

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GREENE,

Defendant-Appellant.

UNPUBLISHED

September 25, 2001

No. 220095

Wayne Circuit Court

Criminal Division

LC No. 98-013570

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

Defendant was charged with five counts of armed robbery, MCL 750.529, five counts of second-degree criminal sexual conduct, MCL 750.520c(1)(c), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was convicted by a jury of five counts of armed robbery and felony-firearm. He was sentenced to five concurrent terms of twenty to fifty years' imprisonment for the armed robbery convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant first argues that the court erred in refusing to hold an evidentiary hearing to investigate an allegation of juror misconduct. We disagree. The court's decision not to hold an evidentiary hearing is reviewed for an abuse of discretion. *US v Shackelford*, 777 F2d 1141, 1145 (CA 6, 1985). Here, when the matter was first brought to the court's attention at the time of sentencing, the court did not abuse its discretion in refusing to adjourn sentencing, or order an evidentiary hearing at that time, inasmuch as the court properly recognized that the claim was dependent upon information possessed by defendant's mother, who was not then present. Further, we conclude that defendant was not entitled to an evidentiary hearing when the matter was subsequently raised in a post-trial motion that was supported by an affidavit from defendant's mother. Even accepting the allegations in the affidavit as true, relief would not be warranted because the allegations involved misconduct inherent in the verdict, not extraneous or outside errors (i.e. undue influence by outside parties). *People v Riemersma*, 104 Mich App 773, 784-785; 306 NW2d 340 (1981).

II

Next, defendant argues that the prosecutor's misconduct deprived him of a fair trial. We disagree. Questions of misconduct by the prosecutor are decided case by case. On appeal, we examine the pertinent portions of the record and evaluate the prosecutor's remarks in context in order to determine whether defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). However, because defendant failed to object to some of the challenged remarks, we review those remarks for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Viewed in context, we conclude that the remarks in question either were proper remarks based on the evidence and reasonable inferences drawn therefrom, *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996), or that any prejudice arising from the remarks could have been cured by a timely objection upon request. *Schutte, supra*. Accordingly, appellate relief is not warranted.

III

Defendant also argues that he was deprived of a fair trial and his right of confrontation because the prosecutor failed to produce two endorsed witnesses. Because defendant did not object to the failure to produce the witnesses at trial, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*. Here, the record indicates that defendant agreed to waive the witnesses in question. Hence, plain error has not been shown.

IV

Next, defendant argues that he did not receive the effective assistance of counsel. Because there was no hearing held in connection with this issue, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). A defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). In attempting to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id.* at 6, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that counsel was ineffective for not demanding the production of Security Officer John Scott and Officer Paul White. We disagree. The partners of each of these witnesses were called at trial and each provided testimony that was unfavorable to defendant. There is no indication in the record that either of the witnesses who were not called would have

provided any different information favorable to defendant. Thus, defendant has not shown that counsel was ineffective for not demanding the production of the two witnesses.

Defendant also claims that counsel failed to present an effective argument in regard to the exclusion of a prior conviction for impeachment purposes. While counsel erred to the extent that he concluded defendant's prior conviction for unlawfully driving away an automobile was admissible under MRE 609(a)(2), defendant has not shown that he was prejudiced, inasmuch as he never testified at trial and, therefore, the conviction was never introduced. Although defendant claims that he was discouraged from testifying because he did not want the prior conviction revealed to the jury, it is apparent that his defense of misidentification was adequately conveyed to the jury even without his testimony. Given the evidence against him, it is not reasonably likely that his testimony would have made a difference to the outcome.

Defendant further claims that counsel did not effectively cross-examine witness Darnell Devine because counsel failed to point out certain inconsistencies between the witness' preliminary examination testimony and his trial testimony. However, a review of the record reveals that the alleged inconsistencies related only to minor points and, therefore, it is not reasonably likely that the result would have been any different had those minor points been brought out at trial.

Next, defendant claims that counsel failed to effectively advance the misidentification defense. He argues that counsel failed to "file a pretrial motion on the tainted identification at the crime scene," failed to find a cab driver who dropped defendant off at the cabaret, and failed to obtain an expert witness on eyewitness identification. However, defendant fails to explain why his identification was tainted and does not cite any authority supporting his contention that suppression was warranted. Moreover, it is not apparent from the record before this Court that a cab driver existed that might have information favorable to defendant, or that defendant even conveyed this information to his attorney. Finally, the decision to call witnesses is ordinarily a matter of trial strategy, and defendant would only be entitled to relief if counsel's failure to call a witness deprived him of a substantial defense that affected the outcome. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987). Here, each of the victims consistently identified defendant as their attacker. Under these circumstances, defendant has failed to show that he was deprived of a substantial defense.

Defendant further claims that counsel provided inadequate advice pertaining to his right to testify. However, this claim is not supported by the existing record, nor has defendant overcome the presumption that he received the effective assistance of counsel. *People v Randolph*, 242 Mich App 417, 422-423; 619 NW2d 168 (2000). Defendant also requests that we remand for a hearing on his claim that counsel failed to inform him that he had an absolute right to testify at trial. We decline to do so. The case on which defendant relies, *Gonzalez v Elo*, 972 F Supp 417 (ED Mich, 1997), is factually distinguishable and does not support defendant's claim that he is entitled to an evidentiary hearing on this issue.

Last, defendant claims that counsel was ineffective because he failed to object to the jury array. Defendant has a Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community. *People v Smith*, 463 Mich 199, 202-203; 615 NW2d 1 (2000). To establish a prima facie violation of the fair cross-section requirement, a defendant must show that

a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process. *Id.* at 203. However, defendant, who is African-American, provides no basis for concluding that African-Americans were underrepresented in the jury pool, nor does he offer anything suggesting systematic exclusion of African-Americans from the Wayne County jury pool. Therefore, counsel did not err in failing to raise this issue. Counsel was not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

V

Because we have found no errors in regard to any of the above issues, we reject defendant's claim that reversal is warranted due to the cumulative effect of several errors. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

VI

Finally, because the court was aware at sentencing that defendant committed the offenses while on parole and that the sentences were required by law to be served consecutively to the sentences for the paroled offenses, we agree that it was not improper for the court to amend the judgment of sentence to reflect this fact without the necessity of a full resentencing. *People v Miles*, 454 Mich 90, 101; 559 NW2d 299 (1997).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra