STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS J. LITTLETON,

Defendant-Appellant.

UNPUBLISHED
December 13, 2002

No. 234010
Wayne Circuit Court
LC No. 00-010334-01

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to two years' imprisonment for the felony-firearm conviction, to be served consecutive to and followed by concurrent terms of life imprisonment for the murder conviction, and two to ten years' imprisonment for the assault conviction. We affirm.

This case arises from an incident that occurred during the early morning hours of May 30, 2000, starting at a reputed drug house on the southwest side of Detroit. The prosecutor presented evidence that defendant operated a cocaine-dealing operation out of the house of Charles Butler, at 2197 Hubbard, that Rob Johnstone created a disturbance at the house on the night in question, and defendant in response shot and killed Johnstone and also shot and wounded Saul Rios, who was with Johnstone at the time.

I. Appellate Counsel's Issues

Appellate counsel moved the trial court for a new trial, asserting myriad claims of prosecutorial misconduct. We agree with the trial court that a new trial is not warranted. "The standard of appellate review regarding a trial judge's decision to grant or deny a motion for a new trial is 'entrusted to the discretion of the trial court and that decision will not be disturbed on appeal without a showing of an abuse of discretion . . . .'" *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998), quoting *People v Hampton*, 407 Mich 354, 373; 285 NW2d 284 (1979). Concerning preserved issues of prosecutorial misconduct, this Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial

trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). "Absent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). See also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (unpreserved claims of error are reviewed for plain error affecting substantial rights). This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995).

A. Defendant as Drug "Boss"

Appellate counsel argues that the prosecutor violated a pretrial ruling of the trial court by eliciting evidence that defendant was a "drug boss" or "drug lord," and by arguing that theory in closing argument. We disagree. The trial court's actual ruling barred mention of defendant as the boss of drug-selling operations in opening statements only and both the court and defense counsel agreed that if the evidence ultimately supported that theory, the prosecutor could argue it at closing.

The prosecutor did elicit from one witness that she had "worked for" defendant selling drugs. This information was relevant to the issue of motive, because without a business interest in the reputed drug house defendant had no apparent reason to resort to extreme measures when the murder victim created a scene there. Because this evidence did arise, the prosecutor properly characterized defendant as a person running the drug operations in closing arguments.

B. Witnesses in Fear of Defendant

Appellate counsel argues that the prosecutor improperly asked witnesses if they were afraid of defendant and improperly made argument pursuant to that theory. We disagree.

A prosecuting attorney may not "create the illusion by innuendo that witnesses are being intimidated by the defense," and thus may not ask witnesses if they are afraid of the defendant absent a properly laid foundation. *People v Stanley Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985). In this case, the prosecutor elicited from Charles Butler that after testifying against defendant at the preliminary examination he left the state because there was no safe place for him locally and from Saul Rios that he was afraid to testify at trial. This information was relevant to the jurors' assessment of the credibility of these apparently nervous witnesses. In light of this testimony, the prosecutor's unsuccessful attempts to elicit similar information from two other witnesses was not prejudicial.

C. Implications that the Defense Failed to Present Evidence

Appellate counsel argues that the prosecutor shifted the burden of proof by making issue of the nonappearance of one potential witness and by arguing that the identification of defendant as the shooter was uncontroverted. We disagree.

The trial court sustained an objection when the prosecutor asked, in closing argument, why a drug operator who used the name "Grape" had not appeared and admonished the jury to disregard the statement. The court further mitigated any prejudice to defendant by instructing the jury that the prosecution bore the burden of proof and the defense was not obliged to prove anything and by admonishing the jury not to decide the case on the basis of "which side presented more witnesses." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). To the extent that it was error for the prosecutor to imply that the nonappearance at trial of one of defendant's alleged fellow drug operatives was an indication of defendant's guilt, the trial court's response to the matter cured any prejudice.

Appellate counsel further argues that the prosecutor shifted the burden of proof by arguing that certain evidence was uncontroverted. The prosecutor stated as follows: "And three people, not one, not two, three people came to a court of law[,] took an oath and said that he's the man that did it, and that evidence is uncontroverted." There was no objection at trial, but appellate counsel now argues that the prosecutor's witnesses were in fact contradicted by Damon Jones, and that, in any event, arguing the prosecutor's evidence was uncontradicted was improper because it implied defendant failed in some duty to offer evidence.

In fact, Jones did not wholly contradict the prosecutor's witnesses but did so only in part. Jones, testifying for the defense, stated defendant had no involvement in the drug-trafficking activities at Butler's house, but that was not the conduct for which defendant was on trial. Concerning the murder of Johnstone, Jones testified he did not see defendant in proximity to the shooting, and that Butler returned from the incident with aggressive statements about the victim plus a gun in his hand, but Jones did not suggest that he had witnessed the shooting himself and so could not directly contradict those witnesses who identified defendant as the shooter. Thus, the prosecutor's argument that the testimony of three witnesses identifying defendant as the shooter was uncontroverted comported with the evidence.

Moreover, "where a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Accordingly, "the prosecutor may comment on the weakness of defendant's alibi, and may observe that the evidence against the defendant is 'uncontroverted' or 'undisputed,' even if defendant is the only one who could have contradicted the evidence, or has failed to call corroborating witnesses . . . " *Id.* (Citations omitted.) In this case, the defense maintained that Butler, not defendant, was in fact the shooter and presented Jones to refute evidence linking defendant to the drug activities at Butler's house and to throw some doubt onto the evidence linking defendant to the shooting. Thus, it was not improper for the prosecutor to argue that the witnesses identifying defendant as the shooter were uncontradicted.

D. Discovery Issues

Appellate counsel argues that defendant was prejudiced by three instances where the prosecutor failed to disclose evidence. We disagree.

A trial court's decision on a request for discovery is reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). A trial court's decision regarding the appropriate remedy for failure to comply with a discovery order is likewise reviewed for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

Appellate counsel first asserts that the prosecutor withheld bond slips from disclosure. However, because appellate counsel fails to explain how defendant was prejudiced by the bond-slip issue or to present authority to support the argument, this argument is waived for failure of presentation. See MCR 7.212(C)(7); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). In any event, we find no error in the trial court's conclusion, when considering this issue at the motion for new trial, that because the defense had actual and ample knowledge that the witnesses in question had been bonded out of jail, the defense suffered no substantial prejudice if the actual bond slips were not tendered in the course of discovery. The court properly declined to grant a new trial over the matter.

Appellate counsel next asserts that the prosecutor failed to disclose the report of the firearms expert who appeared at trial. However, appellate counsel again provides no argument or authority in support of the assertion that this incident warrants appellate relief. Although defense counsel did complain about not having the report in hand, there was no objection to its admission into evidence, and counsel did not otherwise request on the record any sanction in response to the alleged discovery violation. If defense counsel was genuinely surprised, and disadvantaged, for want of earlier access to the report in question, counsel could have moved the court to exclude that evidence, or for a continuance in order that counsel might remedy any disadvantage otherwise existing because of the surprise.[1] The defense's disinclination to do that at trial, coupled with the lack of argument on appeal showing how the defense in fact suffered unfair prejudice in the matter, militates against appellate relief over this incident.

Appellate counsel's final allegation of a discovery violation concerned the testimony of police Sergeant Voizell Jennings, whom the prosecutor called, and Damon Jones, whom the defense called. Sergeant Jennings testified about taking statements from Butler and others reputedly involved in the drug-selling operation.

Later that day, Jones admitting selling cocaine from Butler's house, knowing defendant since they were very young, and acting as a lookout man at the house on the night of the incident in question; however, he testified that defendant was never at the house that night and Jones had never called him. Jones further testified that Butler came back from the shooting with a gun in his hand and said he had "silenced that mother f_ _ _ er, f_ _ _ing with his sh _ _." On cross-examination, Jones protested that at the time of the incident he did not know who "X" was, he never obtained drugs from defendant, and he did not work for defendant or otherwise have a business relationship with him. The prosecutor further elicited from Jones that to his knowledge

[1] Defense counsel in fact expressly declined to object when the report was admitted into evidence.

defendant had nothing to do with drug trafficking from Butler's house and had no business relationship with "Chuckie" or the latter's companion.

The prosecutor recalled Sergeant Jennings to the stand as a rebuttal witness and elicited that Jennings had interviewed Jones earlier that day, before Jones testified. Jennings stated he asked Jones "whose spot was that," meaning "drug house," and Jones answered that "Grape and X ran the spot." Defense counsel interposed no objection to any of Jennings' rebuttal testimony and declined to cross-examine him.

Appellate counsel cites no authority for the proposition that the disclosure requirements set forth in MCR 6.201(A) and (B) extend to statements of prosecution witnesses that are not exculpatory of the defendant. Instead, counsel suggests generally that the trend in Michigan is toward "broader discovery," and implies that said generality included a duty for the prosecutor in this instance to disclose to the defense what Jones had said to Jennings earlier in the day. We know of no legal basis for this assertion. Plain error did not occur. Moreover, in light of the testimony of three eyewitnesses unequivocally identifying defendant as the shooter, the challenged impeachment evidence could neither have caused an innocent man to suffer conviction, nor thrown the proceedings into disrepute. *Carines, supra*.

E. Improper Injection of Instructions

Appellate counsel asserts that the prosecutor "usurped the authority of the trial court and began instructing a deliberating jury on the record." Counsel provides no record citation to indicate where this took place, but presumably this argument stems from the prosecutor's statements in front of the jury, while the trial court was responding to a request to review some testimony:

> Judge, I just, if I could make one suggestion. If a particular area of testimony is isolated, I'd like you to inform them that of course they have the option of asking for a read back of the testimony. The transcript is not the only option.

Defense counsel asked to approach, and the trial court continued to address, then excused, the jury. While the jury was away, defense counsel requested a mistrial, which the court denied, but the court added, "The proper . . . procedure is to place any objections on the record regarding what the Judge has done, outside the presence of the jury. . . . But it was inappropriate to stand up before the jury while I was giving my direction to them."

It is difficult to credit the argument that this episode is representative of some general atmosphere at trial that was prejudicial to defendant. The prosecutor's statement was couched in polite and deferential terms and did in fact suggest a legitimate way of addressing the jury's request. Given the prosecutor should have refrained from offering suggestions in front of the jury, the prosecutor nonetheless hardly can be regarded as having instructed the jury himself, as appellate counsel suggests. This incident does not warrant appellate relief.

F. Vouching

Appellate counsel argues that the prosecutor personally vouched for the strength of the state's case. "A prosecutor may not vouch for the evidence or place the weight of his office behind the prosecution; but, . . . he may argue regarding the credibility of witnesses where the testimony conflicts and the result depends on which of the witnesses is to be believed." *People v Foster*, 77 Mich App 604, 612-613; 259 NW2d 153 (1977). It is also error for a prosecutor to argue that the criminal investigation itself is indicative of the defendant's guilt. See *People v Humphreys*, 24 Mich App 411, 418-419; 180 NW2d 328 (1970). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

Certain of the cited statements did remind the jury that the prosecutor's office and the police thought it well to prosecute defendant. However, there was no objection and the record indicates that the prosecutor's argument came in response to argument from defense counsel. Defense counsel thus opened the door to the prosecutor's remarks defending the state's handling of the case. In any event, that unchallenged commentary neither resulted in the conviction of an innocent man nor threw the integrity of the proceedings into a poor light. *Carines, supra*. To the limited extent that the prosecutor did in fact urge the jury to convict out of respect for the good offices of the prosecutor or the police, a timely objection or special instruction should have cured any prejudice. *Launsburry, supra*. For these reasons, this argument does not warrant appellate relief.

G. Argument not Supported by the Evidence

Appellate counsel contends that by arguing that the lack of gun powder residue on Butler's clothing indicated that Butler was not the shooter, and by stating that Rios told the police that his assailant was "X man," the prosecutor was offering argument not supported by the evidence. "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

The prosecutor argued that had Butler, not defendant, been the shooter, as the defense maintained, then Butler's clothes should have had gun powder residue. There was no objection, and rightly so. Appellate counsel does not dispute that the evidence indicated that Butler's clothes tested negatively for indications of firearms discharges, but merely points out that Butler never testified that those clothes were in the same condition when tested by the police as they were when the shooting took place. However, counsel cites no authority for the proposition that arguments from the evidence must either be suppressed or include mention of all, or any, innocent explanation for the evidence in question. See *People v Johnson*, 137 Mich App 295, 303; 357 NW2d 675 (1984) (the prosecutor need not disprove every reasonable theory of innocence). The prosecutor was free to infer that Butler was not the shooter from the condition of his clothes as tested by the police.

Defense counsel, in closing argument, pointed out that Rios, when he initially talked to the police after the incident, said that "a car full of white guys" did the shooting. In response, the

prosecutor referred to a later police statement of Rios, which was never put into evidence, in which Rios offered a fairly detailed description of the shooter as a black man, and added that when asked on that occasion if he knew who shot him, Rios replied, "At the moment no, but I knew it was X man.'"[2] Defense counsel objected.

In fact, when the prosecutor asked Rios on redirect examination if he remembered giving the police his detailed description, Rios answered in the affirmative. But when the prosecutor asked if he had given the "X man" statement, Rios answered that he did not remember. The latter statement was thus never in evidence, and it was therefore error for the prosecutor to put those words in Rios' mouth. A defendant pressing a preserved claim of nonconstitutional error "has the burden of establishing a miscarriage of justice under a 'more probable than not' standard." *Carines, supra* at 774 (appendix), citing *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). What the prosecutor improperly injected in this instance added little to Rios' plain statements at trial identifying defendant as his attacker. That, plus the identifications offered by two other witnesses, render any improper argument harmless error.

H. Other Argument

Appellate counsel additionally argues that reversal is required because the prosecutor introduced religious and civic-duty arguments, appealed to sympathy, and argued that departure from the scene of a crime was flight evidencing guilt. We disagree.

Appellate counsel argues that the prosecutor improperly delivered religious commentary, citing the statement, "justice allows this man to accept the consequences for his actions, and that's what your job is, and I pray that you do it." This strained argument was not raised below. Although the verb "to pray" is commonly used in a religious context, the word is most often used in its nonreligious sense of "to make earnest petition to," or "to make entreaty to a person or for a thing," in the context of formal requests, e.g., prayers for relief. *Random House Webster's College Dictionary* (2d ed, 1997), p 1023. Viewed in this context, the prosecutor's statement did not constitute religious argument.

Appellate counsel also asserts that the prosecutor engaged in improper civic-duty argument by stating at closing, "[a]nd don't let [defendant] escape justice because the only witnesses to his crime use drugs," and by adding in rebuttal, "[m]urders in drug neighborhoods don't mean people can just walk away because they happened in a bad neighborhood." "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). There was no objection to the prosecutorial statements giving rise to this issue.

Those statements did not inject new issues but simply reminded the jury that to acquit only because the prosecution witnesses were drug users and because the crime took place in an environment of drug trafficking would be a perversion of justice. Further, improper civic-duty

[2] According to the evidence, defendant was known among his drug-trafficking cohorts, and generally about the neighborhood, simply as "X."

arguments may be remedied by a final instruction that arguments of counsel are not evidence. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). In this case, the trial court did so instruct the jury, and so if the challenged argument did touch on an improper civic-duty approach, appellate relief would nonetheless not be warranted.

Appellate counsel argues briefly that the prosecutor improperly inflamed the passions and emotions of the jury and invoked sympathy for the victim by stating at closing, "he died sitting in his car, shot down like an animal," and, in rebuttal, "[t]hat's no fair to the family of this man, the family of Rob Johnstone." Neither statement drew an objection. The first of these statements was simply a fair characterization of what the evidence suggested. The prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). The second statement, considered in isolation, does seem an improper appeal to jury sympathy. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, such argument is not prejudicial where, as here, the bulk of the prosecutor's arguments were properly tied to the evidence and applicable law. See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988) ("A prosecutor's closing argument should be considered in its entirety."). This minor incident does not warrant appellate relief.

Appellate counsel argues that the prosecutor improperly characterized leaving the scene of a crime as evidence of guilt. Counsel provides no record citation to indicate where this argument took place, and the prosecutor's passing reference to leaving the scene of the crime, which was not objected to by defense counsel, did not rise to the level of misconduct. The unchallenged statement, presumably the basis for defendant's current claim, neither resulted in the conviction of an innocent man nor threw the proceedings into disrepute. This was not plain error affecting substantial rights. *Carines*, *supra* at 763.

I. Cumulative Error

Appellate counsel argues that the cumulative effective of all the misconduct he has identified was to deny him a fair trial. However, we conclude that the errors, if any, that occurred fell far short of having that effect.

II. Defendant's Issues in Propria Persona

A. In-Court Identification

Defendant challenges the propriety of the testimony identifying him as the shooter at the incident in question. In-court identification testimony is generally barred where the witness was exposed to an impermissibly suggestive pretrial identification procedure. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998), citing *People v Kurylczyk*, 443 Mich 289, 303 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993). Where such a tainted procedure has taken place, the trial court should not admit a subsequent in-court identification of the defendant absent a showing, on clear and convincing evidence, of an independent basis for the identification. See *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998), citing *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973).

Defendant emphasizes the identification testimony of Rios for this argument, pointing to Rios' initial statement to the police that he had been attacked by "white guys," and his inability or disinclination to identify defendant at the latter's preliminary examination, among other indications that Rios' unequivocal identification of defendant at trial was a new posture. Defendant argues that the record supports the conclusion that it was the suggestiveness of the proceeding, or of the prosecutor, that accounted for the change, failing to acknowledge the obvious possibility that Rios' vacillation concerned whether he *wished* to identify defendant, not whether he *could* do so. Further, defendant's implication that Rios had no ability to identify defendant until the prosecutor suggested such a thing to him does not entirely comport with the evidence. Rios testified that he did not personally know defendant, but had "seen him probably around," in front of Butler's house, before May 30, 2000, thus indicating that defendant's face was not a new one to him, either at the shooting or at trial. Rios' inconsistency in this regard was a matter of evidentiary weight, not admissibility. See *People v Abernathy*, 39 Mich App 5, 7; 197 NW2d 106 (1972) (even where the witnesses' identification of the defendant is less than positive, the question remains one for the jury). Further, defense counsel made all possible capital of Rios' inconsistency, in cross-examination and in closing argument, which was better trial strategy than trying unsuccessfully to suppress such testimony entirely.

Further, Rios' identification of defendant was cumulative to the identifications offered by two other eyewitnesses. Defendant does not suggest any pretrial taint concerning the latter identifications but argues instead that the identification testimony from those witnesses was invalid because defendant was in Arizona at the time they said they were with him in Detroit. As discussed in part III, *infra*, defendant's alibi theory was neither placed before the jury, for sound strategic reasons, nor nearly as strong as defendant would have this Court believe. It affords no basis for questioning the admissibility of any of the in-court identifications. For these reasons, the testimony identifying defendant as the shooter was not plain error and did not affect defendant's substantial rights. *Carines, supra*.

B. Review of Testimony

Defendant argues that the trial court abused its discretion in responding to a request from the jury to review certain evidence. We disagree. Again, there was no objection at trial, and we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*.

MCR 6.414(H) governs review of evidence:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

In this case, the transcripts indicate that within ninety minutes of the start of deliberations the jury sent a note asking to review the testimony of two prosecution witnesses. The trial court summoned the jury, then stated repeatedly that it was not foreclosing having transcripts prepared and made available but explained that the process would take two or three days. The court

further suggested that the jurors would likely find their collective memory sufficient for their concerns and a request to review testimony so early in the course of deliberations was premature.

The prosecutor then mentioned that merely reading back the testimony in question was an alternative to waiting for preparation of a transcript, a matter discussed above, after which the trial court stated as follows:

> Okay, thank you. . . . But I'm not going to do that at this point, okay. . . . [F]or every day in trial, two days in trial you consider one day for deliberation. That's kind of the rule. You guys just started. So go back, listen to my instructions . . . . If there . . . then comes an issue that is so critical that it has to be done, I will consider it. But now let's remember, even assuming a read back. We had those witnesses up here for . . . at least three or four hours . . . so we're talking about six hours in total. . . . So let's go back.

Defendant characterizes the court's statement about there being "kind of the rule" that for every two days of trial there was one day of deliberations as prescribing a "time table" for the deliberations. However, as we read the passage, it is plain that the court was merely describing common experience and expectation, not setting forth any kind of actual rule to which the jurors likely felt obliged to adhere.

Defendant points to indications that some jurors were apprehensive about the possibilities that their obligations in court would conflict with certain pre-existing engagements and argues that in light of such pressure the court's pointing out what kind of time was involved in deliberating, or in arranging for the jury to review testimony, was to coerce a verdict. This is a strained argument. It would be a rare jury none of whose members had ideas about what they would prefer to do with their time were they not obliged to be in court or were otherwise unconcerned about the conflicts that might arise should jury service become prolonged. Such inconveniences as those of which defendant tries to make issue are inherent in jury duty and afford no basis for arguing that the verdict was coerced. For these reasons, we reject this claim of error.

C. Jury Instructions

Defendant argues that by instructing the jury it must accept and apply the law as given by the trial court, the court misled the jury concerning its rights, powers, and duties. However, the defense did not raise this challenge below, and our review of the instructions does not indicate the existence of plain error affecting substantial rights. *Carines*, *supra*.

III. Ineffective Assistance of Counsel

Both appellate counsel and defendant *in propria persona* assert that defendant lacked the effective assistance of trial counsel.

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. The constitutional right to counsel is a right to *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654;

104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 806 L Ed 2d 674 (1984); *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland, supra; People v Pickens*, 466 Mich 298, 302; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy or will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). See also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Counsel is obliged to "investigate potentially meritorious defenses," *Kimble*, *supra*, not necessarily *present* them. Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). To overcome that presumption, a defendant must show that counsel's failure to prepare for trial resulted in counsel remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642, 459 NW2d 80 (1990).

Appellate counsel offers no particulars in support of this claim, but simply states generally that the issues already *addressed* show the extent of trial counsel's incompetence. "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 Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000), citing *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992).

Defendant *in propria persona*, however, offers concrete, if unpersuasive, argument in this regard, asserting that defense counsel failed to take advantage of the opportunity to present a solid alibi defense. Defendant maintains that although testimony was available to the defense that defendant was in Arizona at least near the time of the shooting, defense counsel expressly declined formally to pursue the alibi defense. Defendant has appended to his appellate brief copies of a bench warrant for his arrest for probation violation, and an affidavit allegedly from the mother of his child. The bench warrant seeks defendant's arrest for the reason that he left Michigan and traveled to Phoenix, Arizona, without permission. The warrant further states defendant was arrested by the Phoenix police on May 31, 2000, for money laundering and that charges were pending. There is no indication of the time of day of the arrest, or how long defendant was thought to have been in the area. The affidavit states that the affiant was out of town with defendant "on the day and evening of May 30, 2000," because they were "trying to make it to Arizona." The affiant adds that she communicated this information to defendant's lawyer, but that beyond brief discussion "he never did or said anything to me about it again." The affiant stated she had wanted to testify in defendant's defense but was not allowed to by decision of defense counsel.

Defendant fails to precisely state when he left Michigan for Arizona. According to the evidence, the shooting in question occurred early in the morning of May 30, 2000. The evidence that defendant was the shooter, then, does not in fact conflict with the affiant's statement—if

indeed the protestations of the mother of defendant's children must be believed—that defendant was on his way to Arizona on the "day and evening" of May 30, or with defendant having been arrested in Arizona on May 31. Accordingly, the facts as alleged by defendant established, at the most, an extremely weak alibi defense.

Further, defendant incurred substantial risk by raising the alibi theory. Although the bench warrant stating defendant had traveled to Arizona without authorization reports only that defendant was arrested for money laundering, defense counsel reported the arresting officials seized $57,000 from defendant, and defendant's purpose for making the trip was "to go buy some drugs." Defense counsel expressly stated that he had opted not to file notice of an alibi defense because he did not want the jury to learn of such potentially prejudicial information. Because the theory in question did not itself actually place defendant in Arizona at the time of the shooting at issue or near enough to it in time as to place in serious doubt the possibility that defendant was the shooter, and because it was important to the defense to minimize evidence of defendant's drug-trafficking activities, the decision not to proceed with an alibi defense was sound trial strategy. Because defense counsel, by defendant's own admission, discussed the alibi theory with defendant's companion in the matter, it cannot be said that "a substantial possibility appears on the record" that this potential defense suggested by defendant was not considered. *Kimble, supra*. The record makes plain that the alibi defense was in fact considered and rejected.

Indeed, defense counsel might well be credited with having operated shrewdly on defendant's behalf in this matter. By having the alibi defense expressly ruled inadmissible after ensuring that the jury heard something of it through a defense witness, counsel gleaned some potential advantage from that defense, notwithstanding the trial court's admonishment to the jury that they disregard the testimony touching on it, while keeping the door closed to the prosecutor eliciting information about the implications of drug trafficking tied up with defendant's circumstances as he was found in Arizona.

In light of the weakness of the alibi theory as defendant offers to present it, we conclude that it was sound strategy, not ineffective assistance of counsel, to forgo whatever the advantages of bringing up defendant's trip to Arizona in order to avoid opening the door to the prosecutor delving further into the nature of defendant's business in that location at that time. Further, in light of the compelling testimony of three witnesses identifying defendant as the man who shot Johnstone and Rios, it is highly unlikely that a better performance on the part of defense counsel could have produced a different result. *Pickens, supra*. For these reasons, we reject this claim of error.

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Christopher M. Murray