

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 14, 2012

v

CORIELL TYQUAN BRANCH,
Defendant-Appellant.

No. 299859
Genesee Circuit Court
LC No. 09-025681-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

REONTA DESHON HUNTER,
Defendant-Appellant.

No. 300222
Genesee Circuit Court
LC No. 09-026176-FC

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

PER CURIAM.

Coriell Tyquan Branch and Reonta Deshon Hunter appeal as of right their jury trial convictions in this consolidated appeal.¹ In docket number 299859, Branch appeals his convictions of second-degree murder,² two counts of assault with the intent to do great bodily harm less than murder,³ carrying a concealed weapon,⁴ and possession of a firearm during the

¹ *People v Branch*, unpublished order of the Court of Appeals, entered November 16, 2011 (Docket No. 299859); *People v Hunter*, unpublished order of the Court of Appeals, entered November 16, 2011 (Docket No. 300222).

² MCL 750.317.

³ MCL 750.84.

commission of a felony (felony-firearm).⁵ Branch was sentenced to 375 months to 50 years' imprisonment for the second-degree murder conviction, 57 months to 10 years' imprisonment for each of his assault with the intent to do great bodily harm less than murder convictions, two to five years' imprisonment for the carrying a concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction.

In docket number 300222, Hunter appeals his convictions of second-degree murder,⁶ assault with the intent to commit murder,⁷ carrying a concealed weapon,⁸ and felony-firearm.⁹ Hunter was sentenced to 450 months to 60 years' imprisonment for his second-degree murder conviction, 285 months to 30 years' imprisonment for the assault with the intent to murder conviction, two to five years' imprisonment for the carrying a concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises out of an incident during which Branch and Hunter discharged firearms at two men on the street, but missed the men and instead killed a thirteen year-old girl who was standing nearby. Branch, Hunter and Tarius Barksdale, the driver of the car in which they were passengers, were arrested and charged with murder. Barksdale later pleaded guilty to second-degree murder and felony-firearm. In return, Barksdale agreed to testify truthfully against Branch and Hunter.

II. DOCKET NO. 299859

Branch argues that the trial court erred in admitting Barksdale's prior statement to Chief Scott McKenna. Branch contends that the statement prejudiced his right to a fair trial because it comprised hearsay and was used to improperly bolster Barksdale's testimony. We disagree.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion.¹⁰ "A trial court abuses its discretion when it selects an outcome that does not fall

⁴ MCL 750.227.

⁵ MCL 750.227b.

The prosecution charged Branch with first-degree murder, two counts of assault with the intent to commit murder, carrying a concealed weapon, and felony-firearm. The jury convicted him of second-degree murder and two counts of assault with the intent to do great bodily harm less than murder as lesser-included offenses.

⁶ MCL 750.317.

⁷ MCL 750.83.

⁸ MCL 750.227.

⁹ MCL 750.227b.

The prosecution charged Hunter with first-degree murder, two counts of assault with the intent to commit murder, carrying a concealed weapon, and felony-firearm. The jury convicted him of second-degree murder as a lesser-included offense.

¹⁰ *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

within the range of reasonable and principled outcomes.”¹¹ The decision whether to admit or exclude evidence “frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence.”¹² Such questions of law are reviewed de novo.¹³

“Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted.”¹⁴ Hearsay is “generally inadmissible unless it falls under one of the hearsay exceptions set forth in the Michigan Rules of Evidence.”¹⁵ The admission of a prior consistent statement through a third party’s testimony in accordance with MRE 801(d)(1)(B) requires:

(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant’s testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant’s challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.¹⁶

We find that the trial court properly admitted Barksdale’s prior statement to McKenna.¹⁷ During Barksdale’s cross-examination, Branch’s attorney implied that Barksdale had an improper motive for his testimony. Specifically, Branch’s attorney indicated that the prosecution recommended a sentence of 13 years’ imprisonment for Barksdale’s guilty plea to second-degree murder, as opposed to him being tried for first-degree murder, conviction for which would mean life imprisonment without the possibility of parole. Branch’s counsel also suggested that because Barksdale had not yet been sentenced, his testimony could affect the sentence that he would receive. Moreover, Branch’s attorney questioned Barksdale regarding what information he had access to while he was in jail. Barksdale admitted to being provided with witness statements and police reports, and counsel further implied that having access to such information provided him with the opportunity to review the prosecution’s case before testifying, impacting his testimony.

Barksdale’s prior statement was substantially consistent with his in-court testimony. In addition, Barksdale voluntarily made the statement to McKenna shortly after the incident, and

¹¹ *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

¹² *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

¹³ *Id.*

¹⁴ *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007); MRE 801(c).

¹⁵ *Stamper*, 480 Mich at 3; See also MRE 802.

¹⁶ *People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000), quoting *United States v Collicott*, 92 F3d 973, 979 (CA 9, 1996).

¹⁷ MRE 801(d)(1)(B).

there is nothing in the record to suggest that a plea agreement had been offered at that time. As such, Barksdale's statement was not hearsay and was properly admitted against Branch.¹⁸

Branch next asserts that the prosecutor's closing argument amounted to misconduct requiring reversal because it appealed to the jury's sympathy for the victim. We disagree. Because this issue is unpreserved, this Court's review is limited to determining whether the prosecutor's conduct amounted to plain error affecting Branch's substantial rights.¹⁹ "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings[.]"²⁰

"A prosecutor may not appeal to the jury to sympathize with the victim. Nor may a prosecutor urge the jury to convict as part of its civic duty or on the basis of its prejudices."²¹ Even when the prosecutor's statements would tend to elicit sympathy for the victim, reversal is not warranted if the "comments were relatively brief and did not likely deflect the jury's attention from the evidence presented[.]"²²

The prosecutor's comments during closing arguments did not amount to misconduct.²³ While the prosecution mentioned the word "sympathy" during its closing argument, the subject was not belabored and the word was used in the context of asking the jury to put its sympathy aside. Due to the brevity of the comments and the prosecution's emphasis of the evidence supporting Branch's guilt, it is not likely that the comments diverted the jury's attention from the evidence.²⁴ Moreover, the trial court instructed the jury that it could not let sympathy or prejudice influence its verdict and that the attorneys' statements were not evidence. Because it is presumed that jurors follow their instructions, we find that these instructions cured any possible prejudicial effect.²⁵

As his final issue, Branch argues that the trial court violated his due process rights by failing to give a jury instruction regarding the use of Barksdale's prior juvenile conviction as a basis for impeachment. We disagree. This Court reviews claims of instructional error involving questions of law de novo, and reviews a trial court's determination regarding whether the facts support a jury instruction for an abuse of discretion.²⁶ Although "[a] criminal defendant is

¹⁸ *Id.*

¹⁹ *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

²⁰ *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

²¹ *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

²² *Id.*

²³ *Ackerman*, 257 Mich App at 448.

²⁴ *Unger*, 278 Mich App at 237.

²⁵ *Id.* at 235.

²⁶ *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

entitled to have a properly instructed jury consider the evidence against him[.]”²⁷ reversal is only warranted if an instructional error “undermined the reliability of the verdict.”²⁸ To justify reversal, it must appear more probable than not that the instructional error was outcome determinative.²⁹

The trial court must provide the jury with instructions on the law applicable to the case, and “fully and fairly present the case to the jury in an understandable manner.”³⁰ The trial court did incorrectly state that evidence of juvenile adjudications is not admissible for any purpose,³¹ as use of a juvenile adjudication is permitted when offered to impeach a witness in certain circumstances.³² Any error by the trial court in failing to give the instruction, however, was not outcome determinative.³³ While the additional instruction could have further raised questions regarding Barksdale’s credibility, other evidence challenging Barksdale’s credibility was brought forth by Branch’s counsel. Reversal is not warranted.³⁴

II. DOCKET NO. 300222

Hunter argues that the trial court erred in denying his motion for a new trial. Specifically, Hunter asserts that a juror improperly visited the crime scene, which violated his right to a fair trial and necessitates reversal or remand for an evidentiary hearing. We disagree. This Court reviews the trial court’s decision to deny a motion for a new trial for an abuse of discretion, and the trial court’s findings of fact for clear error.³⁵ A finding is clearly erroneous if this Court “is left with a definite and firm conviction that a mistake has been made.”³⁶

“During their deliberations, jurors may only consider the evidence that is presented to them in open court.”³⁷ “Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.”³⁸ To establish that the extrinsic influence is error

²⁷ *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

²⁸ *People v Hawthorne*, 474 Mich 174, 184; 713 NW2d 724 (2006).

²⁹ *Riddle*, 467 Mich at 124-125.

³⁰ *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991); MCL 768.29.

³¹ See, e.g., *People v Hawkins*, 58 Mich App 69, 74-75; 226 NW2d 851 (1975).

³² MRE 609(e).

³³ *Riddle*, 467 Mich at 124-125.

³⁴ *Id.*

³⁵ *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

³⁶ *Id.* (citation and quotation marks omitted).

³⁷ *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997).

³⁸ *Id.*

requiring reversal, Hunter must prove that (1) “the jury was exposed to extraneous influences,” and (2) the “extraneous influences created a real and substantial possibility that they could have affected the jury’s verdict.”³⁹ To establish the second element, Hunter must “demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.”⁴⁰ If such showing is made, the burden shifts to the prosecution “to demonstrate that the error was harmless beyond a reasonable doubt.”⁴¹ The prosecution may prove the error was harmless beyond a reasonable doubt by showing that the influence “was duplicative of evidence produced at trial or the evidence of guilt was overwhelming.”⁴²

Hunter demonstrated that the jury was exposed to an extraneous influence.⁴³ It is undisputed that juror number seven revisited the crime scene after it was visited by the entire jury. Juror number one then told the prosecutor that juror number seven insisted on telling the other jurors, over their objection, what she observed during her unsanctioned visit to the crime scene.

Hunter has also shown that juror number seven revisiting the crime scene was substantially related to a material aspect of the case.⁴⁴ At trial, Hunter asserted that he acted in self-defense. Whether Hunter could have seen the men he fired at from the position where Barksdale parked his car was key to his defense. Thus, the information provided by juror number seven regarding what was observed at the crime scene related to a material aspect of the case.

Hunter, however, has failed to establish that there is a direct connection between juror number seven’s statements and the adverse verdict.⁴⁵ The trial court permitted the jury to visit the scene of the crime during trial. Counsel and law enforcement recreated the crime scene as it appeared on the day of the shooting. The jurors were then allowed to inspect the scene, but were unable to discuss their observations during the visit. Hunter cannot show that juror number seven explained the crime scene to the remaining jurors in a way inconsistent with how it looked during the jury’s initial visit. Because juror number seven’s statement after revisiting the crime scene provided duplicative evidence, reversal or remand for an evidentiary hearing is not warranted.⁴⁶

³⁹ *Id.* at 88-89.

⁴⁰ *Id.* at 89.

⁴¹ *Id.*

⁴² *Id.* at 89-90.

⁴³ *Id.* at 88-89.

⁴⁴ *Id.* at 89.

⁴⁵ *Id.*

⁴⁶ *Id.* at 88-89.

Hunter primarily relies on *People v Hollingsworth*⁴⁷ in asserting that juror number seven's statement amounted to unsworn testimony against him and violated his right to confront witnesses. *Hollingsworth*, however, is distinguishable because while it similarly involves a juror improperly visiting a crime scene and discussing the visit with the remaining jurors, in that case the trial court prohibited the jurors from visiting the scene.⁴⁸

Moreover, the trial court instructed the jury that they were only to consider the evidence presented in court in reaching its verdict and that it "must not consider anything [it] learned from seeing the scene that was not covered, however, by the evidence admitted during the course of the trial[.]" Because jurors are presumed to follow their instructions, any error does not require reversal.⁴⁹

Next, Hunter argues that the trial court erred by failing to explicitly instruct the jury that he had no duty to retreat before using deadly force. We disagree. This Court reviews unpreserved claims of instructional error for plain error affecting a defendant's substantial rights.⁵⁰

Hunter contends that the trial court erred by failing to instruct the jury that if he reasonably feared that he was about to be attacked by someone using a deadly weapon, then he was justified in defending himself with deadly force. Hunter argues that the trial court failed to read the relevant jury instruction⁵¹ in its entirety and that the instruction as given improperly suggested to the jury that he had a duty to retreat if possible before using deadly force against the men on the street.

In reviewing jury instructions, this Court considers the instructions "as a whole rather than extracted piecemeal to determine whether error requiring reversal occurred."⁵² Taking the instructions in context, we find that they adequately explained the elements of self-defense. The trial court adequately explained that Hunter did not have a duty to retreat by instructing the jury that Hunter could immediately act to defend himself. Because the instructions fairly presented the issues to be tried and sufficiently protected Hunter's rights, reversal is not warranted.⁵³

Finally, Hunter asserts that the trial court abused its discretion by refusing to give a jury instruction regarding the use of Barksdale's prior juvenile conviction as a basis for impeachment.

⁴⁷ *People v Hollingsworth*, 22 Mich App 545; 177 NW2d 687 (1970).

⁴⁸ *Id.* at 546.

⁴⁹ *Unger*, 278 Mich App at 235.

⁵⁰ *Aldrich*, 246 Mich App at 124-125.

⁵¹ CJI2d 7.16.

⁵² *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

⁵³ *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002).

Since this argument is identical to Branch's previously discussed, and Hunter's counsel also presented evidence to attack Barksdale's credibility, we find that reversal is not warranted.⁵⁴

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Kirsten Frank Kelly

⁵⁴ *Riddle*, 467 Mich at 124-125.