STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAM JONES, III,

Defendant-Appellant.

UNPUBLISHED
September 16, 2003

No. 237881
Ingham Circuit Court
LC No. 01-076756-FC

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, under an aiding and abetting theory, MCL 767.39. He was sentenced to life imprisonment. He appeals as of right. We affirm.

I. Facts

This case arises from the December 15, 1999, shooting death of Shemika Rogers, whom the police found slumped in her Range Rover bleeding from a bullet wound to the head. The victim's young son was in the vehicle with her when she was shot, but was himself unharmed.

The prosecutor's theory of the case was that defendant assisted Cornelius Brown[1] in a plan to ambush Kevin Kennard, which resulted in the shooting of Rogers by mistake. The prosecutor presented evidence that defendant's brother owed Kennard $1,600 for cocaine Kennard had supplied, that defendant involved himself in the matter to the extent that Kennard started demanding payment from defendant, and that violent confrontations resulted. According to prosecution witnesses, at a time when Kennard was thought to be living in Detroit, acquaintances of defendant identified Kennard as riding with Rogers in the latter's Range Rover in Lansing; they followed them to the Homestead Apartments in East Lansing while telephoning defendant of such developments. Defendant and Brown then arrived on the scene, and Brown shot Rogers.

[1] Brown and defendant were tried together. Brown was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b.

II. Evidence of Drug Trafficking[2]

Defendant argues that the trial court erred in permitting the prosecutor to present evidence that a debt from illegal drug activities was the motivation for the shooting. We disagree.

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The prosecutor wished to present evidence of drug activities in order to develop his theory of the motive behind the shooting. On appeal, defendant concedes that the existence of an alleged debt was relevant, but argues that its origins in drug transactions should have been excluded on the ground that the potential for unfair prejudice outweighed its probative value.

In support of his contention, defendant relies on an exchange at trial, and two portions of the prosecutor's closing argument. In anticipation of the testimony of Kevin Kennard, both defense attorneys asked the trial court to exclude from evidence that the debt that gave rise to the violence in question involved illegal drugs. The trial court took arguments, and ruled as follows:

> The drug debt is certainly different than a debt for lawful goods or services. A drug debt is even different than a gambling debt. It is well known that even small drug debts are at times subject to ruthless and violent enforcement by the predator or his allies. Therefore, this is relevant and probative on the question of motive and I will allow it to be mentioned.

However, the court included an important limitation with its decision: "[A]ny further details of drug transactions or business arrangements are prohibited until and unless I see a demonstration of their relevance and that their relevance outweighs any prejudice".[3]

The portions of the prosecutor's closing argument upon which defendant relies are as follows:

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[2] Appellate counsel frames this, and the other issues on appeal, as due process claims, and cites US Const, Ams V and XIV. However, the reference to the Fifth Amendment is entirely gratuitous, in that its due process guarantee applies only to the federal government. Section 1 of the Fourteenth Amendment, however, explicitly extends that guarantee to the states. See also Const 1963, art 1, § 17.

[3] When this issue was argued before the presentation of proofs, the court reserved its judgment pending the establishment of proper foundations. However, the court did then instruct the prosecutor to refrain from mentioning drugs in his opening statement, and to advise his witnesses not to volunteer information pertaining to drugs.

> We began with the idea that [defendant], according to the testimony that you heard, had dealings with Kevin Kennard. And those dealings he never paid. He never paid up the amount of money that was fronted to him for the crack cocaine.
>
> * * *
>
> Ladies and gentlemen, the other important fact that seems to go through is this phone call. Let me tell you the theory of our case. It's the theory of our case that [defendant] was involved by way of his brother, . . . with Kevin Kennard, that there was a drug debt. There was a drug debt that was transferred in the way things happen in the street to the point where [defendant] became a responsible party.

Beyond pointing to the above discussion and decision on the record, and the two excerpts from the prosecutor's closing argument, defendant refers only generally to a "constant repetition" of presentations of evidence of drug trafficking, and to "counsel's objections", but otherwise provides no record citations to indicate where he might actually have suffered unfair prejudice. It is defendant's duty, for every issue raised, to present coherent argument and authority, along with appropriate citations to the record. MCR 7.212(C)(7); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Accordingly, we will analyze defendant's claim only in the general terms in which he has presented it.

A jury is entitled to hear the "complete story" of the matter in issue. *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). Accordingly, "'[e]vidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'" *Scholl*, *supra* at 742, quoting with approval *Stave v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964).

To credit defendant's general arguments would be to decree that wherever a homicide follows from drug-related activity, the latter fact must always be concealed from the jury. We decline the invitation to circumscribe so severely the jury's entitlement to the "complete story" of the case. Indeed, leaving the jurors to speculate, as they inevitably would, as to the nature of the conflict that led to a homicide could be more prejudicial to a defendant than a plain presentation of the facts, even if those facts are unseemly. Evaluating the potential unfair prejudice from drug-related testimony attendant to a murder prosecution remains a matter for the trial court's discretion. We find no error in the trial court's reasoned approach in this instance.

Also included within the prosecutor's closing argument, but not cited by defendant on appeal, is the following explanation why evidence of drug dealing was brought to the jury's attention in the first place:

> You looked into a life-style that in some ways was attached to drugs, the sale and use of drugs, a black market economy, and the way the people that lived in that black market economy deal with each other. Drug deals are not subject to small claims court. You can't sue anybody for a bad debt. You can't get a lien on

their car or their house. You can't get a promissory note in order to secure those kinds of obligations.

The prosecutor's explanation is sound. That the debt in question stemmed from illegal conduct was relevant, because the illegality partly explains the participants' inclination to resort to violent self-help in the matter, as opposed to lawful means of redress. Further, as the prosecutor argued at trial, understanding that the indebtedness at issue stemmed from the drug trade would help the jury assess the credibility of witnesses who were describing otherwise seemingly extreme behavior in connection with arguments over a debt of less than $2,000.

Citing the rule of lenity,[4] defendant argues, "[i]f the question is close the advantage should be to Defendant". However, another legal principle is more directly on point here: "'The decision upon a close evidentiary question by definition ordinarily cannot be an abuse of discretion.'" *Bahoda*, *supra* at 289, quoting *People v Golochowicz*, 413 Mich 298, 322; 319 NW2d 518 (1982).

For these reasons, we reject this claim of error.

III. Discovery

Defendant asserts that the prosecutor improperly delayed or withheld discovery of certain evidence, and argues that the defense was prejudiced in its ability to obtain a fair trial as a result. We disagree. This Court reviews a trial court's decision regarding the appropriate remedy for failure to comply with a discovery order for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). However, unpreserved issues are reviewed for plain error affecting substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A defendant making issue of a discovery violation bears the burden of showing that he was so unfairly prejudiced that reversal is required. *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).

A. Immunity Agreements

Defendant's weightiest discovery issue involves disclosure of immunity agreements with four prosecution witnesses, Kevin Kennard, Patrick Gentry, Darrian Mendenhall, and Amber Speed. Defendant asserts that the prosecutor improperly withheld its intention to arrange for grants of immunity for these witnesses, and that this prejudiced the ability of the defense to cross-examine these witnesses effectively. We disagree.

[4] See *People v Wilder*, 411 Mich 328, 343; 308 NW2d 112 (1981) (doubts about the intent behind criminal legislation should be resolved in favor of the defendant).

The prosecutor requested immunity for Kennard during the course of jury selection. At that time, defense counsel expressed no concern about the timing of this development, or its disclosure, stating only that

> as far as to cross or to examine Mr. Kennard, the . . . only thing I would ask at this point, if there has been communications between Mr. Kennard and—any law enforcement agency, we just want to make sure that we have all of the discoverable information that may have occurred. I know that there were statements made by Mr. Kennard earlier, but it sounds as if there may have been more made later, and I don't believe we have any of those.

Defense counsel then expressed some concern over obtaining all discoverable materials, but none over the grant of immunity itself or how and when such machinations came to the attention of the defense. Then, when Kennard testified at trial eight days later, defendant's attorney did not cross-examine him concerning the grant of immunity, but codefendant Brown's attorney pointedly did so. Not only did the defense complain of no impairment in its ability to cross-examine Kennard because of the immunity agreement struck several days earlier, but defendant on appeal suggests only generally that such a concern hampered the defense. The lack of an objection below, coupled with the lack of specific argument on appeal, leaves this Court with no basis for granting relief. *Jones, supra*; *Taylor, supra*.

The immunity agreements for Gentry, Mendenhall, and Speed, were proposed to the trial court, and brought to the attention of the defense, only several days into trial. Counsel for codefendant Brown objected strenuously to having to proceed in the face of this late-breaking development, and defendant's attorney joined in the objection. Neither defense attorney asked for a mistrial, but Brown's attorney spoke of needing time to prepare to make use of possible differences between what these witnesses would say at trial and what they said at the preliminary examination. The prosecutor stated that he and Gentry's lawyer had discussed immunity at the preliminary examination, but admitted that the transcripts of that proceeding did not reflect any such discussion, adding, "I'm conceding some error here". The trial court recognized that the defense objections concerned not the immunity itself, but the last-minute disclosure of such agreements, and ruled that "the witnesses who are to be given immunity and which defense had no prior notice will not testify until tomorrow". Neither defense attorney expressed any dissatisfaction with this remedy.

As with the argument concerning Kendall's immunity agreement, coupled with the lack of a stated objection to the trial court's handling of the matter below, defendant now alleges prejudice only generally, with no specific argument to show how having more than one additional day to prepare for cross-examination would have improved his position. In any event, all three witnesses were effectively cross-examined regarding their immunity agreements, or inconsistencies in past and present testimony.

We conclude that the trial court properly managed the immunity issues, and that defendant suffered no prejudice in the matter. Appellate relief is not warranted.

B. Other Discovery Issues

Defendant makes issue of two rolls of film, which, on the first day of trial, the prosecutor reported had not been shown to the defense. Not only did the defense express no concern about this at trial, but on appeal defendant fails to provide any argument regarding how he was prejudiced by that development. For these reasons, we will not concern ourselves about the film further. *Jones, supra*; *Taylor, supra*.

Defendant next points out that the prosecutor failed to disclose in a timely fashion the crime scene investigator's updated report. The prosecutor admitted the deficiency, but explained that he had thought that the "one page report" had already been disclosed, and offered to make copies right away. Defense counsel neither expressed dissatisfaction with that remedy, nor protested that the defense suffered any prejudice in the matter. On appeal, defendant provides no argument to show that any prejudice resulted from this irregularity. Because no additional remedy was advanced below, and no prejudice shown on appeal, appellate relief is not warranted. *Jones, supra*; *Taylor, supra*.

Defendant further alleges that the prosecutor withheld a transcript of an interview with the victim's son. A police detective confirmed the existence of a videotaped interview with the boy and reported that a discovery request for a copy of that videotape had been filed. Counsel for codefendant Brown stated on the record that the prosecution gave "us" the videotape of the victim's son. There was no protestation to the contrary from defendant's attorney, and defendant on appeal does not suggest that the tape was in fact withheld, or that any prejudice resulted from any such irregularity. At the trial transcript pages cited by defendant there are innuendoes of a transcript of an interview with the victim's son, apart from the videotape that the defense had in hand, but defendant fails to show the existence of such a transcript, or any need for it in addition to the videotape. We are satisfied from this record that the defense had all the access that was needed to recorded statements of the victim's son.

Defendant's complaint that the prosecutor withheld a taped interview of Kevin Kennard is likewise unavailing. Counsel indicated on the record that concerns over discovery of that item were satisfactorily resolved, leaving defendant with no appellate opportunity in the matter. "Defendant should not be allowed to assign error on appeal to something which his own counsel deemed proper at trial. To do so would allow defendant to harbor error as an appellate parachute." *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

In passing, defendant mentions telephone records, of which the prosecutor spoke just before trial and promised to disclose by the end of the day. Defense counsel expressly declined to object below, and defendant makes no effort on appeal to show how any prejudice resulted. This failure of preservation and presentation leaves this Court without any basis for providing relief. *Roberson, supra*; *Jones, supra*; *Taylor, supra*.

Defendant additionally provides record citations to show that Speed and Gentry were taken to the scene of the shooting, and that Speed was shown a gun similar to one involved in the crime, and complains, without elaboration, that no reports of these activities were turned over to the defense. However, defendant did not assert below, and does not show on appeal, that any

such reports ever existed. It does not behoove defendant on appeal to make issue of undiscovered reports that he cannot demonstrate ever existed.

For these reasons, we conclude that defendant's discovery issues do not warrant appellate relief.

IV. Motion for Directed Verdict

At the close of the prosecutor's proofs, defendant moved for a directed verdict of acquittal, on the ground of insufficient evidence, and argues on appeal that the court erred in denying the motion. We disagree.

When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999).

In order to convict a defendant of second-degree murder, the prosecution must prove that the defendant caused the death of another person with malice and without justification, mitigation, or excuse. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Malice may be established by showing either an intent to kill, intent to inflict great bodily harm, or intent to create a very high risk of death with knowledge that the act probably would cause death or great bodily harm. *Id.*

To support a conviction on an aiding and abetting theory, the prosecutor must prove that the defendant or another person committed the crime and that the defendant assisted in the commission of the crime by action or encouragement. *Jones, supra* at 451. The prosecutor must additionally prove that the defendant intended the commission of the crime, or knew that the principal intended its commission, at the time the defendant provided aid or encouragement. *Id*. Aiding and abetting involves all forms of assistance rendered to the perpetrator of a crime, including all words or actions that might encourage or support the commission of the crime. *People v Rockwell,* 188 Mich App 405, 411-412; 470 NW2d 673 (1991).

Defendant predicated his motion for a directed verdict on the sufficiency of the evidence, or lack thereof, to prove that he acted with knowledge that Brown intended to kill his victim. " 'To be convicted, the defendant must either himself possess the required intent or participate while knowing that the principal possessed the required intent.' " *Id.* at 412, quoting *People v Vicuna*, 141 Mich App 486, 495; 367 NW2d 887 (1985). "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted).

Defendant argues that the evidence shows, at worst, that he was merely present when the shooting took place. "Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor." *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). We disagree with defendant's assessment.

Considered in the light most favorable to the prosecution, the evidence indicated that codefendant Brown shot Shemika Rogers while Rogers waited in a car in which she had just been riding with Kennard, and that earlier Kennard had threatened defendant for satisfaction of a substantial monetary debt, prompting defendant to threaten in return, "I'm going to kill you when I see you". The evidence further indicated that when Gentry and Mendenhall learned that Kennard and Rogers were spotted on the road in the Lansing area, the latter telephoned defendant to report that development. In response, defendant asked about locations, then "said he was on his way". When Mendenhall told defendant that he and Gentry had followed Kennard and Rogers into an apartment complex, defendant said, "I'm right behind you". This evidence reveals both a motive for aggression against Kennard and an intention to act on it.

Moreover, one witness reported that, upon receiving a call on the night in question, defendant said, "[l]et's go", then armed himself with a handgun, and left the premises with Brown, who was carrying a long firearm. As this Court observed in *People v Turner*, 213 Mich App 558, 572; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001), a defendant's "knowledge that [his codefendant] was armed during the commission of [an] armed robbery is enough for a rational trier of fact to find that [the defendant], as an aider and abettor, participated in the crime with knowledge of [the codefendant's] intent to cause great bodily harm." Accordingly, in such situations, "a rational trier of fact could find that [the defendant] was acting with 'wanton and willful disregard' sufficient to support a finding of malice . . . ." *Turner, supra* at 572-573. To state the obvious, here defendant's own decision to carry a firearm into the incident in question underscores a malicious intent that may be inferred from resort to such weaponry.

The evidence further suggests that defendant and Brown departed together in the same car, at a high speed, immediately after the shooting. Flight from an incident may be taken to indicate a guilty mind. *People v Kraai*, 92 Mich App 398, 409; 285 NW2d 309 (1979).

Clearly, the evidence brought to light far more than defendant's mere presence at the crime scene. The jury had a reasonable basis to conclude that defendant acted with at least a reckless disregard for the natural tendency of his conduct to cause serious bodily harm, or understood Brown to be acting with that *mens rea*.[5]

Defendant alternatively challenges his conviction on the ground that it was against the great weight of the evidence. However, the motion for a directed verdict was predicated on the legal sufficiency of the evidence alone, not great weight, and defendant framed this issue on appeal exclusively as a challenge to the denial of the directed verdict. An issue that is not raised within the statement of questions in the brief on appeal is not properly presented for appellate review. MCR 7.212(C)(5). See also *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). We therefore need not entertain further defendant's alternative argument.

[5] Not at issue here is the doctrine of transferred intent, which extends culpability for murder to a defendant who intended to shoot someone other than the actual victim. *People v Plummer*, 229 Mich App 293, 304-305 n 2; 581 NW2d 753 (1998).

It is without merit in any event. A decision on a motion for a new trial predicated on the great weight of the evidence is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998), quoting *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). Such motions are not to be granted lightly. "A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon, supra* at 627. In this case, defendant's great-weight arguments are mere invitations to reassess credibility and reinterpret the evidence. Because nothing in evidence in this case was so extraordinary as to invite judicial second-guessing of the jurors' apparent belief or disbelief of any of it, we decline to engage in such review.

V. Preliminary Examination

Defendant asserts that, at his preliminary examination, the prosecutor presented testimony that the prosecutor knew to be false, and argues that reversal is required for that reason. We are not persuaded by defendant's assertion and so reject his argument.

Evidentiary issues attendant to preliminary examinations are not ordinarily grounds for reversal of a subsequent conviction that follows from a fair trial upon sufficient evidence. See *People v Hall*, 435 Mich 599, 601; 460 NW2d 520 (1990) ("an evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error"). However, where a prosecutor knowingly presents false material testimony at the preliminary examination, understands that the same witness will tell a different story at trial, and fails to cooperate with discovery requests intended to help the defense anticipate the witness' actual trial testimony, a conviction cannot be allowed to stand. *People v Thornton*, 80 Mich App 746, 749-750; 265 NW2d 35 (1978).

In likening his case to *Thornton*, defendant points out that Gentry, Mendenhall, and Speed, upon receiving grants of immunity, all admitted at trial to lying to police investigators at first, or at the preliminary examination. Defendant asserts that when immunity agreements resulted in a change in the witnesses' story, the prosecutor knew that those witnesses had lied at the preliminary examination and would tell a different story at trial.

A lawyer's duty of candor before a tribunal includes refraining from offering evidence that the lawyer knows to be false. MRPC 3.3(a)(4). However, defendant cites no authority for the proposition that a prosecutor must disbelieve the prosecutor's own witnesses, or is charged with prior knowledge whenever a prosecution witness' trial testimony ultimately differs from what that witness offered in earlier proceedings. Defendant points out that during the course of trial the prosecutor sought immunity agreements for the three witnesses for the obvious purpose of improving his chances of eliciting useful testimony from them. But that is not the same as saying that the prosecutor knew, or otherwise should have concluded, that these witnesses were lying at the preliminary examination. Because defendant fails to show such misconduct on the prosecutor's part, this issue is without merit.

Further, defendant fails to point out precisely how the testimony of these witnesses differed between the preliminary examination and trial, let alone the materiality, or resulting

prejudice, from those differences. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

For these reasons, we reject this final claim of error.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray