STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 18, 2010
v	No. 286018 Genesee Circuit Court
GORDON SAMUEL FLOWERS, Defendant-Appellant.	LC No. 08-022379-FC

Before: DONOFRIO, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b.[1] He was sentenced as an habitual offender, third offense, MCL 769.11, to 72 months to 20 years' imprisonment for the assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

I. BASIC FACTS

In the early morning of November 24, 2007, the victim was badly beaten outside a social club and eatery in Flint. The victim testified that he parked his vehicle in the parking lot behind a gray Dodge Stratus with a personalized license plate. As the victim walked toward the club, a passenger in the Stratus asked the victim if he left enough room for the Stratus to pull out. The victim responded affirmatively. The passenger in the Stratus, identified as codefendant Tommy Flowers, answered with an obscenity, and the victim responded in a similar manner and continued walking. Codefendant Tommy exited the passenger side of the Stratus and called to someone across the street in a burgundy "Eddie Bauer" Expedition to join him. Codefendant Tommy approached the victim with a handgun, put the gun to the victim's chest, and questioned him about his comments. Meanwhile, defendant had run across the street from the Expedition, stood next to the victim, and joined codefendant Tommy in menacing the victim. The victim did not respond. Codefendant Tommy then repeatedly hit the victim with the gun, while defendant repeatedly hit the victim with his fists. The victim testified that after being assaulted for

[1] Defendant was acquitted of additional counts of armed robbery, MCL 750.529, and felon in possession of a firearm, MCL 750.224f.

approximately five minutes, defendant snatched his diamond neck chain and the two defendants fled in the Expedition.

The victim went inside the club, called 911, and was eventually taken to the hospital. The victim testified that he gave the police a description of the two vehicles at the scene. Approximately a week after the incident, the victim told an associate about the Expedition and the associate gave him the street name and address of the person who drove the Expedition. In turn, the victim gave the information to the police. The police subsequently observed the vehicle at the residence and later saw defendant in the vehicle. An officer testified that the victim identified each defendant in their respective photographic arrays in a "split second." The victim also identified each defendant at a corporeal lineup. The police discovered that codefendant Tommy's girlfriend owned a 2002 Dodge Stratus with a personalized license plate, and that defendants' mother owned a 1997 burgundy Expedition. The Ford Expedition was seized from defendant's residence.

Defendant testified on his own behalf at trial and denied assaulting the victim or being present at the club on the night of the incident. Defendant, his mother, and girlfriend all testified that defendant was with them at the time of the incident. Defendant's mother admitted ownership of an Expedition, but testified that she did not allow defendant to drive because he did not have a license.

II. SUBSTITUTE COUNSEL

Defendant argues that the trial court abused its discretion by denying defense counsel's motion to withdraw. We disagree.

A. BACKGROUND

Defense counsel and defendant appeared for arraignment on March 17, 2008. At that time, the court scheduled trial for April 23, 2008. In the interim, defense counsel filed various motions and handled all pretrial matters. On the day before trial, defense counsel filed a motion to withdraw. The court addressed the motion on the day of trial and the following exchange occurred on the record:

> *Defense counsel*: I had - - moving to ask the Court to release me from this case. My client had told me emphatically he did not want me to represent him. And for a period of time was refusing to talk to me because he said he was getting a new lawyer. And I believe he wants me to bring that motion to the Court's attention. Is that true then?
>
> *Defendant*: Uh-huh.
>
> *The court*: Well, I indicated to [defense counsel], when I received this yesterday that the trial is today; that no other - - other attorney has appeared to represent Mr. Gordon Flowers, and he has filed his witness list, his alibi notice is in the file. Everybody has brought Motions; you've brought [a] Motion to quash; [codefendant's counsel] brought a Motion to suppress identification.

We've covered all the pre-trial matters and the jury is waiting for us, as we speak.

So it's my understanding we are ready to proceed. [Prosecutor], am I right?

The prosecutor: Yes, Judge.

The court: [Codefendant's counsel], also ready?

Codefendant's counsel: Yes, Judge.

The court: So, [defense counsel], I'm denying that motion. And you know, Mr. Flowers, you want to hire a lawyer you don't wait to the day before the trial, fine, but there is nobody here. And no one has called my office saying they're hired to represent you.

Defendant: Yes, ma'am.

The court: So, [defense counsel] is on board. Thank you.

