STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 1999
v	No. 193139 Jackson Circuit Court
DANIEL LEE WOLFE, Defendant-Appellant.	LC No. 95-073557 FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony-murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.242(2). The convictions arise from the armed robbery and murder of Donald Reynolds, the owner of the Silver Rail Bar in Jackson County, during the early morning hours of September 3-4, 1980. The circuit court vacated the armed robbery conviction on double jeopardy grounds and sentenced defendant to life imprisonment without parole for the first-degree murder conviction and to a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first claims that excessive prearrest delay between the crimes and his arrest for those crimes denied him his due process right to a fair trial. We disagree.

Procedural due process protects an accused from excessive delay between the commission of an offense and his arrest for that offense. US Const Am XIV; Const 1963, art 1, § 17. The threshold test is whether the defendant was prejudiced by the delay. In determining whether dismissal is warranted by the delay, the defendant bears the burden of coming forward with evidence that his right to a fair trial was substantially prejudiced and that the government intentionally delayed the arrest to gain a tactical advantage. *US v Marion,* 404 US 307, 324; 92 S Ct 455; 30 L Ed 2d 468 (1971); *People v Reddish,* 181 Mich App 625, 627; 450 NW2d 16 (1989).

Although fifteen years elapsed between the time of crimes and defendant's arrest for the crimes, defendant has not established that he suffered substantial prejudice as a result of the delay. Defendant's "[v]ague assertions of lost witnesses, faded memories, or misplaced documents are insufficient" to warrant a dismissal on this basis. *US v Crouch*, 84 F3d 1497, 1515 (CA 5, 1996). Although some of the witnesses' memories had faded and at times resulted in inconsistent testimony, defendant was able on cross-examination to point out the inconsistencies and to bring the credibility of their testimony into question.

Even assuming, as the trial court did, that defendant established some prejudice, proof of prejudice is insufficient to warrant a dismissal for excessive delay where the reason for the delay was sufficient to justify the prejudice. *US v Lovasco*, 431 US 783, 790; 97 S Ct 2044; 52 L Ed 2d 752 (1977). Defendant neither argued nor established that the prosecutor intentionally delayed this case to gain a tactical advantage. The record reveals that the prosecutor appropriately delayed prosecuting the case until he was "satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Id.* at 795.

II

Defendant next claims that there was insufficient evidence of malice to support his conviction for first-degree murder or, alternatively, that the jury's verdict was against the great weight of the evidence. We agree with the trial court that the evidence was sufficient to support defendant's conviction for felony-murder and that the verdict was not against the great weight of the evidence. *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980); *People v Turner*, 213 Mich App 558, 566-569; 540 NW2d 728 (1995). A new trial is not warranted because the evidence does not "preponderate heavily" against the jury's verdict. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Moreover, contrary to defendant's assertions, there was no "compromise" verdict rendered here because this case involved a verdict with respect to alternative theories of first-degree murder—premeditated murder and felony murder—rather than a verdict on a lesser included offense. See *People v Vail*, 393 Mich 460; 227 NW2d 535 (1975), overruled in *People v Graves*, 458 Mich 476; 581 NW2d 229 (1998).

III

Defendant further argues, as he did below, that he is entitled to a new trial because "newly discovered" evidence in support of an alibi that would have created reasonable doubt as to himself was not presented by codefendant Derbyshire or, alternatively, that trial counsel was ineffective for failing to investigate and present this alibi evidence for Derbyshire.

To warrant a new trial on the basis of newly discovered evidence, a defendant must show that the evidence itself, not merely its materiality, (1) is newly discovered, (2) is not merely cumulative, (3) probably would cause a different result on retrial, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Barbara*, 400 Mich 352, 362-363; 255 NW2d 171 (1977). Defendant has not met his burden of showing that the evidence is both newly discovered and material. *Id.; People v Van Camp*, 356 Mich 593, 602; 97 NW2d 726 (1959).

First, defendant has not shown that the evidence, i.e., the fact that Labor Day fell within the same week as the offense and the *possibility* that Derbyshire may have worked on the holiday, rather than on the day of the offense, could not have been discovered with reasonable diligence. Second, where there was no conclusive evidence to substantiate Derbyshire's purported alibi, defendant has not established that his codefendant's questionable alibi "probably would cause a different result on retrial" for himself. *Barbara, supra.* Defendant has also not established that counsel's failure to present the questionable alibi deprived him of a substantial defense, i.e., one that might have made a difference in the outcome of the trial, *People v Hyland,* 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996), or that there is a reasonable probability that, but for counsel's failure to present the purported alibi defense, the result of the proceedings would have been different. *Strickland v Washington,* 466 US 668; 104 S Ct 2051; 80 L Ed 674 (1984); *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994); *People v LaVean,* 448 Mich 207, 216; 528 NW2d 721 (1995). Thus, defendant has not established that he was deprived of the effective assistance of counsel in this regard. *Id.*

Defendant has also not shown that counsel's further investigation of other leads and suspects would have revealed any beneficial information, and he has therefore failed to establish that he was prejudiced by the absence of this information. See *People v Mitchell,* 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Caballero,* 184 Mich App 636, 640-641; 459 NW2d 80 (1990).

IV

Defendant asserts that the admission into evidence of testimony regarding a handgun possessed by codefendant Derbyshire violated a motion in limine granted by the trial court excluding the evidence and that the trial court should have granted defendant's motion for a mistrial on this basis. We disagree. The basis of the motion and order in limine were specifically limited to a Derringer, not a handgun with a clip as was the subject of the testimony in question. Defense counsel was aware prior to trial that the witness would testify regarding defendant Derbyshire's possession of a handgun, not a Derringer, following the crimes. If counsel wanted evidence of *any* handgun excluded, counsel could have included this in the motion in limine, but did not do so. The order in limine was not violated, and the evidence was admissible as relevant and more probative than prejudicial. MRE 402 and 403.

V

Defendant claims he was denied a fair trial by improper remarks by the prosecutor during his closing rebuttal argument. We disagree.

Improper prosecutorial remarks are grounds for reversal where they deny the defendant a fair and impartial trial. *People v Bahoda,* 448 Mich 261, 266-267; 531 NW2d 659 (1995). We note that the only remark to which defendant objected was the prosecutor's reference to defendant as "Smilin' Jack." That portion of the issue is preserved for appeal; however, defendant's remaining claims of error are unpreserved because defendant failed to timely and specifically object to the remarks below. Our review of the unpreserved claims is therefore precluded unless the prejudicial effect of the remarks was

so great that it could not have been cured by an appropriate instruction and manifest injustice would result. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

We find that no manifest injustice would result from our failure to review defendant's unpreserved claims of error. The remarks, when read in context, were an appropriate response to defense counsel's arguments and, thus, were not improper. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

We further conclude that the prosecutor's apparent reference to defendant as "Smilin' Jack" does not warrant reversal. Even assuming that the remark was improper, it was isolated and does not warrant reversal because, on defendant's objection, the prosecutor was appropriately admonished by the trial court and the remark did not deprive defendant of a fair trial. As noted by our Supreme Court, "[d]efendant is only entitled to a fair trial, not a perfect one. He received a fair trial." *Bahoda, supra* at 293, n 64.

VI

We decline to review defendant's claim that he was denied a fair trial as a result of witness Randy Coppernoll being permitted to claim the Fifth Amendment privilege without a determination by the trial court that the privilege was valid and as a result of the trial court's refusal to allow defendant to admit evidence that Coppernoll had been a suspect in this case. It was counsel for codefendant Derbyshire, not this defendant, who attempted to call Randy Coppernoll as a witness and who attempted to introduce evidence, through questioning of Detective Boyer, that Coppernoll was a possible suspect in this case. We further note that defendant did not question Coppernoll as to why he was asserting the Fifth Amendment and he also agreed to excuse Coppernoll as a witness. An appellant may not assign error on appeal to something that his own counsel deemed proper at trial or to which he contributed by plan or negligence. *Munson Medical Center v Auto Club Ins Ass'n*, 218 Mich App 375, 388; 554 NW2d 49 (1996). Further, because defendant has made no offer of proof as to what Coppernoll would testify in regard to the instant offense, this Court cannot make any determination of the extent to which his testimony would have been decisive of the outcome of this case. MRE 103. Defendant has waived this claim. *People v Grant*, 445 Mich 535, 553; 530 NW2d 123 (1994).

VII

Defendant next contends that he was unfairly prejudiced by testimony concerning his prior incarceration and by evidence that he was involved in illegal drug usage and was a violent man. We disagree. Because defense counsel in opening argument referenced defendant's prior incarceration, defense counsel opened the door in this regard, and therefore the trial court was within its discretion in allowing evidence related to defendant's incarceration. *Bahoda, supra* at 289. Further, we decline to review defendant's claims of error based on evidence, admitted without objection by defendant, that defendant used marijuana in 1980, that Wade Miller felt threatened by defendant, and that defendant had struck Donna Kilgore. None of these claims of unpreserved, nonconstitutional error are based on the admission of evidence which would have been decisive of the outcome of defendant's trial. *Grant, supra* at 553.

VIII

Defendant next argues that the trial court's refusal to dismiss the jury panel and its refusal to direct the trial spectators that they could not wear Silver Rail Bar shirts denied him a fair trial and an impartial jury. We disagree.

A juror commented during voir dire that she felt defendant was already guilty based on "new evidence" that she read in the newspaper, without specifying what she had read. Upon questioning by the trial court, the juror stated that she would take into consideration only the testimony presented in the courtroom. The court refused defense counsel's motion to remove the juror for cause, but the juror was subsequently removed on a peremptory challenge by defense counsel. The court then cautioned the remaining prospective jurors to put the juror's comments out of their minds and to consider only the evidence presented at trial. The court denied defense counsel's motion to strike the entire jury panel.

A defendant who chooses to be tried by a jury has a right to a fair and impartial jury. *Duncan v Louisiana*, 391 US 145; 88 S Ct 1444; 20 L Ed 2d 491 (1968); *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997). Defendant was not denied this right.

The juror's comments were elicited by defense counsel, her comments were brief and general in nature, and the court issued a curative instruction to the jurors. Jurors are presumed to follow their instructions. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). Moreover, the jury panel was extensively voir dired, both collectively and individually, by the court and by counsel. The jurors who served on the panel declared that they could be fair and impartial and did not have an opinion regarding defendant's guilt. The presumption is that the jurors are honoring their oath and are being truthful. *People v King*, 215 Mich App 301, 303; 544 NW2d 765 (1996). Accordingly, the trial court did not err in refusing to strike the entire jury panel.

We also conclude that the trial court's refusal to direct the trial spectators not to wear Silver Rail Bar shirts did not deprive defendant of a fair trial or amount to a miscarriage of justice. It appears that the court did caution the spectators concerning their behavior, appearance, and contact with the jurors. Moreover, defendant has presented no evidence that any juror actually saw the shirts or was influenced in any manner by them. See generally, *Budzyn*, *supra*, and *King*, *supra* at 304-305.

IX

The trial court did not abuse its discretion in denying defendant's motion for mistrial based on the prosecutor's elicitation from Gary Raab that he would have claimed the Fifth Amendment privilege against testifying if he had not been granted immunity.

As defendant correctly points out, a lawyer may not call a witness knowing that the witness will claim a valid privilege not to testify. *People v Dyer*, 425 Mich 572; 390 NW2d 645 (1986). However, in the instant case, Raab did not invoke the Fifth Amendment privilege. Rather, he stated that he *would* have invoked the privilege but for a grant of immunity. Pursuant to the grant of immunity, Raab testified at trial.

Where an accomplice or co-conspirator has been granted immunity to secure his testimony, that fact may be revealed to the jury during examination of the witness by the prosecutor. See *People v Manning*, 434 Mich 1, 13; 450 NW2d 534 (1990); *People v Atkins*, 397 Mich 163, 173; 243 NW2d 292 (1976). Defendant was not denied a fair trial by the disclosure that Raab obtained immunity in exchange for his testimony. *Id.* Any reference to the witness' possible invocation of the Fifth Amendment privilege was, at most, harmless error.

X

Defendant next asserts that the trial court violated his due process rights by requiring him to appear in leg irons in the presence of the jury where no evidence was presented that he was a threat or posed an escape risk and the trial court made no findings in this regard.

A court may order that a defendant be shackled only on the court's finding that this is necessary to prevent escape, to prevent injury to persons in the courtroom or to maintain an orderly trial. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). In this case, as in *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996), "the record lacks any discussion concerning the basis for defendant's being shackled, there is no indication that the defense objected to the shackling or called upon the trial court to unshackle defendant, and there was no showing of actual prejudice." Accordingly, defendant has failed to establish that he was deprived of a fair trial on this basis, and we decline to decide this issue. *Id.* Because he has not shown prejudice as a result of the leg restraints, defendant has likewise not shown that he was deprived of the effective assistance of counsel for counsel's failure to object to the leg irons. *Pickens, supra*. We agree with the trial court's determination that defendant was not entitled to a new trial on this basis.

XI

Defendant and his codefendant, Gregory Derbyshire, were tried jointly but had separate juries to deliberate and decide their respective guilt or innocence. Defendant claims that he was denied a fair trial and an impartial jury because there was massive media coverage of the verdict in codefendant Derbyshire's case, which was rendered while his own jury was still deliberating, and that his jury could not have helped but been aware that the other jury found Derbyshire guilty of first-degree murder and this knowledge would have influenced their verdict as to him.

We first note that, after the jury in the codefendant's case issued its verdict, defense counsel did not request that the jury in this case be sequestered. In excusing the jury for the evening, the trial court strongly cautioned the jury not to discuss the matter with anyone and to stay away from any publicity surrounding the case. As previously noted, jurors are presumed to follow the trial court's instructions. *Hana, supra*. More importantly, defendant has made no showing that he was denied a fair trial due to extraneous influence on his jury's deliberative process.

To prevail, defendant must show (1) that his jury was exposed to extraneous influences, and (2) that these extraneous influences created a real and substantial possibility that could have affected the jury's verdict. *Budzyn, supra* at 88-89. Defendant has simply failed to show that his jury was aware

of, or was influenced by, either the verdict in the Derbyshire case or by media coverage of these cases. Defendant is not entitled to a new trial on this basis.

XII

Finally, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial on remand from this Court.

There is no merit to defendant's claim that he was denied a fair trial because the prosecutor failed to disclose a taped statement made by Gary Raab on June 21, 1995, which defendant asserts could have been used by the defense to impeach Raab's credibility at trial. In reviewing this claim, we consider whether (1) the suppression was deliberate, (2) the evidence was requested, and (3) the defense could have significantly used the evidence. *People v Miller (After Remand),* 211 Mich App 30, 47; 535 NW2d 518 (1995). There was no evidence that the police or prosecutor deliberately failed or refused to disclose the statement in question. The existence of the taped statement was disclosed in a police report provided to defense counsel prior to trial and was disclosed at the preliminary examination. Further, it is undisputed that the defense did not request the taped statement until after trial, and that when the request was made, the tape was provided to the defense. Finally, defendant has not demonstrated that the defense could have significantly used the evidence to render a "reasonable probability" that the result would have been different had the evidence been given to the defense. See *Kyles v Whitley,* 514 US 419; 115 S Ct 1555; 131 L Ed 2d 490, 505-508 (1995); *Stanaway, supra* at 666; *Barbara, supra* at 362-363. The evidence was not "newly discovered." *Id.*.

Defendant was also not entitled to a new trial based on alleged nondisclosure at trial of Gary Raab's status as an "inmate" at the time of the instant offense. It is undisputed that defendant's trial counsel was aware prior to trial of Raab's status as an inmate in the residential home program. Therefore, the prosecution did not breach any duty of disclosure and the information was not "newly discovered" after trial. *Barbara, supra*. There is no reasonable probability that the result at trial would have been different had Raab's status as an inmate in the resident home program at the time of the offense been disclosed to the jury because his status as such does not mean that he could not have been with defendant and Derbyshire at the time the instant offense was committed. Further, although defendant argues that Raab's inmate status could have been used to further impeach his credibility, which was extensively impeached through the trial, this is generally insufficient to warrant a new trial. See *Lemmon, supra* at 643; *Barbara, supra* at 363.

We decline to address defendant's generalized assertions regarding the failure of the police to adequately investigate this case because defendant presents no particularized arguments in support of these claims. A defendant may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *Goolsby v Detroit,* 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *People v Leonard,* 224 Mich App 569, 588; 569 NW2d 663 (1997).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell