

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 26, 2014

v

STEVEN BRANDON ANDERSON,
Defendant-Appellant.

No. 313025
Kalamazoo Circuit Court
LC No. 2012-000202-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

ROBERT WILLIE-ANDREW WRIGHT,
Defendant-Appellant.

No. 313072
Kalamazoo Circuit Court
LC No. 2012-000730-FC

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

In these consolidated appeals, following a joint trial with separate juries, defendants Steven Anderson and Robert Wright each appeal as of right their convictions for first-degree premeditated murder, MCL 750.316, assault with intent to commit murder (AWIM), MCL 750.83, felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced both defendants as third-offense habitual offenders, MCL 769.11, to life imprisonment without parole for the murder convictions, 25 to 50 years' imprisonment for the AWIM convictions, 57 months to 10 years' imprisonment for the felon-in-possession convictions, and two years' imprisonment for each of the felony-firearm convictions. We affirm.

The prosecution arises out of a shooting in Kalamazoo in which one man was killed and a second man was injured. There was strong evidence reflecting that the attack on the two victims was perpetrated by Anderson, Wright, who had allegedly been assaulted weeks earlier by, among others, the homicide victim, and Jaquan Henderson, who was convicted of second-degree murder

and other charges following a separate trial. The evidence showed that, during the commission of the offenses, Wright wielded and fired a .44 caliber handgun, Henderson employed a .380 caliber weapon, and that Anderson discharged a shotgun. The evidence further indicated that the surviving victim had been struck by shotgun fire, while the deceased was hit by a gunfire from a .44 caliber firearm.

I. DOCKET NO. 313025 – STEVEN ANDERSON

On appeal, Anderson first contends that the prosecutor obtained his convictions through the use of false or perjured testimony from Henderson, who, again, was convicted following a separate trial. Anderson further contends that the prosecution presented inconsistent theories with respect to the cases brought against himself and Henderson. We consider claims of prosecutorial misconduct on a case by case basis, examining the entire record and evaluating a prosecutor's conduct in context to determine whether defendant received a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). In *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998), overruled on other grounds in *People v Chenault*, 495 Mich 143, __ NW2d __ (2014), this Court observed:

Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. Prosecutors therefore have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath.

Michigan courts have also recognized that the prosecutor may not knowingly use false testimony to obtain a conviction, and that a prosecutor has a duty to correct false evidence. . . .

[T]he United States Supreme Court [has] expanded the prosecutorial duty to correct perjured testimony to include perjured testimony that related to the witness' credibility and not just the facts of the case. [Citations omitted.]

In *People v Aceval*, 282 Mich App 379, 389-390; 764 NW2d 285 (2009), this Court further elaborated:

If a conviction is obtained through the knowing use of perjured testimony, it “must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.” Stated differently, a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment. Thus, it is the “misconduct's effect on the trial, not the blameworthiness of the prosecutor, [which] is the crucial inquiry for due process purposes.” The entire focus of our analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. [Citations omitted.]

Anderson focuses on statements made by Henderson at both Henderson's trial and at Anderson's trial, wherein Henderson testified that Anderson had a shotgun, that Anderson threatened him with the shotgun and made him stay at the scene, that Anderson made him fire his .380 caliber weapon, that Anderson fired first at one of the victims, that Henderson simply fired

his gun into the air, and that part of the plan had been to rob the victims and shoot them if they attempted to use a gun.

Initially, we point out that Anderson fails to supply any relevant support for his conclusory position that Henderson's testimony was false. Indeed, Anderson's appellate claims indicate that Henderson's testimony at the two trials was consistent. Anderson argues that the prosecutor at Henderson's trial adamantly maintained to the jury that Henderson was a liar, yet that very same prosecutor at Anderson's trial vigorously contended that Henderson was a credible witness. It appears, therefore, that Anderson's theory is that Henderson's testimony at Anderson's trial was false, given that the prosecutor accused Henderson of lying at Henderson's trial, and that the prosecutor thus knowingly used false testimony at Anderson's trial. We fail to see how this theory necessarily establishes the falsity of Henderson's testimony. Moreover, at Henderson's trial, the prosecutor never asserted that Henderson was lying about Anderson being involved and participating in the offenses, about Anderson providing assistance in carrying out the crimes, about Anderson wielding a shotgun, and about Anderson first discharging the shotgun. On these matters, the prosecutor's theory at both trials was entirely consistent.¹ Rather, at Henderson's trial, the prosecutor challenged Henderson's credibility regarding his claims that he only thought that a beating would take place, not a shooting and killing, that Anderson forced him to fire his gun, and that Henderson innocently shot into the air in response. At Anderson's trial, the prosecutor's arguments that Henderson was credible were not expressly linked to Henderson's intent or his belief as to whether or not a shooting would occur, to Anderson forcing Henderson to fire his gun, or to Henderson shooting skyward. In fact, the prosecutor specifically acknowledged to the jury that Henderson clearly was "not clean" and had been deeply involved in the offenses, firing his .380 caliber weapon. Furthermore, Henderson's criminal intent and discharge of his weapon ultimately did not have any meaningful bearing on Anderson's guilt. Assuming that any of Henderson's testimony at Anderson's trial was tainted, it was not material to Anderson's guilt and did not affect the jury's verdict, especially considering the overwhelming evidence of Anderson's guilt, including admissions to friends and physical evidence, aside from Henderson's testimony. *Aceval*, 282 Mich App at 389. Reversal is unwarranted.²

Anderson next argues that the trial court erred in failing to read an accomplice instruction as related to three witnesses. Anderson did not request an accomplice instruction and, aside from unrelated objections, Anderson's counsel approved the jury instructions, thereby waiving any error related to the omission of an accomplice instruction. *People v Kowalski*, 489 Mich 488, 504-505; 803 NW2d 200 (2011); MCL 768.29. Moreover, even were we to consider the issue, Anderson has failed to show that the witnesses were even true "accomplices," i.e., that they knowingly or willingly cooperated or helped in the *commission* of the crimes, as opposed to

¹ As such, the prosecutor did not present "inherently factually contradictory theories," given that there was no inconsistency at the core of the prosecutor's cases against defendants for the same crime. *Smith v Groose*, 205 F3d 1045, 1052 (CA 8, 2000).

² We note that, although Henderson made inconsistent statements to police prior to the trials, the statements were not concealed by the prosecutor and Anderson freely used them in an attempt to impeach Henderson's credibility.

being mere accessories after the fact. See *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993); M Crim JI 5.5(2) (“A person who knowingly and willingly helps or cooperates with someone else in committing a crime is called an accomplice.”). Additionally, although the trial court did not provide an accomplice instruction, the court read the general witness instruction to the jury, which provided criteria for evaluating the witnesses’ credibility, including concerns such as bias, prejudice, and personal interest. The trial court also specifically instructed the jury in regards to the plea agreements received by two of the witnesses in exchange for their testimony, instructing the jury that they could consider whether the agreements affected the “witness’s bias or self-interest.” While not specific to accomplices, these instructions fairly presented the issues of bias, prejudice, and personal interest. See *People v Young*, 472 Mich 130, 144; 693 NW2d 801 (2005).

Finally, even were the plain-error test applicable to the argument regarding an accomplice instruction, Anderson has not established the requisite prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecution presented overwhelming evidence in support of Anderson’s guilt, which was comprised of testimony by numerous witnesses, cell phone records, shells and shell casings, the recovered shotgun, photographs depicting Anderson with the guns involved in the shootings, physical evidence revealing buckshot damage, and incriminating statements made by Anderson in a television interview. This considerable evidence established Anderson’s presence at the crime scene, his active assistance and participation in the offenses, including providing Wright with the .44 caliber weapon used in the killing, and Anderson’s firing of the shotgun. In short, he has not shown plain error affecting his substantial rights relative to the failure to provide an accomplice instruction as to the three witnesses at issue. *Id.*

Anderson bootstraps a claim of ineffective assistance of counsel with respect to the issue of whether an accomplice instruction should have been requested; however, because it does not appear that any of the three witnesses were actually “accomplices” and, assuming deficient performance in waiving the issue, because no prejudice resulted, the ineffective assistance claim fails. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (a defendant must show that counsel’s performance was deficient *and* that the deficient performance prejudiced the defense); *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (counsel is not ineffective for failing to make a futile motion).

In a Standard 4 brief, Anderson raises additional arguments regarding counsel’s ineffectiveness relating to the alleged failure to conduct a reasonable investigation and to call several witnesses. As there was no evidentiary hearing on the matter below, our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Relevant to Anderson’s particular arguments, failure to conduct a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). “Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy.” *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Of course, the trial strategy must be sound, and “a court cannot insulate the review of counsel’s performance by [simply] calling it trial strategy.” *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). “Initially, a court must determine whether the strategic choices were made after less than complete investigation, and any choice is reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.*

(internal quotation marks, alteration, and citation omitted). “In general, the failure to call a witness can constitute ineffective assistance of counsel only when it ‘deprives the defendant of a substantial defense.’” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (citation omitted). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009), quoting *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Anderson argues that defense counsel failed to interview and call several lay witnesses to testify in regard to whether the victims and/or their friends may have also had guns at the scene of the shooting and to impeach a witness who testified against Anderson. In support, Anderson relies solely on his own unsworn affidavit. “Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.” *Carbin*, 463 Mich at 600. The unsworn affidavit falls woefully short of establishing the factual predicate for Anderson’s claim, i.e., establishing what these other purported witnesses would have testified to had they been called to the stand. Moreover, the requisite prejudice has not been established. Even had the victims been carrying guns, the evidence overwhelmingly showed that the victims were effectively ambushed, not that Anderson, Wright, and Henderson fired in self-defense. And the impeachment of the one witness would not have affected the outcome of the trial in light of the extensive evidence of Anderson’s guilt.

Anderson also argues that defense counsel was ineffective for failing to call an expert witness on firearms. Anderson, however, has not shown that counsel failed to investigate the possibility of an expert and, in the absence of how an expert would have testified, Anderson has not overcome the strong presumption that counsel’s decision not to call an expert was sound trial strategy, nor has prejudice been established. *Carbin*, 463 Mich at 600.

Related to counsel’s investigation of Anderson’s case, Anderson also alleges on appeal that counsel failed to explore: evidence of other potential weapons, evidence of another shooter, and the origins of the weapons used in the shooting to establish that Anderson had no connection to the guns. These claim are not well-developed and nothing in the record indicates that counsel failed to investigate these matters or that, had these issues been explored, there was a reasonable probability of a different outcome (prejudice). *Carbin*, 463 Mich at 600. Anderson has not satisfied his burden of establishing the factual predicate of his claims. *Id.*

Anderson next maintains on appeal that defense counsel infringed on his right to testify. Informed on the record that he had a right to testify, Anderson stated that he was not going to testify, thereby waiving his right to do so. See *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). On appeal, he has not presented any support for his claim that counsel advised him unreasonably or even that, but for counsel’s performance, he would have testified. Reversal is unwarranted.

Anderson raises several additional claims in his Standard 4 brief, including claims of prosecutorial misconduct, abuse of discretion in his bindover, improper consolidation of his trial with Wright’s trial, errors related to the jury, evidentiary errors, and a claim that the evidence was insufficient to support his convictions. These arguments are improperly before this Court as they were not included within Anderson’s statement of the questions presented as required by

MCR 7.212(C)(5). *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). Moreover, they are terribly insufficiently briefed and thus deemed waived. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Nevertheless, having fully considered each of Anderson's arguments, we conclude that these additional claims are without merit.

II. DOCKET NO. 313072 – ROBERT WRIGHT

On appeal, Wright first challenges the sufficiency of the evidence supporting his first-degree murder and AWIM convictions, solely arguing that, although he was present at the crime scene, the evidence was insufficient to show that he shot anyone. Appeals regarding the sufficiency of the evidence are reviewed de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). Juries, and not appellate courts, hear the testimony of witnesses; therefore, we defer to the credibility assessments made by a jury. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). "It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded to the inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The prosecution need not negate every reasonable theory of innocence, but must only prove the elements of the crime in the face of whatever contradictory evidence is provided by the defendant. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *Carines*, 460 Mich at 757. We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

It is well-accepted that identity is an element of every offense. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976); *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). We first note that Wright was prosecuted not only in the capacity as a principal but also as an aider and abettor. MCL 767.39 provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

Wright's argument that there was insufficient evidence establishing that he was the shooter, even if true, does not necessarily negate criminal liability under an aiding and abetting theory, and Wright makes no effort to argue that the evidence was insufficient to show that he aided and abetted the shootings. Regardless, there was testimony showing that a .44 caliber weapon was handed to Wright prior to the shootings, that Wright made statements to others acknowledging that he fired his weapon, that the deceased victim was struck by a .44 caliber bullet, that Wright had a motive to instigate the assault and killing, and that Wright made efforts to conceal the murder, to dispose of the guns, and to establish an alibi. The evidence was more than adequate to support a conclusion by the jury that Wright discharged a firearm and that he

indeed was the principal in shooting the decedent. An aiding and abetting theory in regard to the victim who was merely injured was also fully supported by the evidence.

Wright next challenges the admission of two alleged hearsay statements. One of the statements indicated that there was a federal case against Wright and the other statement was one made by Anderson indicating that Wright had fired the .44 caliber handgun. Wright also contends that, while the challenged statements are non-testimonial in nature, they violated the Confrontation Clause, US Const, Am VI, under *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), which, according to Wright based on an unpublished opinion by this Court, was not affected by the United States Supreme Court's decision in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and its distinction between testimonial and non-testimonial statements for purposes of the Confrontation Clause. We decline to address the substance or merits of Wright's arguments. Assuming a hearsay or Confrontation Clause error, the error was harmless and harmless beyond a reasonable doubt, considering the overabundance of other evidence establishing Wright's guilt. MCL 769.26; *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Wright's associated claim of ineffective assistance of counsel likewise fails, given that he has not established the necessary prejudice. *Carbin*, 463 Mich at 600.

Finally, Wright argues, pursuant to MRE 404(b)(1), that the trial court abused its discretion by admitting evidence of a prior bad act that involved Wright prompting Henderson to beat an individual in a matter unrelated to the shooting. MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, 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, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In this case, the challenged evidence is a short video depicting what has aptly been described as a "beatdown" perpetrated by Henderson on a man known as "Mike Mike" on the day of the murder. Although the assault primarily showed Henderson's conduct, it related to Wright as well because he was present for the fight and there was evidence that Henderson undertook the attack on Mike Mike at Wright's behest.

Wright acknowledges that there was substantial testimony regarding the “beatdown,” arguing, in part, that the video was needlessly cumulative. Wright, however, does not challenge on appeal the admission of the *testimony* concerning the assault on Mike Mike. We appreciate that a video of the assault could be more compelling and impactful. But given that the jury was already fully aware of the assault and Wright’s role based on the unchallenged testimony, considering that the video depicted Henderson and not Wright actually committing the violent act, and given the overwhelming evidence of guilt, we cannot conclude that Wright was prejudiced by the introduction of the cumulative video, assuming error by the trial court in admitting the video. MCL 769.26; *Lukity*, 460 Mich at 495.

Affirmed.

/s/ William B. Murphy

/s/ Douglas B. Shapiro

/s/ Michael J. Riordan