STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 31, 2012
v	No. 300052 Wayne Circuit Court
KYLE FREDERICK WILKERSON, Defendant-Appellant.	LC No. 10-003123-FC

Before: GLEICHER, P.J., and CAVANAGH and O'CONNELL, JJ.

PER CURIAM.

Four days before his jury trial, defendant Kyle Frederick Wilkerson informed the court that he had retained counsel to replace his court-appointed attorney and required a continuance as his substitute counsel had a scheduling conflict. Unimpressed by defendant's cited grievances with his original attorney and noting his standard practice of rejecting such motions, the trial judge denied a continuance. The jury acquitted defendant of first-degree murder, but convicted him of the lesser included offense of second-degree murder, MCL 750.317, as well as 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.

We conclude that defendant was not denied his Sixth Amendment right to retained counsel of choice despite the court's citation of its rote practice of denying adjournments to accommodate replacement counsel. Taken in conjunction, defendant's belated record assertion of his right and failure to elaborate upon any complaints against his original appointed counsel support denial of his motion. Defendant's challenges against appointed counsel's performance lack merit and, although not completely proper, nothing about the prosecutor's conduct requires reversal. As such, we affirm defendant's convictions and sentences.

Defendant was involved in a verbal altercation between two groups of men at a Downriver bar. The disagreement arose because of preexisting animosity between defendant and the victim's friend, Terence Peterson. The fight escalated into physical violence in the bar's parking lot. At some point, former codefendant Johnathon Reese drew a gun and fired two warning shots into the ground. Defendant admits that he took the weapon from Johnathon, who is defendant's cousin. Defendant claims that someone from the rival group shot at him and he returned fire in self defense, unintentionally killing Elijah Young. The prosecution contends that defendant chased Young and intentionally shot him four times in the back.

I. COUNSEL OF CHOICE

Defendant argues that the trial court improperly refused to adjourn his trial to allow defendant's newly retained counsel to participate and thereby violated his Sixth Amendment right to retained counsel of choice. Defendant's trial was scheduled for Tuesday, July 6, 2010, the day after the long Independence Day holiday weekend. On Friday, July 2, 2010, four days before the start of trial, defendant informed the circuit court that he and his attorney were "not on the same page." Defendant indicated that he had already secured substitute counsel. However, substitute counsel was scheduled to try another case on defendant's trial start date and declined to file an appearance unless the court agreed to adjourn the trial. The colloquy on the record occurred as follows:

> *The Court.* . . . I received a letter from Mr. Schulman [appointed defense counsel] . . . dated June 29, 2010 – indicating that [defendant] is requesting that the Court appoint him a new lawyer, and then attached to that was a handwritten letter over the purported subscribed signature one of [sic] Judith R. Hunsicker, who is the mother of [defendant].
>
> I suppose we need to deal with the representation issue first.
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> *Mr. Schulman.* . . . Your Honor, just for the record, what occurred was I received a letter from [defendant's] mother which is that attached letter. I was surprised that he would be hiring his own lawyer. He indicated Michael . . . Sharpe. I believe he tried a previous case in your court with [defendant].
>
> I had contact with Mr. Sharpe. He said he is prepared to file[] an appearance.
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> * * *
>
> *The Court.* . . . Is he prepared to go forward with the trial on Tuesday?
>
> *Mr. Schulman.* No. He has another trial that day. This has a Co-defendant on it. It's my understanding the Co-defendant in our case will be pleading which may change the nature of the time – you know, may change this case . . . .
>
> Also, we did receive about twenty-five DVD's about the same time as that motion was filed. So, there is considerable discovery here as well. I mean his complaint is basically that, you know, I did not have discovery – it just wasn't available. I mean, the second I got it, I provided it to him. . . . I'd prefer not to represent someone who makes it difficult for me to communicate with them because they feel they have alternative counsel that is going to represent them. Your Honor, I respect that. That's his choice, but –
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> *The Court.* . . . But, on the eve of trial, it looks like it's a delaying tactic by the Defendant. You know, why did this just come up, and here we are ready to

go to trial, and I've had no indication that anything was wrong with the attorney/client relationship.

From what I could see, Mr. Schulman, you have worked very vigorously on behalf of [defendant]. There was a contested motion earlier on, and you filed a very well done brief in opposition to the People's motion to be able to use 404 B evidence. I usually don't get briefs of that caliber in response to such a motion. So, from what I could see, you've been very vigorous and effectively representing [defendant]. I don't understand his problem, shall we say. At this point, all it looks like is a delaying tactic.

Mr. Schulman. Well, for what its work [sic], Mr. Sharpe did indicate he would file[] an appearance if this Court granted an adjournment.

The Court. No. I'm not going to be forced into that. I don't do that, he can come into the case. I don't have any objection, but, if he comes in and undertakes to represent [defendant], he has to do so on the timetable that had been previously set in this case.

Mr. Schulman. . . . I provided every single document to the Defendant and his family – the discovery, the investigative subpoena testimony, the transcripts, all – everything I've had in my possession, he's had it. I met with the family in West Bloomfield and Detroit.

Given all of that, you know, when you have a Defendant who's indicating he won't communicate or have [sic] some ideas of another lawyer, this is the eve of trial where I recognize that this is the crunch time when communication is at its most important. But, I don't know. I mean, if I can talk to Mr. Sharpe and ask him to file that appearance and be here on –

The Court. . . . There's no appearance. . . . So, he's not even a factor right now in this case. You are the attorney of record. Like I said, I still don't know what the problem is. Nobody has represented it to me.

Mr. Schulman. He feels, I believe, that there was a period of time I did not see him to give no additional discovery [sic]. I have made seven visits with him during that period of time in there. I think there was – I have seven slips that I visited him. But his position is that – you know, he's just not communicating with me, and it's a very serious charge and – . . . . He's got reservations about my ability to be effective. And I can only say that – well, he hasn't specified anything in particular, but –

The Court. That's what I'm saying. What's in this letter is vague, it's general, and I don't – I'm not convinced.

* * *

[*Defendant*]. I'm not chastising his intelligence of the law. I just feel that we didn't have the right communication coming up to the point of trial . . . .

The Court. . . . When did you first come to this revelation?

[*Defendant*]. Probably a couple of weeks after the motion hearing. The motion hearing was May 14th, and I haven't seen him until – from then, since last Monday. You know, I feel that we should have had better communication from then to this time. Like it's been stated, this is a very serious matter. I just feel that we haven't gone over everything correctly. We had an information and communication break-down. I called my mother and asked her to call him and come meet me so we can talk and go over this matter. But, we haven't – I feel we haven't gone over it correctly. I feel we're not on the same page.

The Court. What does correct mean?

[*Defendant*]. I'm not saying that he isn't doing his job. I'm not trying to question his intelligence of the law or chastise it all. I just feel for me in this case, in this matter, we're not on the same page, Your Honor.

The Court. That doesn't mean anything to me. You told me nothing. Sounds like a tactic for a delay. I'm not satisfied, at all.

Right now Mr. Schulman is your attorney, so we're going to listen [to] the motion today because there's nobody here who is going to represent you. I don't know what relationship you've established, whether any retainer has been paid, but right now there's no other appearance in the file. Mr. Schulman has filed a motion on your behalf, and he filed it in opposition to the People's motion on your behalf. So, I'm going to hear that now.

You can have a seat [defendant].

Mr. Schulman. Your Honor, I also want to just put on the record there was a plea offer made yesterday after I had actually visited him. It was some two days ago, the third time in that week. And I have the slips.

On the morning of trial, defense counsel Schulman indicated that defendant's preferred counsel, Sharpe, was in the courtroom:

Mr. Schulman. Your Honor, I was provided an appearance this morning by Michael Sharpe, who is actually seated behind me. He's indicated that he previously represented [defendant] and he's prepared, if the Court will adjourn the matter, to represent him.

I am prepared for trial today, Your Honor. I have all the discovery. I have reviewed the documents. Of course, my ability to communicate with [defendant] is hampered when there is a feeling in his mind that he has private counsel. . . .

I'm prepared to try it. I'm prepared to work with the new attorney, whatever the Court wishes to do . . . .

The Court. All right. Well, as I indicated Friday, an issue came up and I indicated we were going to trial today.

If you wish to retain in, Mr. Sharpe, I can't stop you from doing that, but there will be no adjournment of this trial. We're ready to go today.

Mr. Sharpe. And, frankly, my appearance has not been filed. . . . It's just Mr. Schulman has a copy of my appearance. . . . [Defendant] retained me in a prior matter, which we tried before this court, which you may remember. . . . I'm not here to cause trouble. I'm simply here to – [defendant] wishes to retain me, and if [defendant] has been apprised that should this trial not be adjourned, my original appearance which is in my bag, would not be filed. It may have been some bad information, but the information that I got was that you were concerned about whether or not [defendant] was, for lack of a better word, playing fast and loose with the Court and whether or not an appearance would be filed. I certainly am ready, willing, and able to do that if this trial is adjourned. If it's not, then I'll go back downstairs, or upstairs, and try the case that I'm supposed to be trying right now, and that will be it. . . . But I want the record to be clear, I'm ready, willing, and able, and wish to file an appearance and adjourn this matter.

The Court. . . . I had indicated Friday that I was not going to adjourn this case, that I wasn't satisfied with [defendant's] explanation on the record. I thought it was a delaying tactic. I know both Mr. Schulman and Mr. Sharpe. I've known you all professionally through the years, and I don't think that there is anything untoward that's going on with respect to the attorneys in this matter. But as I indicated Friday, I was not going to adjourn this matter, and we are prepared to go forward today.

We review for an abuse of discretion a lower court's decision affecting a criminal defendant's right to counsel of choice and its denial of a motion to adjourn the trial proceedings. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). "An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes." *People v Weddell*, 485 Mich 942, 944; 774 NW2d 509 (2009). To the extent that defendant's argument implicates his constitutional rights, our review is de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004).

The Sixth Amendment affords a criminal defendant who does not require appointed counsel the right to *retain* counsel of his choice. *United States v Gonzalez-Lopez*, 548 US 140, 152; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *Wheat v United States*, 486 US 153, 159; 108 S Ct 1692; 100 L Ed 2d 140 (1988). There is a recognized "presumption in favor of [a defendant's] counsel of choice," but the right is not absolute and may be rebutted. *Wheat*, 486 US at 164. A defendant's right to retained counsel of choice, for example, does not allow "a defendant [to] insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation." *Gonzalez-Lopez*, 548 US at 151-152. A defendant

may not insist on representation by counsel above his price range or who declines to accept the defendant as a client. *Wheat*, 486 US at 159. Moreover, the court has "wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar." *Gonzalez-Lopez*, 548 US at 152 (internal citations omitted).

At issue in this case is a defendant's right to retained counsel of choice as balanced against the court's and public's need for the "prompt and efficient administration of justice." *Akins*, 259 Mich App at 557. This interest is affected every time a defendant seeks to suspend his trial to allow replacement counsel to participate. Under our court rules, a trial court has "discretion" to "grant an adjournment to promote the cause of justice" and for "good cause." MCR 2.503(B)(1), (D)(1). Yet, a criminal defendant does not have "'an unbridled right' to insist that his trial be held in abeyance while he replaces one competent attorney with another." *United States v Bragan*, 499 F2d 1376, 1379 (CA 4, 1974). The rescheduling of a trial is no easy feat; the court must avoid conflict in its own schedule as well as ensure the ability to assemble "the witnesses, lawyers, and jurors at the same place at the same time." *Morris v Slappy*, 461 US 1, 11; 103 S Ct 1610; 75 L Ed 2d 610 (1983). The court's refusal to adjourn a trial to allow a defendant to retain substitute counsel only rises to the level of a constitutional violation when the court exhibits "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' . . . ." *Id.* at 11-12, quoting *Ungar v Sarafite*, 376 US 575, 589; 84 S Ct 841; 11 L Ed 2d 921 (1964). Whether a court's denial of an adjournment is unconstitutionally arbitrary "must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar*, 376 US at 589.

Although we ultimately affirm the trial judge's ruling, we do not condone his statements implying that he based his decision solely on a desire to expedite the trial. When informed that attorney Sharpe would be unable to step in as replacement counsel unless the court granted an adjournment, the judge responded, "No. I'm not going to be forced into that. I don't do that. . . . [I]f he . . . undertakes to represent [defendant], he has to do so on the timetable that had been previously set in this case." Such statements evidence that "any delay would have been unacceptable to the trial judge. [And t]hat sort of rigidity can only be characterized as arbitrary." *Carlson v Jess*, 526 F3d 1018, 1026 (CA 7, 2008), citing *Linton v Perini*, 656 F2d 207, 212 (CA 6, 1981). See also *United States v Sellers*, 645 F3d 830, 835 (CA 7, 2011) (finding arbitrary a trial court's assertion that "[i]t is typically this Court's rule that new counsel take the case as they find it"). Had defendant raised a "justifiable request" for a continuance to allow Sharpe's participation, the trial court's apparent "insistence upon expeditiousness" would cause us concern. *Morris*, 461 US at 12; *Ungar*, 376 US at 589.

The trial judge also failed to explain why an adjournment would burden the court or the administration of justice. As noted by attorney Schulman, codefendant Johnathon Reese was on the brink of a plea agreement, which would greatly simplify the trial proceedings. Compare *Akins*, 259 Mich App at 558 ("The trial court's reluctance to adjourn the trial was reasonable, given that [the defendant] was to be tried jointly with [a codefendant]. Thus, it would have been a heavy burden on the trial court and the other attorneys to adjourn the trial."). Despite the removal of the codefendant from the trial, this matter still would not have been easy to reschedule. Defendant's jury trial spanned seven days. The parties took a full day to conduct voir dire and empanel a jury. The prosecution then presented 15 witnesses over two full days of

trial before the jury. A fourth day of trial was consumed by defendant's testimony and the prosecution's cross-examination and a partial fifth day by presentation of a prosecution rebuttal witness and closing arguments. Jury deliberations took another two days. A seven-day, 17-witness jury trial is a major undertaking that is not easily shuffled in a hectic court schedule. See *United States v Trestyn*, 646 F3d 732, 739 (CA 7, 2011) (noting that potential "inconvenience [to] witnesses, the court, counsel or the parties" and complexity of the case are relevant factors when balancing a defendant's right to counsel of choice against "the orderly administration of justice"). Compare *Carlson*, 526 F3d at 1025-1026 (a one-day trial with only three witnesses can be easily rescheduled). Accordingly, the court's interest in the efficient administration of justice and the demands of its calendar was weighty in this case.

Weighed against the difficulty of rescheduling a lengthy, multiple-witness jury trial, the court's denial of defendant's motion did not violate his Sixth Amendment right. When considering the defendant's side of the scale in such a motion, we review four factors outlined in *People v Williams*, 386 Mich 565, 578; 194 NW2d 337 (1972): (1) whether the defendant is asserting his constitutional right to counsel; (2) whether the defendant cites "a legitimate reason," such as "an irreconcilable *bona fide* dispute" with his counsel; (3) whether the defendant's timing reveals his negligence in raising the motion; and (4) whether the defendant is seeking the adjournment to delay trial, such as when the defendant has sought previous adjournments. A reviewing court must remember, however, that the standards applicable to the substitution of retained counsel are more lenient than those applicable to the substitution of appointed counsel. *Carlson*, 526 F3d at 1027. "[E]ven if a breakdown in communication is not so severe as to implicate the right to counsel, it may still provide a reasonable justification for a substitution of retained counsel and a continuance." *Id.* Further, even if counsel's strategic decisions do not fall below the level of constitutional effectiveness, "a significant dispute about strategy may implicate a defendant's right to counsel of choice." *Id.*

Here, defendant is clearly asserting his Sixth Amendment right to retain counsel of his own choosing and therefore meets the first *Williams* criteria. Defendant's stated reasons for seeking substitute counsel were inadequate communication and flow of information, insufficient contact, and an underlying disagreement regarding the handling of the case. At first glance, these reasons appear legitimate. Yet, defendant's complaints against appointed counsel unraveled upon deeper inquiry by the court.

First, defendant failed to challenge attorney Schulman's assertion that he did not receive discovery materials until mid-May and provided them to defendant as soon as they became available. Second, attorney Schulman rebutted defendant's claim that he had not spent adequate time preparing with defendant by presenting seven visitor slips from the county jail. Third, defendant provided only generalized complaints regarding his breakdown in communication and disagreement with attorney Schulman. The trial court engaged in an inquiry with defendant on the record in an attempt to define defendant's specific complaint. See *United States v Johnson*, 403 Fed Appx 146, 148 and n 1 (CA 9, 2010), quoting *United States v Torres-Rodriguez*, 930 F2d 1375, 1380 (CA 9, 1991) (requiring district courts to inquire regarding the nature of a defendant's complaints against counsel before ruling on a motion for substitute counsel). The court informed defendant that the reasons provided in the letter to attorney Schulman were "vague" and unconvincing. The court allowed defendant the opportunity to express his concerns and responded with follow-up questions. Defendant indicated that Schulman was a competent

attorney but they "didn't have the right communication," had not "gone over everything correctly," and were "not on the same page." Defendant cited no specific concern with counsel's performance and gave no examples of the attorney-client disconnect.

Had defendant presented his request earlier in the proceedings, his generalized discontent with the attorney-client relationship likely would have sufficed to support a motion for substitute counsel. In the context of a motion this close to trial and requiring a continuance, however, caselaw supports requiring a more concrete complaint. In *Williams*, 386 Mich at 576, for example, the defendant and his original counsel had "an irreconcilable difference of opinion . . . on whether to call certain alibi witnesses." The disagreement did not occur until the eve of trial and could not be presented to the court until that time. In *Carlson*, 526 F3d at 1021, the defendant's proffered replacement counsel provided the court with an extensive, detailed explanation of the investigation that had been neglected by the defendant's original counsel and had to be addressed before trial. In comparison, the Tenth Circuit Court of Appeals found a lack of legitimate reason where the defendant sought a last-minute continuance of an evidentiary hearing, cited no complaint with her original counsel, and simply "prefer[red] another attorney." *Trestyn*, 646 F3d at 737, 740. Similarly, the Wisconsin Court of Appeals upheld a lower court's refusal to adjourn a trial where neither the defendant nor his preferred substitute counsel could provide an "extraordinary reason" meriting relief a week before trial. *State v Prineas*, 316 Wis 2d 414, 431-432; 766 NW2d 206 (2009).

This leads us to the third *Williams* factor—negligence in belatedly raising a motion for substitute counsel. We again note that, had defendant cited more specific reasons, we would be less concerned about the timing of his motion—the Friday before a Tuesday trial with a long holiday weekend in between. The court specifically asked defendant when he realized his general dissatisfaction with attorney Schulman's representation. Defendant admitted that he had known for approximately one month that he wanted replacement counsel. Knowing his trial was fast approaching, defendant waited until June 23 to have his mother send attorney Schulman a letter stating his desire to hire substitute counsel. There is no record indication when Schulman actually received the letter, but he forwarded it to the court on June 29, six days after it was penned. The issue was then discussed at a July 2 hearing on an unrelated motion. Only then did defendant inform the court that he preferred to retain attorney Sharpe. Prior to that revelation, the court had not been advised of defendant's desire for a continuance. In any event, given defendant's inability to cite any specific concerns with Schulman's abilities, his one-month delay in seeking a continuance to substitute counsel appears negligent. Considered together, defendant failed to meet the second and third *Williams* factors.

From this record, however, there appears no evidence that defendant intentionally used his motion as a delay tactic; defendant had not requested any previous adjournments and the case was proceeding smoothly toward trial. Defendant had remained incarcerated pending trial and therefore would not benefit from extended freedom in the event of a continuance. Moreover, there is simply no indication that defendant was "gaming" the system. Accordingly, contrary to the trial court's conclusion, defendant met the fourth *Williams* factor. See *Carlson*, 526 F3d at 1026 (finding no delay tactic where the defendant remained incarcerated pending trial, had never sought a continuance, and "had no history of 'gaming' the system"); *Williams*, 386 Mich at 577 (the defendant was not engaging in delay tactics where a prior adjournment was sought by someone else).

In summary, defendant raised a constitutional ground for his motion and did not appear to employ his constitutional claim as a delay tactic. However, given defendant's lag in acting on his concerns, the short notice provided to counsel and the court, and the lack of any specific complaints with counsel's performance *taken together*, defendant cannot meet the second and third *Williams* factors to support a continuance for the participation of retained counsel of choice. On this record, the trial court did not violate defendant's right to counsel, and acted within its discretion, by declining to adjourn a seven-day, 17-witness trial with, at the most, one week notice.

II. INEFFECTIVE ASSISTANCE OF APPOINTED COUNSEL

Defendant also challenges the efficacy of appointed counsel. Specifically, defendant claims that attorney Schulman ignored his "explicit[] demand[]" to call David Reese as a witness. Defendant contends that Schulman refused to meet with the private investigator hired by defendant's family. Defendant also asserts that counsel did not inform him that his testimony was necessary to the case until "well after the start of his trial." Finally, defendant challenges his counsel's failure to move to suppress his post-arrest statement to the police.

Defendant failed to request an evidentiary hearing below and did not seek a remand to develop the necessary record. As such, our review is limited to mistakes apparent on the existing record. *People v Fike*, 228 Mich App 178, 181; 577 NW 2d 903 (1998). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews findings of fact for clear error and constitutional issues de novo. *Id.* "To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability [exists] that the outcome of the proceeding would have been different but for counsel's errors." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). To show deficient performance, the defendant must overcome the strong presumption that counsel's decisions constituted sound trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "We will not substitute our judgment for that of defense counsel" regarding strategic matters or assess his performance with the benefit of hindsight. *Id.*

Defendant has not established that counsel's failure to present David Reese as a defense witness amounted to ineffective assistance. David is the cousin of both defendant and former codefendant Johnathon Reese. Johnathon testified that David tried to diffuse the situation between the two groups of men and was rewarded with a punch to the head. Johnathon averred that David fell to the ground, suffered an apparent seizure and was unconscious during the remainder of the fray. Defendant, on the other hand, claims that David was alert and would rebut Johnathon's testimony. Specifically, defendant asserts that David would refute Johnathon's recitation of an inflammatory comment made by defendant and would describe Johnathon as a more active player in the shooting incident.

Decisions regarding which witnesses to call and what evidence to present are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Yet, the failure to call a specific witness can be ineffective if it deprives the defendant of a substantial defense. *Payne*, 285 Mich App at 190. A "substantial defense" is one that "might have made a difference

in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Defendant has not provided an affidavit from David to prove the content of his proffered testimony. That alone is fatal to his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level . . . which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately."). Even if David had testified exactly as described by defendant, his testimony would not likely "have made a difference in the outcome of the trial." *Hyland*, 212 Mich App at 710. Defendant admitted that he took the gun from Johnathon and shot towards the members of a rival group. Johnathon's actions and defendant's comments leading up to defendant's acquisition of the gun cannot change defendant's subsequent act of violence.

Defendant has also not established that counsel was ineffective in failing to meet with his family's contracted private investigator. Defendant has not described the alleged exculpatory evidence purportedly uncovered by the private investigator. Defendant has not presented an affidavit or investigator's report either. As such, we have no ground to question attorney Schulman's dismissal of that evidence. See *Hoag*, 460 Mich at 6. Defendant further asserts that "had Assigned Defense counsel actually met with the investigator, he would have been prepared to effectively cross examine those witnesses that were inside and outside of" the bar on the night in question. Yet, defendant cites no examples of Schulman's deficient cross examination of the prosecution witnesses, nor any information gleaned by the private investigator that could have assisted in this regard.

Defendant implies that counsel forced him to testify because counsel had not otherwise prepared a defense. However, attorney Schulman clearly proceeded to trial on the theory that defendant acted in self defense. Moreover, there is no record indication that counsel forced defendant to testify on his own behalf. The trial court notified defendant on the record of his rights and the dangers of testifying on his behalf. Defendant stated his wish to testify with no apparent coercion by counsel. There simply is no record support for defendant's claim.

Defendant's claim that attorney Schulman should have sought suppression of his post-arrest statement to the police also lacks merit. Defendant contends that he "was peppered for 78 pages by the prosecutor as she aggressively impeached him concerning the statement that he made to police. . . . Defense counsel failed to file a motion to suppress the Defendant's statement in the instant capital case." Defendant has cited no grounds supporting suppression or challenging the prosecution's ability to use the statement to impeach defendant during cross-examination. Accordingly, defendant has cited no ground for relief.

III. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecutor engaged in misconduct requiring reversal by asking defendant during cross examination whether: (1) he would like to "give Elijah Young another chance"; (2) he knew that Terence Peterson had previously testified against defendant's friend; and (3) he made certain inculpatory statements to a non-witness fellow inmate. "Generally, a claim of prosecutorial misconduct is a constitutional issue, that is reviewed de

novo" to determine "whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). We must examine the prosecutor's remarks in context to determine if the line has been crossed. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). To preserve his claim, a defendant must raise a contemporaneous objection or request a curative instruction. *Brown*, 279 Mich App at 134. As defendant did not preserve his challenge, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). If "a curative instruction could have alleviated any prejudicial effect," there is no reversible plain error. *Callon*, 256 Mich App at 329-330.

During cross-examination, the prosecutor elicited testimony from defendant that he could have left the area before the violence escalated, but chose not to do so. Defendant asserted that "[g]iven the chance to do it again," he would "have walked away." In response, the prosecutor asked, "Well, you want another chance, sir, but would you like to give Elijah Young another chance?" Defense counsel immediately objected and the court sustained the objection. The prosecution abided by the court's ruling and moved forward. The prosecutor's question arguably appealed to the jury's sympathy for the victim and therefore was improper. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). Yet, the prosecutor's question was brief and isolated. *Id.* And defense counsel immediately objected. The trial court prohibited the question and defendant has no real argument to raise on appeal.

The prosecution also questioned defendant regarding the source of the animosity between the two groups of men at the bar that night. Defendant had previously been friends with the younger brother of Terence Peterson, who was at the bar with the victim that night. The prosecutor elicited testimony from defendant that Peterson's and his brother's 2007 testimony against defendant's friend, Lamar Jones, helped secure Jones's murder conviction. Defendant's challenge is interesting because the prosecution never suggested that defendant was involved in Jones's crime. This is not a case in which a defendant's own prior bad acts were used against him. Rather, the prosecutor's questions arguably implied defendant's bad character because he previously socialized with a convicted murderer.

Even if the prosecutor's questions could be deemed prejudicial, we would find no ground for reversal. "[I]t is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). "It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause." *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978). If the parties are prohibited from connecting the events, the jury may be left "perplex[ed]" by holes in the storyline. See *People v Aldrich*, 246 Mich App 101, 115; 631 NW2d 67 (2001).

Here, the prosecutor's questions elicited testimony that the bar fight was not an inexplicable, random event. The fight occurred because defendant and Peterson had maintained hostility toward one another stemming from the 2007 murder trial of a third party. The jury was given the "complete story" and therefore was not left wondering why this fight occurred. And the prosecutor never implied that defendant or Peterson had any involvement in the murder

underlying Jones's trial. The evidence was informative but "did not bear on [defendant's] guilt or innocence." *Id.* Accordingly, we find no error, let alone error requiring reversal.

The prosecutor's persistence in questioning defendant about a non-witness's out-of-court statements is more problematic however. Early in the cross-examination, the prosecutor began to inquire regarding comments defendant may have made to a fellow inmate while incarcerated in the Wayne County Jail pending trial. Attorney Schulman objected and a side bar was held at the bench. The prosecutor did not return to that line of questioning until much later in the cross examination. The prosecutor then inquired whether defendant had ever discussed his case with a fellow inmate named Robert Kirby. The prosecutor specifically recounted statements allegedly provided by Kirby and asked defendant if he had made those statements to Kirby. For example, the prosecutor asked defendant whether he told Kirby that "Johnathon, fired two warning shots with the gun and that you grabbed the gun telling Johnathon 'You are a pussy. Give the [sic] gun. I'm going to dump on the N-I-G-G-E-R.'" The prosecutor asked defendant if he told Kirby that he "chased after" Young and "emptied the gun." Defendant denied making these statements to Kirby and hypothesized that Kirby overheard him discussing the defense discovery packet with a third, unnamed inmate. The prosecution argued with defendant about the contents of his discovery packet and suggested that only the "real" shooter could have made the statements recounted by Kirby. At that point, defense counsel objected that the prosecutor was arguing facts not in evidence and was testifying through her questions. The trial court agreed.

The prosecutor then switched gears and asked defendant to affirm or deny whether Kirby claimed to have heard certain statements from defendant:

> *Q.* And so, according to Mr. Kirby, you said you emptied the gun on the guy?
>
> *A.* According to him.
>
> *Q.* Yes.
>
> *A.* According to him.
>
> *Q.* According to him, that came from your mouth to his ear?
>
> *A.* According to him.
>
> *Q.* Yes.
>
> *A.* I never admitted that to him –
>
> *Q.* . . . Sir, I'm asking you that, according to him, that came from your mouth to his ear, according to him?
>
> *A.* I'm agreeing. I said, according to him.

Upon defense counsel's objection, the prosecutor argued that she was not asking defendant "to comment on anyone's testimony in terms of the truth or the veracity of it"; rather,

her intent was to ask defendant "if he recalls facts that are being presented in cross-examination were facts that have been previously testified to." The court agreed with defense counsel that Kirby's statements had not "been previously testified to" and sustained the objection. The prosecutor then returned to her previously deemed improper line of questioning in an attempt to elicit defendant's admission that only the shooter could have known certain facts.

As noted by defense counsel at trial, the prosecutor's line of questioning was improper on various levels. The prosecutor assumed facts not in evidence by arguing that certain information provided in Kirby's retelling of events would not have been available in defendant's discovery packet. The prosecutor testified to the contents of Kirby's statement when questioning defendant. The prosecutor called for speculation by interrogating defendant about what the absent Kirby had accused defendant of recounting. The prosecutor also arguably elicited hearsay evidence regarding the contents of the absent Kirby's out-of-court statement through defendant's cross-examination.

Ultimately, however, the prosecutor's misconduct did not deny defendant "a fair and impartial trial." *Brown*, 279 Mich App at 134. Defendant admitted on the stand that he shot the gun several times into a crowd comprised of rival group members; he simply claimed he did so in self defense. As defendant admitted that he was the "real" shooter, it was unnecessary for the prosecutor to elicit defendant's dramatic courtroom admission to facts that only the real shooter would know. Moreover, as defendant admitted to shooting the weapon, the improper injection of defendant's alleged jailhouse confessions was cumulative and redundant. Defense counsel repeatedly objected to the prosecutor's questions and the trial court repeatedly sustained those objections and warned the prosecutor to move on. On the record before us, the prosecutor appeared vaudevillian in her attempt to trick defendant into an unnecessary admission, a bout of unprofessional slapstick that could not have been lost on the jury. In the end, the prosecutor's antics were unsuccessful and unprofessional, but not reversibly prejudicial.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Mark J. Cavanagh