STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 5, 2004
v	No. 247429 Kent Circuit Court
JACOB STAR MARTIN, a/k/a BIG COUNTRY, Defendant-Appellant.	LC No. 02-002860-FC

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), assault with intent to rob while armed, MCL 750.89, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to ten to forty years' imprisonment for the home invasion conviction, ten to fifty years' imprisonment for the assault with intent to rob while armed conviction, two to eight years' imprisonment for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arise out of entry into an apartment. The female victim woke when a masked man grabbed her and demanded money while he held a shotgun to her head. When she refused, the man assaulted her. The female victim called out to her male roommate. He entered the room and was told not to move by the assailant. The female victim believed that her assailant was trying to disguise his voice. However, when he continued to speak and based on the phrases he used, the female victim identified her assailant as defendant, an acquaintance she had met in high school that had been to her apartment twice in recent weeks before this assault.

After seeing defendant with the shotgun, the male victim retreated down the hallway toward his bedroom. Defendant grabbed the female victim and dragged her down the hallway. When defendant entered the bedroom, the male victim grabbed the shotgun and wrestled with defendant. During the struggle, defendant's ski mask came off and was discovered in the bedroom the next day. The female victim was able to jump over the men as they wrestled and went to a neighbor's apartment to call police. As the female victim stood in the hallway, defendant passed by her, and she was able to see his hair color and the back of his head. The female victim was nearsighted and was not wearing her glasses at the time of the assault.

However, based on the height, build, weight, hair color, voice, and phrases used, she told police that her assailant was a man known to her as "Jake" or "Big Country."[1]

Defendant first alleges that he was deprived the right to effective assistance of counsel when his attorney failed to investigate and call exculpatory witnesses, failed to investigate critical DNA evidence, and failed to request a continuance to adequately prepare for a surprise witness. We disagree. When presented with the question of effective assistance of counsel, the trial court must first find the facts and then decide whether those facts constitute a violation of the constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). On appeal, this issue presents a mixed question of law and fact, with the factual findings reviewed for clear error. *Id*. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*.

Following a two-day *Ginther*[2] hearing, the trial court concluded that counsel did not render ineffective assistance. We cannot conclude that the factual findings are clearly erroneous. *LeBlanc, supra*. At the hearing, there was testimony that defendant provided the name of an alibi witness to police and named a different alibi witness to trial counsel. However, trial counsel's investigation of an alibi defense was not substantiated. Consequently, defendant provided the name of the alleged actual perpetrator as Aaron Peterson.[3] While Peterson testified that he gave the ski mask to defendant (and thus, it was possible that Peterson's DNA could be on the mask), Peterson did not match the physical description of the perpetrator of the offense. Peterson was an African-American male of lesser height and build than defendant with braided hair to his neck at the time of the incident. Trial counsel explained that, under the circumstances, it was more appropriate to attribute any DNA on the mask to another person, rather than Peterson. Moreover, trial counsel did not deem it necessary to adjourn to investigate the "surprise" witness because of his admissions regarding his prior record and testimony regarding

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[1] Defendant was approximately 6'6" and 300 pounds. The male victim testified that he could not identify the perpetrator's face, but noted that he was tall (6'1") and the perpetrator was taller and had a bigger build.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[3] While appellate counsel attacked trial counsel's efforts to locate Peterson before trial, Peterson did not testify during the first day of the *Ginther* hearing, and an investigator testified regarding his unsuccessful efforts to locate Peterson. Before the second day of the evidentiary hearing began, the trial judge indicated that his staff had located defendant because of a case before another judge. Consequently, Peterson's presence was secured, and he testified at the continued *Ginther* hearing. Peterson denied any involvement in the robbery and indicated that he would submit to a lie detector test.

his motive to lie.[4] The trial court concluded that the course of action taken at trial was proper, and we cannot conclude, on this record, that the factual determination was clearly erroneous. *LeBlanc, supra*.

Defendant next alleges that the trial court erred in refusing to allow a *Ginther* hearing regarding the failure to request a live line-up. We disagree. The decision to grant a motion for a lineup lies within the discretion of the trial judge, and an entitlement to a lineup arises when eyewitness identification has been established to be a material issue *and* when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). In *McAllister*, this Court rejected a challenge to the denial of a motion for a lineup where the lineup would not have resolved any "mistaken identification" because the victim sat in a vehicle with the defendant before the assault and clearly identified the defendant as his assailant. *Id*.

As an initial matter, we note that the appellate brief does not comport with the provisions of MCR 7.212(C)(6) requiring that "[a]ll material facts, both favorable and unfavorable" be provided without argument or bias. Defendant continues to allege that the identification in this case was premised solely on the visual of a nearsighted woman who merely viewed the back of the head of her assailant from a ten feet distance. This assertion ignores the prior relationship between the female victim and her assailant, his presence at her apartment in the weeks before the incident, the defendant's knowledge that she did not have a bank account, the voice identification, the specific terms spoken, and the uncommon physical height and build of the perpetrator. When viewed in the context of an accurate reflection of the circumstances contained within the record, any lineup would not have resolved any reasonable likelihood of a mistaken identification by the *victim*, particularly in light of the victim's prior relationship with defendant. *McAllister, supra*. Accordingly, the challenge to the trial court's denial of a motion for a *Ginther* hearing on this underlying basis is without merit.

Defendant next alleges that the prosecutor deprived him of a fair trial by engaging in misconduct that included: (1) the argument of facts not in evidence, (2) improper shifting of the burden of proof to the defense during closing argument, and (3) elicitation of improper character evidence at trial. We disagree. Our review of these unpreserved claims of prosecutorial misconduct is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Claims of prosecutorial misconduct are reviewed case by case, examining the challenged remarks in context to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 n 7; 531 NW2d 659 (1995). The record must be read as a whole, and the allegedly impermissible statements judged in the context they were made. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). A prosecutor may

[4] Apparently, trial counsel did discuss the possibility of calling a relative of the surprise witness, but the relative was in a dispute with the witness and police had found stolen property in her home. Moreover, trial counsel opined that the surprise witness testimony did not appear to be credible and did not carry much weight in light of the eyewitness identification by the female victim. Although the trial court disagreed with trial counsel regarding the weight of the testimony, the trial court did not take issue with the ability to impeach the witness based on his prior record, evidence of motive to lie, and lack of credibility.

argue the facts and reasonable inferences from the facts relative to the theory of the case. *Bahoda*, *supra* at 282.

Review of the prosecutor's statements in context reveals that the challenge based on prosecutorial misconduct is without merit. The prosecution noted the DNA findings reported by the expert hired by the defense in comparison to the findings reported by the expert for the prosecution. The prosecution expressly noted that he did not understand the procedure, but stated that defendant could not be ruled out in light of the sample available. Moreover, viewed in context, it appears that the prosecutor was arguing that it was defendant's DNA in the hat in light of *all* of the evidence in the case, particularly the description of defendant by the female victim, his acquaintance. The prosecutor's comments did not impermissibly shift the burden of proof, but was proper commentary on the evidence and theory presented by the defense. Where a defendant advances an alternate theory of the case that would, if true, exonerate the defendant, the prosecutor's comment on the theory cannot be said to shift the burden of proof to the defendant. *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999).

The contention that the prosecutor improperly elicited character evidence from a police officer is without merit. An officer's testimony regarding prior contacts or discussions with a defendant before an arrest do not constitute prosecutorial misconduct where the prosecutor was establishing the identity of the defendant and the officer's basis for the identification. *People v LaPorte*, 103 Mich App 444, 448; 303 NW2d 222 (1981). Review of the testimony in context reveals that it was utilized to establish identification and the location of defendant's residence, and the prosecutor did not elicit testimony concerning any prior bad acts or criminal activities of the defendant. *Id*. Additionally, we note that defendant's best friend testified that he knew of another individual who used the nickname "Big Country." Accordingly, the contention that this testimony constituted prosecutorial misconduct is without merit.

Defendant next alleges that the trial court committed reversible error and abused its discretion by allowing a police witness to testify regarding inadmissible hearsay. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Third-party identification testimony, including repetition of witness statements by a police officer, does not constitute hearsay and admission of such testimony is within the discretion of the trial court. *People v Malone*, 193 Mich App 366, 370; 483 NW2d 470 (1992), aff'd 445 Mich 369 (1994). Moreover, the admission of mere cumulative evidence is not prejudicial.[5] *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). The testimony of the police officer regarding the victim's identification was cumulative to her testimony regarding how she identified her assailant.

Lastly, defendant contends that a new trial is warranted on the basis of cumulative errors that occurred during the trial. Because defendant has not established error, there can be no

[5] Defendant contends that the testimony was not cumulative because the officer testified that the female victim indicated that she was 100 percent sure that defendant was her assailant. On the contrary, the officer testified that the female victim said, "she was nearly 100 percent sure" regarding the identity of her assailant, and the victim testified that she was 99.9 percent positive regarding the assailant's identity.

cumulative effect of errors warranting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello