STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2007
v	No. 266045 Wayne Circuit Court
MICHAEL ANTHONY ROBBINS, Defendant-Appellant.	LC No. 05-005703-01

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 23 to 50 years for the murder conviction, two to five years for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. Underlying Facts

Defendant lived in a house with his girlfriend, Andrea Jackson, her 18-year-old daughter Natasha Jackson, and his and Andrea's six-year-old daughter. On May 11, 2005, defendant had a verbal altercation with a friend of Natasha's, 19-year-old Tanisha Turner; this altercation apparently led to the shooting of Turner's boyfriend later that same day.

On the morning of May 11, Turner arrived at defendant's house to pick up Natasha, and blew her car horn to get Natasha's attention. Defendant suffered from recurring migraine headaches, and stated that he had previously asked Turner to refrain from honking her car horn in front of the house. When Natasha and Turner returned to defendant's house later that day, defendant and Turner had an argument about the noise of the horn. Turner testified that defendant threatened her and called her a "bitch." Turner responded with derogatory language. When Turner left, she threw a brick through the window of defendant's van. Andrea stated that after throwing the brick, Turner said, "That's why Black shot your ass, and I'll be back to finish it." Andrea explained that about a year before this incident, a person named "Black" shot defendant twice in the leg and in his fingertip at a neighborhood store.

Turner testified that shortly after leaving defendant's house, she called the victim, who was her boyfriend, and told him what had occurred between her and defendant. Shortly thereafter, the victim arrived at defendant's house with an individual known as "Fatman." Natasha testified that she heard the victim at the front door of the house asking defendant and Andrea for her. The victim asked Natasha about the argument, and Natasha told him to go home and they would talk later. At this point, Natasha, defendant, and Andrea were standing next to the top step of the porch.[1] Natasha testified that the victim and Fatman walked off the porch and stood in the driveway. Natasha indicated that the victim lifted his shirt and said, "ask nig**rs about me." The victim also allegedly said that he was going to kill defendant, that defendant "was dead in the streets," and that he would be back. Natasha testified that in response to the victim, defendant said, "[T]his is my house." "I'll be here." Natasha claimed that when the victim lifted his shirt she saw "like a brown handle" of a gun tucked in his waistband. Andrea also claimed that the victim "flashed" a gun when he pulled up his shirt. Both Natasha and Andrea denied seeing defendant with a gun, or having any knowledge of him owning a gun.

According to Natasha and Andrea, the victim then ran up to the porch and threw dirt in their faces, causing them to be temporarily blinded. Natasha and Andrea heard gunshots, but did not see the shooting because of the dirt in their eyes. Natasha ran in the house. Andrea testified that after she got the dirt out of her eyes, she saw the victim come toward the porch, walk or stumble back, and trip over a rock near defendant's van.

Three of defendant's neighbors testified for the prosecution. Lorenzo Colbert, Jr., testified that he heard gunshots, and when he opened the door he saw a young man standing in the street with a partially opened umbrella in his hand, looking hysterically toward defendant's house. That man fled. He also saw defendant walk from his porch toward the street, and heard another series of gunshots. He then saw defendant holding a gun while standing over a person lying in the street, and heard defendant say, "you coming around here with this shit," or "teach you to come around here with this shit." Colbert saw defendant walk back toward his house, and saw a woman take something from him and drive away. Andrea admitted that after the shooting, she took defendant's gun and hid it in a dumpster.

Betty Freeman testified she heard seven or eight shots, and did not see a weapon around the victim. Doraretha McKee testified that after hearing gunshots, she saw a young man standing on the street holding an umbrella, who eventually ran, and another young man lying on the ground near the back of defendant's blue van.[2] She saw defendant walking from his house to the sidewalk, holding a gun, looking down at the ground, shouting, "That's what you get for coming to my motherfucking house."

When the police and emergency medical services arrived, the victim was lying in "a pool of blood" in the middle of the street. The victim had been shot eight times. Of the eight gunshots, three were in the back. There were no weapons around the victim. The police found

[1] Andrea indicated that there were five porch steps.

[2] McKee indicated that there was an unpleasant situation between her and defendant's family. Andrea testified that McKee is the mother of "Black," the person who shot defendant.

six spent shell casings, and one "fired bullet" with blood on it in the area. The bullet and one casing were found on the berm near the street, one casing was found on the porch steps, and four casings were found in or near defendant's driveway. Defendant approached the officers and admitted shooting the victim. Detroit Police Officer Sheryl Spiger testified that Andrea initially told her that defendant did not have a gun, but took the victim's gun and shot him with it. Andrea later admitted that she had hid defendant's gun.

In a statement to the police, defendant stated that shortly after he and Turner argued, the victim came to his house, pounded on his door, and identified himself as Turner's boyfriend. The victim allegedly said that he was there to "see" defendant and "smoke [defendant's] ass." Defendant stated that the victim and his companion walked off the porch, and the victim turned around, looked at defendant, and "made a motion with his arm like he was cocking an invisible rifle." The victim then "ran back onto the porch pulling up his shirt." Defendant stated that he believed that the victim "was grabbing a gun out of his pants, so [he] fired his gun at him." Defendant stated that the victim ran into the street and fell down by his van. Defendant admitted that he did not see the victim with a gun. Defendant explained that the victim "was raising his shirt as he was rushing him" and because he had been shot before, he "knows when a man raises his shirt like that, he usually has a gun." Defendant also stated that the victim "kept yelling he was going to smoke [him]." Defendant stated that he had a .45-caliber automatic weapon for protection. When asked why he fired his weapon, defendant stated that he "felt like [the victim] had a gun on him the way he acted. [The victim] kept saying he was going to kill [him]. All [he] did was protect [himself] and [his] family."

Defendant did not testify, but his next-door neighbor, Stephanie Bear, testified on defendant's behalf. Bear testified that she heard an argument and when she went outside, she saw two men in defendant's driveway. She testified that one man pulled up his shirt and said, "I'm-o get you." She indicated that the man also said, "[T]hat's why I hit you . . . that's why you got shot up [and] I'm going to do the same thing." She indicated that the man ran on the porch, and she heard gunshots shortly thereafter.

II. Ineffective Assistance of Counsel

Defendant first argues that he was denied the effective assistance of counsel at trial. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

A. Prior Shooting

Defendant argues that defense counsel was ineffective for failing to introduce additional evidence at trial and at sentencing concerning the circumstances of his being shot two years earlier by a "younger, bigger man," and for failing to sufficiently argue that the similarity

between the two incidents established that defendant had an honest and reasonable belief that he was in danger.[3]

Decisions about what evidence to present and what questions to ask are matters of trial strategy. *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999). "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id.* Additionally, whether to address the court at sentencing is a tactical decision to be made by defense counsel. *People v Hughes*, 165 Mich App 548, 550; 418 NW2d 913 (1987).

As previously noted, defendant stated to the police that the victim threatened him and "made a motion with his arm like he was cocking an invisible rifle." When the victim "ran back onto the porch pulling up his shirt," defendant believed that the victim "was grabbing a gun out of his pants, so [he] fired his gun at him." Defendant stated that the victim "was raising his shirt as he was rushing him" and because he had been shot before, he "knows when a man raises his shirt like that, he usually has a gun." In his brief on appeal, defendant suggests that the circumstances of this shooting were extremely similar to when he was previously shot.

Contrary to defendant's claim, the two incidents did not involve the "same kind of dynamics" such that defense counsel was ineffective for failing to introduce additional information or argue that the incidents were similar enough to support defendant's self-defense claim. Rather, in a statement to the police concerning the earlier shooting, defendant stated that he had a few words with "Black," and then turned around and walked to his car. When defendant heard five gunshots, he turned around and saw Black pointing a pistol at him. Black then shot him.

The jury was aware that defendant had been shot several times by a young man, and defense counsel reiterated this fact numerous times during closing argument. The sentencing court was likewise aware of the prior shooting as it was also mentioned at sentencing. The theory that defendant reacted as he did to the alleged threat from the victim because he had previously been shot was presented the jury, and the jury nonetheless found defendant guilty of second-degree murder.

We find no reasonable probability that additional information or argument would have changed the result of the proceedings. Nothing in the record suggests that defense counsel's presentation of the argument was unreasonable or prejudicial. Counsel's decision about how to present his argument to the jury was a matter of trial strategy. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's

[3] Self-defense requires that the defendant honestly and reasonably believe that he or another was in imminent danger of death or serious bodily harm, that the action taken appeared at the time to be immediately necessary, that the defendant was not the initial aggressor, and that the defendant did not use any more force than is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

competence with the benefit of hindsight." *Rockey, supra* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

B. Fatman

We reject defendant's claim that defense counsel was ineffective for failing to argue that defendant felt threatened by Fatman, who was carrying an umbrella on a "clear and sunny" day, to support his claim of self-defense.[4] Defendant has not identified any evidence that Fatman threatened him and, in defendant's statement to the police, he did not mention Fatman at all when he explained his decision to fire his weapon multiple times. Also, the witness testimony established that Fatman did nothing. In fact, defendant's own witness testified that Fatman was trying to convince the victim to leave. Because there is simply no evidence to support this theory, defense counsel was not ineffective for failing to argue it. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), lv den 463 Mich 855 (2000) (counsel is not required to advocate a meritless position).

C. Failure to Argue

Defendant also argues that defense counsel "should have argued that the fact that there were entrance wounds in the front of the body shows that [the victim] was heading toward defendant not away from him." But as noted by the trial court when denying defendant's motion for a new trial on this basis, defense counsel did, in fact, argue this matter during closing argument. Although defendant suggests that defense counsel should have discussed this issue more extensively, we will not assess counsel's competence with the benefit of hindsight. *Rockey*, *supra*.

D. Failure to Question Witnesses

Defendant further argues that defense counsel was ineffective for failing to question the evidence technician and the firearms expert about whether the spent shell casings could have rolled from the porch area to their final destinations. In his brief, defendant states that "[a]s the gun is fired, the casing is ejected to the side of the pistol." In support of that statement, defendant cites testimony given by Oakland County Chief Medical Examiner Dr. Ljubisa Jovan Dragovic at a posttrial evidentiary hearing. We note first that Dr. Dragovic is a medical examiner, not a qualified firearms expert. And we add that even if Dr. Dragovic's testimony as to the movement of the shell casings might be credible evidence, it does not support defendant's claim. In the same passage referenced by defendant, Dr. Dragovic went on to state that defendant likely went off the porch, and that "[i]t is possible that [the victim] was making an evasive movement, ducking and running, moving away."

Defendant contends that evidence elicited by further questioning of the evidence technician and the firearms expert regarding the movement of the casings would have rebutted

[4] "Fatman" was ultimately identified as Thomas Jones, who was present in court but "released" as a witness.

the prosecution's theory that defendant left the porch and fired additional shots at the victim. But defendant has not identified anything in the record indicating that these witnesses would have provided testimony that would have been advantageous to the defense.

There is no indication that with additional questioning, these witnesses would have provided testimony supporting defendant's contention that the shell casings rolled from the porch area. But there is evidence suggesting defendant's claim is inaccurate. First, a fired bullet with blood on it was found on the berm near the street. Second, the victim's body was found in the street. And third, Colbert testified that he heard a second series of gunshots after seeing defendant leave his porch. We find no reasonable likelihood exists that the outcome here would have been different but for trial counsel's action. *Effinger*, *supra*. Therefore, defendant cannot establish a claim of ineffective assistance of counsel.

E. The Victim's Clothing

We also reject defendant's claim that defense counsel was ineffective for failing to cross-examine the medical examiner about the failure of the person who performed the autopsy to obtain and examine the victim's clothing for evidence of close-range firing. Defendant contends that evidence of close-range firing would have supported his statement that he shot the victim after the victim ran back to the porch. But defense counsel's failure to question the witness about the clothing did not deny defendant a substantial defense. *Hyland*, *supra*. At trial, three witnesses, Natasha, Andrea, and Bear, testified that after being in the driveway and holding up his shirt, the victim ran back to defendant's porch. Additionally, a spent shell casing was found on the porch steps. Because there was other evidence to show that the victim approached the porch, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger*, *supra*.

F. Expert Testimony

We also reject defendant's claim that defense counsel was ineffective for failing to present the testimony of Oakland County Chief Medical Examiner Dr. Ljubisa Jovan Dragovic, a pathologist, as an expert to testify that the gunshots were fired in "rapid sequence" "measured by seconds."

After defendant filed a motion for a new trial, the trial court held an evidentiary hearing to determine if Dr. Dragovic's opinion would have been admissible under MRE 702.[5] At the

[5] Expert testimony is governed by MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

hearing, Dr. Dragovic testified, inter alia, that in formulating his opinion, he reviewed the autopsy report, photographs, diagrams, the evidence technician's report of the scene and location of the spent shell casings and projectiles, and witness testimony. The trial court ruled that if requested at trial, it would not have allowed Dr. Dragovic's testimony, because he was not qualified to give the proffered opinion. The trial court found that Dr. Dragovic's opinion that the gunshots were all fired in rapid succession in a matter of seconds was based not on his expertise as a pathologist, but on his interpretation of the location of the shell casings. The trial court further found that the testimony was speculative, and that "there really is too great an analytical gap between the data of the evidence in this case and the opinion offered" by Dr. Dragovic. The trial court aptly noted:

> [Dr. Dragovic's testimony] was not calling for medical expertise in terms of determining the case of death or the manner of death, but it went to an analysis of shell casings found at a scene and putting together that witness' testimony which, to some extent, is not the entirety of the shooting incident itself.
>
> And I find that in this particular case Doctor Dragovic engaged in what ultimately was I view an opinion that is analogous to a detective's opinion as to the circumstances under which the shooting took place and where the shooters were in regard to this particular priority.
>
> And with all due respect to Doctor Dragovic, I do think that it is outside the scope of his for purposes of giving an expert's opinion consistent with Michigan Rues of Evidence 702.

Had defense counsel raised this issue in the trial court, the trial court would have properly exercised its discretion in excluding Dr. Dragovic's testimony. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004), reh den 472 Mich 1201, cert den ___ US ___; 126 S Ct 354; 163 L Ed 2d 63 (2005). Because Dr. Dragovic was not qualified to give the proffered opinion, defense counsel was not ineffective for failing to offer the testimony at trial. See *Snider*, *supra*. Defendant is not entitled to a new trial.

III. Right of Confrontation

Defendant argues that he was denied his right of confrontation by the admission of a body diagram made by a nontestifying pathologist, and by the admission of the autopsy or toxicology reports through the testimony of a medical examiner who did not examine the body, or prepare the reports. Defendant contends that this evidence was testimonial and, therefore, its admission violated his right of confrontation under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

At trial, the Chief Medical Examiner for Wayne County, Dr. Carl Schmidt, testified that Dr. Leigh Hlavaty, the assistant medical examiner who examined the body and performed the autopsy, was on vacation at the time of trial. Dr. Schmidt testified that he reviewed the autopsy report and Dr. Hlavaty's findings, and agreed with those findings. Dr. Schmit testified, inter alia, that Dr. Hlavaty determined that the victim died from multiple gunshot wounds, and that the manner of death was homicide. He also testified regarding Dr. Hlavaty's observations concerning the direction and paths of the bullets. He indicated that the results of the toxicology

tests were negative for drugs and alcohol. Dr. Schmidt also testified that Dr. Hlavaty prepared a body diagram, which depicted the location of the eight gunshots sustained by the victim.

Because defendant failed to object to the testimony of the medical examiner or the admission of the reports or the body diagram, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

For purposes of the Sixth Amendment Confrontation Clause, "testimonial hearsay is not admissible against a criminal defendant unless the declarant is unavailable to testify at trial and the defendant had the opportunity to cross-examine the declarant." *People v Lonsby***,** 268 Mich App 375, 377; 707 NW2d 610 (2005), lv den 477 Mich 854 (2006), citing *Crawford, supra* at 68. MRE 803 provides a comprehensive list of those types of evidence not "excluded by the hearsay rule, even though the declarant is available as a witness." In *Lonsby, supra* at 391 n 9, this Court stated that "[t]he Court in *Crawford* observed that business records are not testimonial. *Id.* at 55, 76. (Rehnquist, C.J., concurring, also included public records)."

An autopsy report is a public record or report prepared as part of the statutorily defined duties of a medical examiner. See MCL 52.202(1)(a) (mandating a medical examiner to conduct an autopsy when the deceased's death was unexpected), MCL 52.207 (mandating a medical examiner to conduct an autopsy upon the order of a prosecuting attorney). Therefore, the autopsy and toxicology reports qualify as public records under MRE 803(8).

Denying defendant's post-conviction motion for a new trial on this basis, the trial court opined that the body diagram was also a business record. However, we find it is not so clear that Dr. Hlavaty's body diagram documenting her medical observations depicting the location and paths of the gunshot wounds is as routine a record as an autopsy report.

Police reports that are adversarial to the defendant are not admissible as evidence under MRE 803(8), nor as business records under MRE 803(6), because records prepared in anticipation of litigation lack the inherent trustworthiness of records kept in the ordinary course of business. *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003). In that case, a report prepared by a police officer was deemed adversarial because "[i]t was destined to establish . . . an element of the crime." *Id.* at 413. If the body diagram was a document created in anticipation of litigation and intended to establish an element of the crime charged, then it is not a record kept in the ordinary course of business such that it is admissible under either MRE 803(6), or MRE 803(8). However, we need not reach a conclusion as to admissibility, because even if the body diagram was not properly admitted, there was other admissible evidence presented at trial regarding the location of the victim's gunshot wounds. Consequently, defendant cannot demonstrate that any plain error affected his substantial rights. Therefore, reversal is not warranted on the basis of this issue.

Likewise, even if we found that it was improper for Dr. Schmidt to testify regarding Dr. Hlavaty's findings and autopsy report, the error did not affect defendant's substantial rights. The fact that the victim died from multiple gunshot wounds and that the manner of death was homicide were not disputed issues at trial. Defendant did not dispute that he shot the victim several times, or that he caused the victim's death. Additionally, the absence of drugs or alcohol in the victim's system at the time of his death was not a material issue in the case.

In a related claim, defendant agues that defense counsel was ineffective for failing to object to the admission of the body diagram. In light of our conclusion that defendant was not prejudiced by the admission of the diagram, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger*, *supra*.

IV. Sufficiency of the Evidence

Defendant also argues that there was insufficient evidence to sustain his conviction of second-degree murder because the evidence established that he acted without malice and with justification. We disagree.

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; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), lv den 455 Mich 870 (1997). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

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 Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), lv den 465 Mich 952 (2002) (citation omitted).[6] Once a defendant introduces evidence of self-defense, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. *People v Fortson*, 202 Mich App 13, 19-20; 507 NW2d 763 (1993), lv den 444 Mich 983 (1994).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction, notwithstanding his claim of self-defense. Defendant claimed that the victim "rushed" him on his front porch, and he fired in self-defense. But there was evidence that the victim was not armed with a handgun. In fact, in a statement made to the police, defendant admitted that he did not see the victim with a weapon, but relied on his interpretation of how the victim was acting. Defendant shot the victim eight times with a semiautomatic weapon. Three of the victim's eight gunshot wounds were in the back. There was evidence that the victim's body was not found on or near defendant's porch, but in a "pool of blood" in the street. A spent shell casing and a fired bullet with blood on it were found on a berm near the street. Only one shell casing was found on the porch. A witness testified that after an initial series of gunshots, he observed defendant walking from his porch toward the street, holding a gun. The witness then

[6] "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002), lv den 468 Mich 926 (2003) (citation omitted).

heard an additional series of gunshots. There was also evidence that after the victim was lying on the ground in the street, defendant stood over his body while making hostile comments.

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant acted with malice and without justification. Although defendant asserts that he believed that the victim was going to harm him, there was sufficient evidence from which the jury could infer that defendant did not have an honest and reasonable belief that he was in imminent danger of death or serious bodily harm. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Further, it is well established that this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, *supra* at 514. See also *People v Lemmon,* 456 Mich 625, 642; 576 NW2d 129 (1998) ("absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof.'"). The evidence was sufficient to sustain defendant's conviction of second-degree murder.

V. Inadmissible Evidence

We reject defendant's claim that he is entitled to a new trial because the trial court allowed the prosecutor to introduce a photograph of Natasha holding a handgun for impeachment. Defendant argues that the photograph was irrelevant and prejudicial. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995), reh den 448 Mich 1225 (1995).

During the prosecutor's direct examination of Natasha, the following exchange occurred:

Q. Did you see [defendant] with a gun on that date, May 11th of 2005?

A. No.

Q. Had you ever seen him with a gun in that house?

A. No.

* * *

Q. Did you know whether or not there were ever any guns in that house?

A. No.

Q. You never saw any guns in that house?

A. No.

Over defense counsel's objection, the prosecutor sought to impeach Natasha with a photograph of her holding a gun in the house. In a separate record, outside the presence of the jury, Natasha testified that the photograph depicted her holding a black handgun in the dining room of her house. When asked if the gun belonged to defendant, Natasha stated, "I don't know." "It probably was." She recalled that the photograph was taken on New Year's Eve,

although she could not recall the year it was taken. In response to defense counsel's inquiry, Natasha testified that she did not know if the gun was real or a toy, that she did not recall the photograph being taken, and that she did not know if it was defendant's gun.

In allowing the evidence, the trial court indicated that the evidence was relevant because Natasha indicated that the gun might belong to defendant, contrary to her testimony that she had not seen defendant with a gun and had not seen a gun in the house. The court allowed defense counsel to question Natasha about the circumstances regarding the picture, and noted that the jury could choose what weight to give the photograph.

If properly admissible, the photograph would be relevant to rebut Natasha's testimony that she never saw any guns in the house. However, the issue here is that extrinsic evidence was used to impeach the credibility of the witness. MRE 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness.

"A party is free to contradict the answers that he has elicited from his adversary or his adversary's witness on cross-examination regarding matters germane to the issue. As a general rule, however, a witness may not be contradicted regarding collateral, irrelevant, or immaterial matters." *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

In this case, it was undisputed that defendant owned a gun. In fact, in his statement, defendant admitted that he had a gun for protection. Given that, Natasha's statement that she had never seen a gun in the house was collateral, and could not therefore be impeached with extrinsic evidence.

However, even if the trial court abused its discretion by admitting the photograph, the error was harmless. A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999). The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id*. Despite the challenged evidentiary ruling, when Natasha testified about the photograph before the jury, she denied any specific recollection or knowledge about the gun, its owner, and whether it was real. She also generally denied any

recollection about the photograph. Further, it was undisputed that defendant owned a gun. Excluding the photograph would not have changed the outcome here.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter