STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 244688 Kent Circuit Court
EL AMIN MUHAMMAD, Defendant-Appellant.	LC No. 02-000859-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and 10 to 25 years' imprisonment for the carjacking conviction. He appeals of right. We affirm.

In the early morning hours of October 14, 2001, Adam Cheyne and Eric Rodgers left a party to get more beer. Rodgers drove his stepfather's Lexus and Cheyne rode in the passenger's seat. While running the errand, the pair also decided to purchase marijuana. Cheyne knew of a place where they could get marijuana, so he directed Rodgers to the area. Cheyne spotted defendant at the location and recognized him as the brother of a former schoolmate and someone from whom they could purchase drugs. Rodgers pulled over to the curb and Cheyne inquired about buying some marijuana. Defendant initially appeared willing to oblige but then pulled out a gun and ordered them to give him their money and identification. When they did not produce what defendant demanded, defendant ordered them out of the car. After patting Cheyne down and taking money from Rodgers, defendant got into the Lexus and drove away.

Cheyne later identified defendant by name as the person who committed the crimes. When the Lexus was recovered, a Land's Inn receipt bearing defendant's name and fingerprint was found in the car. During an unrelated police chase, defendant disposed of a handgun that, according to Rodger's testimony, resembled the weapon used in the carjacking. After initially denying any knowledge of the situation, defendant admitted in a statement to police that he met the two victims on the night of the crime. In the statement, defendant claimed that he referred the victims to his friend and drug colleague, Foot, who carjacked the Lexus. He claimed that the receipt fell out of his pocket when Foot later gave him a ride home in the stolen vehicle.

Before trial, however, defendant filed a notice of alibi, claiming that he was at the Excel Inn with his ex-girlfriend, his nephew, and his nephew's girlfriend at the time of the crimes. At trial, none of these witnesses were called to corroborate the alibi, and the trial court denied defendant's request to call his current girlfriend to corroborate the story. Defendant, testifying on his own behalf, offered the alibi evidence and claimed that he fabricated his statement to police because they encouraged him to lie. He also claimed that he had not taken his medication for a mental condition at the time of the police interview.

Defendant first argues that the trial court erred when it denied his attempt to introduce into evidence a receipt from the Excel Inn. He also claims that the trial court erred when it denied his request to call his current girlfriend as an alibi witness. We disagree. We review for abuse of discretion a trial court's decision to admit evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

The record indicates that despite a warning from the trial court that it would strictly enforce the discovery rules, MCR 6.201(A)(5) and (F), and the prosecutor's request for disclosure of documents well before trial, defendant failed to disclose his intent to introduce the Excel Inn receipt until the third day of trial. Furthermore, the receipt did little to further defendant's case, because the prosecution did not contest defendant's payment for a room at the Excel Inn on the day of the crimes. Instead, it contested defendant's presence in the hotel at the time of the carjacking. Given the limited value of the receipt and its intolerably tardy insertion into the proceedings, the trial court did not abuse its discretion when it excluded the receipt.

Likewise, the trial court did not abuse its discretion when it barred defendant's girlfriend from providing testimony that would corroborate his alibi. Before trial, defense counsel learned that defendant's ex-girlfriend would not support the alibi. Defense counsel informed the prosecutor that the ex-girlfriend was improperly listed on the alibi notice. Subsequently, defendant informed counsel that his current girlfriend would provide the alibi instead. Defendant claimed that he was actually at the Excel Inn with his current girlfriend, not his ex-girlfriend, at the time of the crime. Defendant did not seek to amend the alibi witness list to include his new girlfriend until the third day of trial.

According to MCL 768.20(1), a defendant must file and serve a notice of alibi, listing names of witnesses, at least ten days before trial. There is a continuing duty to disclose additional names as they become known. MCL 768.20(3). Regarding later discovered witnesses, MCL 768.20(3) states,

> Upon motion with notice to the other party and upon a showing by the moving party that the name of an additional witness was not available when the notice required by subsections (1) or (2) was filed and could not have been available by the exercise of due diligence, the additional witness may be called by the moving party to testify as a witness for the purpose of establishing or rebutting an alibi defense.

A failure to file and serve the written notice in accordance with the statutory time limits will result in exclusion of the alibi evidence. MCL 768.21(1). Here, the statutory notice was not given and trial was almost over when defendant sought to add his new girlfriend as an alibi witness. Defendant made no showing pursuant to MCR 768.20(3) that he could not have

provided her name in a timely manner. Under the circumstances, the trial court did not abuse its discretion when it barred the new girlfriend from testifying. *People v McMillan*, 213 Mich App 134, 140; 539 NW2d 553 (1995).

Defendant additionally argues that the decision to exclude the testimony and the hotel receipt violated his constitutional right to present a defense. We disagree. Defendant totally failed to comply with the rules for presenting his alibi evidence. Moreover, while defendant was prohibited from presenting the evidence at issue, he was not entirely precluded from offering the defense. He personally testified to his alibi and elected not to call his nephew for corroboration even though his nephew was properly included on defendant's alibi witness list. Therefore, defendant's actions, not the trial court's, limited the presentation of his alibi defense.

Defendant next argues that the trial court abused its discretion when it permitted the jury to hear testimony about the police chase that led to the discovery of the handgun. Defendant argues that the evidence violated MRE 404(b), because it was evidence of a different act that only served to prove he had bad character. We disagree. Rodgers identified the recovered gun as being the same, or similar, to the one used during the carjacking. Therefore, the gun linked defendant to the charged crimes and was admissible as identification evidence. *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989). Discrepancies between the witnesses' initial description of the weapon and its actual appearance only undermined the weight of the evidence, not its admissibility. *People v Davis*, 241 Mich App 697, 705; 617 NW2d 381 (2000). Details regarding the police chase that led to the gun's recovery were necessary to provide the jury with a logical link between defendant and the gun. They provided factual background for defendant's possession and disposal of the firearm and demonstrated the propriety of the police in recovering it. *People v Sholl*, 453 Mich 730, 741-742; 556 NW2d 851 (1996). Furthermore, the trial court properly instructed the jury about how the challenged evidence should be considered during deliberations. Under these circumstances, the trial court did not abuse its discretion when it admitted the challenged evidence.

Defendant next argues that the trial court improperly permitted the prosecutor to impeach him with evidence of his prior conviction for attempted unarmed robbery. We disagree. Because the seven-year-old attempted unarmed robbery conviction contained an element of theft and did not closely resemble the crime charged, the conviction was properly admitted under MRE 609 for the purpose of impeaching defendant's testimony. *People v Johnson*, 133 Mich App 150, 155-156; 348 NW2d 716 (1984).

Defendant next argues that the trial court erred in its initial instructions to the jury concerning the presumption of innocence. We disagree. Defendant failed to preserve this issue, so we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Taking the instructions as a whole, the trial court properly instructed the jury on the meaning of reasonable doubt in both the preliminary and final instructions. Therefore, we find no plain error requiring reversal. *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003). Defendant also challenges the trial court's instruction with respect to the use of prior inconsistent statements. Defendant abandons this issue on appeal by simply stating the argument as an unsupported conclusion. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant next challenges the sufficiency of the evidence supporting his felony-firearm and carjacking convictions. "In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

> In order to prove carjacking, the prosecution must prove (1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle, and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting another in fear. [*People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998).]

Rodgers and Cheyne exited the vehicle only after defendant pointed a gun at them, cocked it, and ordered them to exit. Rodgers and Cheyne both said they were frightened. Defendant took the valuables he found on the victims, then walked to the car, got inside, and drove away. Given these facts, the vehicle was within the victims' observation, possession, and control when defendant took it by threats of violence. *People v Raper*, 222 Mich App 475, 483; 563 NW2d 709 (1997). Furthermore, the victims would have retained control of the vehicle if they had not been overcome by the threats of violence. *Id.* These same facts support defendant's conviction for felony-firearm. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Given the strength of this eye-witness evidence and the weakness of defendant's alibi, defendant's conviction was supported by sufficient evidence and was not contrary to the great weight of the evidence.

Defendant next argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. We review unpreserved allegations of prosecutorial impropriety for plain error, and will not reverse if defense counsel could have cured any prejudice with an objection and requested cautionary instruction. Defendant lists several instances of alleged misconduct, but only addresses the merits of four of his allegations. We will not consider the allegations that are not explained, rationalized, or supported by citation to any authority. *Kelly, supra.*

Defendant first argues that the prosecution acted improperly when it introduced evidence of the police chase. Defendant fails, however, to demonstrate the impropriety of the evidence or the bad faith of the prosecutor. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Therefore, the prosecutor's introduction of the chase into evidence was not misconduct. *Id*. Second, defendant argues that the prosecutor committed misconduct by introducing evidence that he sold drugs and carried a weapon. Defendant waived any prejudice this may have caused by testifying to the same facts on direct examination. Also, defendant again fails to demonstrate this evidence's impropriety or the prosecutor's bad faith in requesting its introduction. *Id*.

Third, defendant challenges the prosecutor's elicitation of testimony that a checkbook was stolen from the victims' car and fraudulently used by someone to withdraw money. However, these facts related directly to another charged crime of assault with intent to rob. *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Therefore, evidence that a checkbook was stolen and used was relevant to the prosecution's proofs, and the prosecution did not act in bad faith when it introduced the evidence. *Noble, supra*. Fourth, defendant argues that the prosecutor mischaracterized the portion of defendant's testimony where he explained that his

statement to police was coerced and inaccurate. During closing, the prosecutor revisited the testimony, stating that defendant accused police of forcing him to lie. Defendant contends that this argument misrepresented his testimony. We disagree. A prosecutor may freely argue the evidence and all reasonable inferences that the jury may draw from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the challenged argument was based on defendant's affirmative response to a direct question regarding whether the police told him to lie. Because defendant failed to demonstrate any prosecutorial misconduct based on any of these arguments, we reject his claim that the instances individually or collectively deprived him of a fair trial.

Next, defendant argues that he is entitled to a new trial because defense counsel was ineffective. We disagree. To prevail on an ineffective assistance claim, defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must also overcome a strong presumption that trial counsel's actions were the result of strategy rather than incompetence. *Id*. at 687.

We initially reject defendant's cursory argument that defense counsel's conduct with respect to all of the alleged errors asserted on appeal constituted ineffective assistance of counsel. The only claimed errors related to trial counsel pertain to alleged mishandling of the hotel receipt and defendant's current girlfriend's ability to testify as an alibi witness. We find, however, that trial counsel's actions regarding these issues were the product of trial strategy rather than ineffective assistance.

Defendant's current girlfriend, Lisa Lewis, had credibility problems. For example, in the hearing on defendant's motion for new trial, she claimed that she was in the hotel room with defendant, defendant's nephew and the nephew's girlfriend for fourteen hours, but she could not provide any name for the nephew's girlfriend. Furthermore, she claimed they were celebrating the nephew's birthday, but she could only guess at his age. Added to the fact that defendant asked his defense counsel to call Lewis as a replacement witness for his ex-girlfriend, defense counsel's failure to add the witness to the alibi list until the last minute bears a much stronger resemblance to trial, and appellate, strategy rather than ineffective assistance. The same holds true for the hardly relevant Excel Inn hotel receipt. Under the circumstances, defendant's challenge to his trial counsel's effectiveness fails.

Defendant argues that the trial court abused its discretion when it denied his motion for a new trial. This argument merely reiterates defendant's previous allegations of error. Because defendant has not demonstrated that any of the claimed errors had merit, we find no abuse of discretion in the trial court's decision. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

While defendant's pro se brief presents nine other theories for reversing his conviction, none of the issues were properly preserved below, and none of them have any merit. Cheyne knew and identified defendant by name, and defendant's several versions of his alibi were hopelessly contradictory. Not one of defendant's accusations against police or the prosecutor has any basis in fact. Nevertheless, his trial counsel performed effectively enough to achieve acquittals on four of the six charges the prosecutor brought against defendant.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio