STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2013
v	No. 307763 Genesee Circuit Court
GLEN ALLEN GRAY II, Defendant-Appellant.	LC No. 09–025647–FH

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, the circuit court convicted defendant Glen Allen Gray II of felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, second offense (felony firearm), MCL 750.227b, and felonious assault, MCL 750.82. Defendant's convictions are based on a shooting that occurred while he and Cornisha Doss engaged in a physical altercation inside Doss's car.

Contrary to defendant's appellate challenge, he was not denied a fair trial when Doss testified that defendant sold drugs, and defense counsel was not ineffective for failing to object. It is unlikely that the learned court allowed this irrelevant and inadmissible information to taint its judgment. Defendant also was not denied a fair trial by the prosecutor's and law enforcement's failure to more thoroughly investigate the case as neither had the duty to develop exculpatory evidence. Moreover, we may not interfere with the trial court's resolution of this credibility contest to find that defendant's convictions are against the great weight of the evidence. We therefore affirm.

I. BACKGROUND

Just after midnight on August 23, 2009, Cornisha Doss drove to the home of defendant's friend and picked him up. Doss and defendant had met approximately a month before and had dated, but apparently had since ended their relationship. The pair headed to a restaurant. Doss claimed that defendant asked her for a ride. Defendant asserted that Doss contacted him. Both agreed that Doss expected defendant to purchase her a meal and asked defendant to give her money for gas. Doss drove to a Sunoco gas station on Corunna Road in Flint and pulled up to a pump. The pair argued about Doss's request for gas money. Defendant threw money at Doss but then picked it up, refusing to pay for her gas. Doss claimed that defendant threw a

significant amount of money at her and she tried to take $20 for her purchase. Defendant testified that he had only a few singles in his possession.

When defendant refused to pay for her gas, Doss pulled away from the pump and parked near the gas station convenience store. Doss ordered defendant to exit her car. Defendant had been talking to a friend on his cell phone during this encounter and asked the friend to pick him up. Defendant told Doss that he would not leave her vehicle until his friend arrived. The pair continued arguing and defendant told his friend that he needed to end their telephone call because "I'm about to beat this bitch's ass." Defendant then attempted to take Doss's keys from the ignition. Doss struck defendant to prevent him from taking her keys. In response, defendant grabbed Doss by the hair on the back of her head and punched her several times in the face. A small pistol was then produced. Defendant asserted that Doss took the pistol from her purse and shot twice at him. Defendant claimed that he tried to wrest the gun away from Doss and she shot him in the hand in the process. Doss testified, however, that defendant removed the pistol from his waistband and struck her several times on the head and face with it. Doss alleged that she struggled with defendant for the gun and it went off twice.

After the shots were fired, Doss jumped from her car and ran into the gas station. She asked the attendant to call 911 and told him that she had shot defendant. Doss hid in the restroom and personally called 911 as well. Defendant followed Doss into the gas station and also told the attendant that Doss had shot him. The witnesses testified that defendant's hands were not visible on the gas station's surveillance footage, but the attendant asserted that defendant was carrying a pistol, pointing down, in his left hand.

Defendant walked away from the scene and headed toward a nearby hospital. He was stopped along the way. Officers tracked him by following a trail of blood. They found his cell phone thrown behind a privacy fence next to the gas station. The pistol was never recovered.

II. EVIDENCE OF DRUG DEALING

Defendant challenges the admission of Doss's testimony that he sold drugs and his counsel's failure to object on this ground. Defendant claims that this irrelevant and highly prejudicial testimony affected the fairness of his trial.

At trial, Doss testified on direct examination that defendant told his friend over the phone that she had driven him "out in honkyville" and he was upset because "he had his stuff on him. He got all his stuff on him or whatever." After a few additional questions, the following exchange occurred:

> *Q.* When did you become aware that he might be carrying a gun?
>
> *A.* He said – I didn't know that he had a gun. At first I thought he was talking about drugs because he used to sell drugs when he was on the phone with his friend, but I didn't think he was talking like a gun, you know. Guns, you know, drugs, and all that stuff. I didn't know, you know, exactly what he was talking about with that, you know, but I don't know. When he pulled the gun out on me, I guess when he was hitting me in the head.

On cross-examination, defense counsel revisited this issue:

Q. And when he said I got my stuff on me, do you know what that conversation was about? You just heard his part of the conversation, right?

A. I could hear his friend talking, too.

Q. And – but when he said I got my stuff, you indicated earlier that meant what?

A. I thought he was talking about drugs or something.

Q. Okay. Have you ever known him to do drugs?

A. I know him to sell drugs.

Q. Okay. The short period of time you was with him you've known him to sell drugs.

A. Yeah.

Q. Did he sell drugs around you?

A. No. That's what he told me.

On redirect, the prosecutor continued this line of questioning:

Q. Ms. Doss, can you tell me did you – when [defense counsel] was asking, did you tell him that [defendant] had admitted to you that he was a drug dealer?

A. Yes.

Q. How did that come about?

A. He had told me because [he] was supposed to be in the halfway house, and he told me that he sells drugs at night, and his buddies help him get – sneak himself back in because he spent the night over to my house before.

Q. Okay.

A. And he was like he sell – he told me that he could get all these meds from his psychiatrist, and he said he don't take them, but he sells them to the little dudes on the block. That's what he told me.

Defendant failed to preserve his claimed denial to a fair trial by raising this issue as a contemporaneous objection to the challenged testimony. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). He further failed to preserve his challenge to counsel's performance by requesting a new trial or a *Ginther*[1] hearing. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). We review preserved claims of evidentiary error for an abuse of discretion, *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), but unpreserved claims for plain error effecting the defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). We also review unpreserved constitutional challenges to the fairness of a trial for plain error. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). As no evidentiary hearing was held regarding defendant's challenge to counsel's performance, our review of that issue "is limited to mistakes apparent on the existing record." *Riley*, 468 Mich at 139.

We agree with defendant that the challenged references to defendant's alleged drug activities were completely irrelevant to the issues at trial and should not have been admitted. Only relevant evidence is admissible at trial. MRE 402. "'Relevant 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." MRE 401. Whether defendant had told Doss that he was a drug dealer or whether he actually sold his prescription psychotropic medications to others has no bearing on whether he possessed a gun on the day in question or whether he used that gun to "pistol whip" Doss. The evidence was also inadmissible under MRE 404(b)(1) as "[e]vidence of other crimes, wrongs or acts" that was not presented for a permitted purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material." Rather, the evidence that defendant might have sold drugs in the past was first introduced through an unresponsive answer by Doss.

Yet, the erroneous admission of Doss's testimony did not affect defendant's substantial rights. "Defendant was tried before a judge, not a jury. A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Absent any evidence to the contrary, a trial court is presumed to have done just that at a bench trial. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992). Reviewing the trial court's written bench judgment, it is clear that the court did not actually rely on this improper evidence. Rather the court found that defendant had brought the gun into the car based on Doss's "little [sic] familiarity with guns as reflected in her description of the gun." The court further noted the unlikelihood that Doss could have removed the gun from her purse as her purse was located in the backseat of the vehicle.

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

We similarly reject defendant's claim that defense counsel was ineffective in failing to object to the presentation of this evidence. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant" that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant "must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). As this was a bench trial, counsel likely assumed that the court would not rely on this irrelevant information. And as defendant has not established that the trial court relied on the inadmissible evidence in reaching its judgment, he cannot show that counsel's failure to object affected the result of the proceeding.

III. FAILURE TO INVESTIGATE

Defendant also claims that the police and prosecutor failed to adequately investigate the case against him, preventing him from presenting res gestae witnesses and forensic evidence. Specifically, defendant challenges the failure to question two customers who were inside the gas station when Doss and defendant entered and to inspect Doss's vehicle to determine the location of any potential bullet holes inside.

It is clearly part of a police officer's duty to investigate crimes in an attempt to preserve public safety, detain law breakers, and collect evidence. Similarly, prosecutors have a duty imposed by their oath of office to adequately prepare their cases. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). However, neither the police nor the prosecutor has a duty to develop exculpatory evidence on a defendant's behalf. *People v Miller*, 211 Mich App 30, 43; 535 NW2d 518 (1995).

Defendant maintains that had the police officers who responded to the scene "adequately searched the car for bullets or bullet holes," defendant could have corroborated his claim that Doss shot him intentionally. However, one investigating officer testified that the type of pistol described by the witnesses would not have ejected spent bullet shells and therefore no such evidence could have been found. Moreover, the police did examine Doss's car. An evidence technician took numerous photographs of the blood evidence inside the car and found no bullet holes. One responding officer testified on cross-examination that he had searched the car at the scene and also found no bullet holes.[2]

[2] There is a possible explanation for the lack of bullet holes in Doss's car. As the offense occurred on a warm, dry summer night, it is plausible that the two fired bullets travelled out an open car window.

In relation to the potential res gestae witnesses, the officers that testified at trial acknowledged that no one spoke to the customers inside the gas station. And defendant complained of this failure during his testimony at trial. However, the prosecutor had no duty to produce these witnesses, only a duty to notify defendant of known witnesses and to provide assistance in locating witnesses when requested. *Burwick*, 450 Mich at 288-289, citing MCL 767.40a. Moreover, defendant clearly and unequivocally waived his right to pursue, investigate, or otherwise use at trial the potential testimony of these witnesses. At a January 26, 2011 pretrial conference, defense counsel noted that he had reviewed the surveillance footage from the gas station and discovered that there were two witnesses of whom he had no prior knowledge. Defense counsel apparently attempted to discover the identities of those individuals. Defense counsel advised defendant that those witnesses could provide testimony that might affect the outcome of the trial. Defendant did not want to wait for defense counsel to investigate the matter further and instead insisted that the matter proceed to trial as scheduled on the following day. The court warned defendant that he would be precluded from challenging his convictions based on the absence of those witnesses, but defendant nevertheless decided to proceed to trial.

"[W]aiver is the intentional relinquishment or abandonment of a known right." *Carines*, 460 Mich at 762 n 7 (quotation marks and citation omitted). Once waived, a defendant "may not . . . seek appellate review of a claimed deprivation of" that right because the "waiver has extinguished any error." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). Defendant expressly and unequivocally stated on the record that he did not want to postpone trial so he could investigate these potential witnesses. Accordingly, he waived any error related to their absence.

IV. GREAT WEIGHT OF THE EVIDENCE

Defendant contends that the trial court failed to give due consideration to inconsistencies in Doss's testimony and that the verdict was therefore against the great weight of the evidence. Defendant conceded many relevant facts in this case, including that he physically assaulted Doss. Defendant denied that he introduced the weapon into the fracas. In its written judgment following the bench trial, the court noted the inconsistencies in defendant's and Doss's versions of events. The court found Doss to be more credible and accepted her story that defendant retrieved the pistol from his waistband.

A verdict is deemed to be against the great weight of the evidence when "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; 673 NW2d 800 (2003). "[A]bsent exceptional circumstances, issues of witness credibility" must be left to the factfinder. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). In general, conflicting testimony between witnesses is not sufficient grounds for granting a new trial. *Id.* at 643. As an appellate court, we cannot listen to the testimony firsthand or observe the demeanor of the witnesses and, as a result, are at a disadvantage when reviewing the resolution of credibility issues. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 743 (1992), mod 441 Mich 1201 (1992).

We have no ground to find that the verdict is against the great weight of the evidence. The trial court understood that the question of who brought the gun into the car was *the* salient issue at trial. The court knew the importance of this particular finding of fact, and stated the basis for its finding in its written opinion. We may not interfere with that judgment.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher