STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 2010
v	No. 283213 Wayne Circuit Court
MICHAEL DEJUAN POWELS, Defendant-Appellant.	LC No. 07-009813-FC

Before: K. F. KELLY, P.J., and WILDER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of second-degree murder, MCL 750.317. He was sentenced as a fourth habitual offender, MCL 769.12, to 45 to 75 years' imprisonment. We affirm.

I. BASIC FACTS

On June 18, 2006, the victim was shot while sitting in the driver's seat of a Chevrolet Lumina, which was stopped at a traffic light in Detroit. Before the shooting, the victim engaged in a violent altercation with his former girlfriend, Sonya Carter, at the house of her friend, Danielle Belin. Belin's brother, Michael Watson, escorted the victim out of the house. The victim left, but returned to the home and fired five or six gunshots.

Watson was not present when the victim fired the gun, but when he returned to Belin's home, he was with defendant in a white sport utility vehicle (SUV). An eyewitness, James Tate, reported that he saw defendant driving the SUV, with Watson as a passenger, and that about five minutes after the SUV left Tate's view, he heard gunshots. Meanwhile, a taxi driver, Efrand Johnson, was stopped at a red traffic light on the passenger side of the victim's Lumina when a white SUV approached from the rear and proceeded to the Lumina's driver's side. Johnson then heard gunshots and glass breaking and Johnson drove away. Police officers discovered the victim lying across the front seat of the Lumina and several bullet holes in the driver's side door. Defendant was arrested and charged with first-degree murder. The defense theory at trial was that defendant was not involved in the crime or, alternatively, that Watson was acting in self-defense. After a jury trial, defendant was convicted of second-degree murder. This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that he was denied effective assistance of counsel and that the trial court erred by denying his motion for a new trial after conducting a *Ginther*[1] hearing. A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* We review the trial court's findings of fact for clear error and its ultimate decision whether the defendant was denied the effective assistance of counsel de novo. *Id.* If resolution of a factual issue depends on the credibility of witnesses or the weight of evidence, we must defer to the trial court's superior opportunity to evaluate these matters. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Further, to the extent that defendant raises claims not considered at the *Ginther* hearing, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To prevail on a claim of ineffective assistance, "a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *Id*.

A. ALIBI WITNESSES

Defendant first argues that counsel was ineffective for failing to investigate and present alibi witnesses at trial, thereby depriving him of a substantial defense. We disagree. As this Court has previously explained, "[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Where a defendant's claim is based on a failure to raise a defense, he "must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *Id*. Counsel may be ineffective where he fails raise an alibi defense if it constitutes a substantial defense. See *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

At the *Ginther* hearing, defense counsel testified that defendant told him on August 29, 2007, and again on September 6, 2007, that he had alibi witnesses, but that defendant never provided him with these witnesses' names or contact information despite counsel's repeated requests for the witnesses' information. According to counsel, defendant wrote him numerous letters before trial but never provided the requested information. Defendant produced witnesses who claimed that they attempted to contact defense counsel, but counsel allegedly did not respond to or returns their calls. Defendant also produced a letter containing the names of alibi witnesses that he claimed was sent to defense counsel. However, the letter was not produced at

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the *Ginther* hearing until after defense counsel had completed his testimony and been excused from the courtroom.

At the end of the hearing, the trial court found that defendant's claim that he had notified counsel of the potential alibi witnesses was not credible, and instead concluded that counsel was not ineffective because counsel was never informed of the witnesses' names and whereabouts. The court's conclusion was not erroneous. The authenticity of the letter produced by defendant was suspect; it contained a notarized stamp that did not match the name of the person who signed it. Defendant produced this letter at the *Ginther* hearing only after his counsel had left the courtroom and, thus, counsel was not able to verify whether he had received it. Further, one of defendant's alibi witnesses, who also testified at the hearing, was his own sister, and defendant did not explain why he did not convey that information to counsel at their meetings or in the letters he wrote to counsel. Thus, after our review of the record, we cannot conclude that a mistake has been made. And, although some contradictory evidence in support of defendant's position was offered during the hearing, we must nonetheless defer to the trial court's superior opportunity to evaluate the credibility of the evidence below. *Sexton (After Remand)*, 461 Mich at 752. Counsel's performance cannot be deficient for failing to raise a substantial defense where the defendant failed to demonstrate that he made a good-faith effort to avail himself of that defense. See *In re Ayres*, 239 Mich App at 22. Thus, his ineffective assistance of counsel claim on this ground cannot succeed.

B. ENDORSED WITNESSES

Defendant next argues that trial counsel was ineffective by waiving the production of two endorsed witnesses on the prosecutor's witness list, by failing to require the prosecution to establish due diligence in its attempts to locate the witnesses, and for failing to request a missing witness instruction. We disagree. Defendant has not shown that counsel's performance was rendered defective by waiving production of these witnesses. Defense counsel testified that he believed that these witnesses' testimonies would be unfavorable to defendant and defendant has not otherwise shown that their testimony would have been favorable. Thus, defendant has not overcome the strong presumption that counsel's decision constituted sound trial strategy. *Jordan*, 275 Mich App at 667-668. Further, without any showing that the witnesses would have provided favorable testimony, there is no basis for concluding that defendant was prejudiced. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Counsel's performance was not rendered deficient by failing to request proof of the prosecution's efforts to locate the witnesses—counsel waived their production and, thus, such a request, as counsel admitted at trial, would have been moot. Similarly, a request for a missing witness instruction would have been futile, as such an instruction is given only when it can be shown that due diligence to produce the witnesses was not exercised and defense counsel here waived production of the witnesses. *People v Eccles*, 260 Mich App 379, 388; 677 NW2d 76 (2004). "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Thus, this claim of ineffective assistance also fails.

C. HEARSAY TESTIMONY

Defendant next argues that trial counsel was ineffective for not objecting to the prosecutor's elicitation of "subtle hearsay" during her re-direct examination of Tate regarding what he heard various people in the neighborhood say about the shooting. We disagree. Any

objection would have been futile because no inadmissible hearsay was elicited. See MRE 801(c). A review of the challenged testimony shows that Tate testified that many people in the neighborhood were talking about the shooting; he did not testify regarding the substance of others' statements. Trial counsel cannot be ineffective for failing to make a meritless objection. *Snider*, 239 Mich App at 425.

D. CUMULATIVE ERROR

We also reject defendant's claim that the cumulative effect of defense counsel's errors deprived defendant of a fair trial. Only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 293 n 64; 531 NW2d 659 (1995). Here, the alleged deficiencies of counsel's performance did not constitute actual errors. Thus, these incidents, in the aggregate, did not deprive defendant of a fair trial. See *People v Dobek*, 274 Mich App 58, 106-107; 732 NW2d 546 (2007).

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that several incidents of misconduct by the prosecutor denied him a fair trial. A preserved claim of prosecutorial misconduct is generally reviewed de novo, but any factual findings made by the trial court are reviewed for clear error. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). To the extent that defendant did not object to some of the challenged conduct at trial, his unpreserved claims are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Brown*, 279 Mich App at 134.

A. REFERENCE TO ATTORNEY-CLIENT PRIVILEGE

Defendant first argues that the prosecutor improperly made reference to the attorney-client relationship between defendant and defense counsel during rebuttal argument and that the trial court erred by denying defendant's request for a mistrial on this basis. According to defendant, the prosecutor's argument infringed on defendant's right to remain silent. We disagree. We review the trial court's denial of defendant's motion for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). "A trial court should only grant a mistrial when the prejudicial effect of the error cannot be removed in any other way." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

It is improper for a prosecutor to comment on a defendant's conversations with defense counsel. Such comments can destroy the attorney-client privilege if an improper inference can be drawn from them. See *Dobek*, 274 Mich App at 72. In addition, it is generally improper for a prosecutor to comment on a defendant's right to remain silent or failure to testify at trial. *People v Jansson*, 116 Mich App 674, 690; 323 NW2d 508 (1982). However, "[p]rosecutorial 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." *Brown*, 279 Mich App at 135.

Here, the thrust of the prosecutor's rebuttal argument was that the evidence did not support the defense theory that Watson acted in self-defense or, alternatively, without

defendant's assistance. During the prosecutor's rebuttal argument, the following colloquy occurred:

> *Prosecutor*: The facts show that this Defendant was there and participated. Because going back to the beginning of this case in opening statement [defense counsel] said that, yeah, Watson did this, Watson got mad, he went and got a shotgun and he went and acting in self-defense shot up [the victim.]
>
> Good. [Defense counsel] was there.
>
> Or is he talking to someone in an attorney-client relationship with somebody that was ---
>
> *Defense Counsel*: Your Honor, I'm going to object.
>
> *Trial Court*: That's improper to make that argument, please. Totally improper.

Before giving the jury its final instructions, the trial court stated:

> A couple of things occurred during the course of the arguments and I just wanted to give sort of a special instruction for.
>
> One, there was some, in the context of some statement made that [defense counsel] was either, if he wasn't there, then he must have had some information. You cannot in any way rely or base any kind of a decision in the case on that. It was just argument being made in response to something. You can't look at what might have been said to [defense counsel] by anybody else in any kind of way, particularly by his client. You can't in any way base anything on that.

We agree that the prosecutor's remarks were improper. However, although the prosecutor exceeded the bounds of proper argument by implying that defense counsel must have talked to "someone in an attorney/client relationship with somebody who was there," the trial court immediately interjected and announced that the remark was totally improper. The trial court also provided an emphatic curative instruction. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970), and jurors are presumed to follow their instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Defendant has not explained how the trial court's instruction in the instant case was insufficient to cure the prejudicial effect of the prosecutor's remarks. And, given the trial court's instruction, we fail to see how the jury could not have removed the tainted remark from their minds during deliberations. The prosecutor's remark did not deny defendant a fair trial and the trial court did not abuse its discretion by denying defendant's motion for a mistrial.

B. BOLSTERING WITNESS CREDIBILTIY

Defendant next argues that the prosecutor improperly attempted to bolster Tate's credibility by commenting on the prosecution's obligation to disclose any deals made to a witness and the lack of evidence that Tate had asked for a deal. Although a prosecutor's use of

the prestige of the prosecutor's office to inject a personal opinion is improper, *Bahoda*, 448 Mich at 286, the challenged remarks were responsive to defense counsel's unsupported argument that Tate had tried to "save his own neck" by entering into a deal. Generally, a prosecutor's remarks do not warrant reversal where, as here, they are merely responsive to issues raised by defense counsel. *Brown*, 279 Mich App at 135. Further, the jury is presumed to have followed the trial court's instruction that it was not to give any consideration to whether Tate was offered a deal. *People v Unger*, 278 Mich App at 210, 235; 749 NW2d 272 (2008). The prosecutor's remarks regarding its obligation to disclose plea deals did not deny defendant a fair trial.

C. MISCHARACTERIZATION OF EVIDENCE

Defendant next contends that the prosecutor mischaracterized Tate's testimony in her rebuttal argument when she commented that Tate had heard two witnesses refer to "the [white] SUV that [Watson] and [defendant] were in." We agree that the prosecutor misstated the evidence, but any prejudice was cured when, immediately following defense counsel's objection, the trial court instructed the jury that the lawyers' statements were not evidence. *Id.* Jurors are presumed to follow their instructions, *Mette*, 243 Mich App at 330-331, and thus we fail to see how the prosecutor's seemingly inadvertent statement deprived defendant of a fair trial.

D. APPEAL TO SYMPATHY

Defendant lastly asserts that the prosecutor made an improper appeal for sympathy during rebuttal argument by asking,

> Where is [the victim's] due process? [The victim's] due process was rendered by this Defendant and his buddy on the theory of self-defense, ladies and gentlemen. This was not self-defense. . . . It's purely an execution, purely vigilante justice carried through by this Defendant and Mr. Watson, ladies and gentlemen.

The prosecutor made these comments after noting that defense counsel had negatively portrayed the victim in his closing argument, given the events at Belin's house.

It is true that "[a] prosecutor may not appeal to the jury to sympathize with the victim." *Unger*, 278 Mich App at 237. But, when these remarks are examined in context, they do not constitute a blatant appeal to sympathy. Rather, the remarks are in response to defense counsel's attempt to portray the victim in an unfavorable light and merely imply that the victim was executed in retaliation for the incident at Belin's house. A prosecutor need to state her argument in the blandest of terms, *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996), and may fairly respond to issues raised by the defendant, *Brown*, 279 Mich App at 135. Moreover, to the extent that these comments were improper, they were not so egregious as to deprive defendant of a fair trail. Defendant has not shown a plain error.

In sum, while some of the prosecutor's remarks were improper, the trial court's responses to the remarks at trial were sufficient to cure any prejudice. Whether considered individually or cumulative, the remarks did do not undermine confidence in the outcome of the trial. See *Bahoda*, 448 Mich at 293 n 64; *Dobek*, 274 Mich App at 106-107. Reversal based on the prosecutor's conduct is not warranted.

IV. EXCITED UTTERANCE TESTIMONY

Defendant also contends that the trial court erred by allowing the prosecutor to introduce Tate's testimony regarding hearsay statements made by two unavailable witnesses under the excited utterance exception to the hearsay rule, MRE 803(2). We disagree. We review the trial court's evidentiary decisions for an abuse of discretion. *Unger*, 278 Mich App at 216.

MRE 803(2) provides that a statement is not excluded by the hearsay rule if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The proponent of the evidence must show that the statement was made while the declarant was under the excitement caused by the startling event or condition. See *People v Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). In considering the admissibility of a statement under this rule, a court should consider whether the declarant's emotional state would permit fabrication. *People v Bowman*, 254 Mich App 142, 146; 656 NW2d 835 (2002). A trial court has wide discretion in determining if the declarant was still under the stress of the event or condition. *Smith*, 456 Mich at 552.

Here, Tate testified that two individuals were speaking in an excited manner after witnessing the shooting. Although some of Tate's statements indicated that the two individuals were just talking "like kids do," the trial court reasonably concluded from the testimony that they were excited and reacting to the shooting when they made the statements. Therefore, the trial court did not abuse its discretion in admitting the statements under MRE 803(2).[2]

V. STANDARD 4 BRIEF

Defendant raises several additional arguments in a pro per supplemental brief. We consider each in turn.

A. HEARSAY

Defendant first argues that the prosecutor's use of Tate's police statement, which was allegedly prepared in an "editorialized" manner, to question Tate during cross-examination resulted in the admission of impermissible hearsay and denied him a fair trial. We disagree. Defendant has failed to show plain error affecting his substantial rights. *Carines*, 460 Mich at 763. It appears from our review of the record, that the prosecutor initially used the police report to refresh Tate's recollection; however, when Tate denied making certain statements to the officer the prosecutor followed up with questions to clarify Tate's observations on the day of the incident. Tate's answers substantially confirmed the statements in the police report. Thus, even if the allegedly editorialized statements were improperly introduced, defendant cannot establish

[2] Defendant raises an additional unpreserved claim that the testimony also violated his rights under the Confrontation Clause, US Const, Am VI. However, there is no basis for concluding that the statements in question qualify as testimonial in nature because they were not made under circumstances that would lead a witness to reasonably believe that the statements would be available for use at a trial. See *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Defendant has not shown a plain constitutional error.

prejudice because Tate testified consistently with the allegedly editorialized statements. Moreover, the police report was not admitted into evidence, it was not used to establish the truth, and, thus, the prosecutor did not improperly introduce hearsay evidence. Any alleged error was harmless. Because there was no plain error affecting defendant's substantial rights, defendant's related argument that counsel was ineffective for failing to object also fails.

B. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor concealed impeachment evidence and engaged in misconduct by allegedly allowing the taxi driver, Johnson, to give false testimony. This argument is similarly without merit because defendant has not show plain error. *Carines*, 460 Mich at 763. The basis for defendant's claim of error is that Johnson initially testified that he saw a handgun, but stated on cross-examination that he did not. However, the mere existence of conflicting statements does not establish that the prosecutor knowingly permitted false testimony, *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998), and the record does not otherwise establish that the prosecutor concealed impeachment evidence. Moreover, the prosecutor did not misrepresent the evidence by arguing during closing argument that Johnson was credible. A prosecutor is permitted to argue form the evidence that a witness is credible. *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000). The prosecutor did not engage in misconduct.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also contends that he was denied effective assistance of counsel because he was allegedly denied counsel at a critical stage. It is true that ineffective assistance may be presumed where there is a complete denial of counsel, such as where counsel is denied at a critical stage of a proceeding. *People v Frazier*, 478 Mich 231, 243 n 10; 733 NW2d 713 (2007). The Sixth Circuit Court of Appeals has recognized the broad period of pretrial investigation and preparation to be a critical stage, *Van v Jones*, 475 F3d 292, 307 (CA 6, 2007), but in such instances counsel's failure must be complete, *Frazier*, 478 Mich at 244.

Here, the record does not reflect a complete absence of counsel during the pretrial period. Rather, the record shows that two attorneys represented defendant during the pretrial period. Defendant's second defense counsel testified at the *Ginther* hearing that, after he was appointed, he discussed the case with defendant's former attorney and received discovery materials from him. Counsel testified that he personally met with defendant twice and that there were additional communications through letters. Accordingly, we find no basis for concluding that defendant was deprived of counsel for a critical period such that prejudice may be presumed.

D. JURY INSTRUCTIONS

Lastly, we disagree with defendant's claim that an alleged instructional error requires a new trial. Defense counsel specifically expressed his approval of the trial court's instructions and, thus, any error has been waived. *Unger*, 278 Mich App at 234. We also find no merit to defendant's related ineffective assistance of counsel claim. Although the trial court twice misspoke by referring to "defendant" as the person who allegedly acted in self-defense, it corrected its misstatements by striking those references and indicating that the jury needed to determine if "Watson" acted in self-defense. Because the error was corrected, there was no

reason for defense counsel to object. Counsel is not required to make a meritless objection. *Snider*, 239 Mich App at 425.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kurtis T. Wilder
/s/ Elizabeth L. Gleicher