STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v	No. 286175 Wayne Circuit Court
BRANDEN DENARD POWE, Defendant-Appellant.	LC No. 07-023387-FC

Before: Shapiro, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 15 to 25 years' imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Evidence of Other Crimes

Defendant argues that he was denied a fair trial because of the introduction of damaging, irrelevant evidence. Specifically, defendant claims that the prosecutor improperly elicited testimony that defendant regularly smoked marijuana, when his marijuana habits were not relevant to the charged conduct. We disagree.

An unpreserved issue is subject to review only for plain error affecting the defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). Under the plain error rule, defendant has the burden to show that (1) an error occurred, (2) the error is plain or obvious, and (3) the error affected a substantial right. *People v Cross*, 281 Mich App 737, 738; 760 NW2d 314 (2008). Reversal is warranted only "if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

As a cornerstone of evidentiary law, relevant evidence is admissible and irrelevant evidence is not admissible. MRE 402. However, "[w]here the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004); see also MRE 404(b).

At trial, the prosecutor elicited the following information during her direct examination of Pertrice Woods:

Q. Okay. And did you ever see the defendant smoking marijuana?

A. Yes.

Q. Now, where would you see the defendant smoking marijuana, ma'am?

A. In front of my house.

Defendant contends that "the only conceivable reason for eliciting [the marijuana usage evidence] was to demonstrate that [defendant] had bad character." If the purpose was to demonstrate bad character, the evidence would have been inadmissible. MRE 404(b); *Knox*, *supra* at 510. However, other-acts evidence may be admissible under MRE 404(b) "for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, [or] plan." Here, the evidence was presented to show that defendant had a motive to steal the duffle bag full of marijuana from Jermaine Shaffer, the victim. There was other testimony presented at trial that defendant was seeking to "cop" some marijuana from Shaffer. The evidence of defendant's marijuana use put his need to acquire marijuana in context for the factfinder. In fact, the prosecutor, in her pursuit of a first-degree murder conviction,[1] used the theory that defendant premeditated Shaffer's murder in order to obtain the marijuana for free: "[D]efendant wanted to come over and get some marijuana, only he didn't want to pay for it. He wanted that duffle bag of marijuana for free, and that's exactly what he got after he shot Jermaine Shaffer in the chest." Therefore, defendant's personal use of marijuana was relevant to the prosecutor's theory.

However, even relevant evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403; *Knox*, *supra* at 509. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the [factfinder]." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Defendant failed to show how this evidence posed a danger of unfair prejudice. It is implausible that a factfinder, let alone a judge in a bench trial, would be swayed to convict a defendant of second-degree murder because the defendant previously committed the misdemeanor offense[2] of using marijuana. Thus, defendant's unpreserved claim fails.

II. Sentencing Guidelines Scoring, OV 3

Defendant next claims that when a defendant is convicted of homicide, MCL 777.33 should be interpreted such that Offense Variable (OV) 3 is assessed at zero points, instead of 25 points because the victim suffered a life-threatening injury. Defendant acknowledges, however, that the Supreme Court, in *People v Houston*, 473 Mich 399, 402; 702 NW2d 530 (2005),

[1] Defendant was convicted of the lesser offense of second-degree murder.

[2] MCL 333.7404(2)(d) (use of marijuana is a misdemeanor offense punishable up to 90 days in jail and/or a fine up to $100).

already addressed this precise OV 3 calculation issue when it held that 25 points is the appropriate score for OV 3 when the victim dies from a gunshot wound. Defendant also admits that the sentencing judge did not commit legal error when he scored the 25 points, but simply wishes the Supreme Court to reconsider its ruling in *Houston*.

This Court has no power to change a decision of the Supreme Court; only the Supreme Court may overrule its prior decisions. *Paige v Sterling Heights*, 476 Mich 495, 524; 720 NW2d 219 (2006). Based on the binding authority of *Houston*, there was no error in calculating 25 points for defendant's OV 3 score.

III. Right to Confrontation

Next, defendant claims that he was denied his Sixth Amendment right to confrontation when the testimony of several endorsed witnesses[3] was admitted through stipulation. We disagree.

The Sixth Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI; *People v Buie*, ___ Mich App ___; ___ NW2d ___ (Docket No. 278732, issued August 25, 2009), slip op, p 4.

Similar to virtually any other right, the right of confrontation can be waived. See *People v Lawson*, 124 Mich App 371, 376; 335 NW2d 43 (1983) (stating that defense counsel can waive a defendant's right to demand that res gestae witnesses be produced at trial, but that more integral rights of the confrontation clause must be personally waived by the defendant); *People v Johnson*, 70 Mich App 349, 350; 247 NW2d 310 (1976). Waiver is the "'intentional relinquishment or abandonment of a known right.'" *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation omitted). Here, defendant's trial counsel stipulated to the admission of the evidence and statements at issue, the proposed testimony and reports of endorsed witnesses. By intentionally relinquishing a known right, defendant waived the issue, and any error was extinguished. *Id.*

IV. Directed Verdict

Defendant next argues that the trial court erred when it denied his motion for directed verdict on the first-degree murder charge. We disagree.

"To establish first-degree premeditated murder, the prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation." *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). Premeditation and deliberation require sufficient time to allow the defendant to reconsider his actions. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Factors relevant to the establishment of premeditation and deliberation include the following: "'(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the

[3] The trial court referred to the witnesses as "endorsed" on the record.

defendant's conduct after the homicide.'" *Id*. (citation omitted). Circumstantial evidence and reasonable inferences from the evidence can be sufficient to prove the elements. *Id.*

There was ample evidence linking defendant to Shaffer's murder. Multiple eyewitnesses saw defendant shoot a gun at the time of the shooting, with Dontaze Mosley actually seeing defendant shoot the gun at Shaffer with a distance of only two to three feet between them. With regard to the premeditation and deliberation elements, the prosecution offered evidence showing that defendant set up the meeting with Shaffer in order to obtain some marijuana and argued that a reasonable inference is that defendant planned to kill Shaffer for the drugs all along. While this alone may not have been enough to prove premeditation and deliberation and survive a motion for directed verdict, there was more. Mosley testified that after he ran into the house after seeing defendant initially shoot at Shaffer, he looked out the window and saw that defendant was no longer in the SUV. Mosley then heard another gunshot. A reasonable inference is that after defendant initially shot at Shaffer, defendant exited the SUV, pursued a fleeing Shaffer, and shot at him again. The amount of time between the two shots and the time it took to run after Shaffer was sufficient for defendant to have reflected on his actions. Furthermore, the act of pursuing Shaffer on foot in order to shoot again is strong evidence of premeditation and deliberation.

Viewing all of the evidence in the light most favorable to the prosecution, *People v Gillis*, 474 Mich 105; 712 NW2d 419 (2006), there was sufficient evidence for a factfinder to have concluded that the elements of first-degree murder were proven beyond a reasonable doubt. Therefore, defendant's claim fails.

V. Prosecutorial Misconduct

Defendant alleges that two specific instances of prosecutorial misconduct deprived him of a fair trial. We disagree.

Generally, claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). A prosecutor's remarks are evaluated in the context of the evidence presented and in light of defense arguments. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The test is whether a defendant was denied a fair and impartial trial due to the actions of the prosecutor. *Id*. at 29.

Defendant first contends that the prosecutor improperly "vouched" for the credibility of Mosley when the prosecutor introduced evidence of Mosley's prior consistent statements from the preliminary examination. It is well established that a prosecutor may not vouch for the credibility of witnesses by implying he or she has some special knowledge of the witnesses' truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, a "prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Ackerman, supra* at 448. Here, the prosecutor inquired about Mosley's prior *consistent* statements from the preliminary examination in order to counter Mosley's prior *inconsistent* statements given during police interviews after the incident.[4] While it may not have been technically proper under MRE

[4] At the preliminary examination, just as he did at trial, Mosley identified defendant as being the person in the SUV who shot a gun. However, in Mosley's statements to police immediately after (continued…)

801(d)(1)(B)[5] because there were yet no allegations of fabrication,[6] it does not necessitate that the prosecutor acted in bad faith. Since the prosecutor did not imply that she or her office had "some special knowledge" of Mosley's credibility and there was no basis to conclude that the prosecutor acted in bad faith, defendant's argument fails.

Defendant next contends that the prosecutor introduced facts not in evidence during her closing argument, which denied defendant a fair trial. This assertion lacks merit as well. "Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case." *People v Schumacher*, 276 Mich App 165, 178-179; 740 NW2d 534 (2007) (citations omitted). Defendant alleges that the prosecutor improperly introduced facts during her closing argument that (1) alluded to a drug deal, (2) referenced a revolver being the murder weapon, and (3) indicated a single gunshot wound was the cause of Shaffer's death.

Defendant takes exception to the prosecutor's comments where she argued that defendant "wanted [to get] that duffle bag of marijuana for free, and that's exactly what he got after he shot Jermaine Shaffer in the chest." There was evidence produced at trial that defendant was going to meet Shaffer for the purpose of obtaining marijuana. There was also evidence presented that after Shaffer was killed, the duffle bag containing the marijuana was missing. Therefore, the prosecutor rightfully argued reasonable inferences from the evidence to show defendant's possible motive.

Next, defendant claims that the prosecutor's reference to a revolver being used was improper. In order to explain why there were no casings found at the scene of the crime, the prosecutor stated during her closing arguments:

> I'm sure the court's aware and I would ask the court to take judicial notice that if one were to fire a revolver, it would not automatically eject casings. You would have to manually remove casings. I would submit to the court that it would be unlikely, within the time frame that the defendant fired that last shot as he drove away, that he would open up the revolver and empty the casings there, and that

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(…continued)

the incident, Mosley never stated he saw a gun and at one point told police he could not identify anyone from the SUV. Mosley explained at trial that he lied to the police about the gun because he had safety concerns since he thought defendant was still at-large.

[5] MRE 801(d)(1)(B) allows for the introduction of a witness's prior consistent statement for substantive purposes if (1) the declarant testifies at trial and is subject to cross-examination, (2) there must have been an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony, (3) the prior statement must be consistent with the declarant's challenged in-court testimony, and (4) the prior consistent statement must have been made prior to the time the supposed motive to falsify arose. *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

[6] There were no opening statements, and Mosley, the first witness called, had not been cross-examined yet.

> goes directly to the fact that there were no casings found at the scene in the evidence tech's report.

The prosecutor's argument stating that the type of gun used could have been a type that did not discharge casings, such as a revolver, was an acceptable inference from the evidence presented. See *Schumacher*, *supra* at 178-179.

Last, defendant claims that the prosecutor was arguing facts not in evidence when she stated that Shaffer "received one fatal gunshot wound to the chest." Clearly, there were ample facts to support this assertion, but one needs to look no further than the stipulated testimony of Dr. Leigh Hlavaty, that "[Shaffer] died of a single gunshot wound to the chest." Accordingly, defendant's argument is entirely without merit.

Therefore, because the prosecutor did not improperly vouch for any witness's truthfulness and because defendant did not establish how the prosecutor committed any error, let alone plain error, during closing arguments, defendant's claims of prosecutorial misconduct fail.

VI. Ineffective Assistance of Counsel

Defendant did not preserve this issue for appeal because he did not move for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Unpreserved issues of ineffective assistance of counsel are reviewed for errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval (On Remand)*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

Defendant argues that his trial counsel should not have stipulated to various evidentiary items, consisting of what Officer Karl Simon witnessed after arriving at the scene, Dr. Leigh Hlavaty's autopsy report of Shaffer, and the evidence technicians' report. The crux of defendant's argument is that it was objectively deficient for his trial counsel not to cross-examine the people behind these statements and reports. However, there is nothing on the record, or in defendant's brief, to demonstrate what would have been gained by such cross-examination. In fact, defendant admits at one point in his brief that he "cannot say that such cross-examination would have been fruitful." Therefore, defendant cannot demonstrate that there is a "reasonable probability" that there would have been a different outcome to his trial had there been no stipulations and defense counsel cross-examined these witnesses. Accordingly, defendant has failed to meet his heavy burden, and his claim fails.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Jane M. Beckering