STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AHQUAN MONTRAY LAY,

Defendant-Appellant.

UNPUBLISHED
November 26, 2019

No. 345202
Genesee Circuit Court
LC No. 16-039868-FC

Before: BORRELLO, P.J., and K. F. KELLY and SERVITTO, JJ.

PER CURIAM.

Defendant, Ahquan Montray Lay, was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b); conspiracy to commit armed robbery, MCL 750.529; MCL 750.157a; armed robbery, MCL 750.529; carrying a concealed weapon (CCW), MCL 750.227; being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; being a felon in possession of ammunition, MCL 750.224f(6); and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a habitual offender, second offense, MCL 769.10, to prison terms of life without eligibility for parole for the conviction of first-degree felony murder, 25 to 50 years for the armed robbery and conspiracy convictions, and 60 to 90 months for the CCW and felon-in-possession convictions, and to a mandatory two-year consecutive term for the felony-firearm conviction. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm.

I. BACKGROUND

This appeal arises from an armed robbery and homicide that occurred on April 21, 2015, in Flint, Michigan. The body of the victim, an employee of Cottage Inn Pizza, was found in the driver's seat of a vehicle, with a gunshot wound to the back of his head. While examining the car, police found a pizza delivery bag and shell casings in the backseat area.

Defendant was a former employee of Cottage Inn Pizza. At the time of the homicide, defendant and a former coworker had been terminated from employment with Cottage Inn Pizza for a myriad of reasons. According to the coworker, following his termination, defendant approached the coworker about a plan to rob an employee of Cottage Inn Pizza; however, the

coworker declined to engage in the plan. Defendant revealed to the coworker that he believed the victim always carried a lot of money and that defendant intended to use a "fake number app" on his phone to place the order. Defendant had approached other people about the robbery as well.

The day after the homicide occurred, the coworker again spoke to defendant. During this conversation, the coworker testified that defendant explained the homicide this way: "it was a robbery that had went bad." Defendant also told his coworker that his codefendant, Kevin Thompson Jr.,[1] had killed the victim. According to the coworker, defendant stated:

> . . . that they called off an app on the phone, called in a delivery; they said [the victim] came and went back and forth down the street a couple times while [defendant] was down the street, parked in a driveway. When [the victim] found the driveway, [defendant] told me that, before [the victim] could get out of the car, [Thompson] had already approached the vehicle. And, when [the victim] went to . . . reach for something in the vehicle, he was shot three times slowly.

Defendant also told the coworker that he had provided the gun to Thompson and that he was on the phone with Thompson during the entire course of the robbery. Cell phone records from both defendant's phone and Thompson's phone confirmed that the two phones had a cellular connection during the homicide, between 12:00 a.m. and 12:40 a.m. on April 21, 2015. Additionally, cell phone records showed that both phones were connected to a sector that provides cellular coverage to the location where the homicide occurred.

Defendant was arrested and transported to the Flint Police Department, where he was interviewed. A search of defendant's vehicle yielded a 9-milimeter handgun, which a ballistic report confirmed was the gun that was used to kill the victim. Police also searched defendant's phone and discovered that the phone contained an application labeled "Caller ID Faker."

After the trial court excused Thompson's jury, the prosecutor called Detective Sergeant Bryce Willoughby of the Major Case Unit of the Flint Police Department to the witness stand. Willoughby had interviewed defendant at the Flint Police Department on April 23, 2015. The prosecution offered a DVD of defendant's interview into evidence and published the entire digital video and audio recording.

In describing the interview, Willoughby stated that defendant initially denied any involvement in the homicide, stating that he was not in the area at the time of the murder; instead, he had picked up his sister from work and afterward visited a girl's house and then another friend's house. Defendant also told Willoughby that he was sure his cell phone would not place him at the scene of the crime. However, Willoughby testified that defendant's story subsequently changed, and defendant stated that he had picked his sister up from work, and then found himself on the same street as the homicide at the time the homicide occurred. During the interview, Willoughby asked defendant: "Do you really want to stay with that course of events?

[1] Defendant and Thompson were tried in a joint trial before separate juries.

Because before you answer that, I've already asked you questions that I know the answer to . . . . I know you're not being truthful with me."

Defendant admitted to the police that he had lied to them[2] and stated that another individual he was associated with had used defendant's gun to kill the victim. Defendant explained that he was aware of the robbery, but he had urged Thompson to not kill the victim. Defendant told Willoughby that he dropped Thompson off in the area and when defendant retuned, he recognized the victim's car pull up to the house. Defendant stated that, at that time, he was on the phone with an individual that he believed was in the process of robbing and killing the victim. Defendant heard the gun shots fired and saw Thompson run from the scene on foot.

In addressing defendant's change of story, this line of questioning between the prosecutor and Detective Willoughby transpired:

> *Q*. [H]ow many times did defendant's story change during the course of your interview?
>
> *A*. I would say it changed three times with his whereabouts and different elements until he puts himself at the shooting.
>
> *Q*. Now during these—this, I guess you could say evolution of this story, are you also confronting [defendant] with the information you already have?
>
> *A*. Yeah. I mean, I'm telling him that I want—I want the truth. And I say it repeatedly, repeatedly throughout the course of the interview I want the truth, because when I get the ballistic report back and I get the cellphone dump and everything and they don't match with what he's saying obviously we have an issue. He's not being truthful.
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> * * *
>
> *Q*. Are there certain times that you have to adjust to [defendant's] story to continue talking to him?
>
> *A*. Yeah. I mean, we—obviously we go over specific details because funny thing about the truth is no matter how many times I ask you about it your story's not gonna [sic] change. It's gonna [sic] be the same. And the truth you remember specifically; specific details you don't have to implant them or make them up. When you start lying it's hard because you have to keep track of I told a lie here, I told two or more to cover up for this one, and pretty [sic: soon] it starts snowballing. You've got a lot to keep track of.

[2] In defendant's interview with police, defendant stated: "I lied to you guys. I lied to you guys."

Q. And that's what we saw during the course of that interview with [defendant]?

A. That's correct.

The prosecutor then asked Willoughby if it was common for defendants to minimize their involvement in a crime. Willoughby responded in the affirmative. On cross-examination, defense counsel asked how defendant minimized his involvement, to which Detective Willoughby responded, "Well he minimized it by initially lying to me, not being truthful."

Relevant to this appeal, at the conclusion of defendant's portion of the trial, the trial court gave the jury the following instruction pertaining to judging the testimony of witnesses:

> [I]t is your job to decide what the facts of the case are and you must decide which witnesses you believe and how important you think their testimony is. You do not, as jurors, have to accept or reject everything a witness has said. You are free to believe all, none or part of any person's testimony. In deciding which testimony you believe you should rely on your common sense and everyday experience. However, in deciding whether you believe a witness' testimony you must set aside any bias or prejudice based upon race, gender or national origin of the witness.
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> * * *
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> You have heard testimony also, members of the jury, from a number of witnesses who are employed as police officers and their testimony is to be judged by the same standards that you would use to evaluate the testimony of any other witness.

Defendant was convicted and sentenced as noted *supra*. This appeal ensued.

II. ANALYSIS

On appeal, defendant asserts that the trial court abused its discretion by allowing Willoughby to offer testimony as to his opinion of defendant's credibility. According to defendant, Willoughby commented that defendant fit the pattern of a liar and as a result the trial court deprived defendant of his defense of abandonment by allowing the testimony. Thus, defendant's credibility, which was solely for the jury to determine, was critical to the outcome of the case. Therefore, defendant argues, the trial court's error denied defendant the opportunity for a fair trial because the error was outcome-determinative.

The State asserts that the trial court did not err by permitting Willoughby's testimony regarding defendant's credibility. Further, the State contends that defendant waived any allegation of error by eliciting credibility testimony from the officer during cross-examination. However, seemingly sensing that the solicitation and admission of the testimony may have constituted error, the State also argues that even presuming Willoughby's testimony was error, the error was harmless.

On appeal, defendant argues that it was improper for the trial court to allow Willoughby to comment on defendant's credibility. To preserve an evidentiary issue for review, a party must object at trial and specify the same ground for objection that it asserts on appeal. *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). However, defendant objected to Willoughby's testimony on the basis of relevancy under MRE 401,[3] not on the basis that Willoughby commented on defendant's credibility under MRE 701.[4] Therefore, defendant's argument is not preserved because he did not object on the same ground that he now presents on appeal. *Grant*, 445 Mich at 545.

This Court reviews unpreserved claims of nonconstitutional error under the plain error standard. *People v Carines*, 460 Mich 750, 763-764; 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*. at 763. The final prong requires "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. Reversal is appropriate "only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *Id*. (quotation marks and citation omitted; alteration in original).

MRE 701, which provides for the admission of lay-witness opinion testimony, states:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Under MRE 701, a police officer is permitted to testify regarding his or her opinions or inferences based on his or her rational perceptions as a police officer. *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988). However, our Courts have made clear that it is generally improper for a witness to comment or provide an opinion on the credibility of another witness. See, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Smith*, 158 Mich App 220, 230-231; 405 NW2d 156 (1987). This prohibition is premised on the theory stated by this Court that "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Similarly, an expert may not vouch for the veracity of a victim. *People v Peterson*, 450 Mich 349, 352; 537 NW2d

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[3] MRE 401 states that " '[r]elevant evidence' means evidence having 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."

[4] MRE 701 provides that "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

857 (1995), mod 450 Mich 1212, 548 NW2d 625 (1995).[5] However, even if a trial court improperly admitted evidence, a defendant is not entitled to relief unless the defendant can demonstrate "that it is more probable than not that the error was outcome determinative." *People v Lyles*, 501 Mich 107, 117-118; 905 NW2d 199 (2017) (quotation marks and citation omitted).

Here, it is clear from the trial transcript testimony recited *supra* that the prosecution solicited from Willoughby testimony regarding defendant's credibility. Seemingly, the prosecutor who elicited the testimony quickly understood such testimony could be error by then asking Willoughby, somewhat ironically, if the video did, in fact, speak for itself. In any event, the solicitation of this testimony and the trial court's ruling that the evidence be admitted constituted clear error. *Buckley* 424 Mich at 17, (improper for a witness to comment or provide an opinion on the credibility of another witness); *Dobek,* 274 Mich App at 70-71; (finding that use of a police witness to bolster the victim's credibility by using them as a "human lie detector" was error). However, as previously stated, our analysis does not end with our assignment of error. A defendant is not entitled to relief unless the defendant can demonstrate "that it is more probable than not that the error was outcome determinative." *People v Lyles*, 501 Mich at 117-118. We therefore examine whether the prosecution's solicitation and the trial court's admission of Willoughby's testimony as to defendant's credibility constituted error requiring reversal.

During trial, the jury was able to view the entirety of the interrogation video and were therefore capable of deciding for themselves whether defendant had been truthful. As to the issue of defendant's credibility, defendant himself made the statement to Willoughby during the video interrogation: "I lied to you guys. I lied to you guys." Also, during the interrogation video, the jury heard defendant confess to his involvement in the crime.

In addition to the interrogation video evidence, the jury heard untainted evidence that the gun matching the one used to kill the victim was found in defendant's car. There was also the untainted testimony of defendant's former coworker who informed the jury, with abundant detail, how defendant had planned, then participated in the homicide. Some of the coworker's statements to police, such as defendant's use of a fake caller ID, were supported by physical evidence admitted at trial. Additionally, the State produced cell phone records demonstrating that defendant was in the area where the homicide occurred on the date and time of the homicide speaking with his codefendant---the same individual that defendant had previously told his former coworker who had shot and killed the victim. Moreover, the trial court specifically instructed the jury that it was responsible for making witness credibility determinations. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008) (citation omitted).

On this record, we conclude that the trial court's instructions to the jury cured any error which resulted from the solicitation and admission of Willoughby's improper testimony. Additionally, given the substantial amount of untainted evidence admitted to prove defendant's

[5] This general principle was reiterated recently by our Supreme Court in the context of child sexual abuse cases in *People v Harbison*, 504 Mich ___; ___ NW2d ___ (2019).

guilt, it is improbable that the jury would have rendered a different verdict had the tainted testimony not been admitted.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kirsten Frank Kelly
/s/ Deborah A. Servitto