

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 16, 2012

v

OBAR LEVELL ELLIS,

Defendant-Appellant.

No. 303095
Berrien Circuit Court
LC No. 2010-002756-FC

Before: MARKEY, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions and sentences for second-degree murder, MCL 750.317, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and felony-firearm, MCL 750.227b. Defendant was sentenced, as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 40 to 90 years' imprisonment for the murder conviction and 76 to 120 months' imprisonment for the felon-in-possession conviction, to be served consecutively to the mandatory two-year term of imprisonment for his felony-firearm conviction, against which defendant was awarded 256 days of credit. For the reasons set forth below, we affirm.

Defendant's convictions arise from the fatal shooting of Anthony Campbell on June 13, 2010, outside Smoke's Lounge (Smoke's) in Benton Harbor, Michigan. Defendant admits that he shot Campbell; he asserted at trial and maintains on appeal that he did so in lawful self-defense during an altercation initiated by Campbell in which Campbell repeatedly struck him in the head with a car jack, causing a laceration from which defendant bled significantly. Some, but not all, of the witnesses at trial contradicted defendant's version of events.

Leticia Jones testified that defendant started the fight, and chased the victim with a gun and shot him from behind. She never saw Campbell hit defendant.

Rickie Brown was a bouncer at the bar. He testified that he saw defendant and Campbell fighting, and that Campbell struck defendant hard with a tire iron or jack in the back of the head. He stated that defendant managed to run away, but returned after six to ten seconds with a gun and shot Campbell from a distance of about eight feet.

Latasha Kirby saw defendant and Campbell arguing, but did not see a physical fight. She testified that she heard two or three gunshots, but did not see who fired them or who was shot.

Benton Harbor police officer Benny Meekins was working in the area of Smoke's. He noticed a large crowd in one area outside the bar, and began walking in that direction. At some point, the people in the crowd started running. He testified that about 30 seconds after people began running, he heard a single gunshot. He never saw who fired the shot or who may have been injured, nor did he see a physical altercation beforehand. Another officer, Dustin Blaskie, testified that there appeared to be a fight in the parking lot, then people started running away from the area, and a few seconds later he heard a single gunshot. The police did recover a broken car jack that was covered with blood, and it matched a second jack found in Campbell's trunk.

Defendant's mother, Betty Ellis, testified that defendant came to her house around 2:30am. He was injured and there was blood coming from the back of his head. He told her that someone had hit him, but did not say who. He did not tell her that he had fired a gun.

Jason Eidam testified that while in jail in December 2010, he and defendant shared a common area, though not cells. Eidam considered himself to be a jailhouse lawyer, and would give other inmates advice about their cases. Eidam testified that defendant told him that "he was assaulted with a crow bar . . . and he got his gun and chased a guy down and shot him." Eidam told defendant that a self-defense claim would not work if defendant did not shoot the victim while in the process of being attacked.

Devaughn Greely, called by the defense, testified that he saw Campbell chasing defendant with a crowbar or similar object. He stated that Campbell struck defendant once. Defendant fell to the ground, and Greely heard a gunshot. He testified that defendant did not leave the area between being hit with the crowbar and shooting Campbell.

On appeal, defendant asserts that plaintiff failed to present sufficient evidence to prove beyond a reasonable doubt that he was not acting in self-defense when he shot Campbell. This Court reviews de novo defendant's challenge to the sufficiency of the evidence, considering the evidence presented at trial in a light most favorable to the prosecution to "determine if any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007), quoting *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Roper*, 286 Mich App 77, 84; 777 NW2d 483 (2009). Defendant argues that the prosecution presented insufficient evidence to establish the fourth element of this offense—that he was acting without justification or excuse—beyond a reasonable doubt. The record demonstrates otherwise.

As just discussed, Rickie Brown testified that defendant, though attacked by Campbell, had safely left the scene, only to return and shoot Campbell. Leticia Jones testified that defendant chased Campbell, shooting as Campbell was attempting to seek cover. Another witness, Kiwoa Whitfield, who drove Campbell to seek medical treatment, testified that Campbell stated that he did not know who shot him, giving rise to an inference that he was not shot by defendant during their altercation. Additionally, the recording of the radio transmissions

between police officers present at, or in the vicinity of, Smoke's when the shooting occurred, evidenced a delay of eight or nine seconds between the initial movement of a crowd of people away from a disturbance and defendant's firing of the gun at Campbell, permitting an inference that the crowd observed defendant approaching Campbell, with gun in hand, before the shot was fired. Lastly, Jason Eidam testified that defendant told him that after Campbell hit him in the head, defendant "chased [Campbell] down and shot him." The testimony of these witnesses, if believed, and the inferences fairly drawn from their testimony, contradicted defendants' assertion that his use of deadly force against Campbell was necessary to prevent his own imminent death or bodily harm and constitute sufficient evidence to establish beyond a reasonable doubt that defendant did not act in lawful self-defense.¹

Defendant points to inconsistencies among the versions of events presented by the prosecution witnesses as rendering their testimony "unbelievable," and he notes the testimony of a defense witness that Campbell chased defendant and struck him in the head with a metal object, causing defendant to fall to the ground, and that the gunshot occurred after defendant fell to the ground. However, the assessment of witness credibility and the determination of the probative value of evidence is solely within the purview of the jury. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998).

Defendant next argues that the prosecutor committed misconduct warranting a new trial during questioning regarding the purpose for a police informant being placed in defendant's cell while he was being held awaiting trial. This Court reviews this preserved claim of prosecutorial misconduct de novo, considering the challenged remarks in context to determine whether the remarks denied defendant a fair trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

It is "not misconduct on the part of the prosecutor to introduce evidence expressly permitted by the trial judge." *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989). The trial judge allowed the prosecutor to pursue this line of inquiry after objection by defense counsel. Defendant does not challenge on appeal the trial court's decision to allow the question. It cannot be misconduct for the prosecutor to have done that which the trial court expressly permitted. *Id.* We also note that it was merely a single question about "another murder," and did not include any suggestion that defendant was the accused in that other murder.

Defendant also asserts that the trial court violated his constitutional rights to compulsory process and to present a defense, thereby depriving him of a fair trial, when it denied his motion to adjourn the trial so as to permit him additional time to secure the presence of defense witnesses who failed to appear to testify on defendant's behalf, despite being under subpoena to do so. This Court reviews a trial court's decision whether to grant or deny an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). When assessing the propriety of the trial court's denial of an adjournment, this Court considers whether

¹ Trial counsel might have argued in the alternative that even under the prosecution's version of events, defendant was guilty of no more than manslaughter. However, trial counsel did not do so and appellate counsel does not argue that failure to do so was ineffective assistance of counsel.

the defendant asserted a constitutional right, whether the defendant had a legitimate reason for asserting that right, whether the defendant was negligent or requested previous adjournments, and whether the defendant demonstrated prejudice from the trial court's refusal to adjourn. *People v Coy*, 258 Mich App 1, 18-19; 669 NW2d 831 (2003).

Even assuming that defendant's motion to adjourn was based on the assertion of a constitutional right, was for a legitimate reason, and that defendant was not negligent, defendant cannot establish that he was prejudiced by the trial court's denial of that motion. Defense counsel timely subpoenaed the witnesses at issue and, when those witnesses failed to appear, defense counsel obtained bench warrants for their arrest. Despite defense counsel's attempts to secure their appearance, however, the record reflects that these witnesses were actively avoiding appearing to testify at trial, and, indeed, that they had been "fairly adept at avoiding the officials" for some time preceding trial. Consequently, there is no indication that, had the trial court granted an adjournment, the witnesses could have been secured in a timely fashion. Nor has defendant provided any evidence to suggest that the missing witnesses' testimony would have been favorable to his defense. Further, defendant presented witness testimony that, if credited by the jury, corroborated his version of events. Thus, the absence of the missing witnesses did not deprive defendant of his right to present a defense and therefore defendant cannot establish that he was prejudiced by the trial court's denial of the motion to adjourn. As a result, no relief is warranted on this issue. *Coy*, 258 Mich App at 18; *Snider*, 239 Mich App at 421.

Additionally, defendant asserts that the prosecution violated its duty, set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), to disclose exculpatory evidence to the defense. Because this claim was not raised below, this Court reviews this issue for plain error affecting defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011); *Carines*, 460 Mich at 763-764. "[S]uppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 US at 87. "In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

Defendant argues that the prosecutor failed to disclose to the defense that Demarcus Greely gave an exculpatory statement to authorities corroborating defendant's version of the events leading to Campbell's death. Defendant's argument is premised on Demarcus's affidavit. However, even if credited, that affidavit establishes only that the prosecutor possessed exculpatory evidence in the form of Demarcus's statement. Defendant offers this Court no evidence to establish that this information was not provided to his counsel or that he could not have obtained this information with any reasonable diligence. *Cox*, 268 Mich App at 448. The record reflects that the prosecution was providing defense counsel with supplemental police reports, including reports of witness interviews conducted during the time frame in which Demarcus states that he was interviewed. Thus, it is certainly possible, if not probable, that the prosecution turned over this evidence to defense counsel.

Additionally, in his affidavit, Demarcus avers that he is the brother of a defense witness, Devaughn Greely, with whom he was present at Smoke's during the events at issue; likewise, Devaughn testified that he was at Smoke's with "his brother." Defendant and his counsel were therefore aware of Demarcus's presence at Smoke's at the time of the shooting with Devaughn, and had notice that he may have observed the events at issue. Therefore, defendant cannot establish either that the defense was unaware of Demarcus's existence as a potential witness with exculpatory information, or that the defense could not by reasonable diligence have obtained the evidence offered by Demarcus. Consequently, defendant has not established that the prosecutor committed a *Brady* violation warranting a new trial. *Cox*, 268 Mich App at 448; *Fox*, 232 Mich App at 549.

Finally, defendant raises numerous claims of ineffective assistance of counsel at trial. When, as here, a *Ginther*² hearing is not held, this Court's review of claims of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Defendant first claims that his trial counsel was ineffective because he failed to subpoena essential defense witnesses and secure their testimony at trial. However, the record reveals that trial counsel spoke with the witnesses, that the witnesses were listed on defendant's witness list, and that they were subpoenaed in advance of trial. When the witnesses failed to appear, defense counsel asked the trial court to issue bench warrants for them, and the trial court did so, to no avail. Two of the witnesses had outstanding warrants against them and, as a consequence, they were not only deliberately choosing not to appear, but were actively attempting to avoid apprehension. Trial counsel also sought an adjournment to allow additional time to secure the witnesses, which the trial court denied. Accordingly, this portion of defendant's claim lacks merit. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant also claims that his trial counsel failed to timely compel the production of Campbell's toxicology results and reports of the DNA analysis of blood found in and around the scene of the shooting. As to the toxicology results, testimony established that Campbell's blood and urine samples had been lost in transmission to the state laboratory. Consequently, there were no toxicology results the production of which could have been compelled, and any motion to compel those results necessarily would have been proven fruitless. Counsel is not required to make meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Similarly, as for reports of DNA analysis, testimony at trial established that the DNA analysis of blood samples submitted by police had yet to be completed and therefore, there were no reports of that analysis in existence at any time before or during trial. Hence, defendant's argument must necessarily presume that had his counsel moved to compel the reports at some point in advance of trial the trial court would have ordered the DNA analysis to be completed on an expedited basis. However, the record indicates otherwise. The trial court was aware of the delay in obtaining the results of the requested DNA analysis, as defendant's trial had been adjourned three months previous for that very reason. Counsel moved to adjourn the trial a

² *People v Ginther*, 390 Mich 436, 439; 212 NW2d 922 (1973).

second time, based on the absence of the DNA results, and the trial court denied the motion, observing that there was eyewitness testimony to Campbell's assault of defendant and as to the source of the blood evidence located around the scene and that "for decades" trials had been conducted without DNA evidence.

Consequently, there is no indication that any motion to compel the not-yet-existing reports of the still-incomplete DNA analysis would have resulted in the trial court ordering that analysis to be completed in an expedited manner. Further, there was no dispute at trial that defendant was bleeding as the result of blows to his head inflicted by Campbell, and witness testimony established the likely source of each of the blood samples collected by police at and around the scene. Thus, defendant cannot show any prejudice from the absence of DNA analysis, which he asserts would have established those very facts, at trial. In the absence of any such prejudice, there is no basis for defendant to assert that trial counsel was ineffective for failing to move to compel those reports in a more timely fashion. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant next criticizes his trial counsel's instruction to the private investigator hired to assist in substantiating defendant's defense to report only orally and not prepare any written report of his investigation. There is an obvious strategic reason not to request a written report of witness interviews from an investigator, as disclosure of any report containing witness statements would have been required by MCR 6.201. Additionally, defendant does not offer any explanation as to how his defense was prejudiced, or the outcome of his trial affected, by the absence of a written investigative report. Accordingly, this portion of defendant's claim likewise lacks merit. *Carbin*, 463 Mich at 599-600.

Defendant further questions trial counsel's decision not to undertake additional investigative efforts recommended by the private investigator to interview and locate witnesses for the defense. Defendant does not state what additional investigation should have been undertaken, what evidence this additional investigation might have produced, or how that evidence would have affected the outcome of his trial. This failure renders meritless defendant's claim in this regard. *Carbin*, 463 Mich at 599-600. Additionally, counsel explained on the record that he made a strategic decision to proceed with certain witnesses and to not pursue testimony from others.

We also reject defendant's assertion that trial counsel was ineffective because he failed to call a blood spatter expert or an expert medical witness to testify to the nature and extent of the injury to his head inflicted by Campbell. Defendant has not offered this Court any medical evidence that could have been introduced at trial to establish the severity of the injury to his head. Further, the jury did hear testimony from a witness that defendant was injured by repeated "vicious" blows from Campbell, which were clearly intended to do defendant great harm, as well as with evidence of the nature and extent of the resulting injury by way of photographs of defendant's head taken after his altercation with Campbell. In addition, the dispositive question at trial was not whether Campbell was the aggressor during the initial altercation, or whether defendant had been injured by Campbell during that altercation. The dispositive question was whether defendant broke away from the altercation with Campbell such that the direct threat to his well-being had ended before he shot Campbell.

Defendant next argues that trial counsel was ineffective by failing to establish whether the metal detector at Smoke's was working on June 12-13, 2010. Regardless of whether the metal detector was working at that time, testimony at trial established that, despite the security measures employed, including the metal detector, patrons were successful in carrying weapons into Smoke's, as highlighted by the fact that there had been a shooting inside Smoke's on Halloween 2009. In addition, defendant has not offered this Court any evidence to indicate that the metal detector was, in fact, not working on the date in question. Therefore, he has failed to establish a reasonable probability that the outcome of his trial would have been different had counsel made any inquiry into the functioning of the metal detector, *Carbin*, 463 Mich at 599-600.

Defendant next argues that trial counsel was ineffective by failing to present evidence of Campbell's criminal history or of his propensity and reputation for violence. Defendant testified, and the prosecutor acknowledged, that Campbell had served 15 years in prison for murder. Defendant also testified that as a result of this, he feared Campbell. Defendant has not specified what additional evidence he believes counsel should have sought to introduce. Nor has he explained the manner in which such evidence may have impacted the outcome of his trial. Accordingly, defendant's claim in this regard lacks merit. *Carbin*, 463 Mich at 599-600.

We also reject defendant's assertions that his trial counsel provided ineffective assistance by raising "multiple and frivolous objections and motions," resulting in reprimands by the trial court with "obvious negative effects on the jury," and that counsel "may have improperly advised defendant to reject a highly favorable plea bargain." Defendant does not cite to any instances of the trial court reprimanding his trial counsel in the presence of the jury and we find none. Likewise, defendant offers no evidence that there was any plea bargain offered to him or that he was advised not to accept any such bargain.

Lastly, defendant asserts that trial counsel was ineffective because he failed investigate evidence lost by the police (presumably, Campbell's blood and urine samples) or other police misconduct during the investigation, which he asserts resulted in the deliberate suppression of exculpatory evidence. However, there is no indication that any investigation by trial counsel would have yielded this lost evidence considering that the police, the prosecutor's office, the medical examiner's office, and the state forensic laboratory were unable to locate it. Further, defendant does not articulate the nature of the police misconduct that he asserts his counsel should have investigated, or what additional actions his counsel should have taken to insure that all exculpatory information was provided to the defense. The record reflects that trial counsel was active in requesting information from the prosecutor, that the prosecutor was providing trial counsel with supplemental information during the course of the proceedings, and that trial counsel was acting to further the defense in response to this information up to the commencement of the trial. Defendant has not established to a reasonable probability that any additional investigation into lost evidence or into "police misconduct" during the investigation would have affected the outcome of his trial.

Consequently, defendant's claim that he was denied the effective assistance of counsel at trial lacks merit. *Carbin*, 463 Mich at 599-600.

Affirmed.

/s/ Jane M. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause