

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 16, 2012

V

STEVEN ABRAMS, a/k/a STEVEN ABRAM,

Defendant-Appellant.

No. 300511
Wayne Circuit Court
LC No. 09-007837-FC

Before: GLEICHER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Because defendant was not denied a fair and impartial trial on the basis of prosecutorial misconduct, nor was he denied his constitutional rights to the effective assistance of counsel or to be present during trial, we affirm.

Defendant first argues that the prosecutor committed misconduct requiring reversal on several occasions during trial, including erroneously characterizing the cab driver's testimony during her opening statement and improperly questioning defendant regarding his past convictions, parole status, motives for other witnesses to lie, and possession of a gun. Some of defendant's claims of error are preserved for our review and some are not. To preserve a claim of prosecutorial misconduct, a defendant must contemporaneously object or request a curative instruction. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). The objection must be based on the same grounds that defendant raises on appeal. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

During cross-examination, the prosecutor asked defendant questions involving his possession of a gun on the night of the shooting, and defense counsel objected that no evidence indicated that defendant possessed a gun. The trial court overruled the objection. The prosecutor also questioned defendant regarding other witnesses' motivations to lie. Again, defense counsel unsuccessfully objected, arguing that such questions were improper. Thus, these two issues are preserved for appellate review. Defendant did not object, however, to the prosecutor's characterization of the cab driver's testimony or to the prosecutor's questions regarding defendant's parole status and past convictions. Therefore, those issues are not preserved for appellate review.

We review preserved claims of prosecutorial misconduct de novo on a “case by case” basis. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004); *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). We “must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context to determine whether the defendant was denied a fair and impartial trial.” *Id.* In other words, “the misconduct must have so infected the trial with unfairness as to make the conviction a deprivation of liberty without due process of law.” *People v Blackmon (On Remand)*, 280 Mich App 253, 269; 761 NW2d 172 (2008) (emphasis omitted). We review unpreserved claims of prosecutorial misconduct for plain error affecting a defendant’s substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant, “or if the error ‘seriously affected the fairness, integrity, or public reputation of judicial proceedings,’ regardless of his innocence.” *Thomas*, 260 Mich at 454, quoting *Ackerman*, 257 Mich App at 449.

Defendant argues that the prosecutor’s questions regarding his prior convictions were improper. During a pretrial hearing, the prosecutor specifically stated that she would not introduce evidence of defendant’s criminal history, under MRE 609, unless defendant testifies at trial. MRE 609 governs the use of prior convictions to impeach a witness’s credibility. MRE 609(c) provides that “[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.” Here, the prosecutor questioned defendant regarding six prior convictions, ranging from 1986 to 2003. Defendant’s presentence investigation report shows that the conviction and discharge dates for the 1986, 1987, and 1988 convictions occurred more than 10 years before the date of trial. Thus, these three convictions did not meet the time requirements for admissibility under MRE 609(c).

Nevertheless, defendant did not object to the prosecutor’s questions regarding his prior convictions. Thus, even if the prosecutor plainly erred in asking such questions, defendant must show that the error affected his substantial rights. *Ackerman*, 257 Mich App at 448. This Court has recognized that even where evidence of a prior conviction is erroneously admitted, the error is harmless if the evidence of guilt is overwhelming. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). In this case, the eyewitness, Felicia McCalvin, testified that she saw defendant with the victim below the balcony of her residence moments before the shooting, and defendant and the victim were the only two people in the vicinity. McCalvin heard gunshots, saw defendant running, and saw the victim lying on the ground. Thereafter, she positively identified defendant in a photographic lineup, and a police officer confiscated clothes from defendant that matched McCalvin’s description. Defendant’s statement to the police was inconsistent with McCalvin’s testimony. Defendant told the police that the victim was shot during a drive-by shooting that occurred near a liquor store that was not close to McCalvin’s residence. In addition, the victim’s father, Milton Allen, testified that, hours before the shooting, defendant said that he would kill either the victim or Allen before the night was over. Moreover, Karen Rouse, the victim’s girlfriend, testified that defendant was behaving aggressively toward the victim and had threatened the victim with a gun. Thus, considering the overwhelming, properly admitted evidence, it cannot be said that the erroneous admission of evidence pertaining to defendant’s 1986, 1987, and 1988 convictions affected his substantial rights.

Defendant also argues that, while cross-examining him, the prosecutor impermissibly referenced his status as a parolee. Again, even if the prosecutor's question constituted plain error, defendant has failed to show that the error affected his substantial rights. Immediately before defendant testified, the parties stipulated that defendant had previously been convicted of a felony and was ineligible to possess a firearm. During his cross-examination, before any mention of parole, defendant admitted that he had given the police a false name in the past because he had "been in jail a lot of times." In addition, the prosecutor's statement that defendant had been paroled in December 2007 was made immediately after the prosecutor questioned defendant about his prior convictions. As previously discussed, evidence regarding defendant's three most recent convictions was properly admitted. Thus, considering the numerous references to defendant's criminal history and the overwhelming evidence of guilt, it can hardly be said that the prosecutor's mention of defendant's parole status affected his substantial rights.

Defendant next argues that the prosecutor improperly asked him to comment on the credibility of prosecution witnesses. "[I]t is improper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact." *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988). The record shows that, in response to the prosecutor's legitimate questions attempting to ascertain the facts surrounding the shooting, defendant maintained that the other witnesses had lied. In response to the prosecutor's inquiry whether defendant tried to sell drugs out of Allen's apartment, defendant claimed that Allen had lied when he testified as such. Defendant denied trying to sell drugs out of Allen's apartment. Similarly, when asked whether defendant tried to get the victim and Rouse to find drug customers, defendant testified that Rouse's testimony as such was untruthful. Defendant also testified, in a rambling response to the prosecutor's inquiry whether he remembered the cab driver, that Michael Smith lied when Smith testified that defendant had used profanity when he spoke to the victim.

Thus, rather than asking defendant if other witnesses lied or whether they had motives to lie, the prosecutor initially was attempting to ascertain whether defendant had a different version of events. "It is not improper for the prosecutor to attempt to ascertain which facts are in dispute." *Ackerman*, 257 Mich App at 449. Further, although the prosecutor followed up with questions regarding the motives that the witnesses would have to lie, such questions were proper. While a prosecutor may not attempt to shift the burden of proof, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof[.]" *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). In addition, while it is generally improper to ask a defendant to comment on the credibility of other witnesses, a "defendant open[s] the door . . . when he attempt[s] to undermine" other witnesses' credibility. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Defendant maintained throughout his testimony that the other witnesses were lying and that his testimony was truthful. Thus, the prosecutor's questions regarding defendant's theory of defense were proper.

Defendant also contends that the prosecutor improperly questioned him regarding whether he had a gun. Generally, "[a] witness may be cross-examined on any matter relevant to any issue in the case[.]" MRE 611(c). "Relevant evidence" is "evidence having any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. In this case, the victim died from a gunshot wound. Thus, whether defendant possessed a gun on the night of the shooting was highly relevant to whether he had the ability to shoot the victim. Moreover, a prosecutor may ask follow-up questions on cross-examination that relate to matters raised on direct examination. *People v Barber (On Remand)*, 255 Mich App 288, 297; 659 NW2d 674 (2003). Defendant testified on direct examination that he was with the victim when the victim was shot, but he did not shoot the victim. Accordingly, the prosecutor was entitled to explore the issue of who shot the victim, including asking questions regarding whether defendant had the ability to do so. Given that Rouse and Allen both testified that defendant had a gun, the prosecutor was permitted to inquire whether defendant did, in fact, have a gun.

In any event, even if questions regarding defendant’s possession of a gun were improper, reversal is not required because defendant was not denied a fair and impartial trial. *Rice*, 235 Mich App at 435. Both Rouse and Allen testified that they saw defendant with a gun. Therefore, it is not as if the only mention of defendant’s possession of a gun was in the form of improper prosecutorial questioning. In fact, the prosecutor’s questions afforded defendant an opportunity to dispute Rouse’s and Allen’s testimony that he possessed a gun. Thus, defendant was not denied a fair and impartial trial.

Finally, defendant argues that the prosecutor erroneously indicated during her opening statement that the evidence would show that defendant and the victim were arguing inside the taxi cab. Generally, prosecutors are “afforded great latitude regarding their arguments and conduct at trial.” *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). “[W]hen a prosecutor states that evidence will be submitted to the jury, and the evidence is not presented, reversal is not warranted if the prosecutor did so acting in good faith.” *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

During her opening statement, the prosecutor claimed that the cab driver would testify that defendant and the victim were arguing. To the contrary, the cab driver testified that the two men did not argue. During defendant’s preliminary examination, the cab driver initially testified that the two men were talking normally and that no one was yelling. The prosecutor then impeached the driver with his statement to the police, in which he indicated that the two men were drunk and arguing. Thereafter, the cab driver admitted that the statement that he gave to the police was true. Therefore, the prosecutor was not acting in bad faith when she stated that the cab driver would testify that defendant and the victim were arguing. In any event, the trial court instructed the jury that the attorneys’ statements and arguments were not evidence, and “juries are presumed to follow their instructions.” *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Thus, defendant has failed to establish plain error affecting his substantial rights.

In his Standard 4 brief on appeal, defendant first argues that his defense attorney rendered ineffective assistance of counsel by failing to object to McCalvin’s erroneous identification of him at his preliminary examination. In order to preserve an ineffective assistance of counsel

claim for appellate review, a defendant must move for a new trial or a *Ginther*¹ hearing in the trial court. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Because defendant failed to do so, our review is limited to mistakes apparent on the record. *Id.*

“To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). “[D]efendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy.” *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003).

At the preliminary examination, the prosecutor referred to defendant as wearing “Wayne County jail greens[.]” Thereafter, when the prosecutor asked McCalvin to identify defendant, McCalvin indicated toward defendant and described him as “wearing gray.” Defendant contends that his attorney was ineffective for failing to object to McCalvin’s improper identification of him. Defendant’s argument lacks merit. McCalvin’s description of defendant as wearing gray was not necessarily inconsistent with the prosecutor’s description of defendant as wearing “Wayne County jail greens[.]” The color of defendant’s clothing was subjective and may have appeared “gray” to McCalvin while at the same time appearing “green” to the prosecutor. In any event, there is no indication that McCalvin and the prosecutor were referring to two different people, and it appears from the record that they were both referring to defendant. Thus, there was nothing to which defense counsel should have objected, and counsel was not ineffective for failing to make a meritless objection. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Further, even if defense counsel should have objected, there is no indication that his failure to do so prejudiced defendant. “[A]n error in the preliminary examination procedure must have affected the bindover and have adversely affected the fairness or reliability of the trial itself to warrant reversal.” *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003). Here, defendant fails to indicate how the alleged error affected his bindover or the fairness or reliability of his trial. Moreover, the record fails to show that defendant was prejudiced by the alleged error. Absent a showing of prejudice, reversal is not required. *Uphaus*, 278 Mich App at 185; *McGee*, 258 Mich App at 698.

Defendant next argues in his Standard 4 brief that counsel was ineffective for failing to investigate alleged clerical errors in the “police report, witness statements, dates times [sic], places, addresses and the autopsy report.” Defendant does not indicate specifically, however, the errors to which he refers. “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001). Moreover, defendant fails to indicate how the alleged clerical errors affected the

¹ *People v Ginther*, 390 Mich 436, 444; 212 NW2d 922 (1973).

outcome of his trial. As such, defendant has failed to establish the reasonable probability of a different result had counsel objected to the alleged errors. *Uphaus*, 278 Mich App at 185.

Defendant next contends in his Standard 4 brief that his due process rights were violated when the trial court permitted a video of his police interrogation to be played before the jury without his presence in the courtroom. Because defendant failed to preserve this issue for appellate review by objecting below, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

“An accused defendant in custody has the fundamental right to be present at every stage of trial where his substantial rights may be affected[.]” *People v King*, 210 Mich App 425, 432; 534 NW2d 534 (1995). While a defendant can waive his right to be present at trial, “[w]here there is nothing on the record explaining the defendant’s failure to appear, a valid waiver cannot be established.” *People v Palmerton*, 200 Mich App 302, 303-304; 503 NW2d 663 (1993).

Defendant argues that the trial court permitted the jury to view his police interrogation video on the morning of July 28, 2010, before he arrived in the courtroom. The record does not support defendant’s contention. Toward the end of the day on July 27, 2010, the video of the interrogation was played before the jury. At one point, defense counsel objected because the video contained references to defendant’s criminal history. The trial court stopped the video and sent the jury home for the day. The court directed the parties to review the remaining portion of the video and try to resolve their dispute. Trial resumed the following day at 9:58 a.m., and no further video footage was played. In fact, during the prosecutor’s direct examination of the interrogating police officer, defense counsel objected and stated, “[t]his Court has made a ruling with regards to any further playing of this video[.]” Thus, the trial court apparently ruled that no further video footage would be admitted. As such, the record refutes defendant’s contention that the video was shown to the jury before he arrived to court on July 28, 2010. Further, when defendant testified that day, he stated that he had been in attendance during the entire course of the trial. Therefore, the record fails to support defendant’s argument that the trial court conducted the proceeding without defendant present.

Finally, defendant argues in his Standard 4 brief that the prosecutor committed misconduct by erroneously arguing to the jury, during her closing argument, that the victim was shot at “point blank range.” Because defendant did not object to the prosecutor’s argument, our review of this issue is limited to plain error affecting defendant’s substantial rights. *Ackerman*, 257 Mich App at 448.

Dr. Francisco Diaz, Wayne County Assistant Medical Examiner, testified that there was no evidence of close-range fire on the victim. According to Dr. Diaz, if a victim is shot within approximately three feet, small fragments of gun powder grain will impact the victim’s skin. Here, there were no such fragments on the victim. Nevertheless, the prosecutor argued during closing argument that the victim was shot at “point blank range.” The prosecutor’s argument was not necessarily improper. Although a prosecutor may not make a statement of fact that the evidence does not support, she is free to argue the evidence and all reasonable inferences arising from it. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). McCalvin’s testimony supported the prosecutor’s argument that defendant shot the victim at “point blank range.” McCalvin testified that defendant and the victim were walking together immediately

before she heard gunshots. When asked whether there was any distance between the two men or whether they were “side by side,” McCalvin responded, “[t]hey were side by side.” Thus, McCalvin’s testimony supports the prosecutor’s argument that defendant shot the victim at “point blank range” notwithstanding that there was no physical evidence of close-range fire on the victim’s skin.

In any event, even if the prosecutor’s argument was improper, the error did not affect defendant’s substantial rights. The trial court instructed the jury that the attorneys’ statements were not evidence, and a jury is presumed to follow its instructions. *Mette*, 243 Mich App at 330-331. Moreover, considering the overwhelming evidence against defendant, the prosecutor’s statement did not “seriously affected the fairness, integrity, or public reputation” of the proceedings. *Ackerman*, 257 Mich App at 449.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Patrick M. Meter
/s/ Pat M. Donofrio