STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2004
v	No. 250159 Wayne Circuit Court
DON KELVIN-ANDY PERKINS, Defendant-Appellant.	LC No. 01-013625-01

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder; MCL 750.316(1)(b), armed robbery, MCL 750.529, assault of with intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. After dismissing two of defendant's first-degree murder convictions and his armed robbery conviction,[1] the trial court sentenced defendant to life imprisonment for the two remaining first-degree murder convictions, 225 months to 40 years' imprisonment for the assault with intent to murder conviction, and forty to sixty months' imprisonment for the felon in possession of a firearm conviction, to be served consecutively to two years' imprisonment for the felony-firearm conviction. We affirm.

I. Facts

At about 10:45 p.m. on October 15, 2001, Maurice Odums, Damon Hill, and Antonio Hall drove to a residence at 14181 Spring Garden so that Hall could meet someone to sell a pound of marijuana. After parking the car, they walked up the driveway to get to the back of the residence. Hill and Hall were carrying large wads of money in their pockets and Hall was carrying marijuana in his bag. When they got to the back of the residence, they were confronted by defendant, Corey Scales, and one other unidentified man, who were all armed with handguns.

[1] There were only two murder victims. The court did not specify whether it was dismissing defendant's premeditated murder convictions or his felony-murder convictions. However, the court indicated that it was required to dismiss defendant's armed robbery conviction because armed robbery was the underlying felony supporting defendant's felony-murder convictions.

When defendant pointed his gun at Odums, Hill, and Hall, Hall told the gunmen that they could have whatever they wanted if they did not shoot him. Odums then heard a gunshot and started running away. Scales pursued Odums and shot at him several times during the chase. Eventually, Odums saw a parked police car and ran toward it. Before reaching the police car, Odums and the police officers heard more gunshots coming from the backyard of 14181 Spring Garden. The police officers patted Odums down and put him in the police car. Soon after, Scales emerged from an alley and the police arrested him. The police investigated and found the bodies of Hill and Hall in a driveway between two residences. Both had been killed by a single gunshot to the head. A search of their bodies revealed that Hall was carrying $5.

Meanwhile, another police officer, who was arriving on the scene, noticed a Caprice being driven by defendant and occupied by Anthony Patton. Defendant and Patton testified that they were not at 14181 Spring Garden that night, but were driving to pick up defendant's friend, Lena Nixon, at a nearby bus stop. Defendant slowed down next to the police car where Scales was detained. Defendant testified that he slowed down by the police car because he was curious, and that he recognized Scales in the back of the car. According to the officer, Scales had his face pressed up to the window and appeared to be stating something to the occupants of the Caprice. The officer ordered defendant to stop his car, but defendant drove away. Defendant testified that he did not know that the officer ordered him to stop. Two police cars pursued defendant. Defendant testified that when he noticed he was being followed by police, he sped up because Patton said he did not want to be stopped by police. At one point during the chase, defendant slowed down without coming to a full stop and let Patton out. An officer got out of his car to pursue Patton on foot, but could not catch him. Later, defendant stopped, and police arrested him. A search of defendant revealed that he was carrying $10.50. The next day, Odums identified defendant at a police lineup.

At trial, defendant argued that he was not involved in the murders. In support of this defense, he testified that he was at a wake until about 10:40 p.m. on October 15, 2001. Several witnesses, including Patton, corroborated defendant's testimony that he was at the wake until between 10:30 p.m. and 11:00 p.m.. The jury rejected defendant's defense and convicted him as outlined above.

II. Analysis

A. Production of Witnesses

First, defendant argues that the trial court denied him his right to present a defense by denying defendant's request to produce an unendorsed police officer at trial and to assist him in locating another witness. We review de novo the question whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

The Sixth Amendment to the United States Constitution protects a criminal defendant's right to obtain witnesses through compulsory process. *Washington v Texas*, 388 US 14, 19; 87 S Ct 1920; 18 L Ed 2d 1019 (1967). However, "[a] criminal defendant's right to call witnesses is not absolute." *People v Lueth*, 253 Mich App 670, 689; 660 NW2d 322 (2002). Probative evidence may be precluded when the defendant fails to comply with a valid discovery rule. *Michigan v Lucas*, 500 US 145, 151; 111 S Ct 1743; 114 L Ed 2d 205 (1991).

1. Officer Fisher

Defendant argues that the production of Officer Fisher, who took one of Odum's statements to police, was essential to his defense. Upon request, a criminal defendant is required to provide, within ten days before trial or another time specified by the court, the names and addresses of all witnesses the defendant intends to call at trial. MCL 767.94a; MCR 6.201(A)(1). The trial court has the discretion in deciding whether to allow the late endorsement of a witness or to exclude testimony or evidence for noncompliance with discovery rules. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995); *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003); MCR 6.201(J). Here, defendant did not request production of Officer Fisher until the third day of trial and the last day of testimony. As noted by the trial court, granting defendant's request to produce the witness was late and would have delayed the trial considerably. Further, Officer Fisher would merely have testified regarding one of Odum's statements to police, which was already covered in detail at trial. There is no indication that defendant was prejudiced by the trial court's decision, as defendant does not give any indication how Officer Fisher's testimony would have been beneficial to his case. The trial court did not abuse its discretion in denying defendant's request to produce Officer Fisher for trial.

2. Lena Nixon

Defendant argues that Nixon was necessary to his defense because she would have corroborated his testimony that he was on his way to pick her up at a bus stop when the police saw him and began to chase him. Defendant argues that the trial court should have granted his request to assist him in locating and producing Nixon for trial. A defendant requesting assistance in locating and serving a witness must do so in writing within ten days before trial or another time specified by the court. MCL 767.40a(5). Here, defendant did not request assistance in locating Nixon until the third day of trial and the last day of testimony. Locating and producing Nixon for trial would delayed the trial for days, if not weeks. Further, there is no indication that Nixon would have testified favorably for defendant. Even if she had, the most she could have added was that defendant had agreed to pick her up at the bus stop. Such testimony would have merely corroborated the testimony of two other witnesses who testified to the same fact. The trial court did not abuse its discretion in denying defendant's request that the prosecution assist him in locating Nixon. Thus, defendant was not denied his right to present a defense.

B. Prosecutorial Misconduct

Next, defendant argues that he was denied a fair trial by numerous instances of prosecutorial misconduct. We review claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defendant failed to preserve his allegations of prosecutorial misconduct, our review regarding this issue is for plain error that affected defendant's substantial rights. *Id.* We will not find error requiring reversal where a curative instruction could have alleviated any prejudice. *Id.* at 449.

1. Opening Statement

Defendant first claims that the prosecutor engaged in misconduct during his opening statement. Defendant first points to the prosecutor's statement that defense counsel might not be

thankful for the jurors serving on the jury. This was an isolated comment that was made after defense counsel objected to the prosecutor thanking the jurors, on behalf of the victims' families, for serving on the jury. Second, defendant points to the prosecutor's comment that Scales's case had "already been disposed of." This remark did not, as defendant argues, imply that Scales had been convicted. Further, the prosecutor's comment merely restated what the trial court had already told the jurors during voir dire. Third, defendant argues that it was improper for the prosecutor to say that Odums "passed the gold standard test, going to a line-up and choosing the right man, that is Don Perkins." This statement was a proper comment on the evidence the prosecutor intended to present. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Moreover, there is no indication that defendant was prejudiced by any of the prosecutor's comments during his opening statement. Any possible prejudice was cured by the trial court's instruction that the statements of the attorneys are not evidence.

2. Cross-Examination

Next, defendant argues that the prosecutor engaged in misconduct during the cross-examination of witnesses. First, defendant points to the prosecutor's cross-examination of one of the defense witnesses, where the prosecutor asked the witness if he had been watching the trial from the courtroom despite having been told by the trial court to wait in the hallway. "Opportunity and motive to fabricate testimony are permissible areas of inquiry of any witness." *People v Buckey*, 424 Mich 1, 15; 378 NW2d 432 (1985). Because the prosecutor had reason to believe that the witness had remained in the courtroom throughout the questioning of the prosecution's witnesses, it was proper for the prosecutor to confirm this fact during cross-examination, so the prosecutor could later call the witness's credibility into question by pointing out that the witness could have conformed his testimony to that of other testifying witnesses. The prosecutor did not, as defendant contends, give unsworn testimony while questioning the witness, but merely asked leading questions, which are permissible during cross-examination. MRE 611(c)(2).

Second, defendant argues that the prosecutor engaged in misconduct by asking defendant on cross-examination if one of the police officers would have any reason to lie. "A prosecutor may not ask a defendant to comment on the credibility of prosecution witnesses because a defendant's opinion of their credibility is not probative." *Ackerman, supra* at 449. However, a timely objection by defense counsel could have cured any prejudice by obtaining an appropriate cautionary instruction. See *Buckey, supra* at 18. Further, defendant has not shown that this question affected defendant's substantial rights by changing the outcome of the trial.

Third, defendant argues that the prosecutor engaged in misconduct by reminding defense counsel in the presence of the jury that he had shown him one of the exhibits during their lunch hour. Defendant does not explain why this comment was improper. We do not see any misconduct related to this statement.

3. Closing Argument

Next, defendant argues that the prosecutor engaged in misconduct during his closing argument. Defendant first contends that the prosecutor gave unsworn testimony in his closing argument several times. We disagree. By arguing that Patton might have been the third person involved in the murders, the prosecutor was merely drawing a reasonable inference from the

testimony as it related to his theory of the case, which is allowed during closing arguments. *People v Knowles*, 256 Mich App 53, 60; 662 NW2d 824 (2003). The prosecutor's comment that the backyard of the Spring Garden residence was "lit up" by a "floodlight" was proper because several witness testified that the backyard was illuminated by a floodlight. The prosecutor's comment that defendant turned away from Odums while Odums was testifying at trial was not improper because the record clearly indicates that defendant did in fact turn his back to Odums while Odums testified. The jury could properly consider defendant's actions and demeanor when evaluating his credibility, and the prosecutor's remark properly pointed out that defendant's body language showed his lack of credibility. The prosecutor's statement that "what we have here is the classic returning to the scene of the crime" was not, as defendant argues, unsworn testimony "about the existence of some undocumented phenomenon," but was the prosecutor again properly drawing a reasonable inference from the testimony as it related to his theory of the case. *Knowles, supra* at 60.

Defendant next argues that the prosecutor shifted the burden of proof by commenting on the fact that Nixon did not testify as an alibi witness. However, where the defendant advances an alternate theory or alibi, the prosecution may properly comment on the nonproduction of corroborating alibi witnesses. *People v Fields*, 450 Mich 94, 112-116.; 538 NW2d 356 (1995). Such a comment merely points out the weakness in the defendant's case and does not shift the burden of proof. *Id.* at 107-108, 112-116.

Defendant also argues that the prosecutor attempted to mislead the jury on the law by telling the jury that defendant's flight from the police could be interpreted as "evidence of guilt" rather than as consciousness of guilt. Defendant is correct that evidence of flight is admissible to support an inference of consciousness of guilt. *People v Goodin*, 257 Mich App 425, 668 NW2d 392 (2003). But such evidence is substantive evidence of guilt. *People v Cutchall*, 200 Mich App 396, 399; 504 NW2d 666 (1993). Therefore, the prosecutor's statement that flight can be interpreted as evidence of guilt was accurate. Furthermore, any confusion caused by the prosecutor's comment was cured when the trial court instructed the jury that flight alone does not prove guilt, but can be used to infer a guilty state of mind.

Finally, defendant argues that the prosecutor improperly denigrated and questioned the integrity of defense counsel. A prosecutor may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Additionally, "[a] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

> "The prosecutor may not question defense counsel's veracity. . . . When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. . . . Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality." [*People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), quoting *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984).]

Here, the prosecutor made the following allegedly improper comments during the rebuttal portion of his closing argument: (1) he referred to defense counsel as a "wolf in sheep's

clothing;" (2) referring to defense counsel, he stated, "This is a guy who represents a criminal"; (3) he talked about his past experiences with defense counsel, and implied that defense counsel is unethical; (4) he stated, "when is [defense counsel] ever going to get up and say, 'Well, you know what? They got my guy?' You know. That's his lawyer. His obligation flows to one person, [defendant]"; and (5) he repeatedly referred to the fact that defense counsel was paid to represent defendant, implying that defense counsel would act unethically and argue facts not in evidence because he was paid to do so (e.g., "He's making that statement, which obviously doesn't comport with the evidence, for the benefit of his client"). We conclude that these comments improperly attacked the credibility of defense counsel and implied that defense counsel did not believe his own client, and was only making his arguments because defendant paid him.

Despite the prosecutor's improper comments, we conclude that defendant has not shown that the comments were so prejudicial that they denied him a fair trial. Before making the improper comments, the prosecutor clarified that his remarks were "not necessarily an attack on [defense counsel] or [defendant]. My comments are centered on responding to essentially what the defense is." The prosecutor and the trial court also reminded the jury that the lawyers' statements and arguments were not evidence, and the trial court instructed the jury that the prosecution had the burden of proving defendant's guilt beyond a reasonable doubt. Further, the prosecutor only made the improper comments during the rebuttal of his closing argument, and the comments were not so pervasive that they would have affected the outcome of the trial. Therefore, while we caution the prosecutor to refrain from such remarks in the future, we conclude that defendant has not shown plain error affecting his substantial rights.

C. Jury Instruction

Next, defendant argues that the trial court improperly vouched for prosecution witness Odums by instructing the jury not to consider the lifestyles of the victims or parties. Claims of instructional error are reviewed de novo. *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003). "Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred. It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law." *Id.* (citations omitted). "Even if somewhat imperfect, jury instructions are not erroneous if they fairly present the issues for trial and sufficiently protect the defendant's rights." *People v McLaughlin*, 258 Mich App 635, 668; 672 NW2d 860 (2003).

Here, the jury heard evidence throughout the trial that the victims sold marijuana. At one point while cross-examining a witness, defense counsel asked, "[S]o Antonio Hall and Damon Hill were big[-]time dope dealers[,] right?" The trial court gave the following jury instruction in order to ensure that the jury was not biased against the victims because of their participation in illegal activities:

> Now, you decide[] the facts. And you must do so objectively. You cannot decide the case on any subjective emotions, or any feelings of bias[] or sympathy. You have to leave those feelings outside the jury room.

> . . . . You're not to consider the lifestyles of the victims, or the lifestyles of any of the parties in the case. You are to consider the facts, and do so objectively.
>
> Likes and dislikes and lifestyles or whether you approve of what the parties do, or how they conduct themselves, that's not the issue. You're to disregard that and decide the case objectively on the facts.

Contrary to defendant's contention, this instruction does not vouch for Odums. First, there is no evidence that Odums sold marijuana, so the instruction was not directed at him. Second, the instruction merely reminded the jury to decide the case based on objective facts rather than subjective feelings about the victims' lifestyles. Because the instruction did not improperly vouch for Odums's credibility, the trial court did not err in giving this instruction.

D. Ineffective Assistance of Counsel

Finally, defendant argues that his trial counsel was ineffective for several reasons. In order to preserve the issue of effective assistance of counsel for appellate review, the defendant must move for a new trial or an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Where the defendant fails to create a testimonial record in the trial court with regard to his claims of ineffective assistance, appellate review is foreclosed unless the record contains sufficient detail to support his claims. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996). Here, defendant failed to move for an evidentiary hearing or a new trial in the trial court. Although he filed a motion to remand with this Court, the motion was denied. *People v Perkins*, unpublished order of the Court of Appeals, entered March 30, 2004 (Docket No. 250159). Because an evidentiary hearing was not conducted, our review is limited to the mistakes apparent on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, the defendant must first show that the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). The reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant bears the heavy burden of proving otherwise. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Carbin, supra* at 600. In addition to showing counsel's deficient performance, the defendant must show that the representation was so prejudicial to him that he was denied a fair trial. *Toma, supra* at 302. In order to show prejudice, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Carbin, supra* at 600. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, quoting *Strickland, supra* at 694.

1. Failure to Object to Prosecutorial Misconduct

Defendant first argues that his counsel was ineffective for failing to object to the prosecutor's improper comments discussed in Part II(B) of this opinion. As discussed, *supra*, defendant was not so prejudiced by these comments that he was denied a fair trial. Because defendant has not shown prejudice from these comments, defense counsel's failure to object to these comments did not amount to ineffective assistance of counsel. *Toma, supra* at 302.

2. Failure to Object to Jury Instruction

Next, defendant argues that his trial counsel was ineffective for failing to object to the trial court's instruction to the jury that it should not decide the case based on the victims' lifestyles. However, the record shows that trial counsel did in fact object to the trial court giving this type of instruction. Therefore, counsel was not ineffective.

3. Failure to Move to Suppress Lineup

Next, defendant argues that his trial counsel was ineffective for failing to move to suppress testimony regarding the police lineup. However, defendant's argument consists of one sentence and defendant does not cite any legal authority supporting his position that the lineup was improperly conducted. "'An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *Watson, supra* at 587, quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Because defendant failed to cite any supporting legal authority, he has abandoned this issue. *Watson, supra* at 587.

4. Failure to Present Expert Testimony

Next, defendant argues that his trial counsel was ineffective for failing to present expert testimony concerning the inherent problems and unreliability of the eyewitness identification procedure. Once again, defendant has abandoned this issue by making a one-sentence argument that is unsupported by legal authority. *Watson, supra* at 587.

5. Cross-Examination

Next, defendant argues that his trial counsel was ineffective by attempting "improper cross[-]examination which invited admonishment from the court." Again, defendant has abandoned this issue by making a general one-sentence argument that is unsupported by legal authority. *Watson, supra* at 587.

6. Cumulative Effect of Errors

Last, defendant argues that the errors of his trial counsel, when viewed in their totality, constituted ineffective assistance of counsel. But because defendant has not shown any instances of ineffective assistance of counsel, this argument lacks merit.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot