

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIN A. COUCH,

Defendant-Appellant.

UNPUBLISHED

May 28, 2002

No. 224827

Wayne Circuit Court

Criminal Division

LC No. 99-003525

Before: Smolenski, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty to thirty years for the second-degree murder conviction and ten to twenty years for the assault conviction, to be served consecutive to a two-year term for the felony firearm conviction. He appeals as of right. We affirm.

I. Prosecutorial Misconduct

Defendant first claims that he was denied a fair trial because of improper comments made by the prosecutor during closing and rebuttal arguments. Generally, we review allegations of prosecutorial misconduct de novo by examining the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, we review unpreserved claims of misconduct for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). No reversible error will be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely requested instruction. *Id.* at 721.

The prosecutor's remarks about Officer Simon's testimony were supported by the evidence and reasonable inferences drawn therefrom. *Bahoda*, *supra*. The prosecutor's statement about a line-up, while perhaps disingenuous, was responsive to defendant's claim that another person was the real shooter. Viewed in context, the statement did not deny defendant a fair trial. Although some of the prosecutor's other remarks were hard and emotional, viewed as a whole and in context with the defense theories and arguments, the remarks were not improper.

Bahoda, supra; *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Further, any prejudice potentially caused by the prosecutor's comments regarding defendant's alternative theories could have been cured by a timely objection and curative instruction. Because defendant did not place such an objection or request such an instruction, the prosecutor's remarks do not merit reversal. *Schutte, supra* at 721. In addition, any prejudice that did arise was sufficiently cured by the court's instruction that the statements of the attorneys are not evidence.

II. Prior Consistent Statements

Defendant next argues that the trial court erroneously permitted the prosecutor to elicit testimony of a prior consistent statement made by Jimmy Morgan to Shenita Pippins, wherein Morgan identified defendant as the shooter.¹

On direct examination, Morgan testified that defendant fired the shots from the back seat of the vehicle that Morgan was driving. Morgan testified that, immediately after the shooting, he drove to Pippins' home. When he arrived, he telephoned his mother and told her that defendant had committed a shooting. Morgan also testified that, after placing that telephone call, he told Pippins that defendant was the shooter. According to Morgan, he left Pippins' house and went to his girlfriend's house. While there, his mother telephoned him and told him that the police were at her house, and that they wanted to talk to him. Morgan testified that he went home to his mother's house, where he told the police officers that defendant was the shooter.² The police took Morgan down to the police station, where he subsequently gave a written statement in which he identified defendant as the shooter.

Darryl Webster, a.k.a. "Baby Dell," testified that he was riding in the back seat of the vehicle, behind Morgan. He testified that he heard the gunshots from somewhere right behind him, but denied that he saw anyone in the vehicle brandish a handgun. Baby Dell testified that, immediately after the shooting, he asked Morgan to drive the vehicle over to the home of Baby Dell's stepmother, Shenita Pippins. He admitted telling Pippins that he was riding in the car when some gunshots went off. Further, he testified that Morgan, Etter, and defendant were all with him when they told Pippins that a shooting had occurred. However, he explicitly denied telling Pippins that defendant was the shooter. He also denied knowing what happened to the car after they arrived at Pippins' house, and denied parking the car in Pippins' garage.

Shenita Pippins testified that Morgan, Etter, Baby Dell, and defendant all arrived at her home together. When the prosecutor asked Pippins whether the boys gave her any information when they arrived at her house, Pippins responded that they wanted to park the car in her garage. Defense counsel objected to that testimony on hearsay grounds. The prosecutor argued that the

¹ Pippins testified that both Morgan and Darryl Webster, a.k.a. "Baby Dell," told her that defendant was the shooter. On appeal, defendant does not challenge Pippins' testimony regarding Baby Dell's statement. Defendant challenges only Pippins' testimony regarding Morgan's statement.

² Detroit police officer Phillip Cook also testified that he talked to both Morgan and Etter on the night of the shooting, and that both boys identified defendant as the shooter.

testimony was properly admissible because it went to impeach Baby Dell's testimony that he did not know what happened to the car and he did not personally park the car in the garage. Defense counsel maintained his objection, arguing that the question should be asked regarding a specific person, if it was intended to elicit impeachment. The prosecutor thereafter elicited from Pippins that all of the boys wanted to park the car in her garage, and that Baby Dell had been the one to actually park it there.

Pippins also testified that she spoke to both Morgan and Baby Dell after they arrived at her house, and they both gave her a specific name regarding who committed the shooting. When the prosecutor asked Pippins what name Baby Dell had given her, defense counsel lodged a hearsay objection. The prosecutor responded that the testimony was properly admissible because it directly impeached Baby Dell's testimony that he did not tell Pippins who had committed the shooting. The court overruled defense counsel's hearsay objection and Pippins testified that Baby Dell told her that defendant committed the shooting.

The prosecutor later recalled Pippins to the stand, in order to ask her whom Morgan had identified as the shooter. At that point, the trial court summarized the earlier testimony and objections thereto. The court stated that defense counsel had not objected to Pippins' testimony regarding what Morgan had told her about the shooter. Rather, the court recalled defense counsel objecting to Pippins' testimony regarding what the boys had said about hiding the car in her garage. The court then stated that it would allow the prosecutor to recall Pippins for the purpose of testifying whom Morgan had identified as the shooter. Defense counsel did not object, stating only that his recollection was the same as that of the trial court. Thereafter, Pippins testified that when Morgan arrived at her home, he told her that defendant had been the shooter.

On appeal, defendant argues that Pippins' testimony regarding Morgan's identification of the shooter was improperly admitted under MRE 801(d)(1)(B). Because defendant did not timely object to the admission of this testimony on this ground, we review the issue only for plain error. *Carines, supra* at 763. The admission of evidence is within the trial court's discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The admission of a prior consistent statement through a third party is appropriate if the requirements of MRE 801(d)(1)(B) are satisfied. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

MRE 801(d)(1)(B) provides that a statement is not hearsay if:

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]

In *Jones, supra* at 707, this Court identified the elements that must be established by a party offering a prior consistent statement:

- (1) the declarant must testify at trial and be subject to cross-examination;
- (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-

court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [Citation omitted.]

Thus, “a consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements.” *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001), quoting *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

On appeal, defendant argues that Pippins’ testimony regarding Morgan’s identification of the shooter was impermissible under MRE 801(d)(1)(B) because Morgan’s statement was made after the motive to fabricate arose. Defendant contends that Morgan, Etter and Baby Dell conspired to lie about the shooter’s identity in an attempt to protect Joseph Winston, whom defendant claimed was the real shooter. However, defense counsel’s questioning of the witnesses at trial did not suggest that Morgan’s alleged motive to fabricate arose until after Morgan and Winston were arrested by police. Under these circumstances, plain error did not occur when the trial court allowed Pippins to testify that Morgan identified defendant as the shooter shortly after the event and before he was arrested.

III. Jury Instructions

Next, defendant argues that the court gave an improper jury instruction on reasonable doubt. Because defendant did not object to the instruction given, this issue is not preserved. Therefore, appellate relief is precluded absent a plain error affecting defendant’s substantial rights. *Carines, supra*. The record indicates that the court instructed the jury in accordance with CJI2d 3.2(3). The court’s instruction did not constitute plain error. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000). Further, defense counsel was not ineffective for failing to object to the court’s instruction. *Id.* at 424-425.

IV. Right to a Fair Trial

Next, defendant argues that he was denied a fair trial because a number of jurors had connections to law enforcement. The record shows that three of the deliberating jurors had some connection to law enforcement officers. One worked with a woman who was married to a police officer, one was a retired police officer, and the third had a brother who was a county sheriff. Because defense counsel did not challenge any of the jurors in question, this issue is not preserved. *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998). Therefore, we limit our review to plain error affecting defendant’s substantial rights. *Carines, supra*.

A mere relationship with a law enforcement officer is not grounds for dismissal for cause. MCR 2.511(D); MCR 6.412(D)(1). Apart from his mere contention that the jurors could not be fair and impartial, defendant has not identified any evidence suggesting that the jurors in fact were biased or could not be fair and impartial. On the contrary, each of the jurors stated that they could remain fair and impartial and could base their verdict on the evidence presented at trial. Therefore, plain error has not been shown.

Defendant also argues that the trial court’s failure to question the jurors concerning their pre-trial knowledge about the case requires reversal. Again, we find no merit to this unpreserved claim. *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1996). Defendant has made no

showing that the case was subject to a level of pretrial publicity requiring voir dire on this issue. *Id.* Thus, plain error has not been shown.

Defendant also argues that he was denied a fair trial because the victim's mother worked in the courthouse where his trial was held. Again, defendant has supplied no legal or factual support for this unpreserved claim. Because there is no indication in the record that any of the jurors knew the victim's mother or knew where she worked, defendant has failed to show that plain error occurred. A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Additionally, nothing in the trial court's statement at sentencing describing defendant as a dangerous person indicates that the court was improperly influenced by the fact that the victim's mother worked at the courthouse. Accordingly, we find no merit to this issue.

V. Ineffective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel. We disagree.

For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" [*People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000) (citations omitted).]

Upon review of the record, defendant has not demonstrated that he was denied the effective assistance of counsel.

Finally, in light of our disposition of the foregoing issues, we reject defendant's claim that the cumulative effect of several errors deprived him of a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Michael R. Smolenski
/s/ Janet T. Neff
/s/ Helene N. White