STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HANANDIS LATHAN,

Defendant-Appellant.

UNPUBLISHED
March 22, 2002

No. 222687
Wayne Circuit Court
Criminal Division
LC No. 98-011305

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

A jury convicted defendant Hanandis Lathan of second-degree murder[1] for the death of Derek Elliott, two counts of assault with intent to commit murder[2] for assaults against Michael Colet and Nancy Harris, and possession of a firearm during the commission of a felony (felony-firearm).[3] The trial court sentenced Lathan to concurrent prison terms of twenty-four to fifty years for murder and ten to twenty-five years for each assault, to be served consecutively to a five-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

At trial, the prosecutor elicited testimony that, in the spring or early summer 1998, Lathan sold crack cocaine one block away from the location where Elliott and two other drug dealers operated. Approximately one month before the crimes at issue, Lathan went to Elliott's drug house for a social visit. After drinking with Elliott and his fellow drug dealers, Lathan seized their nine-millimeter gun, which was on a table. He robbed Elliott and one of the other dealers. The prosecutor's theory was that Lathan perceived Elliott and his cohorts as competition for a limited supply of drug customers, some of whom, like Colet, preferred doing business with Elliott. Under the prosecutor's theory, when the robbery did not scare Elliott away from the area, Lathan killed him to secure his own business.

[1] MCL 750.317.

[2] MCL 750.83.

[3] MCL 750.227b.

Harris testified that on July 6, 1998, she and Colet went to buy crack cocaine from Elliott. According to Harris, when they arrived, they saw Elliott sitting on the porch at a house on Sunset Street. Harris and Colet walked onto the porch and, after a brief conversation, Harris heard a loud noise. At first, she did not realize it was a gunshot. She then heard a second, similar noise and knew what it was. She fell over the porch railing and crawled around the side of the house. As she was crawling, she heard three more shots. While at the side of the house, Harris heard Colet's voice inside and tried to get his attention. Unsuccessful in this attempt, she remained on the ground for what seemed like fifteen or twenty minutes. She then crawled to the front of the house and peeked inside before returning to the front porch where she heard a man talking to Elliott. When she whispered for Elliott and Colet, the man told her that Elliott was hurt. She immediately left. According to Harris, she never saw the shooter.

Colet testified that he had bought crack from Elliott hundreds of times before the shooting. On occasion, he also bought from Lathan. Colet testified that on July 6, 1998, he and Harris went to the house on Sunset Street. Elliott was on the porch and they started talking. When Elliott began turning to the door of the house, shots rang out. Colet testified that the shots sounded like they came from a handgun. He heard two shots before he realized that the shots were directed at them. Colet jumped to the right and "hit the ground." When he pulled his head up to see what was happening, he was shot in the arm. He heard four or five shots total but did not see the shooter.

Colet managed to crawl into the house after Elliott and they crawled upstairs. Colet said that he and Elliott saw Kim Jones, and Elliott asked her to call an ambulance. Within minutes, after not hearing any more action, Elliott went downstairs and Colet followed. Colet said that he barely made it down the stairs because he and Elliott were badly hurt. When the police arrived, Colet heard Elliott say that "Hanandis" was the shooter.

Kim Jones could not be located to testify at trial, despite the prosecutor's due diligence in attempting to locate her. Consequently, Jones' preliminary examination testimony was read into the record. In that testimony, Jones stated that she knew both Elliott and Lathan. On July 6, 1998, at approximately 11:50 p.m., Jones awoke from her sleep because, she believed, she heard gunfire. Jones went into her living room and spoke with Andre Gunn, who also lived at the house. Subsequently, she went upstairs and found Elliott and Colet. Both had been shot. Jones assisted Elliott when he went down the stairs. At first, Elliott was able to talk but, eventually, it became more difficult for him to talk and breathe. Jones heard Elliott tell the police that the shooter was "Hanandis."

Officer Herman Hope testified that he and his partner responded to a radio report about a shooting in the area of Sunset and Davison Avenue. They patrolled the area for three to five minutes before being flagged down by someone who indicated that two people were shot at 13444 Sunset. Officer Hope and his partner notified dispatch and went into the residence. They were inside within ten minutes of receiving the radio call. They found Colet sitting on a stairwell. He informed the officers that he had been shot. Elliott had also been shot but when Officer Hope initially arrived, Elliott was talking and coherent. He was standing and moving in circles. Shortly thereafter, however, Elliott began complaining that he could not breathe and that he wanted an ambulance. Though Elliott lapsed into unconsciousness, Officer Hope first had an opportunity to speak with him, and Elliott indicated that "Hanandis" shot him. Elliott did not give Hanandis' last name to Officer Hope. However, he described Hanandis and indicated that

Hanandis sold drugs from a Justine Street apartment building. According to Officer Hope, Elliott was dead on arrival at the hospital.

The prosecution and defense entered into numerous stipulations at trial. One of the stipulations involved a diagram of where police found items eventually submitted in evidence, including a number of bullets found at the scene: four spent, nine-millimeter cartridge casings, one twelve-gauge fired shot gun shell, and one twelve-gauge live bullet. While the diagram is not part of the lower court record, it apparently showed that the spent shotgun shell was by the side of the house and not in the area where the police found the nine-millimeter casings. The prosecutor argued that the shotgun shell evidence was not related to this case at all. All four of the nine-millimeter casings were determined to have come from the same weapon.

One of Lathan's two alibi witnesses was Mark Elswick, who was in the same cell block as Lathan at the time of trial. Elswick, who had been convicted of armed robbery and was facing other charges, recalled that on July 6, 1998, he went to a "weed" house on Sunset at approximately 11:30 p.m. On his way back from the "weed" house, he saw Elliott standing on the porch with two people. Elswick also saw two men between Elliot's house and an abandoned house; neither of these men was Lathan. One man stepped out from behind the bushes with a shot gun. Elswick never approached the police with the information because he had outstanding warrants for his arrest. On cross-examination, Elswick admitted that he never spoke to or had dealings with Lathan before the shooting and had only seen him around the neighborhood on five or six occasions. After the July 1998 shooting, Elswick next saw Lathan a month before trial when they were housed in the same cell block and talked about the murder. Elswick said that he told Lathan that he saw the incident and knew Lathan was not there.

Lathan's second alibi witness was Dorothy Garrett, his aunt, who testified that Lathan arrived at her house for a family gathering on July 6, 1998, at approximately 1:30 p.m. Garrett said that Lathan was still there the following morning when she left for work at 5:30 a.m. As for the time between his arrival and the next morning, Garrett said that she had stayed awake until about 3:00 a.m. and knew that Lathan left the premises only one time the entire evening, which was around 9:30 p.m., to buy beer and that he was gone for five or ten minutes.

II. Prior Bad Acts Evidence

A. Standard Of Review

Lathan argues that the trial court erred in allowing the prosecution to use evidence at her trial of his previous drug dealing activities and robbery of Elliott. We review a trial court's decision to admit prior bad acts evidence to determine whether the trial court abused its discretion.[4]

[4] *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

B. MRE 404(b)(1)

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of *motive*, opportunity, *intent*, preparation, scheme, plan, or system in doing an act, knowledge, *identity*, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.[5]

In *People v VanderVliet*,[6] the Michigan Supreme Court clarified the test used to determine whether prior bad acts evidence is admissible, stating:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

It is insufficient for the prosecution to merely recite one of the purposes articulated in MRE 404(b).[7] Rather, the prosecution must also demonstrate that the evidence is relevant.[8]

> Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence. . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized.[9]

In this case, the prosecution filed a notice of its intent to use the prior bad acts evidence to establish Lathan's motive and identity. MRE 404(b) itself lists these as proper purposes for prior bad acts evidence.

The next inquiry is whether the evidence was relevant. The prosecution charged Lathan with committing first-degree murder and two counts of assault with intent to commit murder. The prosecution used the evidence of Lathan's drug dealing activities and robbery to demonstrate why he would have killed Elliott, namely intense competition. Though the

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[5] Emphasis added.

[6] *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

[7] *Crawford*, *supra* at 387.

[8] *Id.*

[9] *Id.* (citation omitted).

prosecution did not have to prove Lathan's motive as an essential element of the homicide, and irrespective of the fact that the jury actually convicted Lathan of second-degree murder, this evidence was "generally relevant to show the intent necessary to prove [the charged degree of] murder."[10] Evidence of the robbery also demonstrated that Lathan had possession of, or had access to, a nine-millimeter weapon. This tended to support Elliott's dying declaration that Lathan shot him. It also tied Lathan to the nine-millimeter rounds fired at the house. In sum, the evidence of Lathan's drug dealing and robbery were relevant because they made the essential element of intent and the critical issue of identity more probable than they would have been without the evidence.

Though relevant and admissible for proper purposes, the prior bad acts evidence still had to pass the MRE 403 threshold to be admitted in evidence. The evidence gave the jury a full picture of what occurred in the case. Without this background information, the jury would have been unable to have an adequate picture of the events or accurately assess Lathan's motivation and intent.[11] While Lathan claims that his possession of the nine-millimeter gun and his drug dealing activities could have been presented in a less prejudicial way without reference to the robbery, this argument lacks the merit necessary to conclude that the evidence should have been excluded. Though any evidence the prosecution submits to the jury is likely to cause the defense some prejudice, the evidence in this case was not so unfairly prejudicial that it substantially outweighed its probative value.[12] The prosecutor limited his use of the evidence to give the jury background in the case and to make motive, intent, and identity arguments. The prosecutor did not use the evidence for impermissible character reasons. The jury was also aware that all the witnesses, except the police witnesses, were members of the criminal culture in one way or another. Further, the trial court gave a limiting instruction that, in relevant part, informed the jury it could not use the evidence to show that Lathan was a bad person or that he was a person likely to commit crimes. Thus, the trial court did not abuse its discretion in admitting the evidence.

Within this argument, Lathan also takes issue with the scope of the trial court's limiting instruction. However, he failed to present this issue for appeal.[13] Therefore, we decline to review the alleged instructional error.

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[10] *People v Herndon*, 246 Mich 371, 413; 633 NW2d 376 (2001).

[11] See *People v Scholl*, 453 Mich 730, 741; 556 NW2d 851 (1996).

[12] See *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212, 539 NW2d 504 (1995) ("All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded.") (emphasis in original).

[13] MCR 7.212(C)(5).

III. Elswick's Impeachment

A. Standard Of Review

Lathan argues that he was denied his right to a fair trial because the prosecutor asked defense witness Elswick whether he had been charged with criminal sexual conduct and had previously escaped from prison, which violated MRE 609 and was not relevant to his truthfulness. Because Lathan failed to preserve this issue for appeal by objecting at trial, we review the issue for plain error affecting defendant's substantial rights.[14]

B. MRE 609

By its plain terms, MRE 609 provides limited circumstances under which a party can introduce evidence that a witness was convicted of a crime in order to impeach the witness's credibility. However, "MRE 609 applies only to the use of past convictions . . . ."[15] There was no evidence that Elswick was convicted or even charged with the prison escape. As far as we can tell from the record, the criminal sexual conduct charges were still pending. Because the evidence in question does not involve past convictions, MRE 609 clearly does not apply. Even if this evidence was inadmissible under other rules of evidence, the issue Lathan presents for appeal is limited to whether admitting the evidence violated MRE 609. Thus, it is not necessary to consider this issue.

IV. Prosecutorial Misconduct

A. Standard Of Review

Lathan argues that the prosecutor committed misconduct by improperly impeaching Elswick and by using improperly elicited evidence during closing argument. Because this issue is also unpreserved, we review it for plain error affecting Lathan's substantial rights.[16]

B. Questioning And Closing Arguments

Lathan contends that the prosecutor committed misconduct by asking Elswick about his criminal past and incorporating Elswick's answers in closing arguments. In essence, he claims that the prosecutor's actions denied him a fair trial because the prosecutor knew that Elswick's criminal sexual conduct charges and prison escape were inadmissible under MRE 609 and that he asked the jury to disbelieve Elswick solely because he was a felon. Because Lathan has failed to demonstrate that asking these questions was erroneous, we have no basis to conclude that asking these questions and making related arguments also constituted misconduct meriting reversal. Moreover, he has failed to demonstrate that there was sufficient prejudice flowing from the way the prosecutor used this information that doing so was misconduct. As we have explained previously:

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[14] *People v Carines*, 460 Mich App 750, 763-764; 597 NW2d 130 (1999).

[15] *People v Layher*, 464 Mich App 756, 771; 631 NW2d 281 (2001).

[16] *Carines*, *supra* at 763-764.

> In order to warrant reversal, "it is necessary to show some prejudice or pattern of eliciting inadmissible testimony." Where the defendant was not prejudiced by the . . . questions, reversal is not required. "[T]his Court does not believe a case should be reversed merely because a few technically improper questions are asked. In fact, it is hard to find a trial where every question is exactly proper. In order to require a reversal some prejudice or patterns of eliciting inadmissible testimony must be shown."[17]

In this instance, the prosecutor's questioning was brief and isolated, and the trial court informed the jury that the prosecutor's questions were not evidence. Assuming for the sake of argument that the evidence was inadmissible, we can find no indication in the record that the prosecutor asked these questions hoping to exploit any improper effect. Elswick also denied that he was facing any criminal sexual conduct charges, thereby limiting the effect that this evidence would have had on the jury regardless of the prosecutor's intent in asking these questions.

With respect to Lathan's contention that the prosecutor committed misconduct during closing arguments by calling Elswick a felon, we cannot agree. "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'"[18] A prosecutor is not required to state inferences or conclusions in the blandest terms possible.[19] The evidence supported the prosecutor's argument that Elswick was previously convicted of armed robbery. Critically, Lathan does not argue that this evidence was inadmissible under MRE 609 to impeach Elswick's credibility. In fact, in closing arguments, the prosecutor specifically used this evidence to impeach Elswick's credibility with respect to the alibi he provided for Lathan shortly after becoming his cellmate. This alibi defense was a matter hotly debated at trial and squarely the subject of a credibility contest given the victim's contrary dying declaration. While this was, clearly, a harsh attack on Elswick, it was not an improper tactic because, as a whole, it tended to demonstrate that the alibi Elswick provided for Lathan was fabricated recently, and therefore not believable.[20]

Lathan also points to *Washington v Hofbauer*,[21] to support his argument that the prosecutor committed misconduct by using this impeachment evidence during closing arguments. *Washington*, however, is distinguishable on a number of relevant grounds. Notably, the prosecutor in *Washington* commented extensively on evidence concerning *the defendant* that was plainly inadmissible under MRE 404 – not MRE 609 – during closing arguments, implying that the defendant had acted in conformity with his previously demonstrated propensity to commit bad acts in committing the charged offenses.[22] Setting aside the differences between

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[17] See *People v Watson*, 245 Mich App 572, 587-588; 629 NW2d 411 (2001) (citations omitted).

[18] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted).

[19] *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[20] See *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

[21] *Washington v Hofbauer*, 228 F3d 689 (CA 6, 2000).

[22] *Id*. at 699.

these two separate rules of evidence, the evidence and arguments Lathan now challenges attacked Elswick's character, not his own. The prosecutor in *Washington* also made arguments that the evidence did not support simply to bolster the complainant's credibility.[23] While the prosecutor in this case certainly gained some advantage by discrediting Elswick, the prosecutor did so without misrepresenting the facts in this case, much less to bolster the credibility of any particular prosecution witness. The circumstances in *Washington* simply are not present in this case and, therefore, that case does not require us to reverse here.

Even assuming that the prosecutor's questions and comments amounted to plainly erroneous misconduct, Lathan's entitlement to relief depends on whether this alleged misconduct prejudiced his substantial rights.[24] We cannot attribute such effect to the prosecutor's questions and arguments. Other evidence properly admitted at trial directly contradicted Elswick's testimony. The jury had an obvious choice to believe one version of events over the other. The jury simply found the prosecutor's evidence more believable, even rejecting Garrett's alibi testimony though the prosecutor did not treat it as harshly as the evidence concerning Elswick's background. There was no error requiring reversal.

V. Judicial Misconduct

A. Standard Of Review

Lathan argues that the trial judge committed misconduct when it expressed its "hope" that, unlike Elswick, the other defense witnesses were not "guests of the county," meaning individuals in jail. Because Lathan failed to preserve this issue for appeal by objecting at trial, we review this issue for plain error affecting his substantial rights.[25]

B. Judicial Neutrality

In *People v Cheeks*,[26] this Court explained that a "defendant in a criminal trial is entitled to expect a 'neutral and detached magistrate.'" A trial court judge denies a criminal defendant this right if "the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case."[27] Lathan claims that the trial court did just this, suggesting to the jury that Elswick and other defense witnesses were not credible because they were "guests of the county." We cannot similarly draw that inference from the context in which the trial court used this phrase.

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[23] *Id*. at 700-702.

[24] See *Carines*, *supra* at 763.

[25] *Id*. at 763-764.

[26] *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), quoting *People v Moore*, 161 Mich App 615, 619; 411 NW2d 797 (1987).

[27] *Cheeks*, *supra* at 480.

According to the record, the trial court referred to "guests of the county" twice during a pause between witnesses. In the first instance, the trial court evidently referred to Elswick as a "guest of the county" while instructing court officers where to take him following his testimony. His inmate status was never a secret, and the comment itself was completely unrelated to the substance of his testimony. Consequently, nothing in the comment could have led the members of the jury to believe that the trial court found Elswick incredible and that they should also find him incredible.

The second instance in which the trial court referred to "guests of the county" occurred only a moment later. The trial court explained to the jury that both defense and prosecution witnesses had been sequestered, which is why it was allowing defense counsel an opportunity to check the hallway to determine whether any scheduled defense witnesses had appeared. When defense counsel returned to the courtroom and indicated that the two defense witnesses that were supposed to be at court had not arrived even though they had been told when to appear, the trial court remarked:

> I know you did, ma'am [defense counsel]. But we're not going to – we'll give you some time. We won't – we do realize you couldn't go pick them all up or they couldn't all be guests of the County, I hope. But, anyway, let's say this. Um, why don't we take out [sic] break. It's a little early, but maybe you want some coffee . . . .

Again, viewed in context, the trial court was not commenting on the substance of any testimony or its perception regarding any witness or defense witnesses in general. Rather, the trial court was commenting on the difficulty in getting witnesses to appear at court on time. Neither of these comments disparaged anyone, much less revealed that the trial court was biased or conveyed that bias to the jury.

VI. Ineffective Assistance Of Counsel

A. Standard Of Review

Lathan argues that he was denied the effective assistance of counsel because trial counsel failed to object to: (1) the prosecutor's improper impeachment of Elswick; (2) the prosecutor's closing argument, which emphasized testimony elicited by impeaching Elswick improperly; and (3) the trial court's prejudicial comment. De novo review is appropriate for this issue because it presents a constitutional question[28] and does not require us to defer to the trial court in any respect.[29]

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[28] See *Houstina*, *supra* at 73.

[29] See, generally, *People v Toma*, 462 Mich 281, 303-305; 613 NW2d 694 (2000) (Supreme Court directly examined the evidence on the record).

B. Performance And Prejudice

As this Court has explained:

> 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 defense 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). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also 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), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[30]

Lathan has failed to demonstrate that defense counsel's failure to object to questioning about pending charges against Elswick caused Lathan the prejudice necessary for us to reverse his conviction. In this case, there was ample, admissible evidence to cast serious doubt on Elswick's credibility without considering the prison escape. Further, Elswick denied that criminal sexual conduct charges were pending against him and the jury was instructed that questions were not evidence. More importantly, Elswick was not the only alibi witness that Lathan produced; the jury also rejected Garrett's testimony on behalf of Lathan. Even if the jury disregarded Elswick's testimony because of the prosecutor's improper questioning, it nevertheless had an independent and proper basis to reject the alibi defense as a whole by concluding that Garrett's testimony was not believable. Defense counsel also presented a sound defense attacking the paltry identification evidence the prosecutor provided. Consequently, we see no reasonable probability that the result in this case would have been any different if defense counsel objected to the prosecutor's questions.

Though Lathan's trial counsel should have objected to the prosecutor's arguments concerning this evidence, defense counsel's failure to object to these arguments does not appear to have played any critical role in the jury's decision. The jury heard ample evidence that was properly admitted indicating that Elswick was not credible and that Lathan committed the crime. Thus, we have no basis to conclude that defense counsel's failure to object to these closing arguments had any effect on the outcome in this case.

With respect to counsel's failure to object to the trial court's allegedly improper comment regarding "guests of the county," we have already concluded that the remarks, though perhaps not tactful, did not cross the boundary between proper and improper commentary. Having failed to demonstrate that the comment was improper, it follows that defense counsel was under no obligation to make a meritless objection.[31] Further, had defense counsel objected to the remarks,

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[30] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[31] See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

she would have risked drawing the jury's attention to something it could have easily overlooked. This was not ineffective.

VII. Cumulative Error

In his final argument, Lathan argues that we must reverse his convictions because of cumulative error. Minor errors that do not merit reversal independently may, nevertheless, require granting a criminal defendant's request for relief when the errors cumulatively denied the defendant a fair trial.[32] In this case, the only actual errors brought to our attention were defense counsel's failure to object to the prosecutor's questions and closing arguments designed to impeach Elswick. However, though damaging to Elswick's testimony, we do not think that defense counsel's failure to object in these instances denied Lathan a fair trial, especially when considering that Garrett also provided alibi testimony.

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra

[32] See *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).