STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 2, 2002
v	No. 227871 Branch Circuit Court
CACIMIRO CABRERA, Defendant-Appellant.	LC No. 99-126951-FC

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to two concurrent terms of life in prison without parole for the murder convictions and to a consecutive two-year term for the felony-firearm conviction. We affirm.

At trial, witnesses testified that defendant argued with the victims, left the scene, and then returned and shot them. Later in the morning of the murders, the Illinois State Police apprehended defendant, wearing only one sandal, near Chicago for suspected drunk driving. Testimony established that the other sandal was found beneath one of the victims. An Illinois jailer testified that defendant told her that he had argued with two people, obtained a rifle from his car without intending to harm anyone, but then became angry and shot the two men, losing a shoe while leaving.

Marco Alejandro Hernandez, a Michigan police officer who spoke Spanish, as did defendant, testified that, after waiving his Fifth Amendment rights, defendant confessed to shooting both victims but claimed that he thought one victim was armed with a knife and that the other was armed with a rifle. Hernandez testified that when the police told defendant that none of the other witnesses had stated that the victims were armed with weapons, defendant acquiesced to the witnesses' version of events. Only part of this statement was tape-recorded because the police claimed that the tape recorder initially did not work and that part of the taped interview was destroyed during playback.

Johnny Lopez, another Spanish-speaking officer, testified that after defendant was brought back to Michigan he again waived his rights and spoke to Lopez. Lopez testified that

defendant initially recanted his Illinois confession. However, Lopez stated that when Lopez told defendant his fingerprints were on the murder weapon,[1] defendant confessed that he had shot the victims to kill them and that the victims were not armed. Lopez testified that he had trouble operating the tape recorder and that the statement was only partially recorded, but that part was transcribed and read to the jury.

Defendant testified and denied committing the crimes. He further testified that one of the victims had told him two days before the murders that someone who looked like defendant was going to try to kill him (the victim).

Defendant first claims that his trial counsel rendered ineffective assistance by failing to move to suppress defendant's Michigan statement to Officer Lopez. Defendant claims that the statement should have been suppressed because it was obtained in violation of his *Miranda*[2] rights.

Under the two-pronged test for establishing ineffective assistance of counsel, defendant must show that counsel's performance was deficient according to prevailing professional norms and that the deficiency was so prejudicial that defendant was deprived of a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). On this latter point, defendant must demonstrate a reasonable probability that but for counsel's unprofessional error or errors, the trial outcome would have been different. *Id.* at 302-303. Moreover, because defendant failed to move in the trial court for an evidentiary hearing regarding ineffective assistance of counsel, our review is limited to mistakes apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

The only testimony regarding whether defendant was advised of his *Miranda* rights and voluntarily, knowingly, and intelligently waived them before making the statement in question came from Lopez, who testified that he advised defendant of his rights in Spanish and that defendant understood his rights and agreed to speak to him.

The advice of rights and defendant's waiver, in English, were also included in the transcript prepared from the audiotaped part of the statement. While defendant ambiguously referred to an attorney during the advice of rights, an ambiguous statement regarding counsel does not require the police to stop their interrogation of a defendant. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). The transcript further indicates that after being advised of his rights, defendant twice indicated that he was willing to speak to the officer. In addition, Lopez twice specifically asked defendant if he wished to speak to him without a lawyer and defendant, in essence, replied that he did and that he would tell "the lawyer" later what he would tell officer Lopez. The transcript also indicates that defendant, who had already waived his *Miranda* rights and given a statement in Illinois, understood his rights. Thus, there is nothing in the record that provides an objective basis to conclude that counsel erred by failing to move to

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[1] The murder weapon, an M-1 .30-caliber carbine, was recovered by the police at the residence of a friend of defendant, but the police had not identified fingerprints from it.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).

suppress defendant's statement to Lopez because of a defective waiver of *Miranda* rights. "[C]ounsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Moreover, it is defendant's burden to overcome the strong presumption that his trial counsel was pursuing sound trial strategy. *Toma*, *supra*, 302-303. Here, good reasons exist to believe that counsel was pursuing sound trial strategy by not objecting to the admission of defendant's statement to Lopez. The part of the statement that was recorded and transcribed generally mirrored defendant's trial testimony. For example, defendant recanted his Illinois statements that he had shot the victims, asserted that he had said things in Illinois that he should not have said, and advanced his trial defense of mistaken identity. While Lopez testified that defendant again confessed after being told that the police had found his fingerprints on the murder weapon, those admissions were not recorded and thus not laid before the jurors on paper.

By not objecting to the admission of defendant's statement, defense counsel was able to reinforce defendant's trial testimony and at the same time cast doubt on the veracity of the police, who twice had difficulty recording defendant's statements. Also, by not objecting defense counsel was able to plant the seed of defendant's mistaken identity defense three times in the minds of the jurors: in the statement defendant gave in Illinois, in the statement defendant gave to Lopez, and during defendant's trial testimony. In short, defendant on appeal has failed to meet his heavy burden of overcoming the presumption that counsel was effectively pursuing sound trial strategy. *Id*.

Moreover, defendant has failed to establish a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Id.* at 302-303. Apart from defendant's statement to Lopez, the evidence of defendant's guilt was overwhelming. Eyewitnesses identified defendant as the shooter of the two victims. Testimony established a motive for the crime in that defendant had argued with the victims earlier in the evening before they were shot. Defendant made admissions to an Illinois jailer that he had become angry and returned with a rifle, ultimately shooting the victims. Physical evidence linked defendant to the crime: in particular, the mate to the one sandal defendant was wearing when arrested was found under the body of one of the victims. Finally, defendant confessed to another police officer, Hernandez, when confronted with witnesses' statements that the victims were not armed.

The record in this case simply does not show that counsel's performance was deficient or that the alleged error affected the outcome of the trial. Accordingly, reversal based on ineffective assistance of counsel is unwarranted.

Defendant's argument that the trial court erred by not *sua sponte* conducting a hearing on the admissibility of the statement is equally without merit. Indeed, nothing in the record "clearly and substantially" raises a question concerning whether defendant's statement was obtained in violation of his constitutional rights. Therefore, the trial court was not required to conduct such a hearing. See *People v Ray*, 431 Mich 260, 271-272; 430 NW2d 626 (1988).

Defendant next argues that the trial court erred by admitting the audiotape and transcript of defendant's statement to Lopez because there was an insufficient foundation to guarantee the accuracy of the tape and transcription. We disagree. Because defendant raised no objection to

the evidence at trial, we review this issue for plain error. *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000). To obtain relief, defendant must show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We discern no clear or obvious error here. Indeed, defendant on appeal points to no inaccuracy in the tape or transcription. Further, the transcribed portion of the statement was generally consistent with defendant's trial testimony, as noted above. Defendant's rights were also protected by the trial court instructing the jury that it must find "defendant actually made the statement as it was given to you" before the statement could be used as evidence. Moreover, and significantly, Lopez testified to recording the statement at issue and agreed that it had not been "altered or changed in any manner since it was originally created." Lopez also testified that the portion of the statement that was actually recorded was accurately transcribed. Therefore, sufficient foundation was laid under MRE 901, and the trial court did not abuse its discretion in admitting the audiotape and the transcript of it in evidence. See *People v Berkey*, 437 Mich 40, 51-52; 467 NW2d 6 (1991), and *People v Hack*, 219 Mich App 299, 308, 316; 556 NW2d 187 (1997). No error occurred, and reversal based on this issue is unwarranted.

Next, defendant argues that the prosecutor committed misconduct requiring reversal by making improper statements in closing arguments. However, defendant did not object to the prosecutor's allegedly improper conduct. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 310 (2000). Accordingly, to warrant relief defendant must yet again show (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights, i.e., that it affected the outcome of the proceedings. *Carines, supra* at 763.

Defendant argues that the prosecutor improperly commented that all people in this country, regardless of their color, sex, shape or language, are entitled to constitutional rights, which the prosecutor claimed to have "meticulously tried to provide to this defendant," even providing an interpreter. This comment was followed by the prosecutor noting that the victims have rights, too – a right to justice. Defendant claims these comments improperly injected race into the trial and appealed to the jury to sympathize with the victims.

A prosecutor may not inject racial or ethnic remarks into a trial, nor appeal to the fears or prejudices of the jury. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). Furthermore, the prosecutor may not appeal to the jury to sympathize with the victim or victims. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Likewise, a prosecutor may not argue it is the civic duty of jurors to convict a defendant. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). These, and similar arguments, are condemned because they encourage jurors to decide cases on issues broader than a defendant's guilt or innocence of the charges. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

In this trial, where the victims and almost all the witnesses, including police officers and defendant, had Hispanic origins, we cannot agree that the prosecutor's comments injected race

into the proceedings. Rather, the prosecutor affirmed that constitutional rights extend to all people in this country regardless of race, gender, ethnicity, and language. The prosecutor's comments did not call on the jury to employ prejudice or fear in reaching its verdict but rather informed the jury that the use of an interpreter was a necessary part of according defendant his constitutional rights. These remarks were not prejudicial to defendant. Nor was the brief comment that the victims had a right to justice. Indeed, this comment was isolated and did not constitute a blatant appeal to the jury's sympathy. See *Watson, supra* at 591. Moreover, the trial judge instructed the jury that it should not base its decision on sympathy or prejudice. See *id.* at 592. Under the circumstances, we discern no clear or obvious error with regard to the prosecutor's comments. Moreover, in light of the overwhelming evidence of defendant's guilt, we do not believe that the comments, *even if* they were erroneous, likely affected the outcome of the case. *Carines, supra* at 763. Accordingly, reversal is unwarranted.

Finally, defendant argues that the cumulative effect of trial errors requires reversal. In order for reversal to be required on the basis of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001); *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000). No such errors or prejudice occurred here.

Affirmed.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens