

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MALCOLM BUTLER,

Defendant-Appellant.

UNPUBLISHED

June 28, 2002

No. 226624

Wayne Circuit Court

LC No. 99-008878

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to consecutive terms of life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

The decedent, Jadeison (Jay) Ladouceur, was killed during a carjacking while he was washing his 1996 Chevy Impala. Several eyewitnesses testified that defendant struggled with Jay for the car and shot Jay in the head. Defendant dragged Jay's body out of the car and drove away in the Impala. Witnesses testified that defendant was Jay's only assailant. There was evidence that defendant had been driving a brown car that was left at the scene of the shooting, and that he took the tires from the Impala to the house of his cousin, Clee Jackson, where they were later recovered by the police. There was also evidence that defendant carried a gun, that he told his cousin that he had shot someone, and that he was seen with blood on his clothing after the shooting.

At trial, after the court received a note indicating that the jury had reached a verdict, defense counsel informed the prosecutor and the trial court that defendant had received a letter from Jackson. According to defense counsel, the envelope indicated that the letter was received at the jail three months earlier but defendant claimed to have only received it the previous night. Counsel claimed that the letter contained information that could have been used to impeach Jackson, as well as information that the prosecution could have used to support its theory. Defendant's post-conviction motion for a new trial on the basis of this letter was denied.

Defendant argues that the trial court erred in failing to give a cautionary instruction on accomplice testimony, CJI2d 5.6, and an instruction that Jackson was an undisputed accomplice,

CJI2d 5.4. Defense counsel stated on the record that he was satisfied that the jury was properly instructed. Because defendant did not object to the jury instructions below, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 766-767; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

The evidence at trial does not support defendant's suggestion that Jackson was the murderer or an accomplice to the murder. Further, even if Jackson could be characterized as an accomplice, the issue of defendant's guilt was not "closely drawn," inasmuch as the trial was not a credibility contest between defendant and Jackson. On the contrary, several eyewitnesses identified defendant as the shooter, independent of Jackson's testimony. Additionally, the question of Jackson's credibility as a witness was clearly presented to the jury. On the record before us, the trial court's failure to sua sponte instruct on accomplice testimony was not plain error affecting defendant's substantial rights.

Defendant also raises the compound claim that counsel was ineffective and that the prosecutor engaged in misconduct. Because this Court denied defendant's request to remand for a *Ginther*¹ hearing, our review is limited to mistakes apparent on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not acting as the "counsel" guaranteed by the Sixth Amendment and that the deficient representation prejudiced the defense such that it deprived defendant of a fair trial. *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

There is no merit to defendant's claim that counsel was ineffective for failing to request the accomplice instructions. As previously discussed, the evidence did not support those instructions. The issue of defendant's guilt was not closely drawn and the question of Jackson's credibility as a witness was clearly presented to the jury. Nor was counsel ineffective for failing to move for suppression of the in-court identifications of defendant. No witness ever identified anyone other than defendant as the perpetrator. The fact that an eyewitness could not identify defendant from a photograph was not a basis for rendering his subsequent in-court identification of defendant inadmissible. *People v Barclay*, 208 Mich App 670, 676; 528 NW2d 842 (1995). Also, considering that defendant was not identified in the photo array, counsel was not ineffective for failing to move for a mistrial when defendant's photo was not admitted. Nor has defendant identified any basis for suppressing the in-court identifications of other eyewitnesses, one of whom knew defendant from the neighborhood. Although one eyewitness stated that she knew that defendant had been arrested for the crime, she testified that she was specifically told that if she did not recognize defendant as the shooter, she should say so when she testified. The witness testified that she was positive that defendant was the man she saw carjack and shoot decedent. We find no error and we are not persuaded of the need to remand for an evidentiary hearing.

Defendant also argues that he was denied a fair trial because the prosecutor misrepresented that one of the eyewitnesses was currently incarcerated on a charge of carrying a

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

concealed weapon (CCW). Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers claims of prosecutorial misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

The record indicates that the prosecutor first told the court that the witness was incarcerated on pending charges involving possession of narcotics and that defense counsel agreed that, as long as the witness was not “receiving any consideration in exchange for his testimony here [he has] no problem with that.” Another prosecutor noted that the pending charge was for carrying a concealed weapon (CCW). In fact, the witness had previously been charged with CCW but was incarcerated at the time of trial on pending charges of delivery of less than fifty grams of narcotics, possession of marijuana, and felony-firearm. The witness later testified that no one asked him what he was charged with and that he was not promised anything in exchange for his testimony. Defendant argues that he would have been able to impeach the witness had he known that the witness was incarcerated on pending narcotics charges, rather than CCW. However, defendant cites no authority in support of his claim that such evidence would have been admissible. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). We are not persuaded that defendant was denied a fair trial on this basis.

Finally, defendant argues that the trial court erred in denying his motion for a new trial because of newly discovered evidence and because the verdict was against the great weight of the evidence. The grant or denial of a motion for a new trial is a matter within the trial court’s discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). A trial court may grant a new trial on the basis of any ground that would support reversal on appeal or because it believes that the verdict has resulted in a miscarriage of justice. *Id.* “A defendant seeking a new trial on the basis of newly discovered evidence must demonstrate that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial.” *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

In light of the several eyewitnesses to the carjacking, we do not agree with defendant’s characterization of Jackson as the prosecution’s “key witness.” Moreover, Jackson’s letter stating that he and his wife lied to police is not new evidence. The question of Jackson’s credibility was already before the jury. Jackson testified that he lied at defendant’s preliminary examination, he recanted parts of his earlier statement to the police, and he said that he went along with his wife’s statement. Jackson also agreed with defense counsel that if he had to choose between helping defendant or avoiding jail for his part in possessing the tires from Jay’s car, he would choose to avoid jail. Jackson’s wife testified that she gave a statement to the police because she knew that she and her husband were in trouble, and that the statement got them out of trouble. Jackson’s wife claimed not to remember giving most of the information contained in the police statement. It is apparent from the context of the letter that Jackson was attempting to apologize to defendant for talking to the police and saying that he would have gladly taken the blame even if defendant were guilty if not for the impact on other people. We are satisfied that the trial court did not abuse its discretion in denying defendant’s motion for a new trial. *Jones, supra*. Also, in light of the many eyewitnesses identifying defendant as the

perpetrator, the verdict was not contrary to the great weight of the evidence. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998).

Affirmed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot