

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DARNELL MCMILLIAN,

Defendant-Appellant.

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UNPUBLISHED

May 6, 2004

No. 244711

Calhoun Circuit Court

LC No. 02-002118-FC

Before: O’Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for armed robbery, MCL 750.529, felonious assault, MCL 750.82, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I. Jury Selection

Defendant first argues that the trial court violated his constitutional rights to equal protection and a fair trial when it permitted the prosecutor to peremptorily dismiss the only potential African-American juror on the panel. We disagree.

This Court reviews a trial court’s ruling regarding discriminatory use of peremptory challenges for an abuse of discretion. *People v Ho*, 231 Mich App 178, 184; 585 NW2d 357 (1998). In so doing, this Court must give great deference to the trial court’s findings because they turn in large part upon a determination of credibility. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319-320; 553 NW2d 377 (1996). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Regarding peremptory challenges, the United States Supreme Court ruled that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution bars prosecutors from exercising peremptory challenges to strike jurors solely on the basis of their race, and set forth a three-part test for considering claims that the prosecution improperly exercised peremptory challenges to exclude minorities from a jury panel. *Batson v Kentucky*,

476 US 79, 89, 96-98; 106 S Ct 1712; 90 L Ed 2d 69 (1986). Under this test, the defendant must first make a prima facie showing that the prosecution exercised the challenge on the basis of race. *Id.* at 96-97. If the defendant makes such a showing, the burden then shifts to the prosecution to provide a race-neutral explanation for its challenge. *Id.* at 97-98. If the prosecution then articulates a race-neutral reason, the trial court must decide whether the defendant has proved purposeful racial discrimination. *Id.* at 98.

On the facts of this case, we find that the trial court did not abuse its discretion when it found that the prosecutor articulated a race-neutral reason for his peremptory challenge, and that defendant had not proved purposeful racial discrimination. Although the challenged juror was the only potential African-American juror seated on the panel, the prosecutor explained that his challenge to this juror was based on the fact that the juror admitted in his juror questionnaire that he was previously convicted of a misdemeanor. Moreover, the prosecutor indicated that it was his practice for many years to excuse all potential jurors who had been convicted of a criminal offense. Further, the prosecutor explained that his decision to excuse the juror was made after reviewing the questionnaire, well before he ever saw the juror or was aware of his race. In light of these facts, we believe that an unprejudiced person, considering the facts on which the trial court acted, would not say that there was no justification or excuse for the ruling made. Therefore, the trial court did not abuse its discretion.

## II. Out-of-Court Identification

Defendant next argues that the trial court violated his constitutional right to due process when it denied his motion to suppress the out-of-court identification of one of the complainants. We disagree.

We review a trial court's ruling on a motion to suppress evidence for clear error. *People v Oliver*, 464 Mich 184, 191-192; 627 NW2d 297 (2001). We also review the trial court's decision to allow identification evidence for clear error. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

Our Supreme Court has held that in order to sustain a due process challenge in connection with a pretrial identification procedure, a defendant must show that the procedure was so suggestive, in light of the totality of the circumstances, that it led to a substantial likelihood of misidentification. *Id.* at 302-303, citing *Neil v Biggers*, 409 US 188, 196; 93 S Ct 375; 34 L Ed 2d 401 (1972). The factors to be considered in evaluating the likelihood of misidentification include: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness to the confrontation, and the length of time between the crime and the confrontation. *Id.*, quoting *Neil*, *supra* at 199-200. Further, identification procedures can be improperly suggestive if police inform the identifying witness that they have apprehended the right person, or if police single out one person within a show-up in some manner. *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973).

In this case, there is nothing in the record to suggest that the show-up procedure was unduly suggestive such that a substantial likelihood of misidentification would occur. First, Danielle Kane, one of the robbery victims, testified at trial that she had been merely an arm's

length away from the robber when she observed him as he entered the store, that she made a conscious effort to remember identifying details about the robber, that she saw the robber's face, and that she had specifically remembered the robber's eyes. Further, Kane identified defendant positively as the person who had robbed the store, and expressed no uncertainty whatsoever in this identification. In addition, at the hearing on defendant's motion, a police officer informed the court that the car in which defendant was traveling was stopped by police within 1½ miles of the crime scene and within a very short period after the robbery had occurred. Moreover, another officer testified that the two robbery victims were shown each of the two occupants of the stopped car for identification purposes, rather than just defendant, and also advised the court that, although the two victims were together in the backseat of the same police car during the show-up, the victims did not discuss the identification with each other.

None of the testimony presented at trial indicated that any circumstances existed or that any events occurred that could constitute an attempt to be unduly suggestive or to coerce an identification from the victims. While defendant was asked to place a ball cap on his head and the other suspect was not similarly asked to do so, a police officer indicated that defendant was, in fact, wearing the cap at the time the traffic stop was made, and that the other occupant of the vehicle had not been wearing a hat. Moreover, the cap was placed on defendant's head at Kane's own request after she had already stated that she believed defendant was the robber, and not as a result of any attempt by the police to single out defendant. The trial court did not clearly err in its decision.

### III. Videotape Evidence

Defendant next argues that the trial court violated his constitutional right to due process when it permitted the prosecution to introduce highly prejudicial and cumulative evidence of the incident giving rise to this case. We disagree. The evidence at issue is the repeated playing (seven times over the course of the trial) of the videotape of the crime underlying this case, and the use of a diagram of the crime scene.

Because this issue was not preserved for appellate review, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). MRE 402 provides that all relevant evidence is admissible unless barred by the state or federal constitutions, by another Michigan Rule of Evidence, or by a rule adopted by the Supreme Court. MRE 401 defines relevant evidence as "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 403, however, provides that relevant evidence may nonetheless be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, or if it constitutes a needless presentation of cumulative evidence.

We find no plain error regarding the admission of the challenged evidence. In reviewing this issue, we note that defendant does not specifically identify the seven instances he is claiming constituted needless presentation of cumulative evidence. As a result, we find it difficult to fully analyze the error that defendant alleges occurred. However, a reading of the entire transcript reveals no obvious presentation of cumulative evidence. Rather, each of the two eyewitnesses to the robbery was permitted to fully describe and explain the events they observed, and in the process, were allowed to create a diagram to better assist the jury in understanding the details of

the events. In addition, the court permitted the prosecution to play a surveillance video of the events underlying this case, and permitted one of the two eyewitnesses to explain to the jury exactly what they were looking at, as the tape was being played. Defendant has not cited any legal authority to support a claim that the use of diagrams and a videotape of the events underlying a case, either on their own, or in conjunction with testimony from a witness or witnesses, is in any way inadmissible or improper. Under the circumstances, we find that defendant has failed to demonstrate that the introduction of the challenged evidence constituted a needless presentation of cumulative evidence.

Defendant has also failed to show that the probative value of the challenged evidence was substantially outweighed by the danger of unfair prejudice. This Court has held that unfair prejudice arises where there exists a danger that evidence, which is minimally relevant when evaluated in a logical manner, may be given weight by a jury substantially out of proportion to its damaging effect. *People v Meadows*, 175 Mich App 355, 361; 437 NW2d 405 (1989). In the present case, defendant argues that it is precisely the fact that the court permitted the prosecution to repeatedly introduce the same evidence that creates the risk of unfair prejudice. However, there can hardly be any more probative evidence than the accurate and true depiction of the crimes with which defendant was charged. As a result, the risk of unfair prejudice would have to be extremely high in order to substantially outweigh the probative value of this evidence. The mere fact that evidence was presented more than once through various different mediums is simply not sufficient to create the substantial risk of unfair prejudice necessary to make the challenged evidence inadmissible pursuant to MRE 403. Thus, we find that the trial court did not commit plain error when it permitted the prosecution to introduce the challenged evidence.

#### IV. Ineffective Assistance of Counsel

Defendant next argues that trial counsel deprived him of his constitutional right to effective assistance, and cites seven different instances of alleged deficient conduct. We disagree.

When ineffective assistance is alleged, the defendant bears the burden of overcoming the presumption that counsel was effective, and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687-688; *Pickens, supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error(s), the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Additionally, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Defendant first asserts that trial counsel was ineffective in failing to secure the pretrial lineup promised him in exchange for defendant waiving his right to a preliminary examination. However, the record shows that counsel twice attempted to obtain the promised lineup for

defendant, and that in the period between these two attempts, counsel refrained from seeking the lineup only because defendant himself had informed counsel that he did not wish for the lineup to occur. Under these circumstances, we find that defendant has failed to demonstrate that trial counsel's conduct was objectively deficient.<sup>1</sup>

Second, defendant asserts that trial counsel was ineffective in failing to adequately argue the motion to suppress the out-of-court identification. Although counsel did not file a brief in support of his motion to suppress, the record indicates that counsel extensively cross-examined the two prosecution witnesses at the motion hearing and then argued, based on the testimony he elicited, that the identification should be suppressed because the whole environment of the out-of-court identification was unduly suggestive. While trial counsel did not call any witnesses at this hearing, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). Although the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel when it deprives the defendant of a substantial defense, *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), defendant has made no showing that if counsel had called witnesses on defendant's behalf, it would in any way have made a difference in the outcome. Under these circumstances, we find that defendant has failed to demonstrate that trial counsel's performance in connection with his motion to suppress the out-of-court identification was deficient.

Defendant also argues that trial counsel was ineffective because he failed to locate and interview certain potential defense witnesses. However, the record contains no evidence to support defendant's assertion that counsel failed to investigate these potential witnesses. Moreover, this Court has held that when claiming ineffective assistance due to defense counsel's lack of preparedness, a defendant must show prejudice resulting from the lack of preparation and that counsel's failure to interview witnesses, alone, does not establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). In light of the complete lack of record evidence to support defendant's claim, and given the law set forth in *Caballero, supra*, we find that defendant has failed to demonstrate that trial counsel's performance in connection with the finding and interviewing of witnesses was deficient.

Defendant next asserts that trial counsel was ineffective because he failed to adequately pursue discovery of the results of a fingerprint analysis conducted in connection with this case. While it is true that trial counsel only obtained the results of this analysis on the first day of defendant's trial, the record indicates that trial counsel had filed a discovery demand requesting this type of evidence, which demand was ongoing up through the time of defendant's trial. Here, the prosecutor had just discovered the existence of this evidence on the morning of the first day of defendant's trial, and trial counsel immediately moved for the dismissal of the charges against defendant based on the withholding of this evidence and the prejudice it caused defendant's case.

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<sup>1</sup> We decline to address the merits of defendant's one-line argument that trial counsel erred in questioning Officer Barber about gun ownership because it is unpreserved for appellate review. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

In light of this evidence, we find that defendant has not established that trial counsel's performance in connection with discovery was deficient.

Defendant next argues that trial counsel was ineffective for refusing to permit defendant to testify on his own behalf. A defendant has, of course, a constitutional right to testify at trial, *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985), but if a defendant "acquiesces in his attorney's decision that he not testify," his right to testify will be deemed waived. *Id.* In the present case, there is no indication in the record that defense counsel improperly refused to allow defendant to testify. Given the lack of evidence in the record to support defendant's assertion, we find that defendant has failed to demonstrate that trial counsel's conduct in connection with defendant's right to testify was in any way deficient.

Defendant's final assertion is that trial counsel was ineffective for failing to object to certain comments made by the prosecutor during closing and rebuttal arguments. However, as will be addressed below, we find that the statements challenged by defendant were proper. This Court has held that counsel is not required to advocate a meritless position. *Snider, supra* at 425. Since the prosecution's statements were not improper, any challenge to those statements would have been meritless; therefore, we find that trial counsel's failure to object to these statements cannot form the basis of an ineffective assistance of counsel claim.

#### V. Preliminary Examination

Defendant next argues that the prosecutor violated his constitutional right to due process when, after inducing defendant to waive his right to a preliminary examination in exchange for being granted the right to conduct a pretrial lineup, he retracted this promise. We disagree.

Whether defendant was denied his right to due process is a constitutional question, which we review de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997), citing *People v White*, 212 Mich App 298, 304; 536 NW2d 876 (1995). However, because defendant failed to preserve this issue, we review this issue under the test set forth in *Carines, supra* at 763, which requires that (1) there be an error; (2) the error must be plain (i.e., clear or obvious); and (3) the error must have affected defendant's substantial rights (i.e., there must be a showing of prejudice or that the error was outcome determinative). *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763.

At the hearing on defendant's motions, both parties indicated that although the prosecution had granted defendant the right to have a pretrial lineup, defendant informed his counsel that he did not wish for such a lineup to be conducted, and both parties stated that it was for this reason that no such lineup was held. Moreover, at that same hearing, defense counsel informed the court that he originally submitted a proposed order based on the agreement between the prosecution and defendant, but that the court had declined to sign that order. Nothing in the record suggests any bad faith or attempt to retract on behalf of the prosecution. Further, defendant has provided no evidence to support his assertion that the prosecution actually refused to grant him the promised lineup. Although the prosecution argued against the granting of defendant's oral motion for lineup, the prosecution based its argument in part on the fact that defendant himself had made the decision not to proceed with the lineup. The prosecution further

contended that with one week before trial was to begin, it was very late in the process for defendant to change his mind. Indeed, the trial court's primary reason for denying the motion was that defendant had waited until one week before trial to request the offered lineup. Under these circumstances, we find that defendant has failed to show that the prosecution retracted its promise regarding the lineup, and thus has failed to demonstrate that the prosecution committed any error, plain or otherwise. Thus, defendant is not entitled to reversal or remand on this basis.

#### VI. Sufficiency of the Evidence

Defendant next argues that there was insufficient evidence presented at trial to prove beyond a reasonable doubt the element of identity. Again, we disagree.

Identity is always an essential element in a criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Defendant's argument is based solely on the premise that the out-of-court identification of defendant made by one of the complainants was obtained through unduly suggestive procedures and without an attorney being present, and therefore should have been suppressed. Defendant contends that without this allegedly tainted evidence, there was insufficient evidence to prove beyond a reasonable doubt the element of identity. However, this Court has expressly held that prompt on-the-scene identifications occurring within minutes of a crime and conducted without counsel being present are proper. *People v Libbett*, 251 Mich App 353, 359-363; 650 NW2d 407 (2002); *People v Winters*, 225 Mich App 718, 727; 571 NW2d 764 (1997). Moreover, as discussed above, the procedures utilized by the police in obtaining the complainant's identification of defendant were not so suggestive in light of the totality of the circumstances that they would have led to a substantial likelihood of misidentification. Accordingly, evidence of the out-of-court identification of defendant was admissible, and defendant's argument is without merit.

#### VII. Prosecutorial Misconduct

Defendant also argues that the prosecution engaged in misconduct constituting plain error, citing three instances of alleged misconduct. We disagree.

Again, because defendant failed to preserve this issue, appellate review is for plain error affecting substantial rights. *Carines, supra* at 763. Reversal is warranted only when plain error results in the conviction of an actually innocent defendant, or seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

First, defendant asserts that the prosecutor committed misconduct by inducing defendant to waive his right to a preliminary examination in exchange for the right to a corporeal lineup because the prosecution never had any intention of conducting such a lineup. In presenting this argument, defendant merely states that "apparently the Prosecutor's Office refused [to conduct the promised lineup]." However, because we have already rejected defendant's argument that the prosecution retracted its promise, we find that defendant has failed to demonstrate that plain error occurred.

Defendant next argues that the prosecutor committed misconduct by belittling defense counsel, defense counsel's tactics, and the defense as a whole during closing arguments. A prosecutor may not personally attack the credibility of defense counsel, *People v Kennebrew*,

220 Mich App 601, 607; 560 NW2d 354 (1996), nor may a prosecutor suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra* at 592. Further, a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest of terms, *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). In addition, prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Moreover, 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. *Schutte, supra* at 721, citing *Bahoda, supra* at 282.

We first note that four of the challenged statements, when reviewed in context, are clearly arguments relating to the evidence and the reasonable inferences arising from the evidence. Accordingly, to the extent that defendant's argument concerns those statements, defendant has failed to demonstrate that trial counsel engaged in any misconduct.

The remaining two statements cited by defendant, which made specific reference to defense counsel, also do not approach the line of being impermissible denigration of defense counsel. Yet, even if the prosecutor reached the point of impermissible denigration, defendant has failed to demonstrate that the complained of error was outcome determinative. In the present case, the circumstantial and identification evidence presented against defendant was extremely strong; therefore, defendant has failed to demonstrate error affecting his substantial rights.

Defendant last asserts that the prosecutor committed misconduct by making false or misleading statements in order to convince the court to deny defendant's oral motion to compel the promised lineup. We disagree.

Defendant has presented no case law that would support his argument that the prosecution's incorrect statement rises to the level of prosecutorial misconduct. Rather, the three cases cited by defendant in support of his argument concern the presentation of false testimony or the making of a false statement to the jury during the course of a trial. Moreover, defendant has made no showing that the prosecution acted in bad faith in making the challenged statement. This Court has held that a finding of misconduct may not be based upon a prosecutor's good-faith effort to admit evidence. *Noble, supra* at 660. For these reasons, we believe that defendant has failed to show that a plain error occurred in connection with the prosecution's statements made in opposition to defendant's oral motion. Even if we found that plain error had occurred, defendant has also failed to demonstrate that the complained-of error was outcome determinative and, therefore, that it affected his substantial rights. Here, one of the complainants positively identified defendant during a show-up that occurred within minutes of the time the robbery took place. Had the court granted defendant's oral motion, the lineup that would have occurred would have taken place some four months after the events in question. There is no reason to believe that the results of such a lineup would have been different from the result obtained from the show-up. Further, even if the result of the lineup differed from that obtained during the show-up, the prosecution could have, and no doubt would have, argued that the show-up, occurring as it



did so soon after the robbery took place, was much more reliable than a lineup held some four months after the events giving rise to the charges in this case. Under these circumstances, we find that defendant has failed to demonstrate that any error which may have occurred in connection with the prosecution's argument in opposition to defendant's oral motion was outcome determinative.

### VIII. Evidentiary Issues

Citing to the United States Supreme Court's recent decision in *Crawford v Washington*, \_\_ US \_\_; 124 S Ct 1354; 158 L Ed 2d 177 (2004), defendant argues that his right to confront witnesses was violated when Officer Barbre testified that defendant's friend, Hasan Warlick, stated that the gun belonged to defendant. However, it was defense counsel's questioning of Officer Barbre that led to the complained of testimony. A party waives review of the admission of evidence that he introduced, or that was made relevant by his own placement of a matter in issue. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Finally, we note that defendant has abandoned the remaining evidentiary issues raised on appeal, as they were insufficiently briefed, and therefore we will not consider those issues here. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

Affirmed.

/s/ Peter D. O'Connell  
/s/ Kathleen Jansen  
/s/ Christopher M. Murray