Defendant: Yes, ma'am.

B. STANDARD OF REVIEW

When reviewing a trial court's decision denying a defense attorney's motion to withdraw and to grant a continuance to secure new counsel, several factors must be considered:

> (1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

"A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

> An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. [*Id.* (citation omitted).]

C. ANALYSIS

Initially, we reject defendant's claim that the trial court's inquiry into the breakdown in the attorney-client relationship was inadequate. "When a defendant asserts that the defendant's

assigned attorney is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record." *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). Here, defense counsel filed a motion, explaining that defendant intended to hire a new attorney and that the relationship had broken down. Defense counsel repeated those allegations in court and defendant did not dispute or add to counsel's statements. The trial court acknowledged receiving the motion and, therefore, was aware of defendant's complaints regarding the performance of appointed counsel.

Defendant did not assert a constitutional right necessitating a substitution of counsel, and neither defendant nor defense counsel articulated a difference of opinion with regard to a fundamental trial tactic. A mere allegation that a defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause. *Traylor,* 245 Mich App 463; *People v Otler*, 51 Mich App 256, 258-259; 214 NW2d 727 (1974). Likewise, defendant's general unhappiness with counsel's representation is insufficient. See, e.g., *Traylor,* 245 Mich App 460. Although defense counsel asserted that defendant was uncooperative and would not discuss the case with him, a defendant may not intentionally break down the attorney-client relationship by refusing to cooperate with his appointed counsel and later argue that good cause exists for substitution. *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985); *People v Meyers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983).

Defendant's added complaints on appeal also do not establish that there was good cause for the appointment of new counsel. Defendant argues that defense counsel failed to file pretrial motions challenging his identification or requesting an expert witness on eyewitness identification. Codefendant's counsel brought a motion challenging identification, which the trial court denied. Thus, the matter was addressed. Also, as discussed in section III, *infra*, defendant has not made the necessary showing of the need for an identification expert in order to safely proceed to trial. See MCL 775.15. Counsel was not required to file duplicate or futile motions. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, decisions about defending the case, including what motions to file and what witnesses to present, are matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and disagreements with regard to trial strategy or professional judgment do not warrant appointment of substitute counsel. *Traylor*, 245 Mich App at 463. Also, counsel's motion to withdraw was untimely. It was heard on the date set for trial, at which time the jury and witnesses were present, and the prosecutor and codefendant were ready to proceed. Substitution of counsel at that point would have unreasonably delayed the judicial process.

In sum, because there was no bona fide dispute that supported a finding of good cause to allow appointed counsel to withdraw and permit a continuance to enable defendant to obtain new counsel, the trial court did not abuse its discretion by denying counsel's motion to withdraw.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that defense counsel was ineffective for failing to present an expert witness on eyewitness identification. We again disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant has failed to demonstrate that, had defense counsel requested an expert witness, there is a reasonable probability that the outcome would have been different. MCL 775.15 provides a trial court with discretion to appoint an expert witness for an indigent defendant upon request. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006). The statute requires a defendant to show that an expert's testimony is required to enable the defendant to "safely proceed to a trial." To be entitled to the appointment of an expert witness,

> an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995). It is not enough for the defendant to show a mere possibility of assistance from the requested expert. [*People v*] *Tanner*, [469 Mich 437, 443; 671 NW2d 728 (2003)]. Without an indication that expert testimony would likely benefit the defense, a trial court does not abuse its discretion in denying a defendant's motion for appointment of an expert witness. *Jacobsen*, [448 Mich] at 641. [*Carnicom*, 272 Mich App at 617.]

Here, defendant has failed to make the necessary showing that an expert was necessary for him to safely proceed to trial. Through cross-examination and other evidence, the defense attorneys were able to challenge the strength and reliability of the victim's identification testimony, and elicit apparent discrepancies and arguable bases for questioning the accuracy of the victim's identification.

Counsel elicited that the victim had three servings of vodka that evening, with his last drink being only 30 minutes before the incident. The victim acknowledged that after the beating, he was disoriented and woozy because of the impact of the blows to his head. Counsel noted the 911 call made immediately after the incident, elicited that the victim gave the operator a false name and stated that he could not describe the perpetrators, and questioned the victim's ability to later be able to provide an identification. Counsel also elicited that the victim told the Flint police, who first responded to the scene, that the gunman was wearing a white T-shirt, but then subsequently claimed that the gunman wore a black hooded jacket. Defense counsel elicited that the victim's testimony contradicted the initial police report in several other respects, including the number of times he was struck, the time of the incident, where he parked, and the year of the Expedition. Counsel also questioned an officer about the number of Ford Expeditions "out there." Given the gunman's apparel as described by the victim, counsel cross-examined the victim about his ability to actually see the gunman's face since he was wearing a hood. Defense counsel also cross-examined the victim and an officer about the lighting conditions outside at 1:30 a.m. In addition, defense counsel cross-examined the officer who conducted the

photographic array, eliciting that all of the participants in the photographs did not convey a height and age comparable to defendant.

Because counsel was able to challenge the reliability and accuracy of the identification evidence through means of cross-examination and other evidence, defendant has failed to show that defense counsel was ineffective for failing to request the appointment of an identification expert, or that he was prejudiced by the absence of such an expert at trial. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

IV. INADMISSIBLE HEARSAY

Next, defendant argues that he is entitled to a new trial because the prosecutor bolstered the victim's identification by eliciting through several witnesses that a person who did not testify at trial identified codefendant Tommy as one of the perpetrators. We disagree. Because defendant failed to object to this evidence below, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A. CHALLENGED TESTIMONY

Defendant challenges portions of the testimony of the victim and two officers. During the victim's direct examination, the following exchange occurred:

> *Q*. Okay. And what if, any, police investigation actually got going on this incident . . .
>
> * * *
>
> *Q*. Okay, and what, if anything, did you tell [Lieutenant Terence Green] that might have furthered the investigation into who had assaulted you that night?
>
> *A*. I got a name that they said was T-Slow. I took it as someone calling me says a guy named T-Slow that lives in Beecher; that's who it was, he described the first suspect to a T. And to - - from talking to him on the phone and - - and that's what it was.
>
> *Q*. Okay. And that information that you received, who did you receive that from?
>
> *A*. It was a guy, Mack, had called - - a guy that - - I - - I - - I sort of know but I was getting so many calls, and he was like this Mack, and A, B, and C, and - - and talking . . . I was just getting numerous of calls - -
>
> * * *
>
> *Q*. Okay. And what had you said to Mack - - to gather this information that you had passed along to the Lieutenant?
>
> *A*. I told him about the car.

Q. Okay.

A. I told him about the Expedition and - - and he described it to me. I said that's him.

Q. Okay. And that's how you got a name?

A. That's how I got the - - got the name. He told me and then when I said the vehicle was in, he said that's such and such. He also said his brother just got out of jail.

* * *

Q. All right. Now from this juncture forward, what do you do with that information?

A. That's when I called Lieutenant Green.

In discussing the investigation, Lieutenant Green testified as follows:

Q. Okay. And when there's not an arrested person for a crime, describe to the jury what you try to do in taking a formal complaint in an investigation situation like this.

* * *

Q. Okay. And did you ever gain any of that type of information, either at the time of the formal statement or later that narrowed you into an identification of the suspect?

* * *

A. I obtained a street name of one of the suspects, that of T-Flow. I obtained a description of the suspect vehicle, the two suspects fled in after the incident. I also obtained information that the suspects were possibly related.

Q. Okay. And, upon obtaining this information, what did you do next?

A. At this time, disseminated the information I received involving the suspects. From that information, I obtained identification of one of the suspects involved.

* * *

Q. Okay. And who did you - - what name did you put with this, based on the information gathered so far?

A. With the name T-Flow, identified the - - one of the suspects as Tommy Flowers.

Q. Okay. And, when you got that name, what did you do next?

A. At that time . . . I then located the address I believe Tommy Flowers was residing. At that time, I conducted a - - a drive by the residence. Then, at that time, I observed the suspect vehicle that was described by the victim in parked directly in the driveway of the residence . . .

* * *

A. During the surveillance, I observed a second male occupying the vehicle - - the suspect was later identified as Gordon Flowers. At that time, I provided the victim with a photo array displaying Gordon Flowers.

Sergeant Laurence Muddy testified that in preparing a search warrant affidavit for the residence, he received information from the victim and an officer:

> The information I received was that there were two suspects and possibly related, possibly brothers. One had just recently gotten out of prison, was informed that there may be narcotics being sold out of his residence. We were looking for a gun. As far as evidence and the - - the diamond chain that was allegedly stole - - stolen during that assault.

B. ANALYSIS

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). An out-of-court statement introduced to show its effect on a listener, as opposed to proving the truth of the matter asserted in it, does not constitute hearsay under MRE 801(c). *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994); *People v Eggleston*, 148 Mich App 494, 502; 384 NW2d 811 (1986). Such a statement "is not offered for a hearsay purpose because its value does not depend upon the truth of the statement." *People v Lee*, 391 Mich 618, 642; 218 NW2d 655 (1974) (citation omitted). A statement offered to show why police officers acted as they did is not hearsay. *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982).

Here, the challenged statements identifying the street name of the perpetrator were not offered to prove the truth of the matters asserted, i.e., that T-Flow or T-Slow and his relative assaulted the victim. Rather, the statements were offered to explain the course and chronology of the police investigation. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (testimony was not offered to establish the truth of the informant's tip, but rather was properly offered to establish and explain why the detective organized a surveillance of the defendant's home). This was relevant because the victim did not know defendants or their names before this incident, and the victim's identification was the crux of the case. Because these statements did not constitute hearsay, defendant has failed to demonstrate a plain error.

To the extent that the challenged testimony went beyond simply explaining the police investigation and improperly referencing that one suspect was recently released from prison and that narcotics were possibly being sold out of the residence, defendant has not shown that any error was outcome determinative. *Carines*, 460 Mich at 763-764. First, defendant stipulated at

trial that he had previously been convicted of a felony in relation to the felon in possession charge, so the prison reference did not affect defendant's substantial rights. Further, considering the compelling evidence in this case, it is also highly unlikely that the brief reference to narcotics affected the outcome of the proceedings. *Id.* Initially, no specific mention or confirmation was made that either defendant was actually selling drugs. Moreover, the victim identified defendant at trial and was certain that he was one of the perpetrators. He also identified both defendants in photographic arrays in a "split second" and in corporeal lineups. The victim explained that he was within 8 to 12 inches of the perpetrators during the five-minute assault, and could clearly see their faces. Testimony and photographic evidence was presented showing that the parking lot was well illuminated. Also, the victim testified that defendants fled in a Ford Expedition, and the same type of vehicle was seized from defendant's residence. The victim further described codefendant Tommy as being in a gray Dodge Straus with a personalized license plate, and evidence revealed that such a car belonged to codefendant Tommy's girlfriend. Defendant is not entitled to appellate relief.

C. EFFECTIVE ASSISTANCE OF COUNSEL

In a related claim, defendant summarily asserts that defense counsel was ineffective for failing to object to the challenged testimony. In light of our conclusion that any error was not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Frazier*, 478 Mich at 243. Therefore, he cannot establish a claim of ineffective assistance of counsel.

V. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant raises additional issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. RIGHT OF CONFRONTATION

Defendant argues that the trial court erred in allowing the testimony that "Mack" gave the victim the street name of his perpetrator, because the testimony was impermissible hearsay and violated his right of confrontation under *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because defendant failed to object to the testimony below, we review this claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

In *Crawford*, 541 US at 59, the United States Supreme Court stated that, for purposes of the Sixth Amendment Confrontation Clause, "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." However, the Confrontation Clause does not bar the use of testimonial statements for a purpose other than to establish the truth of the matter asserted. *Id.*; *People v McPherson*, 263 Mich App 124, 134; 687 NW2d 370 (2004).

Crawford is not implicated here because, as discussed in section IV, *supra*, the contested statements are not hearsay. The challenged testimony was not offered to prove the truth of the information received, but to explain the course of the police investigation. Because the statements were presented for the limited purpose of providing background information, they did not constitute hearsay such that defendant's confrontation rights were violated. Moreover,

although not dispositive of the applicability of *Crawford*, we note that the prosecutor never mentioned or used "Mack's statement during closing argument for the purpose of identifying the defendants." See *McPherson*, 263 Mich App at 134. Rather, the prosecutor relied on the victim's eyewitness testimony, as well as defendants' connections to the identified vehicles. Consequently, plain error has not been shown.

Further, because the testimony did not violate defendant's right of confrontation, defense counsel was not ineffective for failing to object on that basis. Counsel is not ineffective for failing to advocate a futile position. See *Snider*, 239 Mich App at 425.

B. PROSECUTOR'S CONDUCT

We reject defendant's claim that he is entitled to a new trial because the prosecutor engaged in impermissible conduct. Because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor improperly vouched for the victim's testimony throughout trial. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, defendant has not identified the particular statements that he contends were improper or provide citations to the record in support of this argument. As the appellant, "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *Traylor*, 245 Mich App at 464 (citation omitted). Having reviewed the record and considered the prosecutor's questions and remarks in context, we are satisfied that the prosecutor did not suggest that he had special knowledge that the victim was credible. Moreover, in its final instructions, the trial court instructed the jurors that they were the sole judges of witness credibility, and that the lawyers' statements and arguments were not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant also argues that the prosecutor improperly "vouched for the information provided in the 911 call," when he stated the following during rebuttal argument:

> The 911 tape is a red heron. He told you he remembered his identification from the time of the assault. Not from the time right after the hitting began he states he's covering up and taking the blows. The identification goes to the lead up. I get hit once in the face with a gun I'm probably down for the count. So, when he goes to make his 911 call and he says, "Michael Johnson." And he gets, "What street is this?" "Pasadena – Pasadena and Industrial." All as, you know, he's hurting. And I've never had a broken cheek bone and I don't know what that does to you when your face gets swelled up like that and I don't know how quick I'm going to be on my feet to repeat precisely what was happening and recorded by 911. But you know what none of the 911 tape matters because 911 is to summons the police there. Not to make your police report by phone.

The prosecutor's remarks conveyed his contention that, given the evidence at trial, any defense of misidentification based on the victim's comments in the 911 call was tenuous. During both trial and closing argument, the defense highlighted that during the 911 call, the victim provided a false name and could not describe the perpetrators, and argued that the victim was not credible because his subsequent statements were inconsistent with his statements to the 911 operator.[2] When making the challenged remarks, the prosecutor urged the jurors to evaluate the evidence, use their common sense in evaluating the victim's condition and actions under the circumstances, and argued that there were reasons from the evidence to conclude that the victim was credible. A prosecutor is free to argue reasonable inferences from the evidence as they relate to his theory of the case, including that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant also argues that the prosecutor improperly appealed to the jury's sympathy during closing argument when he referenced the victim's broken cheekbone. Although prosecutors should not resort to arguments that ask jurors to sympathize with the victim, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984), the mention here of the victim's broken cheekbone did not improperly suggest that the jury should convict defendant on the basis of sympathy.[3] Rather, the remark was made in urging the jury to consider the victim's apparent

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[2] During codefendant counsel's cross-examination of the victim, he indicated that he did not recall what he said during the 911 call. He testified that he gave a different name because he was embarrassed. When asked about his failure to identify the perpetrators, the following exchange occurred:

> *A.* Ma'am, at that, I was you know, I'm gonna ask, if you listen to the tape, I'm asking where I'm at, what street I'm at and - - and that whole thing. When I got into that door, it was more of a safety type of situation. I don't even remember the first few minutes of being inside there.
>
> *Q.* Let me ask you this . . . , What's different between that night and today, that makes you so able to be able to identify the Defendant?
>
> *A.* I – I remembered that night 'till I went into that - - in that door. You know, when I when stuff was going on, when you in battle, you are – I'm always taught to be conscious and, you know, I have played sports my whole - - my whole life and I got hit and almost knocked out in games but always remember and recognize – I would have to get up after I have been hit hard and - - and may have been woozy, bit I got to still get up 'cause I'm in battle and I'm steady going. In that situation, I was in the same type of fight that night. You know, I remembered everything from when I got out my car, until I walked to that - to that door. And, when I went in that door, that guy let me in; that's when my memory kind of just, I - I was just trying to get myself together, if you can understand how badly I was - - I was beaten that night.

[3] The treating emergency physician testified about the nature and extent of the victim's injuries, which included a fractured cheekbone.

pain when he made the 911 call. The remark was isolated and was not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Further, the trial court's instructions that the jurors should not be influenced by sympathy or prejudice, that the case should be decided on the basis of the evidence, and that they were to follow the court's instructions were sufficient to dispel any possible prejudice. *Long*, 246 Mich App at 588.

C. CUMULATIVE ERROR

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under a cumulative error theory is unwarranted. *Mayhew*, 236 Mich App at 128.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens