STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2008
v	No. 275752 Wayne Circuit Court
DWAYNE DARNELL BALLINGER, JR., Defendant-Appellant.	LC No. 06-008244-01

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to life in prison for each murder conviction and two years in prison for the felony-firearm conviction. We affirm.

I. Basic Facts

During the early morning hours of July 4, 2006, Darius Jones and Mario Harris were standing next to their friend Ramon Nixon's blue Monte Carlo, which was parked on Fielding Street in Detroit, Michigan near Jones's home. Harris and Jones were having a conversation with Nixon, who was sitting in the driver's seat of his car. Another friend of theirs, Derrick Greene, was watching the conversation from across the street as he sat in the driver's seat of Jones's parked car. At that time, defendant arrived in a green Aurora, whereupon Nixon got out of his car and stood next to Jones and Harris. Defendant exited the passenger's side of the green Aurora, walked over to the three individuals, and engaged in a "heated" argument with Jones, advising him, "[y]ou better not bring your bitch ass back across Kentfield [Street] or it's on."

After a period of time, estimated as 10 to 15 minutes by Nixon and three to four minutes by Greene, defendant walked back to the green Aurora and retrieved an AK-47 rifle. With the rifle in hand, defendant walked back toward Jones, Harris, and Nixon.[1] Nixon and Greene

[1] The driver of the green Aurora also exited the vehicle holding "a little .380 in his hand," but there is no evidence that he fired his weapon.

observed defendant and Jones argue again briefly, whereafter defendant momentarily turned away from Jones, Harris, and Nixon. He then faced them, lifted up the rifle, and began to shoot. After seeing Jones fall, Greene ducked down in Jones's car. When Nixon first heard the first shot, he ran away from the scene. Greene estimated that he heard somewhere between 10 to 15 shots fired.

After the shooting stopped and defendant had fled the scene, Nixon returned to his car, and he and Greene observed Jones and Harris on the ground. The parties stipulated that Jones died of nine gunshot wounds and Harris died of four gunshot wounds. Bullets damaged the windows in Nixon's car. All of the shell casings recovered were from an assault rifle. This criminal case ensued, and defendant was convicted by a jury of the charged offenses.

II. Effective Assistance of Counsel

Defendant first argues that his trial counsel was ineffective for failing to investigate or call Michelle Cunningham as an alibi witness at trial. We disagree.

A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We note that both the trial court and this Court previously denied defendant's request for a *Ginther* hearing. *People v Ballinger*, unpublished order of the Court of Appeals, entered November 9, 2007 (Docket No. 275752). Therefore, our review of this issue is limited to the existing record. *Rodriguez*, *supra* at 38. Because we conclude that an evidentiary hearing is not necessary to decide this issue, we deny defendant's continuing request for a *Ginther* hearing. See MCR 7.211(C)(1)(a)(ii).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Defense counsel's failure to investigate and call a witness does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). In other words, defense counsel's failure to call the proposed witness in this case can only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Id*. at 710. Moreover, the decision whether to call a witness is presumed to be a matter of trial strategy, *Dixon*, *supra* at 398, and we will not substitute our judgment for that of counsel regarding matters of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Before trial, defense counsel filed a "Defense Alibi Witness List" that listed the names of five witnesses, one of which was Michelle Krisel. When the prosecutor filed a motion to quash

the alibi notice, however, defense counsel indicated that the alibi defense would not be pursued. Following trial, defendant retained new counsel who moved for judgment notwithstanding the verdict (JNOV) and a new trial, asserting that defendant's trial counsel was ineffective for failing to present an alibi defense. The motion was accompanied by an affidavit from Cunningham. In the affidavit, Cunningham states that she was with defendant at his residence at the time of the shooting, that she was available to testify to this, and that she was never interviewed or contacted by defendant's trial counsel. At sentencing, defendant's substitute counsel stated that Michelle Cunningham was listed on the alibi notice as Michelle Krisel.

On appeal, defendant argues that his trial counsel's failure to investigate and call Cunningham to testify as an alibi witness deprived him of a substantial defense. But, "counsel cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Although defendant's trial counsel listed Krisel as a potential witness in the alibi notice, there is no evidence in the record supporting the assertion that Krisel and Cunningham are the same person. That said, there is no evidence that trial counsel was aware of Cunningham as a potential witness or the substance of her purported testimony before trial. Moreover, defendant has not established that Cunningham's testimony would have affected the outcome of the case. *Henry*, *supra* at 146; *Hyland*, *supra* at 710. Two eyewitnesses, Greene and Nixon, unequivocally identified defendant as the shooter at trial. Accordingly, defendant has failed to overcome the presumption of effective assistance of counsel. *Henry*, *supra* at 146.

III. Admission of Gun

Defendant next argues that the trial court abused its discretion in admitting exhibit 61, an AK-47 assault rifle, as demonstrative evidence at trial. We disagree.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "The abuse of discretion standard acknowledges that there may be more than one principled outcome in any given case. An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007) (citations omitted).

"Demonstrative evidence, including physical objects alleged to be similar to those involved in the incident at issue, is admissible where it may aid the fact finder in reaching a conclusion on a matter material to the case." *People v Castillo*, 230 Mich App 442, 444; 584 NW2d 606 (1998). As with all evidence, demonstrative evidence must be relevant and probative. *Id*. In addition, "[a] weapon similar to one allegedly used in the commission of a crime may be admitted as demonstrative evidence where substantial evidence attests to the similarity of the exhibit offered to the weapon allegedly used, there is no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence, and the opposing party has ample opportunity for cross-examination regarding the demonstrative weapon." *Id*. at 444-445.

Concerning the first element of the demonstrative evidence test, both Nixon and Greene testified that they saw defendant with an AK-47 at the time of the shooting. Upon comparing exhibit 61 to the AK-47 defendant possessed, Nixon testified, "Yeah. It was the same - I don't

know if that was the exact gun, but it was an AK-47." Similarly, Greene testified, "It's like the same gun. It don't look like that, no." The parties stipulated that the victims died as a result of multiple gunshot wounds and police testified that the bullet casings found at the crime scene came from an assault rifle. This evidence satisfies the requirement of a substantial evidentiary basis for likening the assault rifle in evidence to the alleged instrumentality of the crime. *Id*.

Under the second element of the demonstrative evidence test, there must be no reasonable likelihood that the jury may fail to understand the demonstrative nature of the evidence. *Id*. Both Nixon and Greene testified that exhibit 61 was the same type of gun that defendant possessed, although the guns did not look exactly the same. Furthermore, Investigator Frazer Adams testified that exhibit 61 was recovered from Shajuana Duncan's home, but that he could not recall Duncan's relation to the case. Finally, in regard to the third element of the demonstrative evidence test, defendant does not dispute that defense counsel had the opportunity for cross-examination regarding exhibit 61. *Id*. In fact, defense counsel elicited testimony regarding the lack of connection between the demonstrative assault rifle and defendant.

We also find that the assault rifle admitted into evidence was both relevant and probative. To determine if evidence is relevant, a reviewing court must examine the materiality of the evidence and whether the evidence makes a fact of consequence more or less probable. *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995). In this case, the prosecutor charged defendant with two counts of first-degree murder and felony-firearm. Therefore, it was the prosecutor's burden to prove that defendant intentionally killed the victims with premeditation and deliberation and that he possessed a firearm. MCL 750.227b; MCL 750.316; *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). Nixon and Greene's ability to compare and contrast exhibit 61 to the AK-47 in defendant's possession made their testimony that defendant shot the victims with an AK-47 more probable. *Mills, supra* at 66-67. Because the general principles of admissibility and the elements of the demonstrative evidence test were satisfied, we conclude that the trial court did not abuse its discretion in admitting exhibit 61.

Additionally, defendant argues that he was denied a fair trial because the trial court failed to rule on defense counsel's objection to the admission of exhibit 61. Pursuant to MCR 6.508(E), a trial court "either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion." Under MRE 103(b), when a trial court makes a ruling on evidence, it "may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon." In this case, when the prosecutor moved to admit exhibits 3 to 61, the trial court stated, "It will be received." Defense counsel subsequently objected to exhibit 61 because it had not yet been identified. The trial court indicated that it would consider the objection, but it never made a ruling on the record. We acknowledge that this was error. Nonetheless, defendant has failed to establish that the trial court's error was outcome determinative. See *Lukity, supra* at 495-496 (stating that "a preserved, nonconstitutional error is not a ground for reversal unless . . . it is more probable than not that the error was outcome determinative"). Nixon and Greene compared exhibit 61 to the AK-47 defendant possessed and Investigator Adams identified the exhibit and explained how it was recovered after its admission. Therefore, reversal is not warranted.

IV. Alleged Prosecutorial Misconduct

Finally, defendant argues that the prosecutor committed misconduct by making statements during his closing argument that were unsupported by the evidence. According to defendant, the prosecutor improperly implied that defendant used exhibit 61 to commit the charged crimes. We disagree.

We review defendant's unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). Plain error exists if the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Where a curative instruction could have alleviated any prejudicial effect, reversal is not warranted. *Id*. at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id*. 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. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *Ackerman, supra* at 450, but he 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); *Ackerman, supra* at 450.

In his closing argument, the prosecutor stated at least twice that defendant should be found guilty of the charged crimes because he used "that gun." It is unclear whether the prosecutor was referring to exhibit 61, which was admitted only for demonstrative purposes, or to the AK-47 Nixon and Greene described being in defendant's possession. Considering that the prosecutor referred to the AK-47 in Nixon and Greene's testimony throughout closing arguments, the latter is more likely. But, even if the prosecutor's references to "that gun" were improper, defendant has failed to establish that the alleged misconduct was outcome determinative. *Carines, supra* at 763. A prosecutor's isolated statement, even when improper, is subject to harmless error analysis. See *People v Armentero*, 148 Mich App 120, 134; 384 NW2d 98 (1986). As discussed *infra*, the evidence presented at trial was more than sufficient to support defendant's convictions. Furthermore, the trial court's instruction to the jury that the attorneys' opening and closing statements were not evidence alleviated any potential prejudice to defendant. *Ackerman, supra* at 449; *Watson, supra* at 586.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering