# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETEILUS GREENE,

Defendant-Appellant.

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UNPUBLISHED
October 15, 2002

No. 232008
Wayne Circuit Court
LC No. 00-000764

Before: O'Connell, P.J., and Griffin and Hoekstra, JJ,

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for the first-degree murder conviction and the mandatory two years' imprisonment for the felony-firearm conviction. We affirm.

In November 1999, the victim, a security guard at a Detroit bar, was shot and killed as he was removing an unruly patron from the bar. Several witnesses identified defendant as the shooter. Defendant claimed he was innocent and presented an alibi defense. A jury convicted defendant of first-degree murder and felony-firearm. Defendant now appeals.

I

On appeal, defendant first claims that the court violated the confrontation clauses of the United States and Michigan Constitutions by preventing him from presenting to the jury evidence that the bar's security supervisor, one of the main prosecution witnesses against him, had not been arrested on an outstanding warrant for a parole violation before trial. Defendant claims that the jury should have heard this information as evidence of witness bias. However, we conclude that the error, if any, in this regard was harmless.

A preserved, nonstructural constitutional issue is subject to harmless error analysis. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). An error which constitutes a structural defect in the constitution of the trial mechanism requires reversal, but nonstructural error does not require reversal if it was harmless beyond a reasonable doubt. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998). A constitutional error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640, n 29; 628 NW2d 540 (2001). The party who

benefited from the error must demonstrate that there is no reasonable possibility that the evidence complained of might have contributed to the conviction. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

"Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001), quoting *United States v Abel*, 469 US 45, 52; 105 S Ct 465; 83 L Ed 2d 450 (1984). The trial court may impose reasonable restrictions on a defendant's cross-examination of a witness who has received an inducement to testify, based on concerns about harassment, prejudice, confusion of the issues, repetition, or marginal relevancy. *People v McIntire*, 232 Mich App 71, 102; 591 NW2d 231 (1998), reversed on other grounds 461 Mich 147 (1999). A claim that the denial of cross-examination has prevented the exploration of a witness' bias is subject to harmless error analysis. *People v Minor*, 213 Mich App 682, 685-686; 541 NW2d 576 (1995) (Opinion by Markman, J.).

First-degree premeditated murder requires that the prosecutor prove beyond a reasonable doubt that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Id.* at 537.

In this case, the supervisor's testimony was not, as defendant contends, the only testimony demonstrating premeditation in the victim's shooting death. A security guard testified that he heard defendant say "flick 'em" several times as he left the bar. A waitress testified that defendant left the bar, returned shortly thereafter with the gun, and shot the victim. The coat check attendant testified that he saw defendant run to his car, grab a gun, run back to the door of the bar just before he heard shots, run back to the car, and drive off. The unruly patron being escorted out the door testified that he saw defendant leave the bar and return a few minutes later with a gun and shoot the victim. The patron further testified that the victim said, "Your boy shot me."

The fact that defendant had left the bar for several minutes before returning with the gun, which he had readily available in his car, indicates that defendant had time to "take a second look" before coming back to the bar and shooting the victim. *Id.* at 537. While the victim, in particular, may not have been his specific target, defendant was obviously targeting the security guards at the bar who had forced him and his friends to leave. Because of the substantial, properly admitted evidence, we conclude that it is clear beyond a reasonable doubt that a rational jury would have found defendant guilty absent the alleged error. *Mass*, *supra*. Therefore, even assuming arguendo that error occurred, it was harmless. *Id.*; *Minor*, *supra*.

II

Defendant next argues numerous instances of prosecutorial misconduct. Because he did not object at trial to the alleged misconduct, appellate review is precluded absent a showing of plain error. *Carines, supra* at 752-753, 764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that the errors occurred, these errors were clear or obvious, and the errors affected the outcome of the proceedings. *People v Wyngaard*, 462 Mich 659, 668; 614 NW2d 143 (2000); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Aldrich, supra* at 110. Prosecutors cannot make statements of fact unsupported by the evidence; however, a prosecutor need not confine argument to the "blandest of all possible terms," but has wide latitude and remains free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Id.* at 112, citing *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989); *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

Here, we have reviewed each of the alleged instances of prosecutorial misconduct and we conclude that either the prosecutor's comments fell within the above parameters of proper conduct or a curative instruction could have alleviated any prejudice to defendant. *Schutte, supra*. Under the circumstances, we are not persuaded plain error occurred that affected the outcome of the proceedings. *Carines, supra*; *Schultz, supra*.

III

Next, defendant alleges ineffective assistance of his trial counsel. Specifically, defendant maintains that defense counsel ineffectively (1) failed to move in limine to exclude a witness' ambiguous statement from evidence; (2) failed to move for the appointment of an investigator to find certain potential witnesses; (3) failed to move for an instruction stating that the prosecution's failure to produce evidence within its exclusive control entitled the jury to infer that if produced, such evidence would have been favorable to defendant; (4) failed to properly argue the issue of a witness' possible bias; (5) failed to adequately argue or comprehensively set forth legal authority supporting defendant's motion to suppress identification; and (6) failed to object to alleged prosecutorial misconduct. Because defendant failed to raise this issue in a request for a new trial or a *Ginther*[1] hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

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

> To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), appeal granted in part on other grounds, ___ Mich ___; 650 NW2d 658 (2002).]

Having reviewed the available record, we conclude that defendant's claims of ineffective assistance of counsel primarily involve matters of trial strategy. This Court will not second-guess counsel regarding matters of trial strategy and, "even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). With regard to defendant's claim that his counsel ineffectively failed to move for the appointment of an investigator to find other witnesses, defendant acknowledges that he does not have information as to what the absent witnesses would have testified to. Thus, defendant's argument, that the sheer number of potential but uncalled witnesses (as purportedly indicated in discovery materials) demonstrates a reasonable likelihood that the outcome of the trial would have been altered, is unsubstantiated. Moreover, as previously noted, the issue of witness bias was not outcome determinative. Therefore, defendant's correlative argument that trial counsel was ineffective in failing to adequately pursue this issue is without merit.

Likewise, defendant's claim of ineffective assistance based on his counsel's failure to object to prosecutorial misconduct also fails, in light of our conclusion, see text, *supra*, that the alleged misconduct does not warrant reversal of defendant's conviction. A trial attorney need not register a meritless objection to act effectively. *Snider*, *supra* at 425. Finally, the record indicates that trial counsel argued competently, albeit unsuccessfully, the motion to suppress identification testimony. In sum, defendant has not affirmatively demonstrated that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001); *Watkins*, *supra* at 14.

IV

Lastly, defendant contends that the trial court abused its discretion in denying defendant an evidentiary hearing on his motion to suppress identification testimony. Trial counsel unsuccessfully moved before trial to suppress identification testimony, contending that witnesses were improperly influenced by an unduly suggestive identification procedure that involved showing the witnesses one photograph at the crime scene and, later, a suggestive confrontation during the preliminary examination. However,

> [w]hile . . . certain cases will require a hearing to determine the constitutional validity of identification procedures, we do not agree that all cases require the

> court to conduct such a hearing. Rather, where it is apparent to the court that the challenges are insufficient to raise a constitutional infirmity, or where the defendant fails to substantiate the allegations of infirmity with factual support, no hearing is required. [*People v Johnson*, 202 Mich App 281, 285; 508 NW2d 509 (1993).

In the instant case, as in *Johnson, supra*, defendant has failed to reinforce the allegation of impropriety with factual support. Moreover, it is clear from the record that such a hearing would be futile in light of substantial evidence that there exists an independent basis for the witnesses' identification. *Id*. at 285, 287. Defendant's argument in this regard is without merit and remand is therefore not necessitated by this allegation of error or, for that matter, by the other allegations of error set forth above.

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Peter J. Hoekstra