

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

INDIA FELICIA PORTER,

Defendant-Appellant.

UNPUBLISHED

June 29, 2004

No. 247486

Wayne Circuit Court

LC No. 02-004318

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

The jury convicted defendant India Felicia Porter of two counts of assault with intent to commit murder, MCL 750.83; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during commission of a felony, MCL 750.227b. The court sentenced defendant as a second habitual offender, MCL 769.10, to concurrent terms of 23 to 40 years, and 3 to 7 years' imprisonment, and to a two-year consecutive term for felony firearm. We affirm.

Here, the two victims told police that defendant shot them, and both victims, and the police officers, testified at trial. Defendant argues on appeal that the identifying statements were inadmissible. We do not agree. "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person." MRE 801(d)(1)(C); See also *People v Malone*, 193 Mich App 366, 369-370; 483 NW2d 470 (1992); *People v Sykes*, 229 Mich App 254, 266-267; 582 NW2d 197 (1998). The trial court did not abuse its discretion in admitting the testimony. Nor was counsel ineffective for failing to object to the identification evidence. Defense counsel is not required to make futile motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant also maintains that she was denied a fair trial because of prosecutorial misconduct. Where a defendant alleges prosecutorial misconduct, we must examine the record as a whole and review the offending comments in context. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor is not required to use the "blandest possible terms" to state his inferences and conclusions. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor may use strong and emotional language in making his argument so long as it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

Defendant alleges that remarks made in closing argument were improper appeals to the jury's sympathy. Defendant did not preserve this issue by objecting to the argument at trial, so we review it for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich App 750, 763; 597 NW2d 130 (1999). Reversal is only required where an error resulted in an actually innocent defendant's conviction or where the error "seriously affected the fairness, integrity, or public reputation of the judicial proceedings' independent of the defendant's innocence." *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). See also *Schutte*, *supra* at 721. The trial court here instructed the jury that the remarks of counsel were not evidence, and not to be influenced by sympathy or prejudice. Were we to conclude that some of the prosecutor's remarks were improper, any error was cured by the trial court's instruction and defendant has not shown that she was denied a fair trial. *Carines*, *supra* at 763. Further, decisions about when and whether to object are a matter of trial strategy, *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995), and defendant has not overcome the presumption that counsel's actions were reasonable or that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Finally, defendant maintains that the trial court should have suppressed the in-court identification of victim Danielle Nolan. We review the trial court's decision to admit the identification evidence for clear error. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000), remanded on different grounds, 465 Mich 884 (2001), citing *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). Clear error will be found when we are left with a definite and firm conviction that a mistake was made. *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001).

Here, several witnesses, including some who knew defendant, testified that defendant was in the car when the victims were shot. It is defendant's theory that she did not pull the trigger. Defendant and Nolan were the only two females present, and Nolan testified that she was shot by a female. The other gunshot victim, Sanford Davis, testified that defendant pointed a gun at him. In light of the other evidence at trial, Nolan's identification testimony was not dispositive and we find no clear error.

Affirmed.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello