

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 13, 2012

v

REGINALD DORIAN SALTER,

Defendant-Appellant.

No. 300272
Wayne Circuit Court
LC No. 10-001533-FC

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a concurrent prison term of two to five years for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the September 17, 2009, shooting death of Karlos West, who was fatally shot outside a house in Detroit where he sold drugs with defendant and Ken Russell. According to Russell, defendant and West were involved in a physical altercation three or four days before the shooting, during which West used his superior size and strength. Russell claimed that defendant was angry and bitter at West after this fight. West's girlfriend, Alicia Bishop, testified that she was present when West was shot. Bishop initially told the police that West spoke to someone he referred to as "Black" before he was shot, but she denied seeing the person who shot West. Later, after the police agreed to provide protection for Bishop and her family, Bishop identified defendant as the shooter.

I. FAIR CROSS-SECTION CHALLENGE

Defendant, who is African-American, argues that he was denied his right to an impartial jury drawn from a fair cross section of the community because only 2 of the 14 jurors who were seated for trial were African-American. As a result, defendant argues that his Sixth Amendment right to an impartial jury drawn from a fair cross section of the community was violated. A constitutional claim is a question of law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

“The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community.” *Berghuis v Smith*, ___ US __; 130 S Ct 1382, 1387; 176 L Ed 2d 249 (2010); see also *People v Smith*, 463 Mich 199, 202-203; 615 NW2d 1 (2000). “To establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process.” *Id.* at 203, citing *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).

In this case, even accepting for argument’s sake that defendant has satisfied his burden of showing that African-Americans were underrepresented in his venire or jury pool, he has not satisfied his burden of showing that the underrepresentation was the result of systematic exclusion of African-Americans from the jury selection process. Here, defendant has offered nothing to satisfy his burden of showing that any underrepresentation of African-Americans in his jury venire was attributable to systematic exclusion. Defendant’s reliance on Wayne Circuit Court LAO 2006-12 to establish a prima facie violation of the fair cross-section requirement is misplaced. The administrative order does not signify the existence of systematic exclusion in the jury selection process, but only a procedure for resolving fair cross-section challenges. Accordingly, defendant has not established a prima facie violation of the Sixth Amendment fair cross-section requirement.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant next argues that he is entitled to a new trial because the jury’s verdict is against the great weight of the evidence. Defendant preserved this issue by raising it in a motion for a new trial, which the trial court denied. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). We review the trial court’s decision for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

A new trial may be granted if a jury’s verdict is against the great weight of the evidence, but only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627, 635; 576 NW2d 129 (1998); *Unger*, 278 Mich App at 232. “Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial.” *Unger*, 278 Mich App at 232. A court may not act as a “thirteenth juror” when evaluating a challenge to the great weight of the evidence, and “may not attempt to resolve credibility questions anew.” *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). “Absent exceptional circumstances, issues of witness credibility are for the trier of fact.” *Unger*, 278 Mich App at 232. A court may grant a new trial based on questions of witness credibility only in limited circumstances, such as when a witness’s testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable jury could not believe it. *Lemmon*, 456 Mich at 643-644.

Defendant argues that Bishop’s testimony identifying him as the shooter is against the great weight of the evidence. Specifically, defendant contends that the physical evidence is inconsistent with Bishop’s testimony because Bishop testified that West was first shot while he was still on the porch, with his back turned to defendant, whereas the medical examiner testified

that the bullet that entered West's body through his lower back probably would have incapacitated West immediately, yet Bishop also testified that West was able to run some distance after the initial shots and his body was found down the street, away from the porch.

However, the evidence showed that West received three gunshot wounds, two of which entered his back. The jury could have determined from the testimony that the immobilizing wound to West's lower back was not the first wound that West received, and that West was able to run a short distance before receiving his other gunshot wounds, including the immobilizing lower back wound. Bishop's testimony that West was initially shot while on the porch and was able to run some distance before collapsing in the street is consistent with the evidence showing that blood was found on the porch, on the ground below the porch, and further down the street where West's body was found. Although we agree that Bishop's credibility was a principal issue at trial, her testimony did not contradict indisputable physical facts or laws, was not patently incredible nor did it defy physical realities, and was not so inherently implausible that it could not be believed by a reasonable jury.

We also disagree with defendant's argument that there was no evidence of motive. Although motive is not an essential element of murder, it is relevant to the issue of intent. *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001). In this case, the prosecution presented evidence that West had assaulted defendant three or four days before the shooting, after which defendant was angry and bitter at West. A jury reasonably could have determined that the prior assault motivated defendant to murder West.

For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional issues in a pro se brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. FAILURE TO PRESERVE EVIDENCE

Defendant argues that his right to due process of law was violated because the police failed to preserve a video recording of Bishop's police interview. The record discloses that defense counsel and the prosecutor both learned for the first time at trial that Bishop's police interview was video recorded, but the recording was no longer available because pursuant to departmental procedure it was overwritten before any request to have the recording downloaded was made. Because defendant did not request any relief at trial based on the failure to preserve the video recording, this issue is unpreserved. Accordingly, our review is limited to plain error affecting defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011).

The government's failure to preserve potentially exculpatory evidence violates a defendant's due process rights if the defendant can show bad faith on the part of the government. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Anstey*, 476 Mich 436, 460-461; 719 NW2d 579 (2006). Here, defendant has not shown that the police acted in bad faith when they failed to preserve the video recording of Bishop's interview.

There is no indication that the police intentionally or deliberately destroyed the video recording of Bishop's interview. Instead, the record indicates that recordings of police interviews are automatically overwritten after 10 to 14 days if no request is received to download a specific recording. Because no request for Bishop's interview was received within that time period, the video recording of her interview was automatically overwritten. A mere showing that evidence has been routinely destroyed pursuant to a policy does not generally establish that the police acted in bad faith. *People v Petrella*, 124 Mich App 745, 753; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1985); see also *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992) ("the routine destruction of taped . . . [material], where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal"), and *People v Albert*, 89 Mich App 350, 353; 280 NW2d 523 (1979) ("The pertinent inquiry . . . is whether the action of . . . [the police] in 'discarding' the tape-recorded confession was performed in bad faith or for the purpose of destroying evidence for a forthcoming trial."). There being no evidence of bad faith in this case, defendant is not entitled to relief.

B. LATE DISCLOSURE OF EVIDENCE

Defendant argues that he was denied a fair trial by the prosecution's belated disclosure of audio recordings of defendant's jailhouse telephone calls, which the prosecutor used at trial to impeach defendant's trial testimony. Defendant contends that if the prosecutor had timely disclosed this evidence, he would have elected not to testify.

Defendant preserved this issue to the extent that he objected to the prosecutor's use of the jail recordings on cross-examination because they were not timely disclosed. However, defendant did not move for a mistrial or request an adjournment in response to the belated production of the recordings, and he did not take any other action after the prosecutor completed cross-examination without attempting to make further use of the recordings. Therefore, to the extent that defendant seeks relief on these latter grounds, this issue is not preserved. A trial court's response to noncompliance with a discovery order is reviewed for an abuse of discretion. MCR 6.201(J). Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Richardson*, 490 Mich 115, 137-138; 803 NW2d 302 (2011).

The record discloses that the prosecutor did not obtain the recordings until the afternoon of defendant's direct examination testimony, and immediately provided copies of the recordings to defense counsel. When defendant's testimony resumed after the weekend, the prosecutor used a statement in the recordings to impeach defendant's trial testimony that he intended to be open in his testimony before the court. Specifically, the prosecutor presented a statement from defendant's recorded telephone conversation with his girlfriend in which defendant asked her not to discuss the details of the case or to say anything that might be played during trial.

Upon request, a prosecuting attorney must provide to each defendant "any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial[.]" MCR 6.201(B)(3). MCR 6.201(J) governs sanctions for noncompliance as follows:

If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not

previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.

In this case, defendant's recorded statements were not offered as substantive evidence. Instead, the pertinent inquiry is whether the trial court erred in allowing the prosecutor to introduce an isolated portion of the recorded interviews for impeachment of defendant's direct examination testimony that he intended to be open with the court.

Where there is a violation of a discovery statute, rule, order, or agreement, it is appropriate in resolving the problem to determine what legitimate interests of the courts and of the parties are involved and how they may be affected by the remedial choices available. *People v Taylor*, 159 Mich App 468, 484; 406 NW2d 859 (1987). In the instant case, the trial court did not abuse its discretion in allowing the prosecutor to complete his cross-examination of defendant on the point in question. Defendant's admission that he told his girlfriend not to talk about the details of the case or to say anything that might be used against him in court was not particularly prejudicial or surprising. Defendant's direct examination testimony that he wanted to be open with the court involved a general statement, not a specific statement intended to establish his innocence. Further, there was no evidence that defendant's girlfriend had any information regarding West's homicide. Absent such evidence, defendant's warning to watch what she said was not particularly prejudicial. The prosecutor did not attempt further impeachment with the recordings, nor did he attempt to introduce any portion of the recordings as substantive evidence. Under these circumstances, the trial court's limited use of an isolated portion of the recordings for impeachment was not an abuse of discretion.

Defendant also argues that the prosecutor failed to authenticate the statements he quoted from the recording to establish that they were accurately recited. However, the recordings were not offered or admitted as substantive evidence, but rather for impeachment. Defendant admitted that he told his caller not to say anything that might be played in court. Because defendant did not dispute the authenticity of the recordings and admitted making the statements in the recordings, there is no merit to this argument.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray