STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2004
v	No. 245303 Oakland Circuit Court
JUAN JAVIER PEREZ, Defendant-Appellant.	LC No. 94-135934-FC

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

PER CURIAM.

After a jury trial in 1996, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, and three separate counts of possession of a firearm during the commission of a felony, MCL 750.227b, one each predicated on the conspiracy, murder and assault charges.[1] Defendant was sentenced to twelve to twenty years' imprisonment for the conspiracy conviction, a concurrent term of life imprisonment without parole for the felony murder conviction, a concurrent term of twelve to twenty years' imprisonment for the assault with intent to rob conviction, and consecutive two-year terms for the felony-firearm convictions. Defendant appealed his convictions as of right, but this Court

[1] Defendant had several codefendants, including Ismael Marrero, Rubin L. Moya and Maximillian L. Lloyd, who were tried separately from defendant and convicted of various crimes, most of which this Court affirmed on direct appeal. This Court affirmed codefendant Marrero's convictions of conspiracy to commit armed robbery, assault with intent to rob while armed, involuntary manslaughter, and two counts of felony-firearm. *People v Marrero*, unpublished opinion per curiam of the Court of Appeals, issued March 20, 1998 (Docket No. 194925), lv den 459 Mich 972 (1999). With respect to codefendant Moya, this Court reversed his convictions of involuntary manslaughter and assault with intent to rob while armed, in part because of instructional error, but affirmed his conviction of conspiracy to commit armed robbery. *People v Moya*, unpublished opinion per curiam of the Court of Appeals, issued June 19, 1998 (Docket No. 194799). This Court affirmed codefendant Lloyd's convictions of conspiracy to commit armed robbery, second-degree murder, assault with intent to rob while armed, and two counts of felony-firearm, as well as the circuit court's decision to sentence Lloyd as a juvenile. *People v Lloyd*, unpublished opinion per curiam of the Court of Appeals, issued May 22, 1998 (Docket No. 194593).

dismissed the appeal because defendant "failed to timely file the brief on appeal." *People v Perez*, unpublished order of the Court of Appeals, entered November 20, 1997 (Docket No. 195687). The instant appeal by leave granted arises from the circuit court's denial of defendant's motion for relief from judgment. We affirm.

I

Defendant first contends that, during his trial, the prosecutor occasioned error requiring reversal by eliciting from Pontiac Police Detective Ron Kouri hearsay testimony in the form of Kouri's (1) conclusions regarding the manner of the attempted robbery of the victim's house and the victim's murder, and (2) post-investigation opinion that an early suspect known as Larry Mitchell had no involvement in the crimes.

Because defendant sets forth in this appeal grounds that "could have been raised on appeal from [his] conviction and sentence," to establish his entitlement to relief from judgment he must show "actual prejudice from the alleged irregularities." MCR 6.508(D)(3)(b).[2] "Actual prejudice" means that "in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i).[3] This Court reviews for clear error a circuit court's factual findings in support of its ruling on a defendant's motion for relief from judgment, and for an abuse of discretion the court's decision whether to grant relief from judgment. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001); *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000); see also MCR 2.613(C).

We agree that Kouri's testimony to various conclusions on the basis of his investigation of the crime was hearsay. *People v Lucas*, 138 Mich App 212, 220; 360 NW2d 162 (1984). But the mere admission of hearsay testimony does not establish actual prejudice, which instead depends on the theories of the parties and the entire trial record. *People v McSwain*, ___ Mich App ___; ___ NW2d ___ (Docket No. 241275, issued 12/9/03), slip op at 19-22; *People v Brown*, 196 Mich App 153, 159; 492 NW2d 770 (1992).

The circuit court correctly observed that the first challenged hearsay statements by Kouri, involving his belief in the details surrounding the occurrence of the victim's death, were cumulative of evidence previously admitted during defendant's trial.[4] The victim's teenaged

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[2] We shall assume for purposes of analysis that defendant established good cause for failing to previously raise the instant issues on appeal, MCR 6.508(D)(3)(a), inasmuch as the parties do not dispute this point, nor did the circuit court question it. We shall similarly assume that defendant had good cause for not investigating the status of his appeal during the three-year period following this Court's dismissal of it.

[3] Defendant does not specifically assert that any of the alleged errors constitutes an "irregularity so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(iii).

[4] Defendant challenges the following testimony by Kouri regarding his investigation's conclusions as improper hearsay:

(continued…)

son, Rene Guerrero, testified that five or six masked and armed individuals broke into his house. Within defendant's statement to the police, he explained that codefendant Rubin Moya drove the other robbery participants to the victim's house and remained in the car during the crime. Defendant also acknowledged in his statement that he and "Gator" went to the victim's front door. The testimony of Heather Constable and Nicole Glynn indicated that after defendant saw a newspaper article describing a shooting during a robbery by a group of people, defendant admitted that he did something he should not have done and that he had killed someone. John

(…continued)

Prosecutor: In regards to [defendant's] statement itself, as the investigating officer, did you attempt to corroborate any of this evidence?

Kouri: Yes, sir.

Prosecutor: Did you corroborate any of this evidence?

Kouri: Yes, sir.

Prosecutor: *Based on your review of the evidence*, how many people went to that house to rob it?

Kouri: Six.

Prosecutor: Where was Rubin Moya?

Kouri: He stayed behind the wheel of the car?

Prosecutor: Where was the defendant?

Kouri: He and Jimmy Gator went to the door.

Prosecutor: Who pulled the trigger?

Kouri: The defendant, Mr. Perez.

Prosecutor: *Based on your investigation*, how many shotguns were used in this case?

Kouri: Two.

Prosecutor: How many long guns were used in this case?

Kouri: One rifle.

Prosecutor: How many handguns were used in this case?

Kouri: One nine millimeter automatic and one Western style .22 revolver that never went into the house. [Emphasis added.]

Marantic, a jailmate of defendant, also testified that defendant described to him the details of the planned marijuana robbery and ultimate shooting of the victim, including the detail that defendant shot the victim with a nine-millimeter weapon. Rene's testimony indicated that the group of assailants had weapons including a shotgun, a rifle and a nine-millimeter handgun, and the police found a single nine-millimeter shell casing near the victim's body. Lastly, defendant's own statement included the details that he had a handgun during the intended robbery, that one accomplice had a shotgun, and that another had a rifle. After reviewing the record, we do not possess the definite and firm conviction that the circuit court mistakenly found Kouri's testimony cumulative.[5] Admittedly, defendant told police that someone else was the shooter and Kouri's testimony, in effect, expressed the opinion that the evidence that defendant was the shooter was more credible. Nonetheless, we conclude that Kouri's testimony was based on evidence in the record, not hearsay and that it is unlikely that the jury deferred to Kouri's opinion testimony rather than relying on its own assessment of the testimony.

With respect to Kouri's opinion of initial suspect Mitchell's lack of involvement,[6] defense counsel, in cross-examining Rene, first raised the fact that Rene had given the police the

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[5] The court also correctly observed that the prosecutor did not emphasize or rely on Kouri's opinion regarding the case, but argued that the jury should find defendant guilty on the basis of the properly admitted evidence introduced during trial.

[6] Defendant also characterizes as hearsay the following testimony of Kouri concerning early suspect Mitchell:

> *Prosecutor*: Based on your interviews with both Rocky and Rene, did your attention ever focus on anyone, sir?
>
> *Kouri*: Yes, sir, it did.
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> *Prosecutor*: Who did your attention focus on?
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> *Kouri*: A gentlemen named Larry Mitchell.
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> *Prosecutor*: Did you ever have contact with Mr. Mitchell?
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> *Kouri*: Yes, sir.
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> * * *
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> *Prosecutor*: Now, originally when you spoke with Mr. Mitchell, did you consider him a suspect?
>
> *Kouri*: Yes, sir.
>
> *Prosecutor*: After you spoke with Mr. Mitchell, did you ever include him as a continued suspect or rule him out?

(continued…)

name of a black male suspect as one of the robbers. The prosecutor addressed this fact later during his direct examination of Kouri by inquiring what results the police had obtained when they investigated that lead. Defense counsel in his closing argument emphasized that Mitchell had no involvement in the crime, as Rene believed, in an effort to illustrate that the police had a dead-end case with no leads when they received defendant's coerced and involuntary statement, which they blindly took at face value. Under these circumstances, we cannot conclude that the circuit court clearly erred when it found that defendant "used Mitchell's existence and Rene's mistaken identification to advance its position."

Given defendant's own admission that he participated in planning the robbery and that he held a handgun as he and other codefendants pushed open the victim's door, Rene's testimony that a man with a nine-millimeter handgun pointed it at his head, that the police found only one shell casing, a nine-millimeter, at the murder scene, and the testimony of several witnesses that defendant himself admitted to shooting the victim, we conclude that even absent any hearsay testimony by Kouri, defendant would not have had a reasonable likelihood of acquittal. MCR 6.508(D)(3)(a)(i).

II

Defendant next asserts that the circuit court erred when it found voluntary his statement to the police, which he gave shortly after being beaten by a group of the victim's family and friends. This Court reviews for clear error the circuit court's factual findings in support of its determination of voluntariness. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). Clear error exists only when this Court possesses the definite and firm conviction that the circuit court made a mistake. *Id*. at 373. This Court defers to the circuit court's assessments regarding the weight of the evidence and the credibility of witnesses. *Id*.

This Court examines the following factors in determining whether a defendant's statement qualifies as voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether

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(…continued)

> *Kouri*: . . . I interviewed the boys and Larry Mitchell from 2:30 until 4:30. We spent the rest of that night and until five p.m. the next day with Larry Mitchell and the people that he would have been with at the time, and *we positively ruled out Larry Mitchell and the other people that we had interviewed*. *Larry Mitchell was not involved in this case at all*. [Emphasis added.]

> the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

"The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*.

At the evidentiary hearing regarding defendant's motion to suppress his pretrial statements, defendant recounted his abduction at gunpoint by a group of the Guerrero family's friends, who took defendant to a house of the Guerreros, inside which defendant became scared when he saw codefendant Ismael Marrero and his beaten and bloody face. Defendant testified that because of his refusal to provide any information regarding the victim's shooting death, he was subject to a 3-1/2-hour ordeal that included (1) five people beating him between twenty and thirty times about his head, shoulders, back and chest, which caused bruising and lumps; (2) at least ten people punching and kicking him all over, including his face; and (3) someone cutting the inside of his mouth. After hearing people threaten to harm his family, defendant told the Guerreros "what they wanted to hear." Defendant believed that he appeared beaten and frightened when the police arrived, but conceded that he felt relieved and safer in the company of the police.

Kouri explained that on May 31, 1994, he visited a house pursuant to a telephone call from the victim's eldest son, Rosendo Guerrero, Jr., that the Guerreros held defendant.Based on the information obtained, Kouri arrested defendant, advised him of his constitutional rights, learned that defendant had some involvement in the crime and was willing to be interviewed, and transported defendant and Guerrero, to the police station. Kouri saw no obvious injury to defendant except for a small trickle of blood at a corner of his mouth, and defendant denied that he suffered injury during his arrest or required hospitalization. Kouri denied any knowledge at the time he picked up defendant that defendant had suffered a beating.

While transporting defendant and Guerrero to the police station, Kouri observed their manner and behavior to be civil without threats or signs of trouble between them. Defendant insisted that he did not voice any problems to the police because he felt scared of Guerrero.

Kouri testified that after the police, defendant and Guerrero arrived at the police station, they did not stay together. Instead, defendant gave his statement within an interview room inside the detective bureau, while Guerrero sat fifty-three feet away in a separate bureau of the police station, around the corner and two locked doors away from defendant's soundproof interview room. Defendant maintained that he nonetheless felt scared of Guerrero while giving his statement because he had seen Guerrero before he entered the interview room.

At the time defendant made his statement to the police, he was seventeen years old and his education had progressed to the tenth grade. Defendant did not suggest that the police subjected him to prolonged or repeated questioning, and he did not spend more than an hour in the custody of the police before they conducted the interview. At the time of the statement, defendant, who had one beer on the day of the interview, appeared alert, coherent and sober. Additionally, defendant had not been deprived of food, sleep or medical attention, and the police did not make any promises of leniency or threats to coerce his statement. Defendant testified that he did not fear the police, who treated him fairly. Defendant never mentioned before,

during, or after the interview that anyone had injured him or threatened him with violence.[7] The police advised defendant of his constitutional rights, which he indicated he understood, and defendant waived his rights and agreed to submit to the interview.

On the basis of the entire record established at the suppression hearing, we conclude that the circuit court did not clearly err in finding that defendant voluntarily provided his statement to the police. The undisputed evidence showed that the police informed defendant of his rights and defendant waived them, that the police treated defendant fairly at all times proximate to his statement, that defendant had no obvious signs of serious injury around the time of his statement, that despite police inquiries regarding injury or threats, defendant never mentioned any threats by the Guerreros or complained of experiencing any injuries, and that the police placed Rosendo Jr. well apart from defendant before conducting his interview. Accordingly, we do not possess a definite and firm conviction that the circuit court made a mistake in concluding that defendant's statement to the police did not result from any improper coercion. *Cipriano*, *supra* at 334; *Shipley*, *supra* at 372-373. Because the circuit court correctly found that defendant's statements to the police were voluntary, the admission of the statements during his trial did not result in any actual prejudice.

III

Defendant further argues that the prosecutor made irrelevant and prejudicial inquiries suggesting his affiliation with a gang known as the "Capones." Defendant raised the allegedly improper questions concerning the Capones within his motion for relief from judgment. MCR 6.502(C)(12)-(13).

This Court generally reviews for an abuse of discretion the circuit court's admission of evidence. *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003). But because defendant did not timely object to the challenged questions at trial, MRE 103(a)(1), we review these unpreserved allegations of evidentiary error for plain error affecting defendant's substantial rights. *People v Coy*, 243 Mich App 283, 286-287; 620 NW2d 888 (2000).

None of the prosecutor's questions suggested any specific unlawful activities in which the Capones might routinely engage, and the prosecutor did not dwell on or emphasize the suggested Capones connection between defendant, Lloyd and Marrero during his closing arguments. Even assuming that the prosecutor's questions qualify as improper, defendant cannot establish that the inquiries occasioned any actual prejudice. MCR 6.508(D)(3)(b). Given the evidence of defendant's voluntary statement to the police in which he admitted his involvement in planning and executing the crime, and the properly admitted testimony of several other witnesses to whom defendant indicated that he shot the victim, no reasonable likelihood exists that the jury would have acquitted defendant absent the prosecutor's questions concerning the Capones. MCR 6.508(D)(3)(b)(i).

[7] Kouri opined that defendant's booking photograph showed only some swelling on defendant's lower lip. Kouri expressed surprise that jail personnel took defendant to the hospital later that evening, and that defendant received some stitches in his cheek.

IV

Defendant additionally contends that the prosecutor engaged in misconduct during his closing and rebuttal arguments that deprived him of a fair trial. Defendant failed to preserve this issue for appellate review because he failed to timely object at trial to any of the allegedly improper comments by the prosecutor. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). But defendant did raise these claims within his motion for relief from judgment, and the circuit court ruled on defendant's assertions. MCR 6.502(C)(12)-(13).

This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. 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. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, *supra* at 720.

With respect to the challenged remark by the prosecutor disavowing that he presented a fictitious case, defendant ignores the following context of the prosecutor's remark, which occurred near the end of his closing argument:

> The Court is also going to instruct you that if the defendant went there to commit a robbery and . . . during the course of the robbery he acted with a wanton, willful disregard for human life, he at some point formed the intent to commit great bodily harm or murder, it does not matter if he pulled the trigger, if he was an active participant, *but we do know the defendant pulled the trigger*. *We know the defendant pulled the trigger through his own words*.
>
> *We are not here presenting to you fiction*. What we have presented to you is [sic] the facts that if you look at an [sic] analyze, which you will do, as the oaths you took, you will listen to the evidence, listen to the law, and make the comparison, and you are seated as jurors because you have promised to do that, and when you look at the evidence, you will find that the defendant committed all these actions: That he drove with five other people to the home of 60 Edison Street; that Jimmy Gator knocked on the door; defendant and two other people went in the house.

> When Rosendo Guerrero offered resistance, he was shot, and he was shot by Juan Javier Perez . . . .[Emphasis added.]

A review of the remark in context reveals that the prosecutor did not employ it to highlight his personal opinion of the veracity of any specific items of evidence. The no "fiction" remark occurred immediately after the prosecutor reminded the jury that defendant himself had admitted to shooting the victim. The challenged remark represents the prosecutor's attempt to underscore the importance of defendant's several inculpatory statements to Constable, Glynn and Marantic, i.e., to emphasize that the case was not invented, but supplied by defendant himself. Viewed in this context, the challenged remark constitutes a proper comment on the basis of the evidence admitted during trial. *Schutte*, *supra* at 721.

The next challenged statement of the prosecutor took place at the commencement of his rebuttal to defense counsel's closing argument, during which defense counsel repeatedly emphasized that the prosecutor's case did not "sit right with" him:

> What doesn't sit right is that this man would walk into a police station and then implicate himself in a murder. *What doesn't sit right is that this man would say that, "I was threatened by the Guerreros, that I am not guilty of this crime, that I am home watching videos with my girlfriend, and that I wasn't even there," and the first time he mentions it is today*. What doesn't sit right is he knows the intimate details of the robbery, people going in, people going upstairs, what they are looking for, where they looked for it at, who was shot, where they were, how they got there, how they got out of there. [Emphasis added.]

The last clause of the italicized sentence, "and the first time he mentions it is today," is ambiguous regarding its application to the *entire* preceding portion of the sentence. The sentence embodies the prosecutor's comment regarding the novelty of defendant's assertion that he was with his girlfriend at the time the victim was killed. The prosecutor's comment in this regard qualifies as proper argument on the basis of the record, which contained defendant's concession that he never advised the police of his alleged whereabouts elsewhere at the time the victim was shot. *Schutte*, *supra* at 721. The prosecutor's mention of the Guerreros' threats within the same sentence as the alleged alibi can be seen as merely reflecting the related nature of these two factors as the basis for defendant's claim of innocence during his trial testimony. We reject defendant's suggestion that the italicized sentence reflects the prosecutor's intentional and false suggestion that defendant first mentioned at trial that the Guerreros threatened him.

Even assuming that the first challenged remark could be viewed as an improper personal endorsement of the prosecutor's case, and the second challenged sentence as the prosecutor's knowing misrepresentation of the evidence presented during trial, the comments caused defendant no actual prejudice. MCR 6.508(D)(3)(b). Given the evidence of defendant's admission to the police that he participated in planning and executing the crime and his repeated statements to others indicating that he shot the victim, defendant would not have had a reasonably likely chance of acquittal absent the challenged remarks. MCR 6.508(D)(3)(b)(i).

V

Defendant finally asserts his trial counsel's failure to object to the alleged errors previously discussed deprived him of the effective assistance of counsel. Because defendant has failed to establish that he had a reasonably likely chance of acquittal absent the alleged errors discussed in parts I through IV, *supra*, defendant cannot demonstrate the reasonable probability that, but for the same alleged instances of ineffective assistance of counsel, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *People v Pickens*, 446 Mich 298, 326-327; 521 NW2d 797 (1994); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Affirmed.

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio