

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFONZO BROWN,

Defendant-Appellant.

UNPUBLISHED

January 18, 2002

No. 227329

Wayne Circuit Court

Criminal Division

LC No. 99-007380

Before: Talbot, P.J., and Smolenski and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty to forty years for the murder conviction and five to ten years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial and an impartial jury because one juror, who was on the panel that deliberated the charges against defendant, acknowledged during voir dire that a close friend, two grandparents, and a young cousin had been murdered, and another juror, who was removed as an alternate after hearing the evidence, stated during voir dire that a parent and sister had been murdered at home by an intruder. To preserve a question regarding jury selection, a party generally must exhaust his peremptory challenges. *People v Jendrzewski*, 455 Mich 495, 515 n 19; 566 NW2d 530 (1997). Here, defense counsel did not move to have these jurors removed, exercised only six of the twelve available peremptory challenges, and expressed satisfaction with the jury. Because the issue is unpreserved, our review is limited to determining whether plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury, US Const, Am VI; Const 1963, art 1, § 20; *People v Clark*, 220 Mich App 240, 245-246; 559 NW2d 78 (1996). "The 'impartial jury' guaranteed by constitutional provisions is one which is of impartial frame of mind at the beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged" *People v De Haven*, 321 Mich 327, 334; 32 NW2d 468 (1948) (citation omitted). A defendant is denied his right to an impartial jury when a juror

removable for cause is allowed to serve on the jury. *People v Daoust*, 228 Mich App 1, 8-9; 577 NW2d 179 (1998).

The dismissal of prospective jurors is governed by MCR 2.511(D). MCR 6.412(A); MCR 6.412(D)(1). If a party shows that a prospective juror comes within one of this court rule's enumerated categories, the trial court must excuse such juror for cause. *People v Legrone*, 205 Mich App 77, 81-82; 517 NW2d 270 (1994). However, ultimately the decision to grant or deny a challenge for cause is within the discretion of the trial court. *Id.* Because defendant was charged with murder, an offense punishable by life imprisonment, he was allowed twelve peremptory challenges. MCR 6.412(E)(1). There is no constitutional right to exercise peremptory challenges, which is granted by statute and court rule; this right exists only until the jury is sworn. *Daoust, supra* at 7. "Jurors are presumptively competent and impartial, and the party alleging the disqualification bears the burden of proving its existence." *People v Johnson*, 245 Mich App 243, 256; 631 NW2d 1 (2001).

In the present case, there is no allegation that the jurors withheld information during voir dire. Both jurors challenged on appeal revealed that family members or close friends had been murder victims. Each asserted the ability to be a fair juror in this case. Defendant has not shown that either juror was biased against him or possessed a state of mind that would prevent the juror from rendering a just verdict, or had formed an opinion of the facts of the case or what the outcome would be. MCR 2.511(D)(3) and (4). Defendant does not assert that any of the other enumerated grounds for a challenge for cause is applicable to either juror. Therefore, defendant has not demonstrated that he was denied his right to an impartial jury because the trial court would not have been required to remove these jurors for cause if requested by either party.

Defendant also argues that he was denied his right to the effective assistance of counsel because his trial attorney failed to exercise all of the allowed peremptory challenges while these two jurors remained on the jury panel. To establish ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness under prevailing norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Effective assistance of counsel is presumed, and a criminal defendant bears a heavy burden of proving counsel was ineffective. *Id.* The defendant must overcome the presumption that defense counsel's actions were a matter of trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Decisions relating to the selection of jurors generally involve matters of trial strategy, and this Court normally declines to evaluate trial strategy with the benefit of hindsight. *Johnson, supra* at 259. Moreover, defendant has made no showing that there is a reasonable probability that the result of his trial would have been different had trial counsel exercised peremptory challenges on these jurors. Although defendant argues on appeal that this was a close case, defendant acknowledged the shooting of two people in a statement to the police. Two eyewitnesses to the shootings also testified at his trial, and the preliminary examination testimony of another eyewitness was read to the jury. The testimony of these witnesses was consistent with defendant's convictions. Defendant's primary defense was that the decedent was intoxicated and prone to instigate fights. This defense may have mitigated defendant's convictions from the charged offenses of first-degree murder and assault with intent to commit murder. However, the evidence overwhelmingly supports defendant's convictions of second-

degree murder and assault with intent to commit great bodily harm. There is no indication that the absence of the two jurors would have resulted in a different verdict and, therefore, the failure of defense counsel to exercise peremptory challenges to remove the jurors did not amount to ineffective assistance of counsel.

Next, defendant argues that he was denied his right to a fair trial by remarks made by the prosecutor during rebuttal closing argument. This Court's review of prosecutorial remarks is generally precluded in the absence of an objection because the trial court was deprived of the opportunity to cure the alleged error. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Because defendant did not object to the prosecutor's comments, we will review his claim only for plain error that affected defendant's substantial rights. *Carines, supra* at 761-762.

Issues alleging prosecutorial misconduct are decided on a case-by-case basis. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). A prosecutor may not personally attack a defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, the prosecutor's remarks are not reviewed in a vacuum but must be read in context. *Id.* at 608. An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to defense counsel's argument. *Id.*

In the present case, the prosecutor was responding to defense counsel's assertion during closing argument that there was no recording, either by video or tape recorder, of defendant's statement to the police, and defendant did not write out the statement in his own handwriting. Defense counsel's remarks invited the jury to discount the statement that defendant gave to the police acknowledging his role in the shootings. The challenged rebuttal remarks of the prosecutor were in response to defense counsel's closing argument. The prosecutor stated that no police recording procedure would have satisfied defense counsel, and the jury could take the statement to the jury room and it was up to the jurors to accept or reject it. These remarks do not constitute plain error affecting defendant's substantial rights. *Carines, supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Affirmed.

/s/ Michael J. Talbot
/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder