

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMAR RAY JONES,

Defendant-Appellant.

UNPUBLISHED

March 25, 2010

No. 284884

Wayne Circuit Court

LC No. 07-013536-FC

Before: Gleicher, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), being a felon in possession of a firearm, MCL 750.224f(1), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court vacated the felony murder conviction and sentenced defendant as a second habitual offender, MCL 769.10, to life imprisonment for the first-degree premeditated murder conviction, a concurrent term of three to five years' imprisonment for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. After defendant filed a claim of appeal, this Court, while retaining jurisdiction, granted defendant's motion to remand for an evidentiary hearing on his claim that his defense counsel was ineffective at trial. The trial court held a hearing over the course of several days, ultimately found that defendant did not receive the effective assistance of counsel, and entered an order granting defendant a new trial. We now vacate the trial court's order granting defendant a new trial and affirm defendant's convictions and sentences.

Defendant's convictions stem from his fatal shooting of the victim, Jermaine Webb, during a drug transaction in Detroit on July 18, 2007. The prosecutor's principal witness, Terrance Steward, testified that he had known the victim for many years, and that on July 18, 2007, the victim and Steward arranged to sell heroin to a buyer they had not previously met. The buyer went by the street name "Low." The victim and Steward met "Low" on Woodmere Street and "Low" climbed into the back seat of the victim's vehicle; the victim sat in the driver's seat and Steward occupied the front passenger seat. Steward recounted that after the victim and "Low" exchanged heroin for cash, "Low" shot the victim in the head. Steward fled from the passenger side of the vehicle and did not look back, although he called the police shortly after the shooting. Some residents of the neighborhood where the shooting took place testified that they heard the gunshot, saw two men depart the victim's vehicle, one from the front passenger seat and one from the rear driver's side seat, and that the man who got out of the back seat returned to

the car briefly and reached inside. At trial, Steward identified defendant as “Low,” the shooter. Defendant denied any involvement in the shooting, and claimed that at the time of the shooting he had been shopping with his sister and a cousin.

I. Order Granting a New Trial

As a preliminary matter, we address the prosecutor’s contention that the trial court exceeded the scope of this Court’s remand order when it granted defendant a new trial. Whether the trial court exceeded the scope of this Court’s remand order involves a question of law, which we consider de novo. *People v Hawthorne*, 474 Mich 174, 179; 713 NW2d 724 (2006).

This Court granted defendant’s motion to remand “to the trial court for an evidentiary hearing and decision whether defendant-appellant was denied the effective assistance of counsel.” *People v Jones*, unpublished order of the Court of Appeals, entered January 12, 2009 (Docket No. 284884). The order additionally limited the scope of the remand proceedings “to the issues raised in the motion to remand” and retained jurisdiction of the appeal. *Id.* In similar circumstances involving a remand by this Court for an ineffective assistance of counsel determination and a trial court’s affirmative finding and grant of a new trial, our Supreme Court has held that the trial court exceeded the scope the remand order:

In lieu of granting leave to appeal, that part of the . . . order of the Oakland Circuit Court granting defendant a new trial is vacated, and the case is remanded to the Court of Appeals for consideration as part of defendant’s claim of appeal The circuit court’s decision to grant defendant a new trial exceeded the scope of the Court of Appeals remand order. Because the Court of Appeals retained jurisdiction when it granted defendant’s motion to remand, the Court [of Appeals] should review as part of defendant’s claim of appeal the trial court’s conclusion following the evidentiary hearing that defendant was denied the effective assistance of counsel. [*People v Smith*, 464 Mich 876; 630 NW2d 625 (2001).]

As in *Smith*, the trial court here exceeded the scope of this Court’s remand order to the extent that the court granted defendant a new trial. Consequently, we vacate the order granting defendant a new trial and consider defendant’s ineffective assistance of counsel claims as a part of his claim of appeal, in conjunction with the record developed at the evidentiary hearing and the trial court’s findings of fact on remand.

II. Ineffective Assistance of Counsel

Defendant argues that defense counsel committed numerous serious errors that deprived him of the effective assistance of counsel and a fair trial. “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews for clear error a trial court’s findings of fact, and considers de novo questions of constitutional law. *Id.* To the extent that defendant raises on appeal claims of ineffective assistance that he did not challenge in the trial court, we limit our review of these claims to mistakes apparent on the existing record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

“[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant’s claim of ineffective assistance of counsel includes two components: “First, the defendant must show that counsel’s performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” To establish the first component, a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel’s errors the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his “counsel’s conduct falls within the wide range of professional assistance,” and that his counsel’s actions represented sound trial strategy.” *Strickland*, 466 US at 689. “A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses,” which are those “that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

A. Failure to Contact or Meet with Defendant

Defendant initially complains that before trial defense counsel neither met with defendant outside of court nor accepted his telephone calls. In an affidavit attached to defendant’s brief on appeal, he expressed his view that “I do not feel my attorney did anything to defend me in this case. I only communicated with my attorney at court hearings. He never came to see me and would not take any of my telephone calls.” However, at the evidentiary hearing, defense counsel testified that he first visited defendant in jail within two weeks of his August 2007 appointment as defendant’s substitute counsel, and that in total he met with defendant in jail at least five times and had jail verification forms documenting the visits. Counsel explained that he and defendant spent a larger portion of their time discussing a separate case in which defendant also faced a murder charge, but that they also discussed the instant case, which overall appeared stronger from the defense perspective than the other murder charge defendant faced. Defendant did not testify at the evidentiary hearing and offered no evidence to dispute defense counsel’s trial preparation testimony. The record thus does not support defendant’s failure to contact allegation.

B. Failure to Investigate Defenses

Defendant next insists that defense counsel should have investigated two defenses on his behalf, that defendant had an alibi and that he could not have physically fired a gun with his right hand at the time of the victim’s murder. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

With respect to defendant’s alleged injury, at the evidentiary hearing defendant’s appellate counsel apprised the trial court that he had assembled defendant’s relevant x-rays and other medical records, arranged for a review of the medical records by the doctor who had

“performed the surgery on [defendant’s] forearm,” but that the doctor “could not give a definitive opinion in this case and therefore we’re not going to call him as a witness.” Defense counsel testified that he opted against pursuing the injury issue because, before defendant’s instant murder trial had begun, defendant was convicted of murder in his other case, in which witnesses identified defendant as the culprit in a right-handed shooting. Defendant has not shown that counsel’s failure to pursue this issue deprived him of a substantial defense or that counsel unreasonably elected to forego raising the injury defense. Had defense counsel pursued at his instant trial the asserted inability of defendant to fire right-handed, this defense could have opened the door for the prosecutor to present witnesses or other evidence from defendant’s earlier murder case to rebut his contention in this case that he could not physically have fired a gun.

Concerning defendant’s alibi, defense counsel recalled that his investigator had spoken to defendant’s sister, Sierra Jones. The investigator viewed Jones as incredible because when he spoke with her she initially alleged having been somewhere different than defendant had recalled, and in general Jones “had to be led to create the alibi.” The investigator unsuccessfully attempted before trial to speak to defendant’s cousin, India Holmes. Defense counsel explained that he made a strategic decision not to call either Holmes or Jones at trial, primarily because he questioned Jones’s veracity. At the evidentiary hearing, defendant elicited testimony from both Holmes and Jones: Holmes and Jones testified inconsistently with defendant’s trial account of (1) where they picked up defendant on July 18, 2007, (2) what time they picked up defendant that afternoon, and (3) how much time defendant spent in their company that afternoon. Holmes and Jones did echo defendant’s testimony that the three of them went shopping on the afternoon of July 18, 2007, but many additional discrepancies existed among the three accounts of the shopping trip. The trial court viewed defense counsel’s failure to call Holmes and Jones as alibi witnesses as of “little consequence” in light of their questionable credibility, and concluded that defense counsel “exercised appropriate professional judgment in excluding the use of those two witnesses.” Given the multiple and significant inconsistencies in the testimony of Holmes and Jones at the evidentiary hearing with defendant’s account of his whereabouts at trial, the trial court committed no clear error in finding that defense counsel’s decision to forego eliciting alibi testimony from Holmes and Jones constituted sound trial strategy and did not deprive defendant of a substantial defense. In summary, defendant has not overcome the strong presumption that defense counsel’s decision not to call Holmes and Jones as alibi witnesses fell within the scope of reasonable trial strategy, and defendant also has failed to show the existence of a reasonable probability that the outcome of his trial might have differed had Holmes and Jones testified.

C. Failure to File Pretrial Motions

Defendant additionally maintains that defense counsel was ineffective for neglecting to file any pretrial motions. In particular, defendant argues that his counsel should have requested the production of defendant’s cell phone records and sought the appointment of an eyewitness identification expert and a gunshot wound or ballistics expert. As with the presentation of other evidence, a counsel’s decision whether to call an expert witness involves a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Before the evidentiary hearing commenced, the trial court expressed that it would not have allowed expert identification testimony given that the standard jury instructions adequately conveyed to the jury the principles inherent in assessing the accuracy of an eyewitness’s

identification. Defense counsel did not render ineffective assistance by failing to make a futile motion. *Ackerman*, 257 Mich App at 455.

At the evidentiary hearing, defendant did not produce either the victim's or defendant's cell phone records. Defendant thus has failed to substantiate that a reasonable trial strategy mandated the introduction of cell phone records or that the records could have assisted the defense in any respect. Stated differently, we detect no basis for finding that defense counsel was ineffective for neglecting to obtain cell phone records.

In support of the claim that defense counsel should have called a ballistics expert at trial, defendant presented at the evidentiary hearing the testimony of firearms expert Robert Cilwa. Cilwa opined that the location of the shell casing in the back seat of the victim's vehicle did not necessarily mean that the shot had come from the back seat; Cilwa explained that ejected shell casings often strike objects, bounce, and can end up anywhere. Cilwa also noted that he detected no evidence of gunshot residue or close-range firing in the area of the victim's bullet entry wound, which he would have expected if the assailant had shot from the back seat. However, Cilwa conceded that little to no gunshot residue or stippling might appear around the victim's wound if the shooter fired through an intermediate object like a bag or a shirt, and that pieces of the intermediate object would not necessarily be deposited in or around the victim's wound. Steward recalled at trial that the shooter had possessed a bag containing a white shirt. Cilwa described the victim's entrance wound as in the right rear portion of the victim's head, not directly in the back as one might have expected if the shooter had shot from the back seat. But Cilwa clarified that the shooter's position and the location of the victim's entrance wound depended on the position of the victim's head when the fatal shot occurred. At trial, Steward testified that when the shot was fired the victim had turned his head toward the back seat to ask defendant for the balance of the heroin money.

Defendant further submits that defense counsel should have called an expert witness to highlight that the absence of gunshot residue detected on Steward after the shooting did not signify that Steward had not shot the victim. Cilwa testified to this effect at the evidentiary hearing—that a negative result obtained from Steward did not mean that he had not killed the victim because gunshot residue can readily rub off or wash away. But the trial record reflects that the jury had awareness of these principles. The prosecutor introduced at trial a report analyzing gunshot residue on Steward's face and hands shortly after the shooting. The report detected no "significant" quantities of gunshot residue on the samples taken from Steward. Defense counsel then elicited from Detroit Police Officer Anthony Wright and the evidence technician who collected the gunshot residue samples that an absence of gunshot residue did not mean that the individual tested had not fired a weapon, given that gunshot residue adheres to people for only a matter of several hours and is prone to easy washing away. In defense counsel's closing argument, he reiterated that Steward's negative gunshot residue test did not exclude him as the shooter because Steward had gotten wet and changed his clothes before the police secured the tested samples from Steward's face and hands.

After reviewing Cilwa's evidentiary hearing testimony and the trial record, we conclude that the entire record does not support defendant's claim that his counsel was ineffective for failing to present additional expert testimony at trial in the areas of firearms or gunshot wounds. According to Cilwa's testimony, neither the location of the shell casing, nor the absence of evidence of close-range firing, nor the location of the victim's wound eliminated the possibility

that the victim was shot from the back seat. Furthermore, defense counsel did elicit at trial testimony from two police officers, and argued in closing, regarding the unreliability of Steward's negative gunshot residue test. Therefore, defense counsel's decision to forego presentation of a ballistics expert did not deprive defendant of a substantial defense that reasonably would have affected the outcome of his trial.

D. Failure to Challenge Evidence¹ or Object to Prosecutorial Misconduct

Defendant initially complains under this subheading that defense counsel should have further impeached Steward's credibility about his familial relationship to the victim, whether Steward was involved in the July 18, 2007 drug transaction, and whether Steward was the person who called the police. A defense counsel's decisions regarding the extent of witness impeachment presumptively constitute sound trial strategy entrusted to counsel's professional judgment. *Davis*, 250 Mich App at 368; *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Defendant spent little time exploring these issues at the evidentiary hearing. The trial transcript discloses that Steward's relationship with the victim and his role in the July 18, 2007 drug transaction with the shooter were matters placed on the record at trial. Steward testified that he had known the victim, his "cousin," for at least 15 years, that he sat next to the victim during the drug transaction inside the victim's vehicle, and that he assisted the victim by counting the drug purchase money. The parties agreed at the evidentiary hearing that Steward was not the victim's cousin, but rather the victim's girlfriend's cousin, but no reasonable likelihood exists that this minor discrepancy would have affected the outcome of defendant's trial. Similarly, although defense counsel conceded at the evidentiary hearing that he did not investigate whether Steward had asked someone else to call the police for him when he ran into a credit union shortly after the shooting, defendant offers no explanation of the significance of this detail or any specific, potential prejudice arising from defense counsel's neglect to further investigate or inquire of Steward whether he himself called the police or whether he directed or requested someone else to do so. Defendant thus has failed to show that defense counsel made an unreasonable strategic decision when he opted not to impeach Steward at trial on these insignificant matters, or any likelihood of prejudice arising from defense counsel's purported omission.

Defendant avers that defense counsel should have questioned the medical examiner about the lack of evidence of close-range firing. Defendant did not call the medical examiner at the evidentiary hearing, but instead elicited from Cilwa that he would have anticipated finding some evidence of a close-range gunshot wound. However, Cilwa also clarified the possibility that no gunshot residue or evidence of close-range firing (stippling) would appear if the shooter had fired through an intermediate object, such as a bag or shirt, and that pieces of the intermediate object would not necessarily be deposited in the wound. At trial, Steward recalled that the shooter had a bag containing a shirt. We conclude that defendant has not substantiated that defense counsel's failure to cross-examine the medical examiner was either objectively unreasonable or prejudicial to the defense.

¹ Defendant here repeats many of the same claims addressed above.

Defendant again urges that defense counsel ineffectively challenged the reliability of the negative gunshot residue test of samples from Steward's face and hands. As we previously have expressed, defense counsel amply undermined at trial the significance of Steward's negative gunshot residue test results. Officer Wright agreed at trial that a gunshot residue test may not accurately identify a shooter if the suspect washes his hands before the test, and defense counsel noted Steward's testimony that, in flight from the victim's car, he had waded through swampy water before the gunshot residue test occurred. Moreover, defendant has produced no testimony or other evidence that defense counsel neglected to present tending to suggest that Steward was the shooter. Defendant again has failed to demonstrate any unreasonable conduct by defense counsel or any resultant prejudice.

Defendant next contends that defense counsel should have objected to testimony implying that he obtained a cell phone under the alias Darnel Johnson. Steward testified at trial that the victim had called "Low" immediately before the July 18, 2007 heroin transaction, and that "Low" entered the vehicle and shot the victim. Homicide investigator Darryl Byrge recounted at trial that he had spoken to Steward two days after the shooting and assembled three separate photograph arrays to show Steward, from the third of which Steward identified defendant. Because Steward had informed investigator Byrge about the victim's final phone call with his assailant, Byrge described his efforts to ascertain the identity of the person last called by the victim, including his determination that the number last phoned by the victim was registered to someone named Darnel Johnson. Investigator Byrge did not testify that defendant had a direct connection with the name Darnel Johnson. Investigator Byrge's mention of Darnel Johnson in the course of his investigation into the shooter's identity had relevance in explaining who the investigator had included in the three photographic lineups he prepared and why Steward had identified no one, including a Darnel Johnson in the second photo array, until the third photo array in which defendant's photograph appeared. And defendant has not suggested any basis on which defense counsel could have properly objected to the investigator's relevant testimony. We repeat that "counsel does not render ineffective assistance by failing to raise futile objections." *Ackerman*, 257 Mich App at 455. Moreover, given that Steward did not identify defendant as the shooter on the basis of any connection to the name Darnel Johnson, defendant endured no prejudice arising from the investigator's mention of Darnel Johnson.

Defendant also asserts that defense counsel was ineffective for failing to object to purported prosecutorial misconduct. As discussed in part III, *infra*, the prosecutor improperly referred to gangs and drugs, but those references did not affect the outcome of the trial. Accordingly, even if defense counsel performed deficiently by not objecting to those remarks, defendant has not established the requisite prejudice to prevail on a claim of ineffective assistance of counsel. Because the prosecutor's remaining challenged conduct was not improper, defense counsel was not ineffective for failing to object to it. *Ackerman*, 257 Mich App at 455.

E. Failure to Move in Limine to Exclude Defendant's Prior Conviction

Defendant argues that defense counsel was ineffective for neglecting to raise a pretrial motion in limine to preclude the prosecutor from referencing for impeachment purposes defendant's March 2007 conviction of receiving and concealing a stolen vehicle. The record reveals that defense counsel objected at trial to the prosecutor's mention of the prior conviction. After addressing the considerations embodied in MRE 609(a)(2), the trial court ruled the prior conviction evidence admissible. Because defendant now offers no basis tending to support the

proposition that the trial court would have ruled differently had defense counsel presented the prior conviction issue in a pretrial motion in limine instead of at trial, we conclude that defendant has failed to show either unreasonably deficient performance by defense counsel or resultant prejudice.

F. Additional Ineffective Assistance of Counsel Issues Raised after Remand

In a supplemental brief filed in this Court after the remand proceedings, defendant raises several additional claims of ineffective assistance of counsel, none of which have merit.² Defendant complains that defense counsel did not notice that page three of the medical examiner's report was missing. At the evidentiary hearing, defense counsel acknowledged that he had not possessed page three of the examiner's report. However, because defendant did not present the missing page at the evidentiary hearing and has not otherwise shown what information the missing page contained, he has entirely failed to show that the omission caused him any prejudice.

Defendant next characterizes defense counsel as ineffective for neglecting to inquire about the results of gunshot residue analysis of samples taken from the victim and his girlfriend. Although defendant hints that the victim's girlfriend may have played some role as a catalyst in the victim's murder by Steward, defendant neither introduced evidence about what the results of analysis of the untested samples might have shown, nor does he explain how further inquiry may have yielded information beneficial to the defense. Therefore, defendant has not demonstrated any unreasonable behavior by his counsel or that he endured any resultant prejudice.

Defendant further maintains that defense counsel should have recognized that his investigator canvassed the wrong street when seeking out potential witnesses. At the evidentiary hearing, defense counsel conceded that he had not noticed that his investigator documented a witness canvass of "Regular Street," instead of Woodmere. The investigator did not testify at the evidentiary hearing. Even assuming that the defense investigator canvassed the wrong street, defendant did not produce or identify any witnesses the investigator might have found had he canvassed the correct street, let alone show that any potential witnesses could have testified favorably to the defense. Defendant thus has not established any unreasonable conduct of defense counsel in this regard or that he suffered prejudice as a result of the purportedly erroneous canvass.

Defendant suggests that defense counsel was ineffective for neglecting to interview before trial the three Woodmere residents who testified at trial. Defendant did not call any of the Woodmere residents to testify at the evidentiary hearing, and he fails to elaborate what defense counsel might have learned had he interviewed the residents before trial or how any information they might have provided could have aided his case. Defense counsel explained at the evidentiary hearing that he had viewed the testimony of the Woodmere area residents as helpful

² To the extent that defendant's supplemental brief further elaborates on claims of ineffective assistance of counsel that we already have addressed, we decline to comment on these further because defendant has presented nothing to alter our analysis set forth above regarding these claims of ineffective assistance.

to the defense, in light of the fact that the two residents who described the person who got out of the back seat believed that the individual was someone much younger than defendant. Defense counsel highlighted at trial the facts that none of the Woodmere residents could identify the shooter and that two residents had characterized the person they watched leave the back seat of the victim's vehicle as a teenager. We again conclude that defendant has failed to show either an unreasonable error by defense counsel or resulting prejudice.

Defendant contends that defense counsel should have interviewed the medical examiner before trial and should have realized that the victim was shot in the right side of his head, not directly in the back of his head. The medical examiner did not appear at the evidentiary hearing. Defense counsel explained that he considered the victim's wound as consistent with having been shot from the back seat in the process of turning toward the back seat. Cilwa echoed at the evidentiary hearing that the position of the victim's head, together with the shooter's location, would determine the entrance wound location. Steward recounted at trial that when defendant fired at the victim from the back seat, the victim had just turned to ask defendant for the balance of the heroin money. Given this record, we find no basis for concluding that a pretrial interview with the medical examiner would have yielded any information favorable to defendant's case, and we conclude that defendant has failed to establish that he endured any prejudice from defense counsel's decision not to interview the medical examiner before trial.

Defendant intimates that defense counsel ought to have investigated Steward's background to discover whether he possessed a motive to shoot the victim. At the evidentiary hearing, defendant presented no evidence of any alleged motive of Steward to kill the victim. Defense counsel testified that he did not pursue a theory that Steward shot the victim because it did not make sense in light of the known facts; specifically, the facts that (1) Steward had no apparent motive, (2) Steward had called the police, and (3) unlike the person who exited the back seat of the victim's vehicle, the person who fled from the front passenger seat did not return to the vehicle after the shooting, which behavior seemed more consistent with that of a frightened victim rather than the shooter. Even if defense counsel could have done more to investigate Steward's background before trial, defendant has failed to substantiate that an investigation would have unearthed or led to any information that would have rendered reasonably likely a different outcome of his trial.

In summary, defendant has not shown that the alleged errors of defense counsel, whether considered singularly or cumulatively, deprived him of his Sixth Amendment right to counsel or deprived him of a fair trial. *Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), overruled in part on other grounds in *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008). Consequently, we vacate the trial court's order granting defendant a new trial on the basis of ineffective assistance of counsel.

III. Prosecutorial Misconduct

Defendant further avers that several instances of prosecutorial misconduct infringed on his right to a fair trial.

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to

the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, 240 Mich App at 720. No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *Id.* at 721.

Defendant initially argues that the prosecutor improperly cross-examined him about an arrest for a different offense. A prosecutor may not interject issues broader than a defendant's guilt or innocence. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). However, a prosecutor's conduct must be viewed in light of defense arguments or evidence. *Watson*, 245 Mich App at 592-593; *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). In this case, defendant testified that at the time of the victim's murder, he was shopping in anticipation of attending a car show, and defendant described several items that he claimed to have purchased. The prosecutor inquired whether defendant had receipts for the clothing he had bought, and defendant replied that he did not have such "old" receipts. The prosecutor then asked defendant when he was arrested, and defendant responded that he "was arrested on another case" on July 29, 2007. Because defendant had invoked the passage of time to explain why he no longer had receipts that could confirm his alibi, the prosecutor properly inquired about the specific date of defendant's arrest, i.e., when he first learned that he was a suspect in an offense for which receipts could corroborate an alibi. Moreover, defendant himself raised the issue of his other arrest and thereby opened the door to the prosecutor's brief questioning about a prior arrest, during which the prosecutor did not elicit that the prior arrest stemmed from a first-degree murder charge or any other details relating to the prior charge. We conclude that the prosecutor did not elicit from defendant any information prejudicial to the extent that it deprived defendant of a fair trial.

Defendant next claims that the prosecutor improperly implied that the car show defendant planned to attend had a relationship to gangs or drugs. In describing the car show, defendant stated that "it's, like, east and west, east side and west side of Detroit, they come compare each other's cars." In the course of the prosecutor's subsequent cross-examination of defendant, the following exchange occurred:

Q. Is that gang, east gang and west gang?

A. No, it's not a gang. It's, like, if I get the whole football, you know what I'm saying, football field, you know what I'm saying? I can't really place

the words I'm trying to say right now. I'm kind of nervous right now. But, you know what I'm saying, they get the whole football, they all go up in the football field park, you know what I'm saying? Probably get east in this side, west on this side.

Q. Are they gang members?

A. No, they're not gang members. They're just east coast and west coast.

Q. Okay.

A. Of Detroit.

Neither defendant nor his counsel objected to this line of questioning. In closing argument, the prosecutor noted that although defendant maintained he had been shopping at the time of the victim's murder and that he had spent a lot of money, he possessed no receipts or other corroboration. The prosecutor added that defendant had produced

[n]othing, nothing at all. Not even an announcement on this car [show] that allegedly was going on between the east and the west.

It wasn't gang members, they're just guys with really, you know, drug related cars and things like that in the drug trade. That is cool to him. He had to get a new outfit, so he could go down there and be cool. A desperate man saying desperate things to try and save himself, ladies and gentlemen.

Again, there was no objection to these remarks.

We agree that nothing in the record supported or warranted the prosecutor's questions and comments implying that the car show had a drug or gang relationship, and that the above-quoted comments and questions interjected potentially inflammatory issues irrelevant to defendant's guilt or innocence. Notwithstanding the impropriety of the questions and comments, the drug comment took place very briefly, and after defendant in his testimony had freely admitted that he sold drugs. In light of the properly admitted evidence of defendant's guilt, defendant's denial that the car show participants were gang members, the lack of any other evidence of record implying gang involvement, and the trial court's instruction that the "lawyers' statements and arguments are not evidence," we conclude that the prosecutor's improper questions and comments did not affect defendant's substantial rights.

Defendant lastly alleges that the prosecutor improperly argued that he had obtained a cell phone under the alias Darnel Johnson. A prosecutor remains "free to argue the evidence and all reasonable inferences arising from it as they relate to the [prosecutor's] theory of the case." *Schutte*, 240 Mich App at 721. The prosecutor did not explicitly declare that defendant had obtained a cell phone in Johnson's name; to the extent that the prosecutor implied this, his doing so was not improper because Steward testified at trial that the victim had called the shooter immediately before the drug transaction, investigator Byrge testified that the last number the victim had called was registered to Darnel Johnson, and Steward identified defendant as the shooter. This evidence reasonably supported an inference that defendant employed the name

Darnel Johnson to obtain his cell phone. Accordingly, the prosecutor did not commit misconduct in this respect.

IV. Conclusion

The trial court's order granting defendant a new trial based on ineffective assistance of counsel exceeded the scope of this Court's remand order. After considering the merits of defendant's ineffective assistance of counsel contentions, we conclude that he was not denied the effective assistance of counsel at his trial. We also conclude that no prosecutorial misconduct took place that deprived defendant of a fair trial. Therefore, we vacate the trial court's order granting defendant a new trial, and we affirm defendant's convictions and sentences.

The trial court's order granting a new trial is vacated, and defendant's convictions and sentences are affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder