STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELMER WALLACE NELSON,

Defendant-Appellant.

UNPUBLISHED
February 5, 1999

No. 199577
St. Clair Circuit Court
LC No. 96-002109 FC

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of assault with intent to rob while armed, MCL 750.88; MSA 28.283, and felony-firearm, MCL 750.227b; MSA 28.424(2). The trial court, applying a second offense habitual offender enhancement under MCL 769.10; MSA 28.1082, sentenced defendant to four to twelve years' imprisonment for the assault conviction and to two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from the complainant's allegation that defendant placed a gun to the back of his head and demanded money from him while they were seated in an automobile parked in front of a bar. The complainant was in the front passenger seat; defendant was directly behind him in the back seat. Defendant testified that he was unarmed and that he merely hit the back of the complainant's seat and began to ask the complainant to leave the car. Johnny Gunnells, a.k.a. Everett Gunnells, who was an acquaintance of both defendant and the complainant, was sitting in the driver's seat when the incident occurred. He did not testify at trial because his whereabouts were unknown.

On appeal, defendant first argues that background information regarding the complainant's family life, education, and means of income should not have been admitted at trial because its purpose was to bolster the complainant's credibility. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Crump*, 216 Mich App 210, 211-212; 549 NW2d 36 (1996). As an initial matter, we note that the legal authority offered by defendant in support of his position is not convincing because the issue in this case does not involve the admission of a prior inconsistent statement or the admission of evidence regarding a specific instance of conduct. This Court

will not search for authority to sustain a defendant's argument. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994).

Evidence not directly related to a consequential fact in the case may be admitted to establish background information. See *People v Beckley*, 434 Mich 691, 736; 456 NW2d 391 (1990) (Boyle, J.), citing 1 Weinstein & Berger, Evidence, ¶ 401[05], pp 401-429. Here, the complainant's preliminary testimony regarding his job and family life aided the jury in understanding the circumstances surrounding the alleged assault. Specifically, it helped the jurors understand that the complainant left the City of Detroit with an acquaintance on the day in question because he was attempting to find work in an effort to support his family. Accordingly, we hold that the trial court did not abuse its discretion in allowing the prosecutor to admit the challenged evidence.

Defendant also argues that the trial court erred in admitting rebuttal evidence of the complainant's abstinence from drug use. At trial, defendant only objected to some of the rebuttal testimony, and that objection was on a ground different than that which he now asserts on appeal. Therefore, the issue was not preserved for appeal. See MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Unpreserved issues regarding the admission of rebuttal evidence are reviewed for manifest injustice. *People v Levurn King*, 210 Mich App 425, 433; 534 NW2d 534 (1995). Upon review of the record, we conclude that the rebuttal evidence at issue in this case was relevant and properly responsive to evidence introduced during defendant's case-in-chief from which the implication could be drawn that the complainant was under the influence of narcotics when he witnessed the crime. Accordingly, manifest injustice did not result from its admission. See *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

Next, defendant argues that the prosecutor improperly vouched for the credibility of a witness when he argued that the complainant was an admirable man who testified truthfully. We disagree. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Here, the challenged comments were proper because (1) this aspect of the prosecutor's argument was framed in terms of the evidence introduced at trial and reasonable inferences arising from the evidence, and (2) the prosecutor avoided any suggestion that he possessed special knowledge regarding the complainant's credibility. See *People v Bahoda*, 448 Mich 261, 276-277, 282; 531 NW2d 659 (1995); cf. *People v Erb*, 48 Mich App 622; 211 NW2d 51 (1973).

Defendant also argues that racial stereotypes were injected into the trial when the prosecutor called the complainant "admirable" based on the evidence that he was a young black male from the "inner city" who avoided drugs and worked to support his children. Because defendant did not object to this portion of the prosecutor's argument at trial, appellate review is precluded unless a curative instruction could not have removed any prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996). Here, whether the prosecutor's comment amounted to an appeal to racist beliefs about blacks is debatable; what is clear is that the prosecutor's comments regarding the black complainant could not have been unfairly prejudicial *to defendant*. Rather than arousing the jurors' prejudices against defendant (a white

male), or using racial epithets, the prosecutor's comment simply emphasized the complainant's history of avoiding some of the pitfalls that might have befallen him. Cf. *Bahoda*, *supra* at 266; *People v Hill*, 258 Mich 79, 87-89; 241 NW 873 (1932); *People v Springs*, 101 Mich App 118, 125; 300 NW2d 315 (1980).

Next, defendant argues that testimony from the investigating police officer about a conversation between the officer and Gunnells constituted inadmissible hearsay. In his brief on appeal, defendant asserts that the offending testimony was elicited from the officer "[o]n questioning by the prosecution." In fact, the record clearly reveals that it was defendant's own attorney who questioned the officer regarding the conversation *over the prosecution's hearsay objection*.[1] Because defendant intentionally elicited the testimony upon which he now predicates his claim of error, he is not entitled to relief on appeal. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991); *People v Noah King*, 158 Mich App 672, 677; 405 NW2d 116 (1987); see also *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) (explaining that to allow a defendant to assign error on appeal to something his own counsel deemed proper at trial would be to allow the defendant to harbor error as an appellate parachute).

Finally, defendant argues that he was denied the effective assistance of counsel when trial counsel failed to secure the testimony of Johnny Gunnells. We disagree. After defendant filed his claim of appeal, this Court granted defendant's motion to remand for an evidentiary hearing on defendant's claim of ineffective assistance of counsel. Ironically, appellate counsel was unable to secure Gunnells' testimony for the evidentiary hearing.[2] At the conclusion of the hearing, the trial court denied defendant's motion for a new trial.

The burden of proving ineffective assistance of trial counsel is borne by the criminal defendant. E.g. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To justify reversal on a such a claim, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland*, *supra* at 694; *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). In this case, without the benefit of Gunnells' presence and testimony at the evidentiary hearing, we are unable to determine what effect, if any, his testimony might have had on the result of the trial. Cf. *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996). Accordingly, we hold that defendant is not entitled to relief on appeal because he has failed to demonstrate a reasonable probability of prejudice.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot

[1] The patently false statement made by defendant's appellate counsel suggests a possible violation of MRPC 3.3(a)(1), which prohibits an attorney from making "a false statement of material fact or law to a tribunal."

[2] At the outset of the hearing, appellate counsel explained that a subpoena had been sent to Gunnells' residence, but not signed by him. She further explained, "He's doing exactly the same thing that happened at trial, which is bounding from place to place and not being here."