S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 12, 2013
v	No. 305185 Genesee Circuit Court
DEQUEZE LAMAR DIXON, Defendant-Appellant.	LC No. 10-026759-FC

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Dequeze Lamar Dixon, appeals as of right from jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Dixon was sentenced, as a third habitual offender, MCL 769.11, to 787 months to 100 years' imprisonment on the second-degree murder conviction, 24 months to 120 months' imprisonment each for the convictions of felon in possession of a firearm and carrying a concealed weapon, and two years' imprisonment for the felony-firearm conviction. This case arises from the murder of Gregory Ingram, Jr. on February 26, 2010, in Flint, Michigan. Robinson was tried with his co-defendants, Gary Lee Robinson and Calvin LeSears, before separate juries. Robinson and LeSears appeal separately in Docket Nos. 304936 and 305314, respectively. We affirm.

The primary witness was Jason Sutton, who was present during the murder but uninvolved. He testified that he knew Robinson and Dixon already at the time, but he discovered LeSears's identity later. Sutton testified that he was picked up by defendants while walking home. Dixon was driving a vehicle owned by his girlfriend, Devonda Jiles. Either Dixon or Robinson told Sutton, "If we didn't know who you was, we were going to get you." They drove past the victim, at which point Dixon said, "There's Greg, let's get on him." Robinson got out of the car first, and then Dixon turned the car around and parked, whereupon Dixon and LeSears also got out. Sutton remained in the vehicle using his telephone.

Sutton testified that he heard a barrage of gunfire from multiple guns: an assault rifle, a shotgun, and a handgun. He saw all three defendants outside shooting the victim. A medical examination would later identify the victim's cause of death as multiple gunshot wounds from at least three different kinds of guns. When defendants returned to the vehicle, Sutton observed

Robinson with an assault rifle, Dixon with a shotgun, and LeSears with a handgun. Dixon advised Sutton that they would kill him if he told anyone about the events of the evening. They then dropped Sutton off at his house. Sutton continued to associate with defendants out of fear that they would believe he had told authorities about the shooting. A few weeks later, Sutton was again in the same vehicle with Dixon and Sutton's cousin, when police attempted to pull the vehicle over, apparently for unrelated reasons. All of the occupants jumped out and fled; Sutton was the only one apprehended. He was taken into custody for fleeing and eluding, and Jiles's car was impounded.

When Jiles discovered that her car had been impounded, she falsely informed 9-1-1 and a police officer that her vehicle had been stolen. While incarcerated, Sutton asked to talk to the police about the victim's murder. After Sutton was interviewed, Robinson was arrested two days later, and Dixon was arrested later that same day. Sutton subsequently picked LeSears out of a photographic lineup as the third individual, asserting that he was about 80 percent certain. LeSears was arrested about a month later for an unrelated matter, after which Sutton identified LeSears with certainty out of a physical lineup. Robinson was interviewed and ultimately provided the police with an inculpatory statement regarding his involvement in the homicide.

Dixon contends the trial court erred in permitting prosecution witnesses to testify that Dixon reviewed the statement made to police by his co-defendant, Robinson, even though the content of the statement was not revealed to the jury. We disagree. We review preserved challenges to a trial court's evidentiary rulings for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). We also review a trial court's denial of a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

Dixon asserts that the admission of references to Robinson's statement violated the Confrontation Clause, under which "out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant." *People v Nunley*, 491 Mich 686, 698; 821 NW2d 642 (2012), citing *Crawford v Washington*, 541 US 36, 51-53; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, it does not preclude the use of out-of-court statements, even testimonial statements, for purposes other than establishing the truth of the declarant's assertion. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007) (citation omitted). In particular, the Confrontation Clause is not implicated by "a statement offered to show the effect of the out-of-court statement on the hearer." *Id.* at 11. Robinson's statement here was not offered for its truth—indeed, its contents were not even disclosed—but rather only for the purpose of observing Dixon's reaction to reading that statement during his interrogation by the police. Consequently, there was no violation of defendant's right of confrontation. See *People v Johnson*, 100 Mich App 594, 598-599; 300 NW2d 332 (1980).

Dixon also asserts that the admission of references to Robinson's statement warranted a mistrial because the admission violated a prior order of the court ordering that no mention would be made at trial of statements made by co-defendants. However, that order provided that it could be modified, and the prosecutor properly sought and obtained the trial court's permission before introducing evidence of Robinson's statement. Its admission therefore did not violate any court order in effect at the time.

Dixon next contends that the admission of a video recording of Jiles's police interview violated a discovery order and was so prejudicial that it warranted a mistrial. We disagree. While, in general, this Court reviews claims of prosecutorial misconduct de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), discovery in criminal cases is left to the discretion of the trial court, *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). Similarly, a trial court's ruling on the admission or exclusive of evidence is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005).

In relevant part, during the interview with Jiles, the interviewing officer told her that "DeQueeze [sic] is going to prison forever" and "He murdered somebody." It is a "settled and long-established rule that a witness cannot express an opinion concerning the guilt or innocence of a defendant." *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). With few exceptions, the determination of a defendant's guilt must be left to the trier of fact. *People v Bragdon*, 142 Mich App 197, 199-200; 369 NW2d 208 (1985). However, the officer was not rendering testimony or an opinion while under oath; rather, he made the statements in the unambiguous context of showing his methodology for extracting information while interrogating a witness who had already demonstrated questionable veracity. The trial court properly instructed the jury on its role as the sole fact finder, and "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). In light of the substantial additional evidence of Dixon's guilt, we are not persuaded that the officer's statements likely affected the outcome of the proceedings or denied defendant a fair trial.

Defendant also argues that the video recording had not initially been disclosed to defense counsel, in violation of a prior discovery order, and that it constituted *Brady*[1] material.[2] Although "[c]riminal defendants do not have general rights to discovery," *Stanaway*, 446 Mich at 680, the prosecution is required by due process to turn over any evidence that is favorable to a defendant or that raises a reasonable doubt about a defendant's guilt. *Id*. at 666; *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). In *Brady*, the United States Supreme Court held that the prosecution's suppression of material evidence favorable to the accused constitutes a due process violation. The elements required to establish a *Brady* violation are:

> "(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

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

[2] Defense counsel for Robinson and LeSears did not recall a discussion or mention of the videotape when they met with police to review the file, but acknowledged they might not have been as attentive because the videotape was not as relevant to their clients' respective cases.

> 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 Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007), quoting *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

The defendant "bears the burden of establishing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

The interviewing officer testified that the recording had been in his file when he met with defense counsel, but they did not request to view it. The trial court accepted this assertion. "[I]f resolution of a disputed factual question turns on the credibility of witnesses or the weight of the evidence, [this Court] will defer to the trial court, which had a superior opportunity to evaluate these matters." *People v Sexton*, 461 Mich 746, 752; 609 NW2d 822 (2000) (citation omitted). The trial court also allowed defense counsel to review the videotape outside the presence of the jury, affording Dixon an opportunity to evaluate the evidence and formulate a strategy to deal with the content. As such, Dixon is unable to demonstrate that the prosecution actively suppressed the evidence. In any event, none of the contents of the recording were clearly exculpatory, and it was admitted only for the purpose of impeaching Jiles's credibility. As discussed, there was substantial other evidence of Dixon's guilt, so "had the [videotape of Jiles's police interview] been disclosed to the defense, [no] reasonable probability exists that the outcome of the proceedings would have been different." *Schumacher*, 276 Mich App at 177.

Dixon next argues that the trial court erred by refusing to permit him to introduce evidence that the police had improperly sought to recruit a jail inmate—who was not involved in the Ingram murder and was in jail on unrelated charges—as a "snitch." We disagree. This Court reviews preserved challenges to an evidentiary ruling for an abuse of discretion, but preliminary questions of law pertaining to the admission of the evidence are reviewed de novo. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001); *In re Utrera*, 281 Mich App 1, 15; 761 NW2d 253 (2008).

"The right to present a defense extends only to *relevant* evidence." *People v Danto*, 294 Mich App 596, 604; 822 NW2d 600 (2011) (emphasis in original). "Logical relevance is the foundation for admissibility. Logical relevance is defined by MRE 402 and MRE 401." *Layher*, 464 Mich at 761 (citations omitted). Evidence is "relevant" if it tends to make any material fact more or less likely, MRE 401, and evidence that is not relevant is not admissible. MRE 402. The alleged solicitation of a different jailhouse "snitch" was not relevant to Sutton's testimony and did not serve to prove that Sutton's testimony was false or render his version of events incredible. At most, inquiring into the alleged recruitment of a "snitch" amounted to an attempt at impeaching the testifying officer regarding a collateral matter unrelated to Dixon's guilt, so it was within the trial court's discretion. MRE 608(b); *People v Wofford*, 196 Mich App 275, 281; 492 NW2d 747 (1992). Extrinsic evidence may not be used to impeach a witness on a collateral matter, even where such evidence constitutes a prior inconsistent statement otherwise admissible under MRE 613(b). *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). We find no legal error or abuse of discretion.

Finally, Dixon asserts that the closing of the courtroom to the public violated his constitutional right to a public trial. We agree. The federal and Michigan constitutions afford a

criminal defendant a right to a public trial. US Const, Ams VI and XIV, and Const 1963, art 1, § 20. However, although a courtroom open to public scrutiny helps insure that a criminal defendant will be given a fair trial, *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984), the right to a public trial is not absolute. *Id*. at 45. Significantly, the right to a public trial must be asserted; because defendant neither objected nor asserted his right to a public trial, our review is for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 653-664; 821 NW2d 288 (2012). Not only must defendant establish that an error plainly occurred, but "that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the proceedings." *Id*. at 664-665, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

At the beginning of Sutton's testimony, the judge heard a ringing telephone in the courtroom and stated:

> Who's got the ringing phone? Whoever's got it better give it up or I'm going to kick everybody out of the courtroom. Who's got the ringing phone? Okay, everybody leave the gallery. You're gone. Everybody's gone.

The courtroom was then cleared. When counsel requested to approach, the following interaction transpired:

> *The Court:* This is my courtroom, sir. Everyone will leave.
>
> *Dixon's Counsel:* No. I'm not-I'm not-that's not my concern. I don't care who's in the gallery. That's not my concern.

The court conducted a bench conference with counsel for approximately two minutes before Sutton's testimony resumed. It appears that no spectators were permitted to re-enter the courtroom that day, although it also appears that a representative from the media, who had previously requested and obtained permission to video-record Sutton's testimony, was permitted to continue to do so. On the next day of trial, the restriction regarding spectators was not implemented based on the trial court's permission to counsel to open the courtroom despite the lack of seats available, presumably due to the presence of three juries.

In our view, the trial court's reaction was extreme and excessive; justice is better served by a calmer and more measured response. However, it appears on balance that the trial court's closure was less "to exclude the public, but to control courtroom distractions." *People v Bails*, 163 Mich App 209, 211; 413 NW2d 709 (1987). In any event, none of the defendants objected to the closure, so even if we were—hypothetically—to conclude that the closure was plainly erroneous, reversal would only be warranted of the closure *also* affected defendant's substantial rights. We find no indication that Dixon is actually innocent. Because the courtroom closure has not been demonstrated to have impacted the ability of counsel to examine the witness thoroughly or in any manner "seriously affect[] the fairness, integrity, or public reputation of [the] judicial proceedings," Dixon cannot demonstrate entitlement to a new trial. *Carines*, 460 Mich at 774.

Additionally, Dixon contends that his trial counsel was ineffective for failing to object to the closure of the courtroom to the public. We disagree. Because defendant did not seek a *Ginther*[3] hearing, we review only mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 51; 826 NW2d 136 (2012). As discussed, we perceive no reason why the outcome of the proceedings would have been different had the courtroom not been closed, so we are unable to conclude that counsel's failure to object to that closure could have affected the outcome. Furthermore, given the importance of Sutton's testimony and the fact that the atmosphere in the courtroom was apparently tense—and had already been seriously disrupted the previous day—we are unable to say that it was unsound strategy for counsel to decline to object to the closure. "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012).

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).