

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONRAD ERIC SANDERS,

Defendant-Appellant.

UNPUBLISHED

March 26, 1999

No. 184103

Recorder's Court

LC No. 94-009537

Before: Doctoroff, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to consecutive terms of two years' and fifteen to twenty-five years' imprisonment. Defendant appeals as of right. We affirm.

Following his convictions, defendant moved for a new trial, alleging in part that he was denied the effective assistance of counsel and requesting a *Ginther*¹ hearing. The trial court declined to hold a hearing, finding that the record was sufficient to enable it to rule, and, finding that defendant's claims were without merit, denied the motion.

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To establish that his right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy and show that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

On appeal, defendant, proceeding in propria persona, first claims that counsel was ineffective for failing to move to quash the complaint and warrant on the grounds that they were not supported by

probable cause, MCL 764.1a; MSA 28.860(1); MCR 6.102(A), and that the complaint was not endorsed by the prosecutor or supported by security for costs, MCL 764.1(1); MSA 28.860(1); MCR 6.101(C). However, the complaint contained the substance of the accusations against defendant and the name and statutory citation to the charged offenses, which is all that is required. MCL 764.1d; MSA 28.860(4); MCR 6.101(A). Facts establishing probable cause need not be set forth in the complaint; a finding of probable cause may be based on extrinsic evidence presented to the magistrate. MCL 764.1a(2); MSA 28.860(1)(2); MCR 6.102(B). Also, the absence of the prosecutor's endorsement on the complaint is not fatal if the complaint is prepared by the prosecutor. *People v Seifert*, 17 Mich App 187, 189-190; 169 NW2d 345 (1969). Here, defendant did not allege or show that the prosecutor's office did not issue the complaint. And, the prosecutor was not required to file security for costs. *People v Holbrook*, 373 Mich 94, 97; 128 NW2d 484 (1964). In any event, defendant cannot challenge the legality of his arrest on appeal because he failed to raise this issue in his motion for a new trial. *People v Teal*, 20 Mich App 176, 179; 173 NW2d 736 (1969).

Defendant contends that counsel was ineffective for failing to move to suppress the complainant's identification testimony because the confrontation between himself and the complainant at the preliminary examination was so unnecessarily suggestive as to violate his due process rights. A review of the record shows that the preliminary examination was held one week after the crime, that the complainant was absolutely certain that defendant, whom he had seen about an hour before the shooting, was the person who shot him, having looked him in the face just before defendant fired the shot, and that the complainant was not preoccupied when the shooting occurred and provided an accurate description of defendant. While defendant claims that the identification was based solely on a police officer having told the complainant what kind of car his assailant was driving, the record at both the preliminary examination and trial shows that the complainant described the car to the police. Given the totality of the circumstances, we are satisfied that the preliminary examination confrontation was not impermissibly suggestive. *Neil v Biggers*, 409 US 188, 196-197, 199; 93 S Ct 375; 34 L Ed 2d 401 (1972). There being no basis on which to suppress the complainant's identification testimony, counsel was not ineffective for failing to move for suppression, *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991), and the court did not abuse its discretion in denying defendant's motion for a new trial on this ground, *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).

Defendant next contends that counsel was ineffective for failing to move to preclude the testimony of a witness who violated a sequestration order issued at the preliminary examination. The witness did not violate the order because he did not testify at the preliminary examination and, therefore, counsel was not ineffective for failing to make such a motion, *Gist, supra*, and the court did not abuse its discretion in denying defendant's motion for a new trial on this ground, *Leonard, supra*. Moreover, to the extent defendant claims that a sequestration order issued at any stage of the proceedings remains in effect throughout the time a case is pending in the courts, we deem the issue waived because defendant has failed to cite any authority in support of his argument. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

Defendant next contends that he was deprived of a fair trial due to defense counsel's inadequate cross-examination of the complainant and a police officer. Because defendant did not raise this issue in

his motion for a new trial, review is limited to mistakes apparent on the record. *Price, supra*. It appears that counsel's decision not to question the complainant extensively about the threats defendant made to him not long before the shooting was reasonable trial strategy under the circumstances and thus cannot support a claim of ineffective assistance of counsel. *People v Moreno*, 112 Mich App 631, 638; 317 NW2d 201 (1981). We perceive no possible prejudice to defendant from counsel's failure to have the officer expand upon his testimony that he "was not at the scene" when defendant was arrested, given that all testimony showed that defendant was not arrested at the scene of the crime but was arrested elsewhere approximately an hour later.

Defendant next contends that counsel was ineffective for failing to object to a police officer's testimony that defendant gave a statement in which he admitted to illegally owning a handgun, but claimed to have disposed of it two weeks before the shooting. Defendant has not cited any authority in support of his contention that the evidence was either irrelevant or that its probative value was substantially outweighed by the danger of unfair prejudice. *Weathersby, supra*. In any event, defendant's claim is without merit. The statement, which was admissible under MRE 801(d)(2)(A), *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989), was relevant to show that defendant could have shot the complainant because he owned a gun and to provide a possible explanation for why the gun was never found. Although defendant claimed to have disposed of the gun prior to the crime, his credibility was suspect given that he testified that he never owned a gun and never made a statement to the police. While the evidence was damaging, it was not unfairly prejudicial. *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). Because the statement was admissible, counsel was not ineffective for failing to object to it, *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997), and the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground, *Leonard, supra*.

Defendant next contends that counsel was ineffective for failing to present a different alibi defense. At trial, counsel presented evidence to show that defendant was at his cousin's house in Detroit around the time the crime was committed in Grosse Pointe Farms. Defendant contends that counsel should have presented additional evidence to show that he was using pay phones in Highland Park within ten minutes of the time that the crime was committed. The decision to argue one defense over another is a matter of trial strategy which this Court will not second guess. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Furthermore, this alternative alibi theory is contradicted by defendant