STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK LAMAR DIXON,

Defendant-Appellant.

UNPUBLISHED
October 15, 2009

No. 285637
Washtenaw Circuit Court
LC No. 07-001101-FH

Before: Talbot, P.J., and Wilder and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(*iv*). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent terms of 36 months to 120 months' imprisonment. We affirm.

Defendant contends that he was denied his right to a fair trial when court officers entered the courtroom carrying shackles. "The Sixth Amendment guarantee of the right to a fair trial means that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002), quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978).

Defendant was not shackled during trial. Rather, defendant asserts he was prejudiced when officers entered the courtroom with shackles and sat down. However, defendant and his attorney were outside the courtroom when officers entered and the jury never observed the officers approach defendant. In *Holbrook v Flynn*, 475 US 560, 562-563, 568-570; 106 S Ct 1340; 89 L Ed 2d 525 (1986), the defendant challenged the fairness of his trial because of the presence of uniformed and armed state troopers seated behind the defendant and his codefendants during trial. In determining whether the troopers' presence deprived the defendant of a fair trial, the Court examined whether what the jury observed was "so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial." *Id.* at 572. Under the circumstances of this case, the presence of two court officers carrying shackles, while defendant was not even present in the courtroom does not establish or comprise an "unmistakable mark of guilt." *Holbrook, supra* at 571. Rather, it was a normal show of general concern for the safety and orderly conduct of the proceedings. *Id.* Further, other than defendant's own assertions,

there is no evidence that the trial court ordered these officers into the courtroom or that the officers positioned themselves in conspicuous proximity to defendant. Thus, defendant has failed to demonstrate the existence of any inherent prejudice that would have unacceptably threatened his right to a fair trial. *Id.* at 572.

Defendant also argues that the prosecutor committed misconduct in impeaching an alibi witness, Henry Dishmon, regarding his prior drug convictions. Because defendant failed to raise a timely objection, this issue is unpreserved. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Callon, supra* at 329. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Id.*

Defendant contends Dishmon's credibility was improperly impeached because the convictions referenced did not comport with the requirements of MRE 609. However, a review of the prosecutor's questioning demonstrates that the inquiries and statements were directed to demonstrate that Dishmon was sympathetic to defendant because he had been in similar circumstances and were not focused on his credibility. Dishmon provided an alibi for defendant regarding the February 27, 2007, drug purchase. Although Dishmon indicated that he was troubled by the accusation that defendant sold drugs to an undercover officer and did not want his friends to get into trouble, he also claimed that he was not willing to lie for defendant. However, Dishmon stated that he would not be surprised to hear that defendant was dealing drugs because he had been accused of it before. As part of this discourse, Dishmon acknowledged that he was previously accused of selling drugs. As noted by this Court in *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005) (citations omitted), "Unless excluded by constitution or court rule, evidence is admissible if it is relevant . . . . A witness's bias is always relevant." Specifically:

> Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence that might bear on the accuracy and truth of a witness' testimony. [*People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001).]

Further, defendant has failed to show that any purported error in eliciting this testimony was outcome determinative given the sufficiency of evidence that defendant was the individual engaged in two hand-to-hand sales of cocaine with undercover detective David Ried. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Bartlett*, 197 Mich App 15, 20; 494 NW2d 776 (1992).

In a related claim, defendant asserts that his trial counsel was ineffective for failing to object to the introduction of this prior conviction evidence. We conclude that defendant has failed to demonstrate that defense counsel's actions fell below an objective standard of reasonableness or that he suffered prejudice to the extent that there is a reasonable probability that the outcome would have been different. *People v Pickens*, 446 Mich 298, 312-314; 521 NW2d 797 (1994). "Certainly there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Defendant has failed to overcome the strong presumption that defense counsel's decision not to object was a matter of sound trial strategy in attempting to avoid drawing additional attention to

the existence or importance of the convictions. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). "[E]ven if defense counsel was ultimately mistaken, this Court will not assess counsel's performance with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant also argues that the trial court abused its discretion in admitting evidence of his prior convictions because they were more than ten years old and did not contain elements of theft or dishonesty. Defendant did not object to the evidence at trial on the grounds that some of the convictions did not contain elements of dishonesty. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Further, defense counsel's objection to the fact that some convictions were inadmissible because they were more than ten years old was not timely, as he interposed his objection well after defendant responded to the prosecutor's questions. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). To prevail on these unpreserved claims, defendant must show that a plain error occurred that affected the outcome of the trial. *Carines, supra* at 763-764.

Defendant introduced evidence of his prior conviction for fleeing and eluding police during direct examination. Defendant cannot introduce evidence of his prior conviction and then claim error in its admission on appeal. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003). References to the remainder of defendant's prior convictions arose when he asserted information contained in a presentence investigation report (PSIR) prepared by Rodney Pollard, a probation officer, was untruthful. Defendant further asserted that most of his convictions had occurred over thirty years ago, which the prosecutor corrected by identifying convictions that had occurred more recently. Defendant also implied that he was the subject of long-standing animosity by police officers following his acquittal on a prior drug offense. Contrary to defendant's contention, evidence of his prior convictions was admissible because it was not offered to impeach defendant's credibility for truthfulness, but rather to rebut defendant's assertions regarding the veracity of others. *People v Taylor*, 422 Mich 407, 415-417; 373 NW2d 579 (1985).

Defendant further argues that the prosecutor committed misconduct by expressing his personal opinion regarding the credibility of defendant and Dishmon. Review of this unpreserved claim is precluded unless a timely objection would have failed to cure the error or a miscarriage of justice would result. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). We find that the prosecutor did not impermissibly argue that, based on his personal opinion, defendant and Dishmon were not credible. The prosecutor argued that Dishmon and defendant were not credible based on the evidence and reasonable inferences drawn from it, i.e., Dishmon's poor memory and bias in favor of defendant, defendant's own bias and inconsistencies, and the other evidence against him. *Bahoda, supra* at 276, 282-283; *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Moreover, because defendant failed to object when the prosecutor made the comments, this Court is precluded from finding error requiring reversal where defendant has failed to demonstrate that any error could not have been cured by a curative instruction. *Callon, supra* at 329-330. The trial court also instructed the jury that the attorneys' statements and arguments were not evidence. The jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Next, we find "[d]efendant's argument that these cumulative errors deprived him of a fair trial is without merit. Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999) (citations omitted).

As part of the issues raised in his Standard 4 brief, defendant claims that the trial judge exhibited bias. Because defendant never moved to disqualify the trial judge pursuant to MCR 2.003, this claim is reviewed for manifest injustice, *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* at 340. Defendant must show actual personal bias or prejudice, MCR 2.003(B)(1); *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999), and must overcome the strong presumption that the judge was impartial. *Id.*

Defendant's claims of judicial bias are unsupported. The record reflects that the previous trial court judge granted defendant's motion for disqualification, and the case was reassigned to Judge Shelton. Other than his bare assertion, defendant offers no evidence that the reassigned judge was "hand-picked." Thus, defendant has not overcome the strong presumption of judicial impartiality regarding his case assignment. *Wells, supra* at 391. Further, the record fails to support defendant's claims of judicial bias based on the court officers entering the courtroom with shackles or the revocation of defendant's bond. The trial court revoked defendant's bond because he failed to timely appear in court on the first day of trial, arriving over an hour late and giving conflicting explanations for his tardiness. There is no indication that the trial court's conduct was biased or that it unduly influenced the jury. *Paquette, supra* at 340.

Defendant also asserts that the trial court demonstrated bias having favored the prosecutor by declaring a recess during the cross-examination of Ried. However, the record reflects that the trial court merely took a lunch recess at a convenient stopping point when defense counsel needed to set up an exhibit. The trial court's decision not to dismiss the jury for a recess when defendant conferred with his counsel in the hallway does not demonstrate bias. Defendant and his counsel conferred in the hallway for ten minutes while the trial court "recess[ed] in place," and nothing was said in court in their absence. The trial court merely exercised its broad discretion in conducting the trial. *Paquette, supra* at 340. Further, regarding the trial court's determination of the admissibility of defendant's prior convictions, we find no indication that the trial court's decision was the result of actual personal bias, and defendant has failed to overcome the heavy presumption that the trial court was impartial. *Wells, supra* at 391.

Defendant also contends that the prosecutor wrongly withheld information regarding the existence of an informant. However, defendant's affidavit attached to his motion for a new trial reveals that he knew of the existence of the informant and even resided with him for a period of time. Defendant has failed to establish that the prosecutor withheld favorable and material evidence. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Further, defendant has not established that his counsel failed to investigate and render effective assistance. *McGhee, supra* at 626. The record indicates that defense counsel was made aware of the informant. Based on defendant's explanation that he arranged a purchase of cocaine with the informant, it was a sound strategic decision for defense counsel not to call the informant at trial. His presence would certainly have inculpated defendant in drug related activities and impaired

his credibility. Defense counsel's decision in this regard did not deprive defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Defendant also contends that defense counsel should have treated Pollard as a hostile witness after he gave unfavorable testimony regarding Jaletta King's whereabouts. Defense counsel informed the trial court that Pollard told him several times that King, who was on tether, was not permitted to leave her house in the evenings. Thus, it was reasonable for counsel to believe that Pollard's testimony would rebut Ried's assertion that King was present with defendant during the drug sale on the evening of February 22, 2007. However, on the witness stand, Pollard testified that King was out of her house that evening. Thereafter, defense counsel questioned Pollard about the times that King was absent on her tether and demonstrated that Pollard's testimony was inconsistent with his prior representations. Defense counsel questioned Pollard's credibility during closing argument. As such, defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, *Pickens, supra* at 312-313, or overcome the strong presumption that his decisions constituted reasonable trial strategy under the circumstances. *Dixon, supra* at 398. In addition, based on the lack of record evidence, defendant has failed to prove the factual predicate for his claim that Pollard was "an agent for the prosecution." *Hoag, supra* at 6.

Further, defendant has not demonstrated that counsel's failure to identify and call King as an alibi witness was objectively unreasonable or that defense counsel did not undertake an investigation of this potential witness. Defense counsel explained that he repeatedly attempted to contact defendant regarding alibi witnesses, but defendant failed to return his calls or provide information. Consequently, defendant has not overcome the presumption that defense counsel's decision to use Pollard as a witness instead of King constituted sound trial strategy. *Pickens, supra* at 312-313; *Dixon, supra* at 398.

Defendant next argues that counsel was ineffective for failing to investigate the existence of an alleged police conspiracy against him because of his previous acquittal on drug charges. The record reveals that defense counsel investigated this allegation before trial by requesting and reviewing discovery materials, but found no proof of a conspiracy. Because defendant again has failed to demonstrate that defense counsel failed to investigate this concern, his assertion of ineffective assistance cannot be supported. *Dixon, supra* at 398.

Finally, defendant contends that his appellate counsel rendered ineffective assistance in failing to investigate and refusing to meet with him or respond to correspondence. Other than his self-serving assertions, defendant submits no proof to substantiate this claim, and does not delineate what specific facts defense counsel failed to discover. Further, defendant has not articulated or established how appellate counsel's failure to meet with him has prejudiced his appeal. *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). "[U]nder the deferential standard of review, appellate counsel's decision to winnow out weaker arguments and

focus on those more likely to prevail is not evidence of ineffective assistance." *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995). Further, appellate counsel is not ineffective for failing to raise meritless claims. *Id.* at 402.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Kelly