

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JUAN ALLEN,

Defendant-Appellant.

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UNPUBLISHED

September 21, 2010

No. 291334

Kalamazoo Circuit Court

LC No. 2008-000570-FC

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of committing perjury in a trial on a capital crime, MCL 750.422, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 12 to 20 years' imprisonment on the perjury conviction, 3 to 7 years' imprisonment on the felon-in-possession conviction, which is to be served concurrently to the perjury conviction, and an initial and consecutive 2-year term of imprisonment on the felony-firearm conviction. Defendant's brother, Marvin Allen, had previously been convicted of murder, along with assault with intent to commit murder and two counts of felony-firearm, arising out of multiple discharges of a firearm in a parking lot melee next to a party store and auto parts store. The prosecution claimed that defendant, who was with his brother in the parking lot when the murder was committed, initially possessed and fired the gun before it ended up in the hands of defendant's brother who then used it to shoot two individuals, one of whom died. And the prosecution proceeded with the perjury charge against defendant in the case at bar on the basis that defendant perjured himself at his brother's murder trial when defendant denied ever having possessed the gun. Defendant appeals as of right, arguing that trial counsel was ineffective in myriad ways. We affirm.

Defendant argues on appeal that trial counsel was ineffective for failing to object to the admission of testimony and evidence on various matters, as well as for failing to object to particular remarks and comments made by the prosecutor. Defendant generally preserved his appellate argument below by filing a motion for new trial predicated on the claim that counsel was ineffective, and a *Ginther*<sup>1</sup> hearing, in which defense counsel testified, was conducted. See

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

*People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).<sup>2</sup> To the extent that a particular argument was not the subject of testimony at the *Ginther* hearing, nor raised below, our review is limited to mistakes apparent on the appellate record. *Davis*, 250 Mich App at 368.

Whether a defendant has been denied the effective assistance of counsel presents a mixed question of fact and law, which matters are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the basic principles applicable to a claim of ineffective assistance of counsel, stating:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Additionally, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel’s competence with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). In evaluating whether counsel’s performance was deficient, we must determine whether counsel’s representation fell below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant first argues that counsel was ineffective for failing to object to the admission of Detective Charles Porn’s conclusions and opinions that a DVD, which contained video footage from six different surveillance cameras mounted inside and outside the party store, showed defendant possessing a gun, firing the gun, and transferring the gun to his brother.

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<sup>2</sup> At the hearing, appellate counsel called trial counsel to the stand and argued most of the issues now raised on appeal. The trial court denied the motion in a written opinion and order. The specifics of the court’s ruling will be addressed below in our discussion of the particular arguments raised by defendant.

Defendant relies on MRE 701 and federal case law, chiefly *United States v LaPierre*, 998 F2d 1460 (CA 9, 1993), interpreting FRE 701, which is identical to MRE 701. Defendant maintains that the DVD was available and supplied to the jury and that Porn improperly narrated the video, telling the jurors, in essence, to substitute his conclusions for ones that the jurors themselves could deduce and draw from their own observations and review. By permitting the narration, the court allowed the prosecution and Porn to invade the jury's exclusive province to determine whether defendant possessed and fired the gun, i.e., whether defendant was guilty.<sup>3</sup> Defendant also contends that Porn's opinions given during the narration were in no way helpful to the determination of a fact in issue and that Porn did not personally perceive the events when they actually transpired. Therefore, the testimony was not admissible under MRE 701.

The trial court, in its written opinion and order denying the *Ginther* motion for new trial, first ruled that defense counsel indeed had objected to Porn's narration of the video and that an unfavorable response by the court to the objection is insufficient to demonstrate ineffective assistance of counsel. We agree with defendant that counsel's objection below was predicated on Porn's reference to hearsay in narrating the video and not the particular argument now being raised and addressed on appeal. Despite finding that counsel did object, the trial court nonetheless proceeded to analyze the issue, raised below at the *Ginther* hearing and now on appeal, finding that *LaPierre* was distinguishable and inapplicable. The trial court observed that the video was at times difficult to decipher and hard to follow and that Porn's "narration was helpful in pointing out graphics on items of clothing to assist the jury with tracking an individual's movements, to outline camera angles, etc." The court concluded that the DVD exhibit was complicated and that it was appropriate to have Porn help in explaining the video.

We hold that counsel's performance did not fall below an objective standard of reasonableness and, even were we to assume that counsel's assistance was deficient, we further hold that defendant did not establish the requisite prejudice.

MRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

There is no dispute that Detective Porn was not testifying as an expert relative to his narration of the video. We find that Porn's opinions and conclusions that defendant possessed, discharged, and transferred the gun were rationally based on his perceptions of the video. We recognize that Porn was not present nor perceived anything at the crime scene when the

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<sup>3</sup> Defendant makes clear that he is not claiming that Porn should have been precluded from giving a general narration of the video, drawing jurors' attention to certain images. Rather, it is the conclusions and opinions reached by Porn during the narration that should have been objected to and excluded. We note that at the *Ginther* hearing, defense counsel claimed that he objected to Porn saying anything during the playing of the video; however, this claim is not supported by the trial transcript.

shootings occurred, but we find that, when analyzing the perception of the witness under MRE 701(a) for purposes of this case, the focus is properly placed on perception of the video. In *United States v Begay*, 42 F3d 486 (CA 9, 1994), one of the defendants argued that the district court erred in admitting the testimony of a police officer who narrated events depicted in a portion of a videotape showing criminal activity. The defendant argued, in part, that the officer's testimony was not admissible under FRE 701, which again is identical to MRE 701, because his testimony was not based on his own perceptions given that he was not present at the crime scene when the actual events took place. The United States Court of Appeals for the Ninth Circuit found that the defendant's contention lacked merit. *Begay*, 42 F3d at 502. The court held that the police officer's perceptions did not need to be based on the "live" events of the crime because he was not providing an eyewitness account. *Id.* Rather, the officer was testifying only with respect to the scenes depicted in the videotape; therefore, he needed only to have perceived the videotape. *Id.* Here, while Detective Porn was assisted by some underlying information supplied to him by witnesses, his opinions were *ultimately* derived from his repeated viewings of the video, which he highly scrutinized.<sup>4</sup>

We additionally find that Porn's opinions given during his narration of the video were helpful to the determination of a fact in issue, i.e., whether defendant possessed a firearm. Detective Porn had the benefit of reviewing the video numerous times, giving him the opportunity to comprehend the events that were transpiring on the video and to determine the identity of the participants. Porn, in assessing the video, was also guided by statements and descriptions provided by defendant himself regarding his clothing and the fights in which defendant became embroiled that night.

In *Begay*, the narrating police officer, aided by a magnifying glass, the use of slow motion technology, and videotape enhancement, reviewed the videotape over 100 times and studied 800 separate photographs in his effort to identify the participants and their actions during the crime. *Begay*, 42 F3d at 502. The Ninth Circuit rejected the defendant's argument that the officer's testimony was cumulative and invaded the province of the jury, and it further held:

Moreover, we agree with the District Court that [the officer's] testimony . . . was likely to have been helpful to the jury in evaluating [the videotape]. Although the jury viewed [the videotape] in its entirety, it is reasonable to assume that one viewing a videotape of a demonstration involving over 200 people would likely not see certain details, given the tremendous array of events all occurring simultaneously. [The officer] spent over 100 hours viewing [the videotape]. To have the jury do likewise would be an extremely inefficient use of the jury's and the court's time. Therefore, [the officer's] testimony concerning which persons

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<sup>4</sup> Assuming for the sake of argument that Porn's partial reliance on witness information in forming his opinions as to what was depicted in the video creates a problem in finding compliance with MRE 701(a) (opinion rationally based on perception of witness), we nonetheless find that reversal is unwarranted. For the reasons stated below, any presumed error was not prejudicial.

were engaged in what conduct at any given moment could help the jury discern correctly and efficiently the events depicted in the videotape. [*Id.* at 503.]

We conclude that the same reasoning applies here, i.e., that one would likely miss certain details considering the wide array of events captured by the six cameras and the lack of clarity. Porn's testimony was certainly helpful to the jury in evaluating the video footage and in discerning the identity of the individuals and the events depicted in the DVD.

In *LaPierre*, 998 F2d 1460, a case relied on by defendant, a police officer who investigated a number of bank robberies gave lay opinion testimony that the defendant was the individual pictured in bank surveillance photographs. The Ninth Circuit held that the district court abused its discretion in allowing the testimony, stating:

Lay opinion testimony of the type given . . . is of dubious value. The jury, after all, was able to view the surveillance photos of [the defendant] and make an independent determination whether it believed that the individual pictured in the photos was in fact [the defendant]. [The officer's] testimony therefore ran the risk of invading the province of the jury and unfairly prejudicing [the defendant]. For these reasons we have held that while lay opinion testimony of this sort is sometimes permissible, "the use of lay opinion identification by policemen or parole officers is not to be encouraged, and should be used only if no other adequate identification testimony is available to the prosecution." [*Id.* at 1465 (citation omitted).]

The Ninth Circuit, however, also observed that there were a couple of situations in which such testimony would be permissible, with the common thread binding these situations being that "the witness is more likely to identify correctly the person than is the jury." *Id.* There is no indication in *LaPierre* that the photographs of the defendant lacked clarity and were difficult to assess. Here, we are addressing a video and not photographs, and the video lacks clarity and is extremely difficult to assess, with a very fluid crime scene and numerous individuals being captured by the cameras. Given Detective Porn's extensive review of the video and knowledge of the shootings gained through his investigation, it is not unreasonable to conclude that he would be more likely to correctly identify defendant in the video footage. We find that *Begay* is the more persuasive opinion given the similarity of the testimony and circumstances and that *LaPierre* is distinguishable. See also *United States v Zepeda-Lopez*, 478 F3d 1213, 1221-1222 (CA 10, 2007) (where an FBI agent viewed videotape numerous times, the district court did not abuse its discretion in allowing lay opinion by agent identifying the defendant as person depicted in videotape); *Vinson v Indiana*, 735 NE2d 828 (Ind App, 2000), disapproved of on other grounds *Long v Indiana*, 743 NE2d 253 (Ind, 2001) (under Indiana Evidence Rule 701, the trial court properly allowed police officer to testify with regard to his opinion that Vinson was the person depicted in surveillance video, where officer had the opportunity to view video 15 to 20 times).

Furthermore, defendant's argument that the trial court effectively allowed Porn to invade the province of the jury is inconsistent with MRE 704. Although "a witness cannot express an opinion on the defendant's guilt or innocence of the charged offense," *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985), "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by

the trier of fact,” MRE 704. Here, an ultimate issue was whether defendant possessed a gun, and Porn’s opinion that he did so based on Porn’s review of the video was not objectionable under MRE 704. Porn did not testify that defendant was guilty of the perjury and firearm charges, which charges entailed consideration of legal criteria and elements other than solely whether defendant had a gun.

Because we find that Porn’s opinions and conclusions that defendant possessed, discharged, and transferred the gun were admissible, defense counsel was not required to object and thus his performance was not deficient. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003) (counsel need not make meritless and futile objections). Furthermore, defendant, in an attempt to establish his defense that he never possessed the gun, relied in part on some narration of the video by one of his witnesses, and defense counsel himself made observations concerning the video as it played during closing argument, which he claimed supported defendant’s case.

Moreover, defendant has failed to satisfy his burden to show that, but for counsel’s alleged failures, the outcome of the trial would have been different. The jury heard eyewitness testimony from Roneca Echols that defendant possessed a gun, and she had been familiar with defendant for many years. William Palm, the surviving shooting victim, also identified defendant as having possessed the gun. The jury additionally reviewed the video and was free to assess it on its own; jurors were in no way led to believe that they were required to accept Porn’s opinions. Indeed, the jurors were instructed that it was up to them alone to assess the evidence, that they could believe all, part, or none of a witness’s testimony, and that a police officer’s testimony is to be judged by the same standards used to evaluate the testimony of other witnesses. It is important to note that defendant specifically states that he is not claiming that counsel should have objected to Detective Porn’s narration of the video “to the extent that he drew jurors’ attention to specific images.” Given Echols’ and Palm’s testimony, the jury instructions, and defendant’s agreement that narration drawing attention to certain images was proper, we cannot conclude that defendant suffered prejudice, assuming deficient performance by counsel. Defense counsel aggressively cross-examined Porn, eliciting some shortcomings in his testimony, and counsel, attempting to use the video to defendant’s benefit, pointed out problems in closing argument in reconciling the video with the prosecution’s theory of the case.<sup>5</sup> The case was fairly presented to the jury, and we simply find no basis warranting reversal.

Next, Detective Porn opined that, having reviewed the video, having talked to the witnesses, and having pieced the case together, there was no doubt in his mind that defendant possessed the gun and fired it into the air. Defendant argues on appeal that counsel was ineffective for failing to object to this testimony.

There was no objection by defense counsel when the prosecution elicited the challenged opinion from Porn, although counsel had twice earlier interjected a hearsay objection relative to Porn’s partial reliance, in narrating and explaining the video, on statements and information

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<sup>5</sup> Thus, defendant himself was essentially narrating the video and expressing the opinion that it did not show that defendant possessed a gun.

derived from witnesses that he interviewed. When the second hearsay objection was raised, the trial court ruled that Detective Porn could continue narrating the video, but the court also stated that defense counsel could raise hearsay objections as Porn continued his testimony if the questioning and narration created hearsay violations. Defense counsel did not object on any ground with respect to Porn's subsequent opinion that we are now addressing.

Defendant contends that counsel should have objected to Detective Porn's opinion because the opinion violated MRE 701 and invaded the province of the jury and because the opinion blended in hearsay statements that were not subject to any exception. Defendant maintains that it could be argued that there was a strategic reason to not object to Porn's opinion, i.e., on cross-examination of Porn, counsel, with the door now open, would have been free to delve into specific statements made by certain absent witnesses to police, which statements actually contradicted Porn's conclusion that the video showed defendant possessing a gun. However, because defense counsel did not actually pursue such questioning on cross-examination of Porn, there clearly was no strategic reason for failing to object to Porn's opinion.

Defendant made this identical argument below, but the trial court did not directly address the argument in its written opinion and order denying the *Ginther* motion for new trial. It appears that the court misconstrued the argument, treating it as one asserting that counsel was ineffective for failing to cross-examine Detective Porn about witness statements that may have called into question Porn's analysis of the video. The trial court ruled that the cross-examination failure did not deprive defendant of a substantial defense, nor did defendant establish that the information to be elicited would have been beneficial to defendant's case.

Defendant's arguments that counsel should have objected because Porn's opinion violated MRE 701 and invaded the province of the jury mimic those made by defendant with respect to the first issue addressed above, except that defendant is now making the arguments in the context of a subsequent portion of Porn's testimony. Because the opinion being challenged is essentially the same opinion rendered by Porn earlier in his testimony and simply repeated, and because we addressed and rejected the MRE 701 and jury-province arguments relative to Porn's earlier-stated opinion, our analysis is equally applicable to this issue. Accordingly, the arguments premised on MRE 701 and invasion of the jury's province are rejected for the reasons that we set forth above.

With respect to the hearsay argument, hearsay is defined as including oral or written assertions, other than those made by a declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. MRE 801(a)-(c). Porn did not specifically testify regarding the details of any particular out-of-court statements made by crime-scene witnesses, other than some made by Echols and Palm, and he did acknowledge the statements provided by defendant concerning his clothing and the fights, which statements are not hearsay, MRE 801(d)(2), nor claimed to be hearsay.<sup>6</sup> Porn's references to statements made by Echols and Palm were, in part, to show consistency with their trial testimony, which, as will be explained *infra*,

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<sup>6</sup> It was Porn's knowledge of defendant's clothing and the fights that assisted Porn in tracking defendant's movements in the video.

took the testimony out of the realm of hearsay under MRE 801(d)(1)(B). As to the specific testimony being challenged by defendant, which we must focus on given that counsel did interject hearsay objections to earlier testimony, Porn merely made a vague and general reference to having spoken to witnesses. Outside of the non-hearsay statements made by defendant, Echols, and Palm, and to the extent and assuming that Porn effectively testified to oral or written assertions other than ones made by declarants while testifying at trial, we question whether the statements were offered to prove the truth of any matters asserted. Rather, Porn's testimony concerning witness information merely showed the information's effect on Porn's analysis and interpretation of the video footage. See *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995) (statements may be admitted to show the effect on the hearer or reader when the effect is relevant, and the policies underlying the hearsay rule are inapplicable because the statements are not being admitted to prove the truth or falsity of the matters asserted).

Regardless, assuming deficient performance and that Porn's opinion that the video showed defendant in possession of a gun was grounded in hearsay, we conclude that defendant was not prejudiced by the testimony for the reasons proffered by us above in addressing the first claim of ineffective assistance of counsel. This is especially true where there was cross-examination of Echols and Palm on their statements to police, and where Porn's interpretation of the video was also based on extensive and exhaustive review of the footage and statements made by defendant. Reversal is unwarranted.

Defendant next argues that trial counsel was ineffective for failing to object to Detective Porn's testimony that investigatory statements made by Echols and Palm to the police were consistent with their trial testimony.<sup>7</sup> Defendant claims that counsel should have objected to Porn's testimony as it was improper under MRE 801(d)(1)(B), which allows the admission of a prior consistent statement regardless of its hearsay nature but only if it is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. Defendant contends that there was no express or implied charge of fabrication or improper influence or motive relative to testimony by Echols and Palm; therefore, it was improper and constituted hearsay when Detective Porn testified concerning Echols' and Palm's prior statements.

The trial court found that defense counsel objected to Porn's testimony regarding the prior statements made by Echols and Palm to the police. Our review of the record reflects that counsel did not object to the specific testimony now being challenged. The trial court's reference to a transcript page, in relation to its conclusion that an objection was made, does not correlate to the transcript page on which Porn testified that the testimony and prior statements were consistent. Rather, the court's citation regards subsequent testimony by Porn in which defense counsel objected on hearsay grounds to Porn's assertion that pretrial statements made by Echols and Palm were consistent with the *video*.

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<sup>7</sup> Palm's "trial" testimony was actually the testimony that he gave at the preliminary examination, which was used at trial when extensive efforts by the prosecution to procure Palm's attendance at trial failed.

Under MRE 801(d)(1)(B), a prior statement of a declarant does not constitute hearsay if the declarant testifies at trial and is subject to cross-examination concerning the statement, and the statement is “consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive[.]”

Defendant’s argument lacks merit. The cross-examination of both Echols and Palm by defense counsel was conducted in a fashion that implicitly suggested that they lacked credibility and were fabricating as to some of their testimony. That defense counsel was intent on charging fabrication with regard to the testimony by Echols and Palm became expressly evident during counsel’s closing argument, where he stated the following concerning Palm’s and Echols’ testimony, respectively:

We know that’s a lie. We know that is an absolute lie . . . . Mr. Palm is not credible. Mr. Palm has lied on I would submit three separate occasions. Mr. Palm does not tell the truth.

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I’m only doing that to show that if Miss Echols is saying that she had a clear line of sight, she’s lying. If Miss Echols is saying that nothing was obstructing her view, she’s lying.

We also note that the jury heard earlier testimony by Detective Porn that Palm’s first statement to the police was inaccurate and deceitful.

While the testimony by Porn regarding consistency between the trial testimony and statements to the police obviously came before defense counsel made his closing argument, the jury had already heard the cross-examination of Echols and Palm suggesting lack of credibility and fabrication before Porn testified. And given that counsel clearly planned to argue that their testimony was fabricated, at least in part, it would make little sense to object to Porn’s testimony on consistency. We thus conclude that counsel’s failure to object did not constitute deficient performance. Moreover, the challenged testimony falls far short of having any impact on the verdicts and therefore the requisite prejudice is lacking.

Defendant next argues that counsel failed to object when the prosecution elicited testimony that constituted a blatant appeal for sympathy. First, Detective Porn testified that he was approached by the murder victim’s family who asked Porn why defendant was not being held responsible for having brought the gun to the crime scene. According to Porn, it was the family’s plea that prompted him to seek charges against defendant. Second, the prosecutor who handled the case against Marvin Allen testified that it is difficult to break the code of silence as to inner-city murders, that witnesses are intimidated and threatened in such cases, that it is common for these witnesses not to talk to police, and that such witnesses are fearful of being labeled a snitch. Defendant argues that this testimony from Porn and the prosecutor improperly

appealed to the jury's sympathy and was irrelevant and inadmissible under MRE 401-403; therefore, counsel should have objected.<sup>8</sup>

The trial court ruled that defense counsel objected to the line of questioning concerning the family's wishes and that an unfavorable result is not enough to demonstrate ineffective assistance of counsel. Our review of the record reveals that defense counsel objected to testimony by Detective Porn, but he did so in regard to the timeline as to when charges were brought against defendant, which is the objection cited by the court in support of its ruling. Defense counsel, however, never objected to Porn's testimony relative to the family's questioning of the failure to prosecute defendant and to hold him accountable, nor did counsel object when Porn testified that the family's outcry precipitated his decision to seek charges against defendant. Further, there was no objection to the testimony of the prosecutor.

It is improper for the prosecution to seek the jury's sympathy for the victim or victims of a crime. *People v Mallory*, 421 Mich 229, 250; 365 NW2d 673 (1984); *People v Dobek*, 274 Mich App 58, 80; 732 NW2d 546 (2007). "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *Id.* at 63-64.

The testimony regarding the murder victim's family and their desire to see justice done initially arose after defense counsel, in cross examining Porn, attacked the failure of the police to conduct a search of defendant's home and to perform a gunpowder residue test on defendant. In response, the prosecutor began eliciting testimony from Porn explaining that the initial focus of the police was on catching and prosecuting the actual murderer, Marvin Allen, and not defendant. It was during this testimony that Detective Porn announced the family's sentiments and his decision to pursue defendant. The challenged testimony was arguably irrelevant and could evoke some sympathy. The prosecution, in order to rebut the suggestion that the police botched opportunities to gather relevant evidence as to defendant, could have simply touched on the fact that the police were initially solely focused on Marvin Allen without then broaching the subject of the murder victim's family.

At the *Ginther* hearing, defense counsel explained that he did not object to the testimony because he did not believe it was harmful or sufficiently inflammatory to object. We find that counsel's position constituted sound trial strategy as the testimony was not harmful in any meaningful way and the jury could have been suspicious of any objection, where the prosecution's question that elicited the testimony sought an explanation as to why defendant was being prosecuted. The jurors could reasonably have thought that defendant was attempting to hide some damning evidence had an objection been raised. Minimally, defendant fails to overcome the strong presumption that counsel's performance constituted sound trial strategy. With respect to the challenged testimony by the prosecutor who prosecuted Marvin Allen, we do not find that it reflected any improper attempt to evoke sympathy; rather, it was merely explanatory in nature and set the background in relation to the prosecution of Marvin Allen. Furthermore, prejudice is wholly lacking. Reversal is unwarranted.

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<sup>8</sup> Defendant did not raise the issue concerning the prosecutor's testimony at the *Ginther* hearing.

Defendant next argues that counsel was ineffective for failing to object to portions of the prosecution's closing argument. Specifically, defendant cites the closing argument where the prosecutor noted the call for justice by the murder victim's family that sparked the prosecution of defendant, where the prosecutor remarked that nothing could bring the murder victim back but full justice could be achieved with a conviction, and where the prosecutor commented on Detective Porn's intense scrutiny of the video, his unparalleled knowledge of the case, his two-plus years devoted to seeing the case through, and his extensive investigation and interviewing of all the witnesses. Defendant argues that the prosecutor's comments were attempts to appeal to the jury's sense of sympathy and justice, diverting the jurors from the real issues in the case. Defendant further contends that the prosecutor's remarks went beyond the evidence, and reasonable inferences arising therefrom, and that the prosecutor's comments effectively urged reliance on hearsay, even beyond the hearsay statements improperly admitted at trial.

The trial court ruled that there was no record support for the proposition that the prosecutor attempted to persuade the jury with any commentary that went beyond the submitted evidence.

With respect to the issue presented, whether defense counsel was ineffective depends in part on whether the prosecutor committed misconduct during his closing argument. In *Dobek*, 274 Mich App at 64-66, this Court reviewed several principles regarding prosecutorial misconduct:

Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. "The propriety of a prosecutor's remarks depends on all the facts of the case." A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel.

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A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms. [Citations omitted.]

We hold that reversal is unwarranted. The arguments posed by defendant relative to the prosecutor's closing argument are essentially the same arguments already presented but made in the context of challenged testimony and evidence, which we rejected above. There was testimony supporting the prosecutor's comments concerning Detective Porn's intense scrutiny of the video, his unparalleled knowledge of the case, his two-plus years devoted to seeing the case through, and his extensive investigation and interviewing of all the witnesses. For the reasons stated earlier in this opinion, we find that Porn's narration of the video and his conclusions and opinions were proper and, assuming any error, it was harmless and did not prejudice defendant. With regard to any appeal for sympathy, this Court in *People v Hedelsky*, 162 Mich App 382,

385-386; 412 NW2d 746 (1987), found that the prosecutor's comments that there should be some sense of justice for the tragic death of an innocent person were not improper when the comments were couched in terms of asking the jury to do justice after examining all of the evidence and upon a finding of guilt beyond a reasonable doubt. Here, the prosecutor made the challenged remarks and then intensely reviewed the evidence that he thought supported a guilty verdict and the imposition of justice. We do not find that counsel's performance was deficient. Objecting to a prosecutor's call for justice during closing argument would likely not sit well with a juror and, had counsel objected, the best that defendant could have expected was a cautionary instruction. But the trial court was already going to, and it did, instruct the jury that it was to render a verdict based solely on the evidence and not sympathy or prejudice, making it reasonable not to object during the closing argument. Moreover, and once again, the requisite prejudice is wholly lacking.

Defendant finally contends that all of the errors committed by counsel, when viewed separately or in conjunction with each other, resulted in prejudice, necessitating a new trial. The trial court ruled, in summation, that defense counsel's performance was not deficient and that there was no indication that the results of the trial would have been different but for counsel's performance. For the reasons stated above, we agree with this assessment. Reversal is unwarranted.

In sum, counsel's performance did not fall below an objective standard of reasonableness and, assuming any errors, defendant fails to show the existence of a reasonable probability that, but for counsel's error or errors, the results of the proceeding would have been different.

Affirmed.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Christopher M. Murray