

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER J. KNOX,

Defendant-Appellant.

UNPUBLISHED

May 29, 2003

No. 231396

Wayne Circuit Court

LC No. 94-007684

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of life imprisonment without parole for the murder conviction, a concurrent term of twenty-five to fifty years' imprisonment for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals by right. We affirm.

Defendant's appeal stems from his convictions on retrial for the shooting death of Inkster Police Officer Kenneth Woodmore, and for shooting at auxiliary officer, Willie Hadley, Jr. The shootings occurred when the officers stopped defendant as he was riding a bike. After his first trial, a jury convicted defendant of first-degree murder, assault with intent to commit murder, and felony-firearm, but this Court reversed defendant's convictions because several prior statements if witnesses were used improperly, and the trial court failed to explain to the jury the appropriate, limited use of the statements. *People v Knox*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 1998 (Docket No. 186235).

I

Defendant first argues that at his retrial, the trial court erred in admitting evidence that the police found a pill bottle containing cocaine in the neighborhood of the shooting, and permitting the prosecutor to suggest that the evidence provided defendant's motive for shooting at the officers when they stopped him. We review for a clear abuse of discretion the trial court's decision to admit evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

The evidence suggesting that defendant possessed cocaine when Woodmore stopped him implicated MRE 404(b), which prohibits the admission of evidence of a defendant's other acts or

crimes when introduced solely for the purpose of showing the defendant's action in conformity with his criminal character. MRE 404(b)(1); *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). Evidence of a defendant's other acts or crimes qualifies as admissible under the following circumstances: (1) the prosecutor offers the evidence for a proper purpose under MRE 404(b)(1), including to prove the defendant's motive in committing a charged crime; (2) the other acts evidence satisfies the definition of relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other acts evidence does not substantially outweigh the probative value of the evidence, MRE 403. *Starr, supra* at 496.

The prosecutor proffered a proper noncharacter purpose for admitting the evidence: to show that defendant had a motive to open fire on officers Woodmore and Hadley because when they approached defendant, he possessed the pill bottle containing crack cocaine. In a murder case, evidence of a defendant's motive is always relevant. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001); *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

Defendant asserts, however, that the pill bottle containing cocaine had no probative value because insufficient evidence connected him to the pill bottle or to 4111 Spruce Street, the address where the police found the bottle after the shooting. See *Starr, supra* at 497 (“[r]elevant evidence has two characteristics: it is ‘material’ and has ‘probative force’”), citing MRE 401. Evidence at trial showed that defendant began his brief bike trip that Officers Woodmore and Hadley interrupted from a known crack house. By 8:00 or 9:00 a.m. on the morning of the shooting, after searching for evidence in the vacant schoolyard just north of the Henry Street dead end where defendant had fled, the police located the pill bottle near the back wall of 4111 Spruce Street, a residence immediately north and west of the schoolyard. The canine officer and dog, who began tracking defendant's flight from the crime scene within approximately fifteen minutes of the shooting in nearly optimum tracking weather, followed defendant's scent north on Henry Street to its dead end at the vacant school, straight across the schoolyard and apparently past the edge of 4111 Spruce Street. This evidence of defendant's flight path and the pill bottle's location tended to establish that defendant had the bottle when the officers stopped him, and thus constituted a motive for the shootings.¹ *Starr, supra* at 497-498.

¹ Although defendant suggests that the shootings occurred in a known drug area and that a bystander in the area of the shooting might have discarded the pill bottle, a police officer who arrived at the scene to assist in searching the schoolyard and Spruce Street testified that the police had secured the search area since before 6:00 a.m. While defendant's theory regarding the pill bottle's placement might have constituted another reasonable inference arising from the bottle's discovery at 4111 Spruce Street, defendant had the opportunity to present this theory during his closing argument, and it was for the jury to determine what significance, if any, it assigned to the pill bottle. The facts that the tracking dog did not detect the pill bottle, that someone else might have been in the area of defendant's flight path, and that the police did not discover defendant's fingerprints on the pill bottle did not render the pill bottle inadmissible, but affected only the weight of the evidence. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Similarly, defendant's arguments concerning which testimony to believe with regard to defendant's relationship with the occupant of 4111 Spruce Street involved an issue for
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With respect to MRE 403, evidence suggesting that, at the time of his stop by Woodmore, defendant had the pill bottle that he later discarded helped to explain his otherwise inexplicable action in opening fire on Woodmore, who had not drawn his gun. In light of the unchallenged testimony of two witnesses indicating that the house defendant left just before the shooting was a known crack house, and the testimony of three different witnesses who identified defendant as the shooter or the person the police stopped on the bike, we cannot conclude that the jury might have afforded any preemptive weight to the police discovery of the pill bottle. *Rice, supra* at 441. Accordingly, we find no abuse of discretion in the trial court's admission of evidence concerning the bottle.

II

Defendant next argues that the trial court erred in admitting hearsay testimony of two trial witnesses that improperly bolstered a third witness' identification of defendant. We again review the trial court's evidentiary rulings for a clear abuse of discretion. *Starr, supra* at 494.

Alonzo Dixon testified at trial that he witnessed the shootings and identified defendant as the shooter. Dixon's mother testified at trial that Dixon telephoned her within an hour of the shootings and, in a very excited manner, told her that he had observed the shootings and that defendant was the shooter. Sylvester Skinner, who drove the car from which Dixon saw the shootings, testified that after the shootings, Dixon joined a group of people gathered in the area of the shootings and told several people "he thought that was Chris . . . , it looked like Chris."

We find that the court properly admitted Armstrong's and Skinner's testimony regarding Dixon's prior identifications of defendant because their testimony did not constitute hearsay. MRE 801(d) provides in relevant part:

A statement is not hearsay if—

(1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person

See *People v Malone*, 445 Mich 369, 377-378; 518 NW2d 418 (1994) (explaining that as long as the statement is one of identification, MRE 801(d)(1)(C) permits the substantive use of any prior statement of identification by a witness as nonhearsay, even when the out-of-court statement is offered by a third party, provided the witness is available for cross-examination).

The testimony at trial indicated that both Armstrong's and Skinner's challenged testimony concerning Dixon's prior statements reflected Dixon's identifications of defendant after having observed him shoot Woodmore. Dixon himself testified at trial, and defense counsel had an ample opportunity to cross-examine him concerning his ability to observe the shootings, and about various inconsistencies between Dixon's testimony at the retrial and his prior

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the jury's determination. *Id.*; *People v Lemmon*, 456 Mich 625, 642, 646-647; 576 NW2d 129 (1998).

testimony and statements to the police regarding the circumstances of the shootings and identity of the shooter. Accordingly, even though defense counsel chose not to question Dixon concerning the content of his statement to his mother and his statements of identification in Skinner's presence, Dixon was available for cross-examination regarding these statements.² *People v Chavies*, 234 Mich App 274, 283 n 4; 593 NW2d 655 (1999).

We conclude that the trial court properly admitted Armstrong's and Skinner's testimony regarding Dixon's out of court statements of identification, even though the court did not expressly rely on MRE 801(d)(1)(C) in doing so. *Chavies, supra* at 284; *People v Whitfield*, 214 Mich App 348, 350-351; 543 NW2d 347 (1995).

III

Defendant further asserts that the trial court erred in permitting the prosecution to present rebuttal alibi testimony by Felicia Harris without adhering to the notice requirement of MCL 768.20(2). While defendant correctly observes that pursuant to MCL 768.20(2) the prosecutor generally must provide notice before trial of his intended rebuttal alibi witnesses, our review of the record demonstrates that Harris did not offer testimony in rebuttal of defendant's alibi.

"Alibi testimony is testimony which is offered in order to prove that the defendant was somewhere else than at the scene of the crime when the crime occurred." *People v Gillman*, 66 Mich App 419, 424; 239 NW2d 396 (1976). Defendant's alibi witness, Ernest Thomas, testified that at the time of the shooting, he and defendant were at Thomas' house, having sometime earlier returned there from a nearby party store where they saw Harris and her cousin and made plans to go swimming together. In rebuttal, Harris testified that she had not seen defendant or Thomas near the party store or elsewhere during the evening before or morning of the shootings, and never made plans to go swimming with defendant or Thomas. Harris' testimony did not contradict the actual alibi testimony given by Thomas because Harris' testimony did not place defendant at the scene of the crime or otherwise address defendant's or Thomas' whereabouts at the time of the shootings. *Gillman, supra* at 424, 426-427. Accordingly, the trial court did not abuse its discretion in admitting Harris' testimony, which constituted proper rebuttal impeachment of the credibility of Thomas' testimony, not rebuttal of alibi testimony subject to the notice requirement of MCL 768.20(2). *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996); *People v Lyles*, 148 Mich App 583, 598; 385 NW2d 676 (1986).

IV

Defendant lastly contends that he was deprived of his right to due process and his right to confront witness Ruth Friday because the police lost a tape-recorded statement of Friday's June 1994 interview, thereby precluding him from effectively impeaching her at his retrial. The issues

² While Armstrong's testimony regarding Dixon's identification of defendant occurred after Dixon had testified, defense counsel had notice, on the basis of the prosecutor's direct examination of Dixon, that Dixon had not provided the police with defendant's identity as the shooter in a written statement until after he had spoken with his mother, who urged him to tell the truth.

whether a defendant received due process and his right to confront a witness involve constitutional questions that this Court reviews de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

In connection with defendant's June 1999 motion to strike Friday's testimony, the trial court permitted defendant to call seven witnesses, including the defense attorney and prosecutor at defendant's first trial, the two police officers in charge of the case, another officer who had handled the tape of Friday's statement, and defendant's former appellate attorney. The testimony at these hearings established that the police had placed the tape inside a box of evidence after defendant's first trial, but now simply could not locate the tape and did not know what had happened to it. The testimony further indicated that the police had not prepared an official transcript of the tape of Friday's statement, and that defendant's previous trial counsel had prepared the only, unofficial written record of the statement from a copy of the tape that the police provided him during the course of the first trial. The trial court characterized the police loss of the tape as a negligent misplacement. The court disagreed that permitting Friday's testimony at the retrial would deprive defendant of due process because defense counsel could impeach Friday with the transcript of her testimony at the first trial, interview Friday before the commencement of the retrial, and argue to the jury that the police or prosecutor misplaced the tape of Friday's initial interview.

A defendant has a constitutional right to confront the witnesses against him, US Const Am VI; Const 1963, art 1, § 20. If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). Yet, there are limits to this right to confront witnesses. The Confrontation Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993) (Boyle, J.), quoting *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985). Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). [*People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998) (emphasis in original).]

After our extensive review of the record, it appears plain that defendant had ample opportunity to impeach Friday and test her credibility during his cross-examination of her at the retrial. Defendant inquired of Friday where and when she had smoked crack around the time of the shootings; questioned Friday about the man she had dated at the time of the shootings, who was a cousin of a now deceased police officer who might have been involved in the murder investigation; inquired of Friday how and when she had happened to arrive in the neighborhood of the shootings in mid-June 1994, where and with whom she had stayed, and how, where and with whom she had spent the days before the shootings; questioned Friday about when she borrowed the bike that she loaned defendant, the color of the bike, and when she gave defendant the bike; inquired what Friday saw just before and after the shooting, including from which house defendant had appeared before the shooting, the number of police cars she saw, whether the police cars drove with their lights on, and the condition of the bike she saw near the police

cars after the shooting; asked Friday about her taped interview with the police, including a statement by Friday apparently indicating her uncertainty that defendant was the person she saw on the bike; and impeached Friday with many prior inconsistent statements she made during the first trial. To many of defendant's questions, Friday responded that she did not remember. In light of this cross-examination of Friday by defendant, the jury certainly had a sufficient basis to question her credibility.

After carefully reviewing defendant's first trial counsel's cross-examination of Friday with her June 1994 taped interview and the unofficial transcript that apparently assisted defendant's second trial counsel in understanding at least some of what Friday stated during the taped interview, we cannot conclude that the loss of the tape itself precluded defendant from meaningfully cross-examining Friday at the retrial. The defense counsel's questions during the first trial and Friday's responses at least provided defendant's second trial counsel the information from which to formulate questions to Friday concerning most areas of and topics within her June 1994 tape-recorded discussion, despite that the playing of the tape itself appears in the transcript of the first trial as mostly inaudible. Furthermore, defendant's second trial counsel read from the transcript of the first trial in questioning Friday concerning what appears to represent the most significant inconsistency, the fact that in the taped interview Friday expressed some uncertainty concerning defendant's identity as the person she saw on the bike shortly before the shootings.³ While an enhancement of the original audiotape of Friday's June 1994 interview might have yielded additional inconsistent statements, we cannot conclude that the loss of the tape limited defendant's right to cross-examine Friday. *Cunningham, supra*. Defendant's questioning of Friday concerning her inconsistent June 1994 statement on the basis of his possession of the first trial transcript and unofficial transcript of Friday's June 1994 interview together with his other questions of Friday regarding her memory and drug use, constituted a reasonable and meaningful opportunity to cross-examine Friday and demonstrate before the jury a potential basis for questioning or rejecting her testimony.⁴ *Ho, supra*.

With respect to defendant's due process argument, our review of Friday's testimony from each of defendant's trials and the unofficial transcript of her taped interview convinces us that any lost information on the tape of Friday's interview would not have *materially* affected the jury's determination of her credibility. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d

³ It does not appear that any significant area of discussion on the tape beneficial to defendant's case remained undeveloped at his retrial. The most significant remaining inconsistencies with Friday's recollections at defendant's trials involve her taped statement that she saw defendant throw down his bike before the shootings began, and that, after the shootings, defendant ran in a different direction than that to which Hadley had testified. Friday's taped statements to this effect appear within the first trial transcript, in a manner sufficient to have permitted defendant to question Friday concerning them at the retrial. Defense counsel did not during the retrial address Friday's previous statements suggesting that she had seen the shootings, perhaps because they prejudicially tended to place defendant at the police cars when the shootings began.

⁴ Defense counsel elicited from the officer in charge of the case that the tape had been lost, and argued during her closing argument that the tape of Friday's interview was missing, that Friday's initial statement had expressed some doubt concerning whether defendant was on the bike, and that Friday's testimony was incredible.

267 (1998). No further facts potentially gleaned from the tape “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” especially given the properly admitted identifications of defendant by Hadley and Dixon. *Id.* at 282. Accordingly, we conclude that the loss of the tape did not deprive defendant of due process. *Id.* at 281-283.

With respect to defendant’s related claim that the trial court erred in failing to read an adverse inference instruction concerning the loss of the tape, we conclude that because the trial court found only that the prosecution negligently misplaced the tape, the court properly denied defendant’s request for the instruction. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993).

We affirm.

/s/ Jane E. Markey

/s/ Brian K. Zahra