

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANTHONY-WILLIE CROSS,

Defendant-Appellant.

UNPUBLISHED

June 23, 2011

No. 295549

Kent Circuit Court

LC No. 09-005532-FC

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

James Anthony-Willie Cross challenges his jury trial convictions of felony murder¹, assault with intent to rob while armed² and possession of a firearm during the commission of a felony.³ Cross was sentenced as a fourth habitual offender⁴ to life imprisonment for the felony murder conviction, 50 to 95 years in prison for the assault with intent to rob while armed conviction and 5 years' imprisonment for possession of a firearm during the commission of a felony. We affirm.

Cross initially contends that the trial court erred and deprived him of his constitutional right to present a defense when it denied his request for an adjournment of trial to conduct gunshot residue testing. We review a trial court's decision to deny a motion for an adjournment for an abuse of discretion.⁵ We review unpreserved constitutional claims for plain error affecting defendant's substantial rights.⁶

¹ MCL 750.316(1)(b).

² MCL 750.89.

³ MCL 750.227b.

⁴ MCL 769.12.

⁵ *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

⁶ *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

“[A] request for an adjournment must be by motion or stipulation made in writing or orally in open court based on good cause.”⁷ A trial court may grant an adjournment based on the “unavailability of . . . evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the . . . evidence.”⁸ The denial of an adjournment by the trial court does not constitute “grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion.”⁹

At the outset, we note that Cross failed to demonstrate the requisite “diligent efforts” to obtain testing for gunshot residue.¹⁰ The record indicates that evidence consisting of his clothing and hand swabs were available for testing for a two year period since they were secured in 2007 and trial did not occur until 2009. Any implication by Cross that the prosecution failed to provide this as exculpatory evidence is unavailing as the prosecution was not required to test the evidence on his behalf.¹¹

Cross also fails to demonstrate the requisite showing of “good cause” to support his request for an adjournment¹² as it did not involve the production of material evidence.¹³ Expert testimony showed that the results obtained from gunshot residue testing do not necessarily or incontrovertibly establish whether a person discharged a firearm. In addition, whether Cross discharged a firearm during the commission of this crime was immaterial as the prosecution’s theory of the case was that Cross aided and abetted the armed robbery, not that he fired the fatal shot. As a result, Cross could be convicted of the charged crimes regardless of the absence of any evidence of gunshot residue on his hands or clothing.¹⁴

Similarly, we reject Cross’ contention that the refusal of the trial court to grant an adjournment to permit him to procure gunshot residue testing deprived him of his constitutional right to present a defense. We do not dispute that a defendant is afforded a constitutional right to present a defense.¹⁵ But, when a defendant is able to present his theory of the case through other

⁷ MCR 2.503(B)(1).

⁸ MCR 2.503(C)(2).

⁹ *Coy*, 258 Mich App at 18-19.

¹⁰ MCR 2.503(C)(2).

¹¹ *Coy*, 258 Mich App at 21.

¹² MCR 2.503(B)(1).

¹³ MCR 2.503(C)(2).

¹⁴ See *People v Robinson*, 475 Mich 1, 14-15; 715 NW2d 44 (2006); see also *People v Podolski*, 332 Mich 508, 517; 52 NW2d 201 (1952).

¹⁵ *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967); *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

evidence, evidentiary errors do not necessarily rise to the level of a constitutional error.¹⁶ Further, the right to present a defense is not deemed to be absolute as a defendant is still required to comply with “established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.”¹⁷ As such, a defendant’s right to present a defense “extends only to relevant and admissible evidence.”¹⁸ In this instance, the failure to present the results of gunshot residue testing did not preclude Cross’ claim that he was not the shooter. The absence of this evidence was arguably beneficial to Cross as it could not serve to contradict his theory of the case regarding his lack of involvement or participation. Further, Cross was not denied his constitutional right to present a defense given his lack of compliance with established rules of procedure necessitating the demonstration of “good cause” or “diligent efforts” to support his request for an adjournment, coupled with the limited relevance of the absence of gunshot residue on his person or clothing.

Cross next asserts that the trial court erroneously admitted three autopsy photographs of the victim, which were more prejudicial than probative. We review a trial court’s decision to admit or exclude evidence for an abuse of discretion.¹⁹ “The decision to admit or exclude photographs is within the sole discretion of the trial court.”²⁰ A trial court may exclude relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice. . . .”²¹ Evidence is not deemed to be unfairly prejudicial merely because it is damaging to a defendant’s case.²² Rather, undue prejudice is defined as meaning “an undue tendency to move the tribunal to decide on an improper basis . . . an emotional one.”²³

We find that the trial court did not abuse its discretion when it admitted the autopsy photographs into evidence. As with any autopsy photographs, while graphic, the photographs did not have an undue tendency to influence the jury to decide the case on an improper basis.²⁴ The pathologist referred to the photographs during his testimony to explain the nature and extent of the victim’s injuries.²⁵ Such evidence was probative to help establish the intent element for a

¹⁶ *People v Steele*, 283 Mich App 472, 488-489; 769 NW2d 256 (2009).

¹⁷ *Yost*, 278 Mich App at 379 (citation omitted).

¹⁸ *People v Likine*, 288 Mich App 648, 658; 794 NW2d 85 (2010) (citation omitted).

¹⁹ *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

²⁰ *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).

²¹ MRE 403.

²² *People v Vasher*, 449 Mich 494, 502; 537 NW2d 168 (1995).

²³ *Id.*

²⁴ *Mills*, 450 Mich at 76-77.

²⁵ *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

robbery²⁶ and by assisting the jury in determining whether the victim was the aggressor or the target in the robbery.²⁷ We also reject Cross' contention that the autopsy photographs were inadmissible because the pathologist's testimony was sufficient to explain the cause of death, as photographs may be used to corroborate a witness's testimony and "are not excludible simply because a witness can orally testify about the information contained in the photographs."²⁸

Cross also argues that he was unduly prejudiced by the prosecutor's improper elicitation of testimony from a witness indicating his previous incarceration. Because Cross failed to object to the alleged misconduct, this Court reviews for plain error affecting his substantial rights.²⁹ Testimony referencing a defendant's previous incarceration is generally deemed to be inadmissible³⁰, because of "[t]he danger . . . that the jury 'will misuse prior conviction evidence by focusing on the defendant's general bad character . . .'"³¹ While a prosecutor's intentional elicitation of testimony regarding a defendant's previous incarceration constitutes error³², "an isolated or inadvertent reference to a defendant's prior criminal activities will not result in reversible prejudice."³³ In this instance, the witness' remark constituted "an unresponsive, volunteered answer to a proper question" by the prosecutor.³⁴ As Cross failed to object to this testimony at trial, we need not even address this unpreserved issue unless a curative instruction would not have eliminated the prejudicial impact or our failure to address the issue would result in a miscarriage of justice.³⁵ The very brief and unsolicited reference by the witness to Cross having been in prison and in trouble with police when weighed against the strong evidence of his guilt was not so prejudicial that it denied Cross a fair trial.

Cross further contends the prosecutor engaged in misconduct by failing to disclose to defense counsel and the jury that a witness, Jermario Phillips, was provided use immunity in exchange for his testimony. "Where an accomplice or co-conspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor . . . to disclose such fact to the jury upon request of defense counsel."³⁶ A prosecutor is required to disclose upon

²⁶ MCL 750.89; see also *Mills*, 450 Mich at 71.

²⁷ *Id.* at 71-72.

²⁸ *Id.* at 76.

²⁹ *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

³⁰ *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983).

³¹ *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988).

³² *People v McGee*, 90 Mich App 115, 116-117; 282 NW2d 259 (1979).

³³ *People v Wallen*, 47 Mich App 612, 613; 209 NW2d 608 (1973).

³⁴ *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009).

³⁵ *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

³⁶ *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976).

request “any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.”³⁷ Specifically:

Due to the undeniable relevance of evidence of a witness' motivation for testifying, the prosecutor must, upon request of defense counsel, disclose to the jury “the fact that immunity or a plea to a reduced charge has been granted to the testifying accomplice [or conspirator].” Defendant is “entitled to have the jury consider any fact which might have influenced an informant's testimony.” The disclosure requirement may be considered satisfied where the “jury [is] made well aware” of such facts “by means of . . . thorough and probing cross-examination by defense counsel.”³⁸

At the outset, we note that the transcript selections referenced by Cross in the brief submitted to this Court from the witness' investigative subpoena testimony discussing the grant of use immunity are not part of the lower court record and, thus, comprise an improper expansion of the record on appeal.³⁹ Contrary to Cross' assertion that the prosecutor failed to inform defense counsel of the grant of use immunity for this witness, the lower court record demonstrates that his attorney had a copy of and referenced testimony by this witness from the investigative subpoena hearing during his cross-examination wherein he attempted to impeach Phillips through the use of prior inconsistent statements. We also note that the testimony provided by Phillips was generally supported by other witnesses during trial. “[A] new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.”⁴⁰

Addressing Cross' contention that the jury was not informed of the immunity agreement, we concur that a prosecutor owes a duty to a defendant to disclose the existence and details of such an agreement.⁴¹ Requiring disclosure permits a trier of fact to evaluate the credibility of a witness within the context of its knowledge regarding the existence of a possible motive for the witness to fabricate testimony.⁴² First, in this instance, there is no evidence that defense counsel requested the jury be informed of the existence of an immunity agreement with this witness. Second, even if the prosecutor suppressed information regarding the existence of the immunity agreement, reversal is not warranted unless “the suppressed evidence might have affected the

³⁷ MCR 6.201(B)(5).

³⁸ *People v Mumford*, 183 Mich App 149, 152-153; 455 NW2d 51 (1990) (emphasis in original, internal citations omitted).

³⁹ *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

⁴⁰ *People v McMullan*, 284 Mich App 149, 158; 771 NW2d 810 (2009) (citation omitted).

⁴¹ MCR 6.201(B)(5).

⁴² *Atkins*, 397 Mich at 174.

outcome of the trial.”⁴³ Based on the existence of corroborating testimony by other witnesses and evidence, Cross is unable to demonstrate that the failure of the prosecutor to inform the jury of the immunity agreement impacted the outcome of trial.

Finally, Cross alleges ineffective assistance of counsel for failing (1) to procure testing of the evidence for gunshot residue, (2) to cross-examine Phillips about his use immunity agreement with the prosecutor and (3) object to witness testimony pertaining to his previous incarceration. To prevail on his claim of ineffective assistance of counsel Cross must meet the two-part test elucidated by the United States Supreme Court, demonstrating that his counsel’s performance “fell below an objective standard of reasonableness” under prevailing professional norms and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁴⁴

With regard to Cross’ claim of ineffective assistance of counsel for failing to secure testing for gunshot residue, we note that the lower court record is devoid of any evidence that such testing would have established his innocence. Expert testimony indicated that gunshot residue testing could not conclusively establish that Cross did not discharge a weapon. Further, because the prosecutor’s theory of the case was premised on Cross’ role as an aider and abettor, his conviction did not hinge on evidence that he actually fired the fatal shot but merely his presence and furtherance of the criminal activity that resulted in the death.

Cross also contends that trial counsel was ineffective for failing to assure disclosure of the use immunity agreement between the prosecutor and Phillips. At the outset, Cross has failed to establish the factual predicate for this claim as the lower court record is devoid of any indication that the prosecutor granted Phillips use immunity.⁴⁵ Because Phillips’ testimony was corroborated by other witnesses, evidence pertaining to the alleged immunity agreement would merely have provided an additional means for defense counsel to try to impeach this witness. Given the strong evidence that Cross was a participant in the crimes charged, he is unable to demonstrate a reasonable probability that the outcome of his trial would have been different notwithstanding defense counsel’s alleged errors.⁴⁶

Finally, Cross asserts that counsel was ineffective because he failed to object to the testimony regarding his previous incarceration. While defense counsel was deficient in not objecting to this testimony, Cross cannot demonstrate a reasonable probability that this very brief

⁴³ *US v Agurs*, 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976); see also *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992).

⁴⁴ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

⁴⁵ *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

⁴⁶ *Strickland*, 466 US at 694.

and transient reference by a witness to his previous incarceration affected the outcome of his trial given the plethora of evidence supporting his guilt.⁴⁷

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

⁴⁷ *Id.*; *Wallen*, 47 Mich App at 613.