

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DWIGHT ADAMS,

Defendant-Appellant.

UNPUBLISHED

May 31, 2005

No. 252723

Wayne Circuit Court

LC No. 03-008886-01

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

Defendant appeals his convictions of felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to twenty-three months to four years in prison for the felonious assault conviction, twenty-three months to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm defendant's convictions and sentences.¹

A. Exclusion of Evidence

We reject defendant's assertion that the trial court erred when it excluded evidence that the victim, Romel Rogers, was a drug dealer. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).² Evidence that Rogers sold drugs does not support defendant's self defense claim by showing a propensity for violence, nor does the evidence help prove defendant's alleged fear of Rogers. Because the evidence does not have a tendency to make the existence of defendant's

¹ We remand for the trial judge to correct the information from defendant's presentence investigation report, consistent with this opinion.

² "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2003). "A trial court's decision on a close evidentiary decision does not amount to an abuse of discretion." *People v Geno*, 261 Mich App 624, 632; 683 NW2d 687 (2004).

self-defense argument more or less probable than it would be without the evidence, the trial court correctly excluded this evidence as irrelevant. MRE 401; *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).³

Defendant also claims that the trial court abused its discretion by excluding the testimony of Detroit Police Investigator Flora Mills. Specifically, defendant asked Mills to testify about statements made during a prior investigation of charges against Rogers by defendant's daughter, Tema Overstreet. However, contrary to defendant's argument, the trial court excluded the testimony not because it was irrelevant, but because it constituted inadmissible hearsay. During Mills' testimony, defense counsel asked her to repeat statements made by defendant regarding his fears about Rogers. The testimony would have been hearsay because it was offered to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. Accordingly, and because defendant did not establish an applicable exception to the hearsay rule, the trial court did not abuse its discretion by excluding the evidence.

B. Prosecutorial Misconduct

Defendant asserts that the prosecutor denied him a fair trial when he stated, in his closing argument, that witnesses testified that defendant shot Rogers. Defendant failed to properly preserve this issue and, therefore, we review it for plain error that affected the defendant's substantial rights. Reversal is merited only if plain error caused the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor may not make a statement of fact to the jury that is not supported by evidence, but he may argue the evidence and any reasonable inferences that arise from the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

The record shows that the prosecutor's statements are supported by the evidence. Rogers testified that defendant called him over to his vehicle, said, "You don't think I'll kill you," and then shot him. Likia Holman testified that defendant shot Rogers and Latrice Lewis testified that defendant told Rogers, "You think I won't kill you," and then shot him. Similarly, Amber Manuel testified that defendant called Rogers over to his vehicle, and shortly after this, she heard gunshots and later heard Rogers say that he was shot. Finally, defendant himself testified that he called Rogers over to his vehicle and shot him after Rogers pulled out a gun and pointed it at

³ Defendant also asserts that the trial court abused his discretion by excluding evidence that defendant carried a gun. To the contrary, defense witnesses repeatedly testified that Rogers either carried a gun prior to the incident or at the time of the incident. Therefore, defendant's argument that he was denied his right to properly present the defense of self-defense is without merit.

defendant. The prosecutor's comments were directly supported or could be inferred by the evidence presented, and therefore, we find that the prosecutor's statements were proper.⁴

Defendant also says that the prosecutor denied him a fair trial by allowing the jury to hear false testimony and by withholding evidence from defendant. Defendant failed to object to these alleged errors at trial and, accordingly, we review this issue for plain error affecting defendant's substantial rights. *Thomas, supra*, pp 453-454.

Defendant asserts that the prosecutor misled the jury by suggesting that the shooting took place at 4:00 p.m. The record does not support this assertion. Rather, Rogers, the victim, established when certain events took place on the day of the shooting and the prosecutor asked other witnesses questions in reference to the time established by Rogers. Further, the precise time of the shooting is not relevant because defendant admitted that he shot Rogers and the critical issue for trial was defendant's claim of self defense. Accordingly, were we to find that the prosecutor suggested the time of the shooting, it would not have denied defendant a fair and impartial trial and he is not entitled to relief on this basis.

