safety—and can be reasonably understood as an awareness of his criminal culpability. See *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). The prosecution therefore presented evidence on each of the four factors applicable to premeditation and deliberation, and the trial court noted this evidence in its well-reasoned verdict. The evidence was therefore sufficient to prove first-degree murder beyond a reasonable doubt.

B. MRE 404(B) EVIDENCE

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

For prior bad acts to be admissible under MRE 404(b), four requirements must be satisfied:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended in part on other grounds 445 Mich 1205 (1994).]

In this case, defendant claims that the trial court violated MRE 404(b) when it admitted evidence that he threatened the victim with a firearm on two previous occasions. However, his assertion is incorrect: the trial court properly admitted the evidence under MRE 404(b). The testimony at issue was admitted for a proper purpose, i.e., to show defendant's intent to commit murder.[2] In particular, the testimony showed that defendant wanted to physically harm the victim with a gun because of his poor relationship with the victim. The testimony was directly relevant to the case, as intent to kill is an element of first-degree murder. *Bennett*, 290 Mich App at 472. Nor was its probative value substantially outweighed by unfair prejudice. The testimony

[1] See analysis of MRE 404(b) evidence *infra*.

[2] See *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992) (evidence that the defendant had previously assaulted the victim on two occasions was admissible under MRE 404(b) to show motive and intent to solicit murder).

had a significant probative value because it showed defendant's intent to shoot the victim, an essential element of first-degree murder. And because this was a bench trial, the danger of *unfair* prejudice was minimal. In a bench trial, it is presumed that the trial court understands how the evidence could be used and did not consider the testimony for an improper purpose. In fact, the trial court specifically noted for the record that it would only consider the testimony to the extent that it showed intent. See *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Accordingly, the trial court properly admitted the prior acts testimony under MRE 404(b).

C. POST-ARREST CONDUCT[3]

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Under MRE 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). "It is well established that evidence of flight is admissible to show consciousness of guilt." *Compeau*, 244 Mich App at 598.

Here, defendant inaccurately claims that the trial court erred when it admitted testimony on the location of his arrest (a "drug house") and his failure to visit his mother. The prosecution did not elicit this testimony from defendant to prejudicially portray him as a drug-addicted criminal who did not care for his mother. In fact, the prosecution never questioned defendant about whether he actually used drugs after the shooting or had a strong relationship with his mother, nor did the prosecution argue these points during closing argument. Rather, the prosecution elicited this testimony to show that defendant fled the scene of the shooting and misled the authorities as to his location. The trial court cited this testimony for a proper and relevant purpose, because it showed a consciousness of guilt. Though it was unnecessary for the prosecution to make reference to a "drug house"—as simply asking where defendant was arrested would have supported the argument that he fled from the shooting—the trial court is presumed to follow the law in a bench trial,[4] and there is no indication it considered the drug-house reference for an improper purpose.

D. LACK OF CRIMINAL HISTORY

Under the rules of evidence, a party may not introduce evidence that a witness lacks a criminal record to bolster the credibility of the witness. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). However, the prosecution is allowed to "fairly respond to issues

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[3] Because defendant failed to object to the challenged testimony, we review this issue for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*.

[4] *Jones*, 168 Mich App at 194.

raised by" the defendant. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). Further, even if the prosecution's response to the issue raised by the defendant is erroneous, under the doctrine of "invited response" appellate courts must consider the error in light of the issue raised by the defendant. *Id*. at 353. Defendant did not preserve this issue and we accordingly review it for plain error. *Carines*, 460 Mich at 763.

Here, the prosecution called defendant's neighbor as a rebuttal witness to rebut defendant's testimony that his neighbors were violent drug dealers. When defendant raised the issue of his neighbors' alleged violent and criminal nature, defendant opened the door for the prosecution to show that the neighbor and his family were not criminals. Thus, testimony about the neighbor's lack of criminal history was admissible under the doctrine of fair response. See *Jones*, 468 Mich at 352 n 6.

E. ALTERNATE DEFENSE

Questions of law decided by the trial court in a bench trial are reviewed de novo. *People v Lanzo Constr Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). A criminal defendant may raise inconsistent defenses so long as each defense is supported by the evidence and the law. *People v Lemons*, 454 Mich 234, 245-246; 562 NW2d 447 (1997). In a bench trial, the trial court need not specifically instruct itself about the applicable law. See *People v Cazal*, 412 Mich 680, 686; 316 NW2d 705 (1982). However, the trial court must make findings of fact on "theories argued by [the] defendant and which were supported by the facts." *People v Maghzal*, 170 Mich App 340, 347; 427 NW2d 552 (1988).

Here, defendant argues that the trial court convicted him of first-degree murder because he presented alternate, inconsistent defenses. In fact, as the trial court noted, defendant's arguments were implausible—not inconsistent. And in any event, the trial court did not convict defendant of first-degree murder because he presented alternate arguments. The trial court's critical reference to defendant's use of legal terms such as "justification" and "duress" was not to highlight the various legal arguments raised by his attorney during closing argument. Rather, the trial court described two of the three subplots in defendant's story that defendant hoped would reduce or eliminate his punishment. The reference to "justification" described defendant's testimony that he shot the victim after the victim started a fistfight, and the reference to "duress" described defendant's testimony that he was compelled to shoot the victim by hidden armed men. The trial court stated that defendant lacked credibility as a witness because his testimony advanced a highly unlikely version of events. It was neither legal nor factual error for the trial court to determine that defendant lacked credibility on this basis.

F. DEFENDANT'S TESTIMONY

It is improper for a trial court to punish a criminal defendant for exercising his constitutional rights. See *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991). And a criminal defendant's decision to testify cannot shift the burden of proof of guilt or innocence. See *People v Fields*, 450 Mich 94, 110-113; 538 NW2d 356 (1995). But when a criminal defendant elects to exercise the constitutional right to testify, the finder of fact may determine

that the testimony is credible or incredible. *People v Clary*, 494 Mich 260, 279; 833 NW2d 308 (2013).

Here, defendant claims that the trial court punished him for testifying on his own behalf. Specifically, defendant points to the trial court's statement that "if the defendant did not testify and tell this incredible story [i.e. the group of armed men that supposedly instructed defendant to shoot his stepson], it would be a harder decision for the Court to make. I'm just going to be honest about that."

The trial court's comments were not a criticism of defendant's decision to testify, but a criticism of his story. Defendant's implausible testimony destroyed his credibility and undermined his contention that his poor relationship with the victim drove him to unanticipated violence. When a criminal defendant's testimony is implausible, it is proper to infer that the defendant lacks credibility. See *People v Buckey*, 424 Mich 1, 15-16; 378 NW2d 432 (1985). The trial court correctly noted that it was defendant's lack of credibility—not his decision to testify—that led to his conviction for first-degree murder.

G. INEFFECTIVE ASSISTANCE

1. MEDICAL EXAMINER'S TESTIMONY

Under the federal and state constitutions, a criminal defendant has the right to the effective assistance of counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Id*. Because defendant did not successfully move for a new trial or a *Ginther*[5] hearing, *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009), we review this issue for errors apparent on the record, *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Whether a defendant received ineffective assistance of counsel is a question of constitutional law reviewed de novo. *Id*.

Trial counsel's decision whether to call a witness to testify is presumed to be sound trial strategy that this Court does not question with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Ineffective assistance based on failure to call a witness to testify may only be established if the failure deprived the defendant of a substantial defense. *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Here, defendant unconvincingly argues that he received ineffective assistance from his trial attorney because: (1) she did not call the medical examiner to testify; and (2) claimed that duress was a defense to homicide. Trial counsel's decision to not call the medical examiner to testify was not objectively unreasonable. The medical examiner's testimony that the victim was shot in the side of his arm would have been cumulative to the stipulations placed on the record. And while the affidavit attached to defendant's supplemental brief on appeal is not part of the record before this Court,[6] the affidavit only indicates that the medical examiner would have additionally testified that the victim was not running away from defendant when he was shot. Trial counsel made this exact argument to the trial court on the basis of the stipulations. It was reasonable trial strategy for defendant's lawyer not to present expert testimony that was cumulative to the evidence already on the record. See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).[7]

2. DURESS

Under common law, duress is not a defense to homicide. *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). The underlying rationale of this rule is that a person should risk his or her own life instead of risking another's life. *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987).

Defendant's lawyer was not ignorant of the law, as she explicitly conceded during closing argument that duress is not a defense to homicide. In fact, not only did she correctly identify that duress is not a defense to homicide, she also recognized the rationale underlying this common-law rule. She merely observed that the facts of the case were consistent with duress. This statement is not objectively unreasonable, nor did it advance duress as a defense to homicide.

III. STANDARD 4 BRIEF

[6] See MCR 7.210(A)(1).

[7] Defendant makes an equally unavailing argument in his Standard 4 brief that the trial court violated his rights of confrontation and to present a defense when it admitted the medical examiner's report but did not require the medical examiner to testify at trial. Actually, defendant's attorney stipulated to admission of the medical examiner's report without any objection from defendant on the record—meaning that he waived his right of confrontation. *People v Buie*, 491 Mich 294, 315; 817 NW2d 33 (2012). And defendant argued that he was not responsible for the fatal bullet on the basis of the medical examiner's report—a defense that the trial court did not believe. In any event, as noted, admission of the medical examiner's report without the medical examiner's testimony was reasonable trial strategy, because the medical examiner's testimony would have been cumulative to the report itself. *Cooper*, 236 Mich App at 658.

A. PROSECUTORIAL MISCONDUCT[8]

Defendant wrongly claims that the medical examiner's report introduced by the prosecution (and stipulated to by defendant at trial) was false, and that the prosecution concealed exculpatory evidence when it did not call the medical examiner to testify. Defendant has failed to show that the medical examiner's report was false, or, even if the report was false, that the prosecution knew it was false. He has also failed to show that the prosecution suppressed exculpatory evidence in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Defendant has not identified anything in the record to suggest that the prosecution suppressed the medical examiner's opinion from defendant. In fact, defense counsel's closing argument indicates that she was fully aware of the medical examiner's opinion and its relevance to this case. Accordingly, defendant shows no error and the prosecution did not commit misconduct. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Henry William Saad
/s/ Kirsten Frank Kelly

[8] Defendant's claim that the prosecution failed to show the victim was killed by a gunshot wound is completely without merit. When a defendant challenges his or her conviction on the basis of alleged error at the preliminary examination, this Court only considers the extent to which the defendant was prejudiced at trial. *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990). At trial, the prosecution introduced by stipulation the medical examiner's report indicating that the victim "died of a gunshot wound" and "[t]he manner of death is homicide." This report was sufficient by itself to show the death of the victim by criminal agency, i.e., the *corpus delicti* of murder in the first degree. This conclusion is also supported by several of the trial witnesses. Thus, the *corpus delicti* of murder was established by a preponderance of the evidence. See *People v Modelski*, 164 Mich App 337, 342; 416 NW2d 708 (1987).