STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2011
v	No. 291123 Wayne Circuit Court
KEITH TATE, Defendant-Appellant.	LC No. 99-012340-FC

Before: SAAD, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

This case has an extensive procedural history, and defendant was initially tried with a codefendant.[1] This case arises out of a drive-by shooting that took place in 2000 in front of a then-abandoned drug house in Detroit. The victim, Toriano Collins, was killed, and the only eyewitness, Robert Madden, was shot at but not injured. Most recently, defendant moved for relief from judgment in the trial court, arguing that the verdict was against the great weight of the evidence, the denial of the right to a jury trial, prosecutorial misconduct, and failure to suppress a witness's identification of defendant. We initially denied leave to appeal, and our Supreme Court remanded for consideration as on leave granted.[2] We affirm.

Defendant first argues that the verdict was against the great weight of the evidence because the evidence could not support identifying him as the shooter. Identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). We review for an abuse of discretion the trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v McCray*, 245 Mich App

[1] See *People v Harper*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2003 (Docket No 230717).

[2] *People v Tate*, 486 Mich 925; 781 NW2d 842 (2010), amended 782 NW2d 499 (2010).

631, 637; 630 NW2d 633 (2001). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand" *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Significantly, the trier of fact is not obligated to believe every piece of evidence introduced. A new trial is not warranted just because the evidence conflicts, even if it is impeached to some extent. *People v Lacalamita*, 286 Mich App 467, 469-470; 780 NW2d 311 (2009). The trier of fact is the sole evaluator of witness credibility, and this Court will not interfere with that evaluation unless material testimony was physically impossible or patently absurd. *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998). We find no abuse of discretion here.

Defendant points out that some of the evidence is indeed conflicting. For example, the medical examiner testified that the victim was shot from an angle somewhat higher than where the victim was standing. However, according to Madden, the victim was up on porch steps, and defendant fired the shots from the passenger window of a Geo Metro; we note that a Geo Metro is a very small car, not the high van or sport utility vehicle the medical examiner speculated about. But Madden also testified that after the shooting, he found the victim lying on his stomach, which could explain how shots might have seemed to enter his body from above. In fact, the medical examiner testified that "[a]ny scenario" where "the muzzle of the gun . . . [is] above the decedent . . . could be consistent" with the angle of the fatal wound. The Geo Metro would, according to Madden's description of the shooting, have been "above" the victim.

Madden admitted that he told defendant's attorney that defendant was not the shooter, but he explained that he did so in an effort to avoid conflict with others around his neighborhood and to keep his incarcerated son safe. Madden's unequivocal identification in court of defendant as the shooter conflicted with testimony from defendant and a friend that defendant was in a hotel room at the time, although no clearly supporting evidence was introduced. In any event, while this evidence does present some conflict, that conflict falls squarely within the umbra of witness credibility. Deferring to the superior ability of the fact-finder to assess witness credibility and weigh the evidence accordingly, *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008); *People v Jackson*, 178 Mich App 62, 65; 443 NW2d 423 (1989), Madden's testimony was sufficient to identify defendant as the shooter.

Defendant next argues that the trial court erred in denying defendant's motion for a new trial based on a denial of defendant's right to a trial by jury. Criminal defendants are entitled to a trial by a jury, but may, with the consent of the prosecutor and the trial court, waive that right. US Const, Am VI; Const 1963, art 1, § 20; MCL 763.3; *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). Any waiver must be knowingly and voluntarily made. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). There is no dispute here that the trial court appears to have complied with the requirements of MCR 6.402(B), as required. *People v Cook*, 285 Mich App 420, 422-423; 776 NW2d 164 (2009). However, defendant now argues that he waived his right to a jury under duress, because he was forced to choose between his attorney and his right to a trial by jury.

At issue was the fact that defendant's attorney, personally, conducted an interview with Madden and made an audio cassette recording of that interview; defendant wished to introduce that recording into evidence. This obviously created the possibility that defendant's attorney

might be called as a witness. Michigan Rule of Professional Conduct 3.7(a) forbids lawyers from acting as advocates at trial in which they are likely to be called as a witness unless the testimony pertains to an uncontested matter or to the nature and value of services rendered; or unless disqualification of the attorney "would work substantial hardship on the client." We note that, in contrast to *People v Crawford*, 147 Mich App 244, 251; 383 NW2d 172 (1985), the likelihood that defendant's attorney would be called as a witness was not "remote." Defendant asserts that his attorney's withdrawal would have created a substantial hardship because of their developed relationship, the seriousness of the charges, his inability to afford another attorney, and the seven months of trial preparation that had taken place.

The parties and the trial court chose to discuss the matter off the record in chambers, so the record we have available is not as complete as we might wish. However, the trial court carefully placed on the record a summary of the parties' discussions and agreements, to which defendant assented. It does not appear that the trial court ever ruled on a motion to disqualify defendant's attorney. Consequently, unlike in *People v Rodgers*, 119 Mich App 767; 327 NW2d 353 (1983), defendant's waiver was not the result of an adverse evidentiary ruling by the trial court. Instead, the record indicates that the parties negotiated a mutually acceptable way to avoid the possibility of defendant's attorney being disqualified. Pursuant to that agreement, the prosecutor agreed to allow the recording to be admitted in exchange for both defendants agreeing to a waiver trial. Furthermore, the circumstances under which the recording was made were discussed, and so we are inclined to agree with the prosecutor that counsel participated in creating the problem and waiving a jury trial was likely the optimal tactical strategy. In any event, the record shows that defendant was aware of what his options were and made a knowing and voluntary choice. The trial court did not clearly err in finding that defendant's waiver was knowingly and voluntarily given. *Cook*, 285 Mich App at 422-423.

Defendant also argues that the trial court should have granted him a new trial based on several instances of alleged prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Defendant first argues that plaintiff unfairly restricted discovery of information regarding another suspect for the crimes and pictures of the crime scene. Madden identified the shooter to a police officer as "Lucky." The officer had previous contact with another individual called "Lucky," who was then investigated with respect to the crime. Defendant sought discovery of information related to the other individual, and the trial court issued a discovery order for the criminal history and any photographs of the man. Defendant stated that he had not received this information as of the trial, and plaintiff explained that defendant was informed at a June 9, 2000 hearing that he had to pick up the information from the police department. Although the evidence does not support a finding that the materials were deliberately suppressed, it seems clear that defendant did not receive the requested information. *People v Davis*, 199 Mich App 502, 514; 503 NW2d 457 (1993).

However, a prosecutor's failure to disclose evidence requires reversal only if the evidence was material. *People v Harris*, 261 Mich App 44, 49; 680 NW2d 17 (2004). Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id*.

Defendant has not shown that the evidence sought would have done so. Defendant appears to be arguing that his ability to "test the authenticity" of plaintiff's evidence was undermined by the failure to disclose the evidence sought. However, defendant was able to present to the jury that there were other people nicknamed "Lucky" in the area. Additionally, defendant had a full and fair opportunity to cross-examine the police officer who had knowledge of another man known as "Lucky." Given Madden's unequivocal identification of defendant at trial as "Lucky," we are not persuaded that there was any real possibility that the outcome of the proceedings would have been different if defendant had properly received the material.

Similarly, we have been given no argument, or even speculation, as to how pictures of the crime scene would have affected the trial. Both parties introduced photographs of the house and the porch, as well as sketches of the crime scene. The record simply does not contain any support for defendant's assertion that plaintiff's lead investigator pressured witnesses to testify against him or instructed Madden not to speak to defendant's attorney. Defendant's attorney did, as discussed, interview Madden, and Madden was thoroughly cross-examined regarding the changes in his statements and his involvement with the police. We agree that the prosecutor expressed some concerns and suspicion regarding possible alterations to hotel records, but they were not directed at defense counsel—or indeed anyone in particular—and thus do not constitute an accusation that defense counsel tampered with evidence. We find no prejudice based on speculation.

Defendant also argues that testimony from Madden that his son was attacked while in jail and told that his father better not testify was errantly admitted. However, the evidence was admitted not for the truth of the matter asserted, *People v Salsbury*, 134 Mich 537, 569-570; 96 NW 936 (1903), but because it was a reason proffered by Madden to explain why he told defendant's counsel that his statement to police implicating defendant was a lie. No attempt was made at any time during the trial to associate defendant with threats against Madden, and Madden said he did not know specifically who was threatening him. And contrary to defendant's contention, the evidence did not tend to bolster Madden's testimony. It was simply relevant to an examination of the contradictory nature of Madden's statements.

We agree with defendant that the prosecutor crossed the line and made improper comments regarding defense counsel's interaction with Madden. See *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984). However, this was a bench trial. Judges, unlike jurors, are presumed capable of ignoring such errors and to decide cases based solely on the actual evidence properly admitted at trial. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Furthermore, some of defendant's claims of impropriety came not from the prosecutor, but from the evidence itself: Madden indicated that he met with defendant's counsel because he felt harassed, and Madden disclosed that the attorney drove him to the store and bought him a half-pint of liquor during the interview. This evidence was, furthermore, highly relevant to explain why Madden's statements conflicted. While the prosecutor made some inappropriate comments, they were harmless in context.

Next, defendant argues the prosecutor violated the parties' stipulation that evidence of defendant's involvement in the sale of drugs would not be admitted. However, defendant opened the door to evidence of drug activity. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003); *People v Matthews*, 143 Mich App 45, 60-61; 371 NW2d 887 (1985). Evidence is

admissible where it is properly responsive to evidence introduced or a theory developed by the defendant. *People v Figgures*, 451 Mich 390, 399-400; 547 NW2d 673 (1996). Additionally, a finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence. *People v Abraham*, 256 Mich App 265, 278-279; 662 NW2d 836 (2003). Here, the trial court determined that the evidence was admissible. It is not prosecutorial misconduct to introduce evidence expressly permitted by the trial judge. *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989).

Next, defendant argues that Madden's out-of-court identification of defendant should have been suppressed. Madden was only shown one picture and identified defendant. However, those facts are misleading out of context. By that time, Madden had already identified defendant—a person with whom Madden was familiar—as the shooter and provided a description of him and a nickname to police. Considering all of the circumstances, evidence of Madden's out-of-court identification of defendant by photo did not constitute plain error that was outcome determinative. Rather than being unduly suggestive, the procedure seems to be more of an attempt to confirm an identity already established. Madden's in-court identification was also properly admitted. Although the shooting happened quickly and at night, there was street illumination in the area, and Madden had known defendant for several years and viewed defendant leaning out of a car window shooting a gun. See *People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998).

Finally, we see no abuse of discretion in the court's denial of defendant's motion for relief from judgment. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). Defendant cannot demonstrate any prejudice by the failure of his appellate attorney to appeal additional issues because none of his issues have merit. MCR 6.508(D)(3)(b).

Affirmed.

/s/ Henry William Saad
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause