STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2001
v	No. 222610 Lenawee Circuit Court
RAMIRO SILVA, Defendant-Appellant.	LC No. 99-008303-FC

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial conviction and sentence for kidnapping, second-degree murder, and possession of a firearm during the commission of a felony, MCL 750.349, MCL 750.317, and MCL 750.227b, respectively. Defendant was sentenced to twenty-five to fifty years for kidnapping, to be served concurrently with the life sentence for second-degree murder, with both sentences to be served consecutive to two years for the felony-firearm conviction. Defendant was accused of assisting in the kidnapping, shooting, and killing of a person who had accompanied him and others to conduct a transaction for the sale of marijuana. We affirm.

Defendant's first issue is that the trial court improperly admitted alleged hearsay testimony. We conclude, however, that the testimony was admissible under MRE 801(d)(2)(A) and (B) and 804(b)(3). Moreover, the testimony was cumulative of other properly admitted evidence, and, therefore, any error is harmless. *People v Crawford*, 187 Mich App 344, 353; 467 NW2d 818 (1991).

The second issue defendant raises on appeal concerns his allegation that the prosecution's rebuttal closing argument impermissibly vouched for the credibility of the codefendant's testimony. Defendant admits that he did not object to the rebuttal argument at trial, allowing us to review this unpreserved constitutional claim only for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A prosecutor may not personally vouch for the credibility of a witness, giving the impression that the prosecutor has some reason to know the witness' testimony is the truth. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A mere reference to a plea agreement containing a promise of truthfulness is not, standing alone, grounds for reversal. *Id*. at 276. The plea bargain reference did not imply that the prosecutor was taking personal responsibility for the codefendant telling the truth. *Id*. Nor did the prosecutor

impermissibly use the prestige of his office to persuade the jury to convict. *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985).

Rather, the prosecutor's rebuttal closing was a likely response to defendant's closing argument immediately precedent, which attacked the codefendant's credibility on the basis of his plea bargain. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Moreover, absent an objection, the judge's instruction that arguments of attorneys are not evidence dispelled any prejudice. *Id*. at 721-722. In this case, the trial judge did give this instruction, as well as one cautioning the jury about the reliability of the codefendant's testimony as it related to his negotiation of a plea bargain. Therefore, only if the defendant's objection and request for a further curative instruction would have been futile in preventing what actually resulted in prejudice, could prejudicial error now be found. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *Schutte*, *supra* at 721-722. No prejudice resulted there. Further, considering the other evidence convicting defendant, it is not shown on this record that this error "resulted in the conviction of an actually innocent defendant or . . . seriously affected the fairness, integrity[,] or public reputation of judicial proceedings independent of the defendant's innocence." *Carines*, *supra* at 763-764 (citations and quotations omitted). Therefore, the prosecution's remarks do not require reversal.

Defendant's third claim of error is moot because the judgment of sentence was corrected before the appeal was filed in this Court. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Turning to the issues raised in defendant's pro per supplemental brief, we are not persuaded that any require reversal. First, defendant argues that there was insufficient evidence to support his convictions. Defendant's argument largely challenges the credibility of the evidence presented at trial. Judging the credibility of the evidence is, of course, the jury's role, not ours. In looking at the evidence in the light most favorable to the prosecutor, *People v Hampton*, 407 Mich 354; 285 NW2d 284 (1979), there was evidence presented at trial which, if believed by the jury, not only put defendant at the scene of the crime, but as an active and willing participant in the kidnap and murder of the victim.

Next, defendant argues that he was denied due process of law when the prosecution solicited testimony in exchange for payment, specifically sentencing leniency and reduction of charges for two of the witnesses against defendant. The statutes cited by defendant are inapplicable, nor does defendant refer us to any authority which has held that offering a witness a plea or sentence bargain in exchange for truthful testimony is improper. Defendant was, of course, free to argue to the jury that the witnesses' testimony was suspect because of the agreements and the jury could give that proper consideration.

Defendant next argues that the testimony of the jailhouse informant regarding statements made by defendant while in jail was improperly admitted in violation of the hearsay rule. However, defendant did not raise an objection at trial. Accordingly, he has waived consideration of this issue. *People v Dowdy*, 211 Mich App 562; 536 NW2d 794 (1995).

We now turn to defendant's argument that the statements made by him to the informant were admitted in violation of his Fifth and Sixth Amendment rights. However, defendant has

failed to preserve this issue for appeal by either objecting to the testimony at trial or by moving to suppress the statement in advance of trial. *Dowdy, supra*. Further, defendant points to no evidence that the informant was, in fact, acting as an agent of the police. Rather, the testimony established that the informant approached the police with the information supplied him by defendant.[1]

Defendant next argues that he was denied the effective assistance of counsel by counsel's failure to interview a potential alibi witness. However, defendant did not raise this issue in the trial court and, accordingly, there is nothing in the record before us that counsel did fail to adequately pursue this potential defense, what testimony the witness would have given, nor why counsel chose not to present this defense. Accordingly, defendant has not met his burden of demonstrating that counsel's performance was deficient and that defendant was prejudiced by that performance. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Finally, defendant argues that the trial court failed to state the reasons for his sentence, that the sentences are disproportionate, and that the trial court made improper racial references. First, the trial court in fact explained the sentence in detail. As for the issue of proportionality, this was a planned, cold-blooded killing in revenge for a drug deal gone bad. The sentence imposed reflects the seriousness of the crime as well as defendant's apparent secondary role in the killing. We are satisfied that it is proportionate to this offense and this offender. Defendant's third point is that the trial court made an improper racial remark. Specifically, the trial court made a comment that defendant may have thought of himself as "a macho man." While the term "macho" certainly has Hispanic roots, its use is no longer limited to Hispanic culture. Accordingly, we are not persuaded that use of the word "macho" by itself reflects any racial prejudice by the sentencing judge.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad

[1] In fact, the transcript page to which defendant refers us for testimony that the informant had received instructions from the police in fact contains no such testimony.