

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICHOLAS V. HUDSON,

Defendant-Appellant.

UNPUBLISHED

November 26, 2002

No. 228030

Wayne Circuit Court

LC No. 99-012250

Before: Murray, P.J., and Cavanagh and Bandstra, JJ.

PER CURIAM.

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

I.

Defendant argues that he is entitled to a new trial because trial counsel was ineffective in several respects. To establish ineffective assistance of counsel, a defendant must show (1) that the counsel's performance was objectively unreasonable in light of prevailing professional norms, and (2) that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was so prejudicial that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). A defendant claiming ineffective assistance of counsel must also overcome the strong presumption that the counsel was exercising sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). This Court will not second-guess counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

A.

Defendant first argues that trial counsel erred by failing to obtain, in advance of trial, a copy of the prosecution's expert witness report on gunshot residue tests. This claim is predicated

on the assumptions that the gunshot residue evidence was highly damaging to defendant, and that defense counsel missed opportunities to counter and minimize the evidence. Neither of these assumptions is supported by the record.

The gunshot residue test evidence was not highly incriminating. The prosecution's expert admitted that he found only small amounts of residue on defendant and defendant's girlfriend, Kiahrenishe Ransburg, and that the amount he found on Mark Hudson was so small that it could not be conclusively attributed to gunfire. He also admitted that the presence of residue on a person does not necessarily mean that the person fired a gun. Rather, he testified that it is possible to pick up the residue by touching a person who fired a gun or by touching an object that came in contact with a person who fired a gun. He also admitted that the absence of gunshot residue does not necessarily mean that a person did not fire a gun, because most of the residue sheds off the hand within two hours, or earlier if the person rubs or washes his hand.

A review of the trial record reveals that defense counsel was able to effectively cross-examine the expert despite having received the report only a few hours before he testified.¹ It is apparent that defense counsel clearly understood the most important points of this evidence, and that he was able to elicit testimony that gunshot residue is not a reliable indicator of guilt.

Defendant did not establish at the *Ginther*² hearing that defense counsel's delay in obtaining the report caused him to miss opportunities to discredit the gunshot residue evidence. During the *Ginther* hearing, defendant's expert was able to expand upon defendant's theory that gunshot residue is unreliable evidence because innocent persons can pick up the residue and guilty persons can get rid of it before testing. However, these points were already brought out at trial. Furthermore, defendant's theories that defendant picked up the residue from handcuffs or the seat of a police car, or that another person killed the victim using ammunition that does not leave residue, are purely speculative and would not have added substantially to defendant's trial defense. Accordingly, though defense counsel was dilatory in obtaining the report, defendant was not prejudiced by such error.

B.

Defendant claims that trial counsel erred in failing to obtain Jimmie Blue's criminal record before trial, which deprived him of an opportunity to impeach Blue's highly incriminating testimony. We disagree.

Defendant's argument greatly exaggerates the potential impeachment value of Blue's criminal record. At most, defense counsel could have questioned Blue about the prior arrests and the conviction on cross-examination, but he could not have introduced extrinsic evidence. See MRE 608(b). Moreover, considered in context, it is not apparent that Blue's statement that he

¹ Indeed, as the trial court correctly noted, although the expert report is lengthy, "the vast majority are graphs. Furthermore, gunshot residue is not a complicated or difficult concept which requires lengthy study and analysis. It is really quite straightforward." May 23, 2001 Opinion and Order Denying Defendant's Motion for a New Trial, p.7.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

had never been in trouble before amounted to perjury. Blue made the statement (which he was unable to complete) while defense counsel was questioning him about the advice of rights form he signed. Defense counsel was suggesting that Blue falsely incriminated defendant (or persuaded Janet Inge to falsely incriminate him) because Blue himself was the killer. Blue's statement that he had never been in trouble seems intended as an explanation for why Blue did not realize that he was considered a suspect in the shooting even after the police held him for seven days. The statement could have meant that he had never been in trouble for anything as serious as murder. Defendant's claim that the jury would have found Blue's testimony completely incredible if they had known about his criminal past is too tenuous to establish that defense counsel committed a serious error, or that the error prejudiced defendant at trial.

Furthermore, defense counsel adequately cross-examined Blue by eliciting testimony to suggest that the police coerced Blue into blaming defendant. Although defendant argues that counsel could have pursued both of these means of impeaching Blue, we cannot say that it was not sound trial strategy to pursue only the coercion theory and avoid distracting the jury with the collateral matter of Blue's criminal past.

Defendant also argues that counsel should have used Blue's past arrest for assault with intent to commit great bodily harm against Inge in order to show that Blue was controlling Inge's testimony. However, defense counsel did suggest to the jury that one member of this couple was the killer, and that the other member was lying to protect the killer. It is purely speculative to argue that the jury might have been convinced by this theory if it had known that Blue was once arrested for assaulting Inge, five years earlier. Accordingly, defendant has not shown that counsel acted unreasonably in his approach to handling Blue's testimony, nor has he shown that a different approach would have led to a different result.

C.

Defendant contends that trial counsel erred in failing to use his peremptory challenges to remove a juror who expressed skepticism about alibi defenses, another juror who admitted feeling "bitter" toward drug dealers, and a juror whose family members had been raped and murdered. This Court generally regards an attorney's decisions involving juror selection to be a matter of strategy that should not be evaluated with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Furthermore, this Court presumes that jurors are competent and impartial, and that a juror's promise to set aside biases is sufficient to protect a defendant's right to a fair trial. *Id.* at 256.

Here, defendant has not demonstrated that counsel made any jury selection errors that invoke an exception to these general principles. The jurors in question each stated that they could and would decide the case on the evidence presented. The juror whose relatives had been murdered stated that he did not blame defendant for these crimes. The juror who was skeptical about alibi defenses simply admitted, as a matter of common sense, that a defendant's friends and family might try to protect him. She did not indicate that she believed all alibi defenses were incredible. Defense counsel testified at the *Ginther* hearing that he did not excuse the juror who felt bitter about drug dealers because he believed that jurors who are willing to admit their prejudices can still be fair. Defendant has failed to overcome the presumption that it was sound strategy to infer that a juror who is conscientious enough to admit her prejudices will also be conscientious enough to decide the case based on the evidence.

D.

Defendant claims that trial counsel admitted during jury voir dire that defendant was guilty. We have reviewed the colloquy in question and find that it does not support defendant's claim. Defense counsel made the "everybody else in the courtroom is innocent" comment in the context of explaining the concept of the presumption of innocence. The comment cannot reasonably be construed as an admission that defendant was guilty.

E.

Defendant claims that trial counsel erred in failing to object when the prosecutor stated, in opening statement, that defendant ran a drug house, and in failing to object to questions about the house being used to sell drugs. This argument assumes that the questions and statements were improper, but defendant does not explain why they were inadmissible. Evidence that defendant ran a drug house was not irrelevant in this case. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401, 402; *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Evidence that defendant ran a drug house on Stout Street was highly relevant to the question of defendant's motive, given the prosecution's theory that defendant killed the victim because he was a rival drug dealer trying to enter defendant's territory. Indeed, the evidence was also relevant to defendant's defense. Defendant suggested that Blue or Inge killed the victim and blamed defendant after Inge involved the couple in the drug rivalry between defendant and the victim. Furthermore, the prosecutor's questions to Mark Hudson about the execution of a search warrant at the Stout house were not hearsay because the questions were based on Hudson's personal knowledge. See MRE 801(d). Because these questions were not improper, defense counsel was not ineffective in failing to object.

F.

Defendant maintains that trial counsel should have requested that the trial court give the jury an instruction on the proper and limited consideration it could give to Ransburg's statements about the Dacosta shooting. We agree that it was error not to request the instruction, but the error did not deprive defendant of a fair trial. The sole permissible use of the evidence was to impeach Ransburg with a prior inconsistent statement. The evidence was potentially prejudicial, because it cast defendant as a violent person who shot at a man who damaged his car. Defense counsel should have sought to minimize the prejudice with a limiting instruction.

However, we cannot conclude that defendant was prejudiced by the error. The trial court instructed the jury that "certain witnesses made earlier statements that did not agree with their testimony during trial" and advised the jury that it "must not consider them when you decide whether the elements of the crime have been proven" but only to "help you decide whether you think the witness is truthful." This instruction was sufficient to alert the jury that Ransburg's prior statements about the Dacosta shooting could not be used when considering whether defendant shot the victim.

G.

Defendant's remaining claims of ineffective assistance of counsel are also without merit. Defense was not prejudiced by counsel's failure to enforce Damia Genia's subpoena as such alibi testimony was cumulative and ultimately rejected by the jury. Counsel also did not err in failing to produce a photograph to clarify Mary Wilson's confusion when she indicated that defendant and "Red" were the same person. It was clear from the other evidence that Wilson was mistaken. In any event, she did not implicate either defendant or "Red" in the shooting.

In sum, defendant has failed to establish that he was denied the effective assistance of counsel. With the possible exception of counsel's failure to request a limiting instruction regarding the Dacosta shooting, defendant did not show that counsel committed an error so serious that he was not acting as the counsel guaranteed by the constitution. *Carbin, supra*; *Harmon, supra*. Defendant did not show that any of the errors were so prejudicial, that but for counsel's errors, the result of the proceedings would have been different. *Id.* Accordingly, defendant is not entitled to relief on this issue, and the trial court did not err in denying his motion for a new trial.

II.

Defendant contends that the prosecution's failure to disclose Blue's criminal record was both a violation of the trial court's discovery order and a violation of his constitutional right to exculpatory evidence pursuant to *Brady v Maryland* 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Because defendant failed to preserve this issue by raising it before the trial court, we review it for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must show that an error occurred, the error was plain, "i.e., clear or obvious" and that the error affected his substantial rights. *Id.* The third requirement requires a showing that the error affected the outcome of the lower court proceedings. *Id.* Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness of the proceedings. *Id.*

Because defendant did not raise this issue before the trial court, we are unable to determine what discovery materials the prosecution did or did not supply before trial. Thus, it is not apparent that a plain error was committed, or that any error prejudiced defendant.

Furthermore, failure to supply Blue's criminal record did not constitute a *Brady* violation. This Court held in *People v Banks*, 249 Mich App 247; 642 NW2d 351 (2002), that even the most generous reading of the "favorable evidence" standard would not require the prosecution to disclose evidence whose utility lay only in helping a defendant contour a portion of his cross-examination of a key state witness. *Id.* at 254, quoting *Weatherford v Bursey*, 429 US 545, 559-561; 97 S Ct 837; 51 L Ed 2d 30 (1977). This holding applies here, where defendant claims that Blue's criminal record would have been useful only to impeach Blue. Additionally, we conclude that this evidence does not meet the *Brady* requirement of materiality because we do not believe that had Blue's criminal record been disclosed, "there is a reasonable probability that . . . the result of the proceedings would have been different." See *id.* (citations omitted).

III.

Defendant claims that he was denied a fair trial because of prosecutorial misconduct. “This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *Aldrich, supra* at 110. This Court held in *Aldrich* that a prosecutor “need not confine argument to the ‘blandest of all possible terms,’ but has wide latitude and may argue the evidence and all reasonable inferences from it.” *Id.* at 112, quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). However, a prosecutor “should not resort to civic duty arguments that appeal to the fears and prejudices of jury members” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

A.

Defendant argues that the prosecutor made improper civic duty arguments in his closing remarks, and urged the jury to convict defendant based on fear of defendant and in order to support the police. We have reviewed the challenged remarks, and do not find that they contain any improper civic duty arguments. Although the prosecutor described Stout Street as a place where citizens are more frightened of drug dealers than they are of the police, these remarks were based on the changes in witnesses’ statements and in response to defendant’s insinuations that the police threatened and intimidated witnesses to falsely accuse him. Nothing in these remarks suggested that the jury should convict defendant even if the evidence did not support his guilt.

B.

Defendant also claims that the prosecutor “vouched” for his case and testified to facts not in evidence by mentioning that the police had problems getting witnesses to testify. However, after reviewing the prosecutor’s remarks in context, we believe that such references were based on the evidence presented and the inconsistencies in the witnesses’ statements at trial. *Aldrich, supra*. Defendant further argues that the prosecutor again vouched for his case by suggesting to the jury that Ransburg and Mario Collier were lying. A prosecutor may argue from the evidence and any inferences arising from the evidence that a witness is not worthy of belief. *People v Avant*, 235 Mich 499, 512; 597 NW2d 864 (1999). At the same time, a prosecutor may not vouch for his witnesses’ credibility by suggesting that he has special knowledge concerning their truthfulness. *Bahoda, supra* at 276. Defendant’s argument is based on the converse of this principle, i.e., defendant argues that the prosecutor “vouched” for two witnesses’ lack of credibility by suggesting that he had special knowledge concerning their untruthfulness. The record does not support defendant’s claims.

We cannot conclude that the prosecutor “vouched” for his case by asking Ransburg why he would want a fourth statement from her, or by asking who would want to talk to her. Neither question suggested that the prosecutor had personal knowledge that Ransburg was lying. They may have suggested to the jury that Ransburg’s credibility was suspect because she changed her story, but a prosecutor is allowed to draw such an inference from the evidence. *Avant, supra*. Furthermore, the trial court did not allow the second question because it was argumentative.

The prosecutor’s closing remarks about Mario’s testimony did not suggest that he had special knowledge that Mario was lying when he testified that he did not see who shot Harris. Again, the prosecutor’s remarks were based on a series of inferences arising from the evidence

presented. Thus, there was no suggestion that the prosecutor had any unique knowledge about what Mario did and what Mario knew. Thus, the prosecutor did not improperly vouch for Mario's lack of credibility. Accordingly, the prosecutor did not commit misconduct and defendant was not denied a fair trial on this basis.

IV.

Defendant claims that the trial court abused its discretion when it denied his motion for a continuance to allow him more time to review the expert report on gunshot residue tests. A trial court's decision whether to grant a continuance is reviewed for an abuse of discretion. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). In determining whether a trial court has abused its discretion in denying a defendant's request for a continuance, this Court considers whether: "(1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5), on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion." *Id.*

Here, the report was not essential to defendant's constitutional right to confront witnesses against him. This Court observed in *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999), that the "Confrontation Clause guarantees only 'an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Furthermore, defendant was negligent in failing to take steps to timely obtain the report before trial. Finally, as discussed previously, defendant was not prejudiced by the delay in receiving the report, because the report was not highly incriminating and defense counsel was able to effectively cross-examine the expert at trial. As such, we find no abuse of discretion.

V.

Defendant raises several evidentiary issues. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A.

Defendant first claims that the trial court erred in admitting impeachment evidence concerning an unrelated shooting on Dacosta Street. We disagree. A party may impeach a witness with her own prior inconsistent statements. MRE 613. However, prior inconsistent statements cannot be admitted as substantive evidence, but only for impeachment purposes. *People v Jenkins*, 450 Mich 249, 261; 537 NW2d 828 (1995). Here, defendant contends that the impeachment of Ransburg with her prior inconsistent statement about the Dacosta shooting was inadmissible under MRE 403, which provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Defendant relies on *Jenkins, supra*, wherein our Supreme Court reversed a criminal conviction where the prosecutor impeached a witness' testimony with a prior inconsistent statement that contained numerous prejudicial comments unrelated to the witness' trial testimony. The Court held that "[w]here an inconsistent statement contained in a writing contains other prejudicial information, 'only so much thereof as contains the inconsistent statements should be admitted into evidence.'" *Id.* at 263-264. At first glance, this argument seems to have merit; the Dacosta incident was entirely unrelated to Harris' murder, the prosecutor should not have been permitted to use the statements to impeach Ransburg's testimony about her visits to the Dacosta house the night before the murder. The statements were prejudicial, and Ransburg's contacts with the Dacosta house were unrelated to the victim's murder in this case.

However, upon closer examination, it is apparent that the statements were pertinent considering the prosecution's unique problems in cross-examining Ransburg, who changed her story numerous times, not only while giving statements to the police, but also while testifying at trial. She claimed that her first two statements, which exculpated defendant, were truthful, except to the extent that they related to the Dacosta incident. Apparently, this incident came up during the police interview when the police asked her if she had ever seen defendant with a gun. Ransburg testified that she lied to the police about the gun, and about the entire Dacosta incident, sometimes claiming that the part about the gun was a fabrication, and other times claiming that she had not even been to Dacosta before the murder. As the trial court pointed out when denying defendant's request for a mistrial, her prior statements about the Dacosta shooting were relevant for purposes of impeachment because her highly detailed account in the statement belied her trial testimony that she could not remember being on Dacosta. Furthermore, Ransburg testified that these fabrications were of her own invention, but she testified that her other alleged lies—those which inculpated defendant—were coerced by the police. Ransburg's testimony was thus a tangled web of contradictory statements and inconsistencies, in which she contradicted herself not only about what happened on the night of the victim's murder, but also about when she told the truth, when she lied, and why she lied. The statements thus impeached not only Ransburg's testimony about what happened on Dacosta, but also her testimony that she was truthful with the police except when they coerced her into lying. Under these circumstances, we cannot say that the trial court abused its discretion in allowing plaintiff to impeach Ransburg with her prior inconsistent statements about whether she went to Dacosta with defendant and what happened when she was there.

B.

We find no merit to defendant's remaining claims of evidentiary error. The trial court did not abuse its discretion in excluding defense counsel's highly inflammatory question to Blue about killing one "dopeman," and defense counsel made no effort to correct himself with an appropriately worded question. The trial court also did not abuse its discretion in allowing the prosecutor to ask Mario if defendant could have committed the murder. The question did not call for speculation, but simply for the conclusion that if Mario did not see the actual shooting, he could not rule out the possibility that defendant was the shooter.

Affirmed.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Richard A. Bandstra