

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEROY WARNOCK,

Defendant-Appellant.

UNPUBLISHED

March 1, 2002

No. 227965

Oakland Circuit Court

LC No. 99-168921-FC

Before: Whitbeck, P.J., and Markey and K.F. Kelly, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529, assault with intent to commit murder, MCL 750.83, assault with intent to rob while armed, MCL 750.89, first-degree home invasion, MCL 750.110a(2), and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of nine to fifty years for the conspiracy conviction, 10-1/2 to 50 years each for the assault with intent to commit murder and assault with intent to rob while armed convictions, and five to twenty years for the first-degree home invasion conviction, those sentences to be served consecutive to four concurrent two-year terms for the felony-firearm convictions. He appeals by right. We affirm.

Defendant first argues that the prosecutor and several codefendant witnesses, who testified for the prosecution, deliberately misled the jury with regard to whether the codefendants testified in exchange for lenient charges or sentences. This issue was not preserved with an appropriate objection at trial; therefore, we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no plain error requiring reversal.

Prosecutors have a duty to correct false evidence and may not knowingly use false evidence to obtain a conviction. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001), lv pending, quoting *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998). The duty to correct applies to testimony relating to the facts of the case and to testimony affecting the credibility of witnesses. *Lester, supra* at 277.

[D]ue process is offended where a prosecutor, although not having solicited false testimony from a state witness, allows it to stand uncorrected when it appears. This rule applies even where the false testimony goes only to

credibility. Failure to correct false testimony requires reversal if the false testimony could in any reasonable likelihood have affected the judgment of the jury. [*People v Canter*, 197 Mich App 550, 568; 496 NW2d 336 (1992) (citations omitted).]

Alleged errors must be reviewed to determine whether the prosecutor allowed false testimony to pass uncorrected. See *Lester*, *supra* at 278.

In this case, three codefendant witnesses testified that they did not receive promises of leniency in exchange for their testimony. Defendant speculates that there must have been promises made or bargained for in exchange for the testimony. He accuses the prosecution of eliciting false testimony and allowing this false testimony to stand. The record does not support this argument; it is based only on defendant's speculation. We will not grant defendant a new trial based on speculation that the prosecution allowed false testimony to stand and deliberately misled the jury. In *Herndon*, *supra* at 417-418, a panel of this Court rejected an argument that the prosecutor elicited false testimony where the record did not support that the testimony at issue was false or that the prosecutor knew there was false testimony. We find that the record in this case does not lead to the conclusion that the testimony of the codefendants was false or that the prosecutor deliberately misled the jury with regard to whether promises were made in exchange for the testimony.

Defendant next argues that the prosecutor improperly admitted prior bad-acts evidence in violation of MRE 404(b). This issue is not preserved. Defendant never objected to the evidence in question on the ground that it was inadmissible under MRE 404(b). Although defendant objected to some of the evidence on grounds of relevance, an objection on one ground is insufficient to preserve an appellate attack on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). We review unpreserved issues for plain error. *Carines*, *supra* at 763, 774.

Defendant complains that evidence that he was a drug dealer and was involved in previous drug-related violence was improperly admitted under MRE 404(b). We disagree.

[R]elevant other acts evidence does not violate Rule 404(b) unless it is offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith. Thus, other acts evidence is admissible *whenever* it is relevant on a noncharacter theory. [*People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996) (citation omitted; emphasis in original).]

In this case, the prosecutor's questions were not asked to call defendant's character into question or to obtain a conviction based on the impermissible inference that defendant had a propensity to commit crime and acted in conformity therewith. The jury was already aware of the character of the victim and all of the codefendants because there was no question that all were involved with illegal narcotics. Rather, the prosecutor's reasons for questioning defendant were relevant to rebut defendant's testimony on direct examination. Specifically, the evidence was relevant and probative of the victim's ability to identify defendant and to discredit defendant's claim that he had never met the victim. Further, the evidence called into question defendant's claims that he transported one of the codefendants to the motel party to supply drugs. Finally, the questions about defendant's knowledge of drug-related violence were relevant and probative of

defendant's intent to carry the gun to the crime scene. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). The evidence was not improperly admitted and, therefore, we find no plain error.¹

Defendant next contends that reversal is warranted because the prosecutor improperly elicited an opinion from a police detective that defendant was the shooter. We disagree. In *People v Moreno*, 112 Mich App 631, 635; 317 NW2d 201 (1981), the defense counsel asked an officer about whether witnesses were shown pictures of other suspects or only pictures of the defendant. The officer admitted that he had not shown pictures of other suspects to the witnesses. *Id.* To rehabilitate the investigation on cross-examination, the prosecutor wanted to show that numerous people were interviewed before the defendant was identified as the perpetrator and that the defendant's picture was shown to witnesses only after the officer was satisfied of the defendant's guilt based on other evidence. *Id.* The prosecutor was allowed to ask some questions on the issue and, in fact, elicited that the officer became personally satisfied about the defendant's guilt but nevertheless continued to investigate until he had sufficient information to seek a warrant. *Id.* at 636. This Court held that because the questions were asked in response to the defendant's questions about the investigation and because the questions were not asked in an attempt to persuade the jury to convict the defendant based on the officer's opinion of the defendant's guilt, they did not warrant reversal. *Id.*

It is impermissible for a witness to express his belief in the guilt or innocence of the defendant. It is also impermissible for the prosecutor to express his opinion on defendant's guilt. However, where the prosecution's remarks are made in response to questions or arguments made by defense counsel, no error occurs. [*Id.* at 635 (citations omitted).]

See also *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

In this case, defense counsel called the detective as a witness and attempted to leave the jury with the impression that the information gathered during the investigation pointed to someone other than defendant as the shooter. On cross-examination, the prosecutor attempted to rehabilitate the investigation and the fact that defendant was charged as the shooter. The prosecutor elicited that the *investigation* determined that defendant was the shooter. Some of the information, which led to that conclusion, was thereafter emphasized by the prosecutor on cross-examination. Contrary to defendant's arguments on appeal, the prosecutor did not ask the detective to express his personal beliefs about defendant's guilt. Further, at trial, the prosecutor

¹ We note that even if the evidence were improperly admitted, reversal still would not be required because defendant has failed to demonstrate that the testimony at issue affected the outcome of his case. *Carines, supra* at 763. The evidence was overwhelming that defendant was the shooter. Moreover, even if this Court accepted that the outcome of the case was affected by the admission of the evidence, reversal is not warranted because there has been no showing that defendant was actually innocent or that the error affected the fairness, integrity, or public reputation of the proceedings. *Id.*

did not argue for conviction based on the prestige of his office, his opinions, or the opinions of the detective. Defendant was not denied a fair trial under the circumstances.

Defendant also argues that he was deprived of his constitutional right to a fair and impartial jury because a courtroom spectator made an improper comment to a juror in an attempt to influence the juror. We find no error requiring reversal. A “criminal defendant has a constitutional right to be tried by a fair and impartial jury.” *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). To justify a new trial, “error must appear affirmatively.” *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998). In other words, before a new trial based on juror misconduct is warranted, some showing must be made that the misconduct at issue affirmatively prejudiced the defendant’s right to trial before a fair and impartial jury. *People v Schram*, 378 Mich 145, 159-160; 142 NW2d 662 (1966); *People v Fox (After Remand)*, 232 Mich App 541, 558; 591 NW2d 384 (1998); *Fetterley, supra* at 545. In *Fetterley, supra* at 545, the juror testified that she left her neighbor’s company immediately when her neighbor began to talk about the defendant. The trial court found the juror to be credible and refused to grant the defendant a new trial because there was no showing of prejudice. *Id.* at 545-546. In *Schram, supra* at 159-160, the Court cited to two cases where jurors overheard remarks about the guilt of a defendant and, because prejudice was not shown, reversal was not warranted. Prejudice must be shown. *Id.* at 159. It cannot merely be the subject of speculation. *Id.*

In this case, the juror continued immediately to the jury room after hearing the spectator’s comment. The juror later informed the trial court of the incident and indicated that she could nevertheless be fair and impartial. The juror agreed not to discuss the incident with the other jurors. Under the circumstances, defendant’s claim that he was denied a fair and impartial jury is unsupported by the record. Defendant has failed to show that he was prejudiced.

Finally, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to object to the admission of the other bad-acts testimony, failed to object to the detective’s testimony that defendant was the shooter, and failed to move for the removal of the tainted juror.

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). “Defense counsel is not required to make frivolous or meritless motions,” *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998), or objections, *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

None of defendant’s allegations of ineffective assistance of counsel have merit. Counsel was not ineffective for failing to object to the challenged other bad-acts evidence. As previously discussed, the evidence was properly admissible. Second, counsel was not ineffective for failing to object to the detective’s testimony. The testimony was not improper under the circumstances.

Finally, the record does not support that the juror who heard the spectator's comment about defendant's guilt was tainted. Moreover, counsel's decision relating to the selection of jurors is generally a matter of trial strategy. See *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001), lv pending. Defendant cannot overcome the presumption in this case that counsel's actions in failing to pursue the removal of the juror was a matter of trial strategy. We also note that defendant has failed to demonstrate that, but for counsel's alleged errors, the outcome of his case would have been different. Defendant has therefore failed to sustain his burden of demonstrating that he was deprived of the effective assistance of counsel.

Defendant also requests that we remand this case for a *Ginther*² hearing. The request is not only untimely, but also defendant has failed to make the requisite showing that a remand is necessary. MCR 7.211(C)(1). The request is denied.

We affirm.

/s/ William C. Whitbeck

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).