# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>November 19, 2013 |
| v | No. 311433<br>Oakland Circuit Court |
| JALEN DEVONTE MCCOY,<br><br>Defendant-Appellant. | LC No. 2011-238600-FC |

Before: M. J. KELLY, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Defendant Jalen Devonte McCoy appeals of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), and carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. McCoy pleaded no contest to two additional charges: possessing a firearm while ineligible to do so (felon-in-possession), MCL 750.224f, and a second felony-firearm count. The trial court sentenced McCoy to serve life in prison without the possibility of parole for his first-degree murder conviction. It also sentenced him to serve two years in prison for each felony-firearm conviction and from 5 to 7 years in prison for his felon-in-possession conviction. Because we conclude that there were no errors warranting relief, we affirm.

## I. BASIC FACTS

McCoy's convictions arise from the shooting death of Daniel Gay in June 2011. On the night at issue, Gay picked up McCoy and another friend, David Brown, at around 11 p.m. in his maroon Chevy Malibu. Gay drove them to an apartment complex where they purportedly hoped to sell McCoy's handgun. Afterward, they drove to a Sunoco gas station.

Michael Betts testified that he was at the Sunoco gas station when Gay pulled in at about 1:30 a.m. Betts stated that he knew Gay as an acquaintance. There were two other men in Gay's car: a man who was later identified as McCoy was in the backseat and a man who matched Brown's description was in the front passenger's seat.

Betts testified that Gay came over and borrowed his cell phone and made a call. Gay's girlfriend testified that he called her and told her that he had been robbed and was still with McCoy and Brown, but would return at 9:00 a.m. Betts said that Gay returned his phone and then drove off. As Betts was about to leave, McCoy walked up and demanded money. When

Betts asked what he was talking about, McCoy tried to pull out a rifle or shotgun from his waist. While McCoy was struggling with the gun, Betts drove off. He panicked, however, and struck a curb, which deflated his tire. Betts drove as far as a nearby liquor store. Soon after arriving at the liquor store, Gay pulled up and someone pointed a gun from the backseat and fired at him.

Deshaunte Smith testified that he had known McCoy for about three years; Smith saw McCoy on the night at issue with a rifle that he had seen McCoy possess in the past—it was a .22 caliber rifle with its barrel sawed off. At sometime between 2 and 4 in the morning, McCoy and Brown showed up at his home. Smith testified that McCoy told him that he had shot Gay in the head with the .22 and then dragged him into a nearby wooded area in Shirley Park. McCoy wanted to clean Gay's car and Smith told him about a friend that might help. When Smith got into Gay's car, he saw a lot of blood. They then went to his friend's home and got some cleaning materials. McCoy also burned some of Gay's clothing from the trunk.

Antonio Lenoir testified that he had known Gay and McCoy for a few years. He said McCoy called him on the night at issue and told him that he had killed Gay with a .22 sawed-off rifle, but Lenoir did not believe him. McCoy told Lenoir that he was mad because Gay had "made it look like he got robbed" and lost the gun he had loaned him—"he [McCoy] thought he got played." McCoy told him that he had Gay pull over near Shirley Park, got out of Gay's car, and then shot Gay in the head. He then dragged Gay into a wooded area.

Testimony established that Gay was found in Shirley Park. His body had been covered with two pieces of clothing which had McCoy's DNA on it. The medical examiner testified that Gay died from a single gunshot wound to the temple between 1:30 a.m. and 4:00 a.m. on the night at issue. He extracted a .22 caliber "brass wash" bullet from Gay's head, which other testimony established was consistent with ammunition seized from McCoy's bedroom.

McCoy testified at trial and denied that he shot Gay. He admitted that he was with Gay and Brown, but stated that Brown was the one who shot Gay.

The jury rejected McCoy's version of events and found him guilty. This appeal followed.

## II. EVIDENTIARY ERRORS

### A. STANDARD OF REVIEW

McCoy argues on appeal that the trial court deprived him of a fair trial by permitting the admission of improper evidence. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). However, we review de novo whether a rule or statute precludes admission of evidence as a matter of law. *Id.* at 91.

### B. THE ARNOLD SHOOTING

McCoy first argues that the trial court improperly allowed the prosecutor to present evidence that he shot at Olajuwon Arnold the day after Gay's murder. McCoy's trial lawyer moved to suppress this evidence, but the trial court determined that the evidence was admissible as part of the res gestae of the homicide and was not unfairly prejudicial. On appeal, McCoy

argues that the evidence was substantially more prejudicial than probative and should have been excluded under MRE 403.

Generally, all relevant evidence is admissible. *Id.* However, even if relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403; *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Under the res gestae rule, a prosecutor may admit evidence of other acts if the acts are connected to the charged crime in such a way that their admission is necessary to give the jury the complete story. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Here, the challenged evidence helped to complete the picture concerning the events immediately after Gay's murder—it showed McCoy's demeanor and established his continued connection to various items involved in the murder within a short time of the murder. See *People v Key*, 121 Mich App 168, 180; 328 NW2d 609 (1982). The evidence that Arnold recognized Gay's car and knew that it was unusual for Gay to let someone else drive it also permits an inference that McCoy shot at Arnold in an attempt to conceal his involvement with Gay's murder, which in turn is relevant to premeditation and consciousness of guilt. See *People v Gonzalez*, 468 Mich 636, 641-642; 664 NW2d 159 (2003); *People v Yost*, 278 Mich App 341, 357; 749 NW2d 753 (2008). While this evidence was prejudicial, only evidence that is *unfairly* prejudicial should be excluded under MRE 403. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995). And, on this record, we cannot say the evidence's probative value was significantly outweighed by the danger of unfair prejudice. *Roper*, 286 Mich App at 106. Finally, even if this evidence were excludable under MRE 403, we would conclude that any error in its admission was harmless in light of the overwhelming evidence that McCoy shot and killed Gay. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

## C. THE BETTS SHOOTING

McCoy also argues that the trial court improperly admitted evidence that someone shot at Betts from the backseat of Gay's car a short time before the Gay's death. Although McCoy's lawyer objected to the testimony that McCoy was involved in trying to rob Betts, he did not object to Betts' testimony about the shooting. Because this claim of error was not properly preserved, our review is for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

As with the evidence concerning Arnold, Betts' testimony concerning the attempted robbery and shooting helped fill in some important gaps in the events leading to Gay's death. The testimony established that McCoy was initially riding in the backseat of Gay's car and Brown was in the front passenger's seat. His testimony also established that McCoy had the rifle with him when he attempted the robbery and, given that the shot was fired from the backseat, the testimony permitted an inference that McCoy continued to possess the rifle shortly before Gay's death. All of this evidence tended to corroborate and complement the other witnesses' testimony by providing a complete picture concerning McCoy's actions leading up to the murder; as such, it was proper res gestae evidence. *Scholl*, 453 Mich at 740-741. Because of the high probative value of the challenged evidence, we cannot say the probative value was significantly outweighed by any danger of unfair prejudice under MRE 403. Therefore, it was not plain error to allow this evidence. *Carines*, 460 Mich at 763.

## D. HEARSAY

McCoy next argues that the trial court improperly admitted hearsay into evidence. Specifically, he contends that the trial court erred when it permitted Robert Norton to testify that he heard rumors at a party that McCoy had killed Gay and left his body in Shirley Park. The record establishes that the trial court attempted to prevent Norton from testifying about the statements that he heard at the party by cautioning him to only testify as to his personal knowledge and by permitting the prosecutor to ask Norton leading questions on direct examination. Accordingly, we cannot conclude that the trial court erred with respect to Norton's testimony. *Id.*

## III. MISTRIAL

McCoy next argues that the trial court abused its discretion when it denied his motion for a mistrial. After the prosecutor questioned McCoy about his refusal to provide a DNA sample and participate in a line-up, McCoy's lawyer moved for a mistrial on the grounds that the questions violated McCoy's Fifth Amendment right against self incrimination. The trial court denied the motion. We review a trial court's decision on a motion for mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). The constitutional privilege against self-incrimination protects a defendant from being compelled to testify against himself or from being compelled to provide the state with evidence of a testimonial or communicative nature. *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988). Because neither DNA evidence, *Wilson v Collins*, 517 F3d 421, 431 (CA 6, 2008), nor refusal to participate in a police lineup, *People v Benson*, 180 Mich App 433, 437-439; 447 NW2d 755 (1989), remanded for resentencing 434 Mich 903 (1990), are testimonial in nature, we conclude that this line of questioning did not violate McCoy's Fifth Amendment rights. The trial court did not err when it denied the motion for a mistrial. *Alter*, 255 Mich App at 205.

McCoy also makes a cursory argument that this Court should expand or modify the law to establish that DNA evidence and participation in lineups amount to testimonial evidence. Given that he has not properly addressed this argument on appeal, we decline to consider it. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro