

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KARL D. HARRIS,

Defendant-Appellant.

UNPUBLISHED

August 31, 2001

No. 212870

Wayne Circuit Court

Criminal Division

LC No. 97-003612

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree murder, MCL 750.317, five counts of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced outside the guidelines range to concurrent terms of fifty to seventy-five years, and ten to fifteen years' imprisonment, and to a two-year consecutive term for felony-firearm. We affirm.

This case arises from a shooting on the I-94 expressway in Detroit that resulted in two deaths and several injuries. Richard Ward, who was not charged in the shooting, testified without counsel at the preliminary examination that he was driving the vehicle from which the shots were fired and that defendant was the shooter. At the time of trial, the prosecutor reported that Ward could not be located. After the trial court determined that there had not been due diligence in locating Ward, the prosecution applied for leave to appeal to this Court, which granted leave and a stay of the proceedings. Ward subsequently was located and taken into custody. When called to testify at trial, however, Ward, who was then represented by counsel, asserted his Fifth Amendment rights on the basis that he believed his life was in danger.¹ The trial court found him in contempt, but the next day rescinded the contempt order and ruled that Ward was, in fact, unavailable and that the preliminary examination transcript could be used.

Defendant raises on appeal several claims of prosecutorial misconduct involving Ward's preliminary examination testimony. Prosecutorial misconduct issues are decided case by case.

¹ The trial court clarified that the witness could only assert his Fifth Amendment rights on the basis that he might incriminate himself, not on the basis that he believed he was in danger.

People v Schutte, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers alleged prosecutorial misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

We are not convinced that alleged police statements revealed at the evidentiary hearing, that Ward's girlfriend would be released from custody once Ward gave a statement and that Ward would be released once he testified consistently with that statement, rise to the level of a promise to induce Ward's testimony implicating defendant. Moreover, although Ward testified at the preliminary examination that he was offered no bargain or promises for his statement and testimony, there is no evidence that the prosecutor knew about the alleged police statements or that it failed to correct testimony that it knew to be false. Also, Ward's counsel testified at the evidentiary hearing that she knew of no plea bargain or offer of immunity by the prosecutor at the preliminary examination or at trial. Thus, we are not persuaded by defendant's claim that *People v Wiese*, 425 Mich 448; 389 NW2d 866 (1986), controls in this case.² Further, although the trial court determined that Ward was entitled to the Fifth Amendment privilege because he was not represented by counsel at the preliminary examination, we are not persuaded that the prosecutor "manufactured" Ward's unavailability at trial. Defendant's trial counsel testified at the evidentiary hearing that he did not want Ward to testify against defendant at trial and that he never requested immunity for Ward. Defendant's claim on appeal that he was prejudiced because a significant witness against him was not granted immunity is without merit. Accordingly, we conclude that the prosecutor's actions in this case did not deny defendant a fair and impartial trial.

Nor is defendant entitled to a new trial because of "newly discovered evidence." The evidence, that police allegedly promised to release Ward's girlfriend, and later Ward himself, if Ward made a statement and then testified consistently with that statement, goes to impeaching Ward's credibility. Impeachment evidence is not considered newly discovered evidence for purposes of a new trial. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

Defendant also argues that he did not have a full and fair opportunity to cross examine Ward, because Ward was declared unavailable and his preliminary examination transcript was read into the record at trial. Although Ward had only been incarcerated for one day on the court's contempt order before the court determined that he was unavailable, Ward insisted that he would not testify, and the trial court determined that Ward was not likely to change his mind. We find no error in this regard. See *People v Burgess*, 96 Mich App 390, 401; 292 NW2d 209 (1980). Further, defense counsel clearly had an opportunity and similar motive to develop Ward's testimony through cross examination at the preliminary examination. *People v Adams*, 233 Mich App 652, 657; 592 NW2d 794 (1999). Indeed, the trial court found that defense counsel engaged in a lengthy and very thorough cross-examination of Ward. Also, defendant's claim that certain crucial lines of inquiry were improperly precluded is not supported by the

² In *Wiese*, the witness was given an undisclosed plea bargain agreement but falsely testified at the preliminary examination that no such agreement existed. *Wiese*, *supra* at 450, 455. The Supreme Court found that the prosecution's failure to correct the false testimony "resulted in considerable prejudice to defendant at trial." *Id.* at 455-456.

record. Preliminary examination testimony is a firmly rooted hearsay exception under MRE 804(b)(1) and, without more, the testimony “bears sufficient indicia of reliability.” *People v Meredith*, 459 Mich 62, 71; 586 NW2d 538 (1998). Thus, the Confrontation Clause is satisfied and the testimony was admissible. *Id.*

We find no merit in defendant’s contention that the evidence of identification of defendant in the preliminary examination transcript was insufficient. At trial, the only identification of Karl Harris as the shooter was the preliminary examination transcript indicating that Ward pointed at the person in the courtroom he knew as Karl Harris. While it is true, as defendant argues, that Ward’s physical identification at the preliminary examination was not a direct identification of defendant at trial, we find that the jury could reasonably infer that the “Karl Harris” identified by name at the preliminary exam was, in fact, the “Karl Harris” on trial in this case. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant next contends that the prosecutor made improper remarks and commented on defendant’s failure to testify. Where, as here, the defendant fails to timely and specifically object to alleged instances of prosecutorial misconduct, this Court will only review defendant’s claim for plain error. *Schutte*, *supra* at 720. We are not convinced that the prosecutor’s remarks, that he was representing the People of the State of Michigan and the victims in this case, rise to the level of an appeal to juror sympathy. Nor do we agree that the prosecutor commented on defendant’s failure to testify. The prosecutor’s remark was made in response to the defense argument that many people were present during the events leading up to the shootings and that the prosecutor should have produced corroborating witnesses. We find no plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

Defendant next argues that the trial court erred in failing to sua sponte give an instruction on lack of presence. Again, when a defendant does not object below, a challenge to the jury instructions is reviewed for plain error affecting defendant’s substantive rights. *Carines*, *supra*. Again, we find no plain error. Jury instructions must include all elements of the charged crimes and must not exclude material issues, defenses, and theories if the evidence supports them. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant’s rights. *Id.* Error does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. *Id.* Here, defendant’s “alibi witness” was not able to account for defendant’s presence during the entire evening and the jury was instructed not to convict defendant unless they found that he committed the crimes. We conclude that the jury instructions were adequate.

Defendant next argues that the trial court improperly permitted the jury to see the transcript of Ward’s testimony at the preliminary examination, which was read into the record at trial. Even assuming, *arguendo*, that it was error to provide a copy of the testimony to the jury, any error was harmless because it contained the same testimony that had been read into the record in the jury’s presence. *People v Williams*, 179 Mich App 15, 22; 445 NW2d 170 (1989), *rev’d on other grounds* 434 Mich 894 (1990).

Defendant also argues that the trial court did not adequately protect the jury from taint after two jurors reported overhearing threatening and intimidating comments by people in the hallway. The trial court has the responsibility of ensuring that the “jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict. . . .” MCR 6.414(A). The control of trial proceedings is a matter within the trial judge’s discretion. *People v Henderson*, 47 Mich App 53, 59; 209 NW2d 326 (1973). It is apparent from the record in this case that counsel discussed the matter off the record and agreed that the jurors involved would not deliberate. Because the trial court cautioned the jurors not to discuss the case amongst themselves and detained the people responsible for the threatening behavior, and because the jurors involved were excused before deliberations, we find no abuse of discretion.

Defendant next argues that the trial court erred by failing to read back to the jury the testimony of two witnesses. Because defendant failed to preserve this issue, we review under the plain error rule. *Carines, supra*. Our Supreme Court has held that it is error for a trial court to “completely foreclose the possibility of having any testimony reread.” *People v Henry Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976). Here, the record reveals that when the jury asked for transcripts, the trial court did not foreclose the possibility of having testimony read back, but simply explained some of the realistic restrictions in having transcripts of testimony immediately available. We find no plain error affecting defendant’s substantial rights. *Carines, supra*.

Defendant next contends that counsel was ineffective. In a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made serious errors that prejudiced the defense and deprived defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel’s conduct was reasonable. *Id.* Further, this Court will not assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Here, most of defendant’s claims of ineffective assistance involve issues previously considered and found not to be error. Moreover, each of the claims of error raised by defendant involves questions of trial strategy, on which competent counsel could differ, particularly in hindsight. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Remand for an evidentiary hearing is not necessary and defendant has not established ineffective assistance of counsel.

Defendant next argues that the cumulative effect of the errors alleged on appeal requires reversal. There must be errors of consequence for there to be a cumulative effect necessitating reversal. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). We have found no errors of consequence that prejudiced defendant in this case.

Defendant also contends that his sentences for second-degree murder, which were departures from the guidelines range, are disproportionate. Because the offenses here were committed in March 1997, prior to the January 1, 1999, effective date for the statutory guidelines, MCL 769.34(1) and (2), the judicial guidelines apply in this case. *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). Under the judicial guidelines, sentences are reviewed under the principle of proportionality to determine whether they are proportionate to the seriousness of the

circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The sentencing guidelines range in this case was fifteen to thirty years or life, and defendant was sentenced to concurrent terms of fifty to seventy-five years. The trial court indicated simply “nature and tragedy of the killings and injuries” on the departure form, and when sentencing defendant, expressed dismay at the use of a laser sighting scope in this crime. We note further that defendant’s offense variable score of 165, which included 100 points for multiple victims, is more than three times higher than the “50+” that marks the top of that scoring range. We find defendant’s sentences for the second-degree murder convictions are proportionate to the offenses and the offender. *Milbourn, supra*.

Finally, defendant argues that remand is necessary for an evidentiary hearing on the issues involving the prosecutor’s remarks and the ineffective assistance of counsel claim. As previously noted, the prosecutor’s remarks are apparent on the record and each of defendant’s claims of ineffective assistance involves a legitimate matter of trial strategy. We are not convinced that the trial court abused its discretion in denying defendant’s motion for an evidentiary hearing on these issues, MCR 6.508(B), and do not agree that further proceedings would be helpful.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper