

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALPHONSO MITCHELL CLARK,

Defendant-Appellant.

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UNPUBLISHED

May 31, 2007

No. 267188

Wayne Circuit Court

LC No. 05-007176-01

Before: Whitbeck, C.J., and Murphy and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to life imprisonment without the possibility of parole for the first-degree murder conviction, 1 to 7-½ years' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment for the felony-firearm conviction. We affirm.

This case arises out of a street shooting in which the victim suffered four gunshot wounds and died soon after the shooting at a nearby hospital. On appeal, defendant first argues that the evidence was insufficient to support the first-degree murder conviction.<sup>1</sup> The premise of defendant's argument is that there was a lack of physical evidence connecting him to the shooting and that the witness who identified defendant as the shooter, the victim's brother (hereinafter "Jones"), was not credible given the other evidence presented at trial.

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution 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 Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at

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<sup>1</sup> While defendant at times makes reference to the great weight of the evidence, the substance of his argument and the cited legal principles relate to sufficiency of the evidence.

514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). To convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. MCL 750.316(1); *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000).

First, there is no requirement that physical evidence be presented in order to convict a defendant of a crime, and defendant cites no authority to the contrary. Next, with respect to Jones, there was testimony showing that Jones knew defendant, having seen him 20 to 25 times in the past. Indeed, defendant had been at Jones's home, which is also where the victim resided, several times on the day of the murder. Jones testified that he saw defendant run toward the victim and then shoot him in the back as the victim was attempting to flee. Defendant then shot the victim several more times after the victim had fallen and while he was attempting to rise to his feet. While defendant was wearing a hood, it was not covering his face according to Jones, and Jones had no doubt that defendant committed the murder because he saw defendant's face and was within twenty feet of defendant. Jones also picked defendant out of a photographic lineup. Two other witnesses to the murder, who did not see the gunman's face, did not believe that defendant was the shooter because of his height. But they also described the gunman as wearing clothing, that being dark pants and a dark hooded sweatshirt, which was consistent with the description of defendant's clothing being worn the day of the murder as testified to by numerous other witnesses. Moreover, another witness, defendant's friend, told police that defendant had left her house with her SUV for two to three hours around the time of the crime, and Jones testified that defendant had been driving an SUV shortly before the shooting. The mother of both the victim and Jones testified that defendant had threatened the victim in the past and that the two had an ongoing dispute over drugs. She further testified that defendant called her the day after the shooting because he heard that his name "was in the wind," and he offered her some money, ostensibly because she was in financial need. Finally, defendant's testimony regarding the events that transpired was inconsistent with his statement to police.

On this record, and viewing the evidence in a light most favorable to the prosecution, along with resolving all conflicts in the evidence in favor of the prosecution, there was sufficient evidence showing that defendant intentionally killed the victim and did so with premeditation and deliberation. Although there was evidence that might arguably call into question Jones's credibility, issues concerning credibility, as well as issues regarding how much weight to give the evidence, were for the jury to resolve, not this Court, which did not have the benefit of observing the live testimony. *Wolfe, supra* at 514-515.

Defendant next makes a fairly cursory argument that the playing of a 911 tape should not have been permitted because the probative value of the tape was substantially outweighed by the danger of unfair prejudice, in that the tape evoked a heightened emotional and sympathetic response from the jury.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). With regard to the abuse of discretion standard, this Court defers to the trial court's judgment when the trial court chooses an

outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).<sup>2</sup>

In general, evidence is admissible if it is relevant. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Under MRE 403, however, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

The contents of the 911 tape were clearly relevant and probative because the identity of the shooter and witness credibility were key issues. Multiple voices are heard on the tape, including that of Jones and his and the victim’s mother, and the events on the tape corroborated Jones’s testimony at trial that defendant was the gunman and his version of the events. The 911 tape was played a second time, but only a very short portion of the tape, in order to allow the victim’s mother to authenticate her own voice. While the playing of the tape may have elicited an emotional response from the jurors, we cannot find that the probative value was substantially outweighed by the danger of unfair prejudice. Given the deferential standard of review, i.e., abuse of discretion, we hold that the trial court did not abuse its discretion in admitting the 911 tape.<sup>3</sup>

Next, defendant argues that the prosecutor committed misconduct when he elicited testimony regarding a suspected drug transaction between the victim and defendant, where there was no evidence to support such a theory. Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor’s good faith effort to admit evidence does not constitute misconduct. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

When the prosecutor asked Jones what went on earlier between the victim and defendant in the basement of the victim’s home, Jones replied that it was probably something to do with drugs, and this answer was stricken based on a lack of personal knowledge. There was certainly no bad faith relative to the question as it was quite possible that Jones, who also lived in the home, had personal knowledge of drug activity between defendant and the victim. The question

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<sup>2</sup> Although the *Babcock* Court suggested that this “abuse of discretion” standard was only applicable in the context of sentencing departures, the Court has since held that it “prefer[s] the articulation of the abuse of discretion standard in *Babcock* to the *Spalding* [*v Spalding*, 355 Mich 382; 94 NW2d 810 (1959),] test and, thus, adopt[s] it as the default abuse of discretion standard.” *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

<sup>3</sup> In addition, the trial court instructed the jury not to let sympathy and prejudice influence its decision. Juries are presumed to follow the court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

in and of itself was not improper and did not constitute prosecutorial misconduct. During Jones's testimony regarding the second time the victim and defendant were in the basement, Jones stated that the victim *told* him that he conducted a drug transaction. Again, the trial court struck the statement for lack of personal knowledge. We do note that, considering that the victim was unavailable and that his non-testimonial statement was against his penal interests, the testimony was arguably admissible. See MRE 804(b)(3). Jones had personal knowledge of the statement. We fail to see any bad faith on the part of the prosecutor because the testimony was arguably admissible and because, again, Jones conceivably may have viewed drug activity during the second meeting in the basement. There was no misconduct. Moreover, the victim's mother testified that the victim and defendant had an ongoing drug dispute, which testimony came in as a result of defendant opening the door on the issue concerning the nature of the relationship between the victim and defendant, and which testimony is not challenged on appeal. Therefore, defendant was not denied a fair trial and any assumed misconduct was harmless. MCL 769.26; *Lukity, supra* at 495.

Defendant's next argument is that the trial court erred when it gave a "lying in wait" jury instruction when there was no factual basis supporting the instruction. We disagree. Issues of law arising from jury instructions are reviewed *de novo*, but determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Instructions must not exclude material issues, defenses, and theories, if there is evidence to support them. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994); see also *Gillis, supra* at 137 (instruction must be given if supported by a rational view of the evidence).

A rational view of the evidence supports a finding that defendant may have been hiding behind or somewhere in the vicinity of the victim's house and planning to take the victim by surprise. There was evidence that defendant pulled up in front of the victim's house in the SUV and that the victim joined defendant in the vehicle for three or four minutes. The victim then exited the SUV and started walking toward his house. Defendant then drove to the next street and turned right. When the victim calmly neared his home, he suddenly looked to his left, startled, and started running as defendant chased him down and shot him. We find no error with the instruction as there was evidentiary support. And even if the instruction lacked evidentiary support, there was no prejudice to defendant, where the jury agreed that he was the shooter, and where the circumstances of the shooting clearly established a premeditated and deliberate killing, considering that the victim was chased, shot once, fell down, was approached up close, and was then repeatedly shot again.

Finally, defendant argues that the trial court erred by denying defendant's motion for a mistrial when the jury asserted that it was deadlocked, and where the court put undue pressure on the jury to reach a verdict. A trial court's decision to deny a motion for a mistrial is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

The declaration of a mistrial is generally proper when it is premised on a deadlocked jury. *People v Lett*, 466 Mich 206, 218-219; 644 NW2d 743 (2002). Great deference is given to a trial court's decision to dismiss a jury that is unable to reach a unanimous verdict. *Id.* at 219-220. The inquiry turns on a determination whether the trial court was entitled to conclude that the jury was in fact unable to reach a verdict. *Id.* at 213. If a court fails to discharge a jury that is unable to reach a verdict after protracted and exhaustive deliberations, a risk exists that a verdict may

result from pressures inherent in the situation rather than the considered judgment of the jurors. *Id.* at 220 (citation omitted). The *Lett* Court noted, “[W]e remain cognizant of the significant risk of coercion that would necessarily accompany a requirement that a deadlocked jury be forced to engage in protracted deliberations.” *Id.* at 222-223. But, a trial court must “refrain from declaring a mistrial until ‘a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.’” *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994)(GRIFFIN, J), quoting *United States v Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971). As a general rule, reasonable alternatives should be considered before a mistrial is granted. *Hicks*, *supra* at 841.

Jury deliberations took place over portions of four days. After only a few hours on the first day of deliberations, a Wednesday, the jury indicated that it was deadlocked, yet the jury was also sending notes around that same time asking to review testimony, asking for the instruction on reasonable doubt, and asking for an explanation regarding the elements of the offenses.<sup>4</sup> Additionally, there were other notes on various topics sent to the court on that Wednesday. The trial court told the jurors to continue their deliberations because it was much too early to halt the process given the length of the trial and especially considering all of the questions they were posing and the information being sought.

The record is unclear how long the jury deliberated on the following day, Thursday. During deliberations on Friday, the jury sent a note to the court indicating that it was deadlocked. This fact is not revealed in any transcript of Friday’s proceedings, for which day there is no transcript; rather, the transcript of the proceedings for the following Monday indicate that a note was passed from the jury to the court on Friday indicating that the jury was deadlocked. The transcript for Monday’s proceedings indicates that the court had the jurors continue deliberating on Friday before sending them home mid-afternoon on Friday. The jury had begun deliberating Monday morning when the court placed the information on the record regarding the events of the previous Friday. The court further stated on the record that the jury had also sent a note on Monday morning again indicating that it was deadlocked. This note also indicated that, while originally there were eight jurors in favor of finding defendant guilty, there was now only one juror who was not convinced that defendant was guilty, that this juror would not change his mind, and that the jury had no hope of any change. The trial court admonished the jury for informing it of the nature of the division in the voting, i.e., eleven for guilty and one for not guilty, which the court stated was contrary to prior instructions given to the jurors regarding revelations concerning their deliberations. The trial court then gave the deadlocked-jury instruction, CJI2d 3.12, which instructed the jurors to try to reach an agreement without violating each individual’s own judgment, and which instructed them that no one should give up any honest beliefs about the evidence simply because of the thoughts of fellow jurors or only for the sake of reaching agreement. The trial court then asked if counsel had any objections to the deadlocked-jury instruction, and both the prosecutor and defense counsel affirmatively replied

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<sup>4</sup> There is nothing in the transcript of the proceedings for Wednesday indicating that notes were being sent to the court. Rather, in the transcript of Thursday’s proceedings, the court expressed, for purposes of making a record, that notes were sent to it on Wednesday, including the one suggesting a deadlocked jury, and it explained how it handled the notes.

that there were no objections. After the jury was excused to continue deliberating, defendant moved for a mistrial because there would be undue pressure on the one juror who had voted not guilty. The trial court denied the motion because it had given the standard instruction for deadlocked juries that essentially informed the jurors that they should not bow to pressure. Within an hour, the jury returned with the guilty verdicts.

We first note that it is arguable that defendant effectively waived any claim that the court erred by having the jury continue deliberating on Monday morning when defense counsel agreed with the giving of the deadlocked-jury instruction, which necessarily sent the jury back to the jury room to continue deliberations. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). Instead of objecting to the deadlocked-jury instruction and demanding that deliberations cease and that a mistrial be granted, defendant allowed the instruction without objection, allowed deliberations to resume, and then requested a mistrial. Regardless, reversal is unwarranted.

In *People v Wilson*, 390 Mich 689, 692; 213 NW2d 193 (1973), our Supreme Court stated:

Whenever the question of numerical division of a jury is asked from the bench, in the context of an inquiry into the progress of deliberation, it carries the improper suggestion that the state of numerical division reflects the stage of the deliberations. It has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority.

However, there is no evidence of improper judicial inquiry in this case regarding numerical division. The jury volunteered the information regarding its division against the court's instructions. The court chose to give the standard instruction for a deadlocked jury, which we believe reflected a reasonable alternative to declaring a mistrial considering the stage of the deliberations at that time. The trial court did not state anything that could reasonably be deemed coercive from the perspective of the holdout juror; the standard instruction informed this juror to stick to his honest beliefs. Moreover, the deliberations had not yet reached the point of being exhaustive and protracted. Indeed the record indicates that the jury had just received some requested trial transcript on the previous day of deliberations (Friday). We find that no undue pressure was put on the members of the jury and that the court did not abuse its discretion in not declaring a mistrial.

Affirmed.

/s/ William C. Whitbeck

/s/ William B. Murphy

/s/ Jessica R. Cooper