Defendant also says that the prosecutor committed misconduct by withholding evidence favorable to defendant. Takisha Harrison testified that she saw a tan Jeep Cherokee on Robson Street before the shooting, and defendant says that the prosecutor should have asked Harrison whether she gave a description of the driver of the vehicle to the police. Specifically, defendant asserts that Harrison told police that the driver she saw wore a goatee. Defendant's prosecutorial misconduct claim fails because the prosecutor did not withhold exculpatory evidence from defendant: the record shows that defense counsel had in his possession and referred to the police report that contained Harrison's description. Defense counsel could have cross-examined Harrison regarding her description, but did not. Further, any alleged error would have been harmless because defendant admitted that he was the person who shot Rogers and he did not allege that another person committed or participated in the crime.

C. Assistance of Counsel

Defendant also claims that several alleged errors by defense counsel denied him a fair trial. When reviewing an unpreserved claim of ineffective assistance of counsel, our review is limited to the facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2002). To establish an ineffective assistance of counsel claim, a defendant must show that: (1) counsel's performance was below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, defendant must overcome the

⁴ Defendant further claims that defense counsel was ineffective for failing to object to the prosecutor's statement. Counsel does not render ineffective assistance by failing to raise futile objections and, therefore, defense counsel's failure to object did not constitute ineffective assistance. *Ackerman, supra*, p 455.

strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302.

Defendant alleges that defense counsel failed to inform the court that the shooting occurred later than 4:00 p.m. This argument fails because, were we to find that defense counsel erred, defendant admitted that he was at the scene of the crime and that he, in fact, shot the victim. Accordingly, as noted, the precise time of the shooting is irrelevant. Nonetheless, defense counsel called defendant's supervisor, Wesley Steele, who testified that defendant worked through the early evening on the day of the incident. Therefore, defense counsel presented evidence to establish the timing of the shooting and defendant's whereabouts before the crime occurred.

Defendant also takes issue with defense counsel's examination of Steele, during which Steele testified that he does not use time cards and that defendant could leave his workplace at any time. The record reflects that defense counsel simply inquired about how defendant's employer kept track of its employees. Steele specifically testified that he knew defendant worked twelve hours on the day of the shooting and that, on that day, defendant could not have left work in the middle of the day. Defense counsel's examination was objectively reasonable and established his intended point – that defendant was at work until the early evening. Therefore, this does not constitute ineffective assistance of counsel.⁵

We also reject defendant's claim that defense counsel failed to adequately cross-examine Takisha Harrison regarding her testimony that defendant's Jeep Cherokee was the same one she saw driving up and down her street before the shooting. Defense counsel questioned Harrison about the shooting itself and he called Wesley Steele to testify that defendant was at work all day. Defense counsel asked Steele, "[Y]ou're sure [defendant] couldn't have been out just driving around somebody's neighborhood that day?" Steele answered, "No, not that day." By calling defendant's employer, defense counsel presented evidence to rebut Harrison's assertion. Accordingly, defendant has not overcome the strong presumption that his counsel's actions constituted sound trial strategy and, therefore, his ineffective assistance of counsel is without merit. *Toma, supra* at 302.

D. Presentence Investigation Report

Defendant asserts that the trial court erred by ignoring his objection to certain information in his presentencing investigation report (PSIR). As this Court explained in *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003):

The sentencing court must respond to challenges to the accuracy of information in a presentence report; however, the court has wide latitude in responding to these challenges. The court may determine the accuracy of the

⁵ Defendant also complains that he had to remind defense counsel to call Steele as a witness. Were we to find that this claim is established in the record, defendant cannot show that he was prejudiced by any error because, regardless whether defendant had to call him to defense counsel's attention, Steele testified at the trial.

information, accept the defendant's version, or simply disregard the challenged information. Should the court choose the last option, it must clearly indicate that it did not consider the alleged inaccuracy in determining the sentence. If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections. [Citations omitted.]

Here, defendant says that the trial court failed to adequately respond to a challenge he made to a statement in his PSIR that he was convicted of a crime in Florida. The record reflects that the trial court found the information irrelevant. However, the record does not indicate that the trial court struck the information from the report, as it was required to do. *Spanke, supra*. Accordingly, while we affirm defendant's convictions and sentences, we remand for the trial court to correct defendant's PSIR. We do not retain jurisdiction.⁶

/s/ Henry William Saad

/s/ Brian K. Zahra

/s/ Bill Schuette

⁶ Defendant also contends that his convictions of felon in possession of a firearm and felony-firearm violate the prohibition against double jeopardy. He concedes, however, that this issue is controlled by our Supreme Court's decision in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), in which the Court explicitly held that a defendant may constitutionally be charged with and convicted of both crimes. Accordingly, and because defendant does not distinguish *Calloway* or otherwise explain why it should not apply here, we reject his argument.