# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 27, 2011 |
| v | No. 298400<br>Muskegon Circuit Court |
| BERNARD JAMES MOORE,<br><br>Defendant-Appellant. | LC No. 09-057501-FC |

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his convictions and sentences, following a jury trial, for assault with intent to murder, MCL 750.83; carrying a concealed weapon, MCL 750.227; felonious assault, MCL 750.82; and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's convictions arise out of the January 27, 2009 shooting of Ronald Ezell. Defendant argued at trial that he shot Ezell in self-defense after Ezell reached for what defendant believed to be a weapon. Defendant denied having the requisite intent for assault with intent to murder. However, multiple prosecution witnesses testified that defendant shot Ezell during a confrontation, and that defendant then pointed the gun at Ezell's head and threatened to kill him.

Following the parties' closing arguments, the trial court instructed the jury as to the elements of each of the charged offenses and pertinent lesser offenses. The trial court also instructed the jury on the elements of self-defense, noting that the prosecutor was required to prove beyond a reasonable doubt that defendant did not act in self-defense when shooting Ezell. After deliberating for approximately 30 minutes, the jury submitted a communication to the court. The court described the communication as a request to "know what all the elements are of all of the offenses." The court then reinstructed the jury as to the elements of each of the charged offenses and the pertinent lesser included offenses. The trial court did not reinstruct the jury as to the elements, or burden of proof, for self-defense. The jury subsequently convicted defendant as charged, rejecting defendant's self-defense claim.

On appeal, defendant first argues that the trial court erred by responding to the jury's request for reinstruction as to the elements of the offenses without also reinstructing the jury on self-defense. We disagree.

This Court reviews de novo claims of instructional error. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). When reviewing a claim of instructional error, this Court "examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant's rights by fairly presenting to the jury the issues to be tried." *People v Dumas*, 454 Mich 390, 396; 563 NW2d 31 (1997). A trial court's decision whether, and to what extent, to reinstruct the jury is reviewed for an abuse of discretion. *People v Parker*, 230 Mich App 677, 680-681; 584 NW2d 753 (1998).

In *Parker*, 230 Mich App at 681, this Court specifically rejected the defendant's argument that the trial court abused its discretion by repeating its instructions as to the charged offenses without reinstructing the jury as to self-defense.

> Defendant first contends that the trial court erred in repeating for the jury its instructions regarding first- and second-degree murder, but failing to repeat the court's instructions regarding manslaughter and self-defense. We disagree. While the jury specifically requested supplemental instructions regarding first- and second-degree murder, no similar request was made with regard to the manslaughter and self-defense instructions. It is not an abuse of discretion for a trial court to fail to repeat instructions addressing areas not covered by a jury's specific request. [*Id.*]

Like the *Parker* jury, the jury in this case made no request for reinstruction on the defense of self-defense. We conclude that the trial court did not abuse its discretion by not including the self-defense instruction in response to the jury's request.

Next, defendant argues that the trial court erred by permitting plaintiff to rehabilitate witnesses by use of their prior consistent testimony. We disagree. Plaintiff questioned certain witnesses, on redirect examination, as to consistent statements they provided to police officers on the day of the shooting. However, plaintiff asked these questions after defendant made an "express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony," and the statements about which plaintiff inquired were made before "the time that the supposed motive to falsify arose." *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999). Therefore, the trial court did not err by permitting plaintiff to question witnesses about these statements. *Id.*

Defendant also contends that he was denied the effective assistance of counsel by his trial counsel's decision not to seek a continuance to permit Sharon Waldron to testify regarding Ezell's reputation for violence. This claim, too, lacks merit.

To establish ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms," and (2) there is a reasonable probability that but for defense counsel's error at trial the result of the proceedings would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess

counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Waldron testified during the prosecution's case in chief. During cross-examination, defense counsel inquired about Ezell's reputation. Plaintiff objected. Ultimately, the trial court ruled that it would permit Waldron to testify that Ezell had a reputation as a bully only if defendant first testified that he was aware that Ezell had such a reputation. However, defendant did not testify that he was aware of Ezell's reputation. Accordingly, by the terms of the trial court's ruling, Waldron's testimony was not admissible, and there would have been no purpose served by seeking a continuance to permit her to appear at trial. Defendant has not established that defense counsel's decision not to seek a continuance fell below an objective standard of reasonableness but for which the outcome of trial would have been different. See *Rodgers*, 248 Mich App at 714.

Defendant next contends that the trial court violated his right against self-incrimination by permitting the prosecution to question him at trial about statements he made at the hearing on his motion to withdraw his plea. We disagree.

Defendant originally pleaded nolo cotendere as part of a plea arrangement. Thereafter, defendant moved to withdraw his plea, attaching in support his affidavit, which presented a description of the events in question and set forth defendant's contention that he was acting in self-defense when he shot Ezell. In arguing the motion to withdraw the plea, defense counsel relied on defendant's affidavit, in lieu of having defendant testify. Plaintiff opposed defendant's motion, called defendant to the witness stand, and cross-examined him on the subject matter of his affidavit. The trial court subsequently granted defendant's motion to withdraw the plea.

At trial, plaintiff sought to impeach defendant with his prior testimony. Defendant objected. The trial court ruled that plaintiff could ask defendant about statements he made under oath at the plea withdrawal hearing, but could not reference that the statements were made in the context of a motion to withdraw a guilty plea. Plaintiff complied with this ruling.

Defendant first asserts that his prior testimony was not voluntarily given. Defendant did not object to taking the stand during the motion hearing for cross-examination on his affidavit; nor could he have done so. Having offered his affidavit in support of his motion to withdraw his guilty plea, defendant waived his right to invoke the privilege against self-incrimination to avoid cross-examination on the contents of that affidavit. *People v Robinson*, 306 Mich 167, 176; 10 NW2d 817 (1943); *People v Siler*, 171 Mich App 246, 257; 429 NW2d 865 (1988), superseded on other grounds as stated in *People v Orr*, 275 Mich App 587; 739 NW2d 385 (2007). "[I]f [a defendant] elects to [testify], he is held to have waived his constitutional right of refusing to answer any question material to the case . . . ." *Robinson*, 306 Mich at 176. See also *People v Koukol*, 262 Mich 529, 533; 247 NW 738 (1933) ("Where one under indictment takes the witness stand, he waives his constitutional privilege against self-incrimination, and is subject to the same rule of cross-examination as any other witness, and cannot shield himself from making a full and fair disclosure of all the facts of which he has knowledge upon the ground his answers may tend to incriminate him.").

As for defendant's contention that he had no choice but to submit the affidavit in support of his motion to withdraw his plea, the United States Supreme Court has explained "[t]hat the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *United States v Rylander*, 460 US 752, 759; 103 S Ct 1548; 75 L Ed 2d 521 (1983), quoting *Williams v Florida*, 399 US 78, 83-84; 90 S Ct 1893; 26 L Ed 2d 446 (1970). Thus, courts have struck testimony when the defendant has invoked the Fifth Amendment to refuse to respond to cross-examination questions. See *Lawson v Murray*, 837 F2d 653 (CA 4, 1988) (striking testimony of witness who invoked the Fifth Amendment during cross-examination); *United States v Baker*, 721 F2d 647 (CA 8, 1983) (disregarding direct testimony after defendant invoked the Fifth Amendment to prevent cross-examination). Defendant's cross-examination testimony was not coerced in violation of his right against self-incrimination.

Defendant also argues the questioning violated MRE 410, which provides in relevant part:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
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> * * *
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> (3) Any statement made in the course of any proceedings under MCR 6.302 or comparable state or federal procedure regarding either of the foregoing pleas; or
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> (4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

Here, no evidence of defendant's withdrawn plea was placed before the jury. The testimony with which defendant was impeached was not a statement made in the course of proceedings under MCR 6.302, which governs the trial court's acceptance of pleas, or in the course of plea discussions with a prosecuting attorney. Thus, by its plain language, MRE 410 does not apply to defendant's testimony in support of his motion to withdraw his plea. Defendant does not offer any authority to support his assertion that MRE 410 precludes admission of his prior testimony for impeachment purposes.

Defendant next argues that the prosecutor committed misconduct, denying defendant a fair trial, during his examination of defendant's brother, Walton Smith, by referring to his notes of an interview with and "testifying" as to his own recollection of that interview. We disagree.

Issues of prosecutorial misconduct are decided on a case by case basis by reviewing the pertinent portion of the record in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test is whether the defendant was denied a fair trial. *Id.* The propriety of a prosecutor's remarks depends on all of the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship to the evidence admitted at trial. *Id.* Prosecutors are

generally given "great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation omitted). A prosecutor, however, may not engage in conduct or make an argument that rises to the level of denying the defendant a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Reviewing the prosecutor's remarks as a whole, we conclude that the prosecutor did not commit misconduct by asking Smith questions regarding his statements during the interview. The prosecutor's reference to his own notes were an attempt to clarify with Smith or refresh his memory that, contrary to Smith's testimony on cross-examination, Smith had indeed previously indicated to the prosecutor that defendant expressed concern that he may have killed Ezell. MRE 612(a) permits the prosecutor to use his notes to refresh Smith's recollection regarding his comment that defendant was concerned that he may have killed Ezell. Additionally, "MRE 613(a) allows the questioning of a witness concerning a prior written or oral statement made by that witness. . . . [The rule] does not require either that the written statement be introduced into evidence or that the hearer first testify regarding the contents of the statement." *People v Avant*, 235 Mich App 499, 510-511; 597 NW2d 864 (1999); see also *People v Malone*, 445 Mich 369, 387; 518 NW2d 418 (1994) ("if a prior statement . . . was inconsistent with trial testimony, it could be admitted to impeach."). During his questioning of Smith, the prosecutor established that the "notes" were, essentially, his verbatim recording of Smith's statement from the interview. "When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement." *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). Accordingly, the prosecutor did not offer inadmissible evidence or misstate the facts or evidence presented.

Moreover, the trial court specifically instructed the jury that the statements and questions of the lawyers were not evidence, and that the jury should consider them only to the extent that they give meaning to the witnesses' answers. Jurors are presumed to follow the court's instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Lastly, defendant contends that the trial court abused its discretion by failing to consider several factors that defendant asserts warranted a downward departure from the sentencing guidelines. The trial court was presented with argument, from both parties, as to whether a downward departure was warranted. At the conclusion of that argument, the trial court sentenced defendant within the recommended minimum sentence range under the legislative guidelines. MCL 769.34(10) provides that, "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Defendant does not argue that his sentence is based on inaccurate information or that the guidelines were scored in error. Accordingly, this Court must affirm his sentence. MCL 769.34; *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter