

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH OSMONDS RILEY,

Defendant-Appellant.

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UNPUBLISHED

April 16, 2002

No. 224903

Saginaw Circuit Court

LC No. 99-017240-FC

Before: Fitzgerald, P.J., and Bandstra and K.F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, carrying a dangerous weapon with unlawful intent, MCL 750.226, and felony-firearm, MCL 750.227b. Defendant was sentenced to terms of six to ten years' imprisonment for the assault conviction, three to five years' imprisonment for the dangerous weapon conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the trial court's method of jury selection violated MCR 2.511(F), thus entitling him to a new trial. However, our review of the record shows that defense counsel at trial affirmatively waived any argument that the procedure used by the trial court was improper, and thus defendant may not seek appellate review of this issue. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). Defendant argues that trial counsel's waiver of the issue should be excused because it was likely an attempt to avoid alienation of the jurors. This argument, however, is belied by the fact that counsel's waiver occurred before the jury selection process began and before any jurors were chosen.

Defendant next argues that the prosecutor committed misconduct when he observed, during his closing argument, that the jury should ask why defendant had not subpoenaed certain witnesses if he thought they could contradict the prosecutor's case. We review claims of prosecutorial misconduct case by case, to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Defendant argues that the challenged comment shifted the burden of proof regarding defendant's guilt or innocence to defendant. We disagree.

A criminal defendant is presumed innocent until proven guilty. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). Accordingly, the prosecution may not shift its burden of proof that the defendant is guilty beyond a reasonable doubt and obligate the defendant to prove his innocence. *Id.* However, prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Here, the prosecutor was merely commenting on the defense argument that other people who witnessed the shooting were not brought in by the prosecution to testify. The prosecutor clarified during his closing and rebuttal arguments that the burden of proof lay with the prosecution. Moreover, the trial court specifically instructed the jurors that it was their duty to determine the credibility of the witnesses and that the attorneys' statements and arguments should not be considered evidence. The court also instructed that the burden of proof lay with the prosecution and that it was the obligation of the prosecution to prove its case to the jury beyond a reasonable doubt. Under these circumstances, the prosecutor's comments did not constitute misconduct.

Defendant also argues that it was misconduct for the prosecutor to comment on "what kind of person" defendant was and to state that he was an animal and guilty of a "cold, cold killing." Defense counsel, however, did not object to any of these comments by the prosecutor. Thus, to avoid forfeiture of his unpreserved claims of prosecutorial misconduct, defendant must establish that errors occurred, these errors were clear or obvious, and the errors affected the outcome of the trial court proceedings. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000).

Prosecutors may use "hard language" and are not required to couch their arguments in "soft" words calculated to avoid arousing emotion. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Moreover, a prosecutor "need not state [his] argument in the blandest possible terms." *Schutte*, *supra* at 721-722. A review of the trial transcript reveals that these comments by the prosecution were primarily limited to his closing argument. A vigorously argued and otherwise sound trial will not be reversed on the basis of isolated remarks that could have been immediately cured by the trial court with a cautionary instruction had defense counsel timely objected. *Ullah*, *supra* at 679. Although the prosecutor may have imprudently used certain adjectives when referring to defendant, those remarks, if timely objected to at trial, could have been addressed by the trial court immediately thus eliminating any possible prejudice to defendant. Accordingly, we find that no error requiring reversal exists.

Finally, defendant argues that trial counsel was ineffective for failing to object to the jury selection process, to request a lesser included misdemeanor instruction, and to request a mistrial. Because defendant failed to move for a *Ginther*<sup>1</sup> hearing or a new trial based on ineffective assistance of counsel, our review of this claim is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

attendant proceedings were therefore fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Initially, we note that to properly present an issue on appeal, an appellant must argue the merits of the issue he identifies in his statement of the questions presented. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Here, defendant presents no argument in support of his claim that he was entitled to a mistrial. Similarly, defendant advances no argument suggesting why the method of jury selection used by the trial court prejudiced his defense, or in any manner affected the outcome of the trial.<sup>2</sup> Accordingly, these issues are not properly presented for review on appeal.

As to his remaining claim of ineffective assistance, defendant bears the burden of proof, effective assistance of counsel being presumed. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). A lesser included misdemeanor instruction would only have been warranted if a rational view of the evidence could support a verdict of that offense. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987). Defendant argues that the jury might rationally have concluded that the two bullets that struck the victim within inches of his heart and lungs merely bounced off the street pavement and accidentally struck him, rather than being the result of an intentional aiming with malice. We do not conclude that a rational juror could have accepted that view of the evidence, in light of the testimony regarding defendant's chasing the victim down the street and shooting at him up to eleven times. It is certainly not ineffective assistance of counsel to fail to request a misdemeanor instruction that finds no support in the evidence. *Id.*

We affirm.

/s/ E. Thomas Fitzgerald  
/s/ Richard A. Bandstra  
/s/ Kirsten Frank Kelly

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<sup>2</sup> In contrast, defense counsel in *People v Miller*, 411 Mich 321, 326; 307 NW2d 335 (1981), which defendant relies upon, made the "not implausible" argument that the jury process there caused confusion as to the answers given by each of the eighty perspective jurors that were examined during the voir dire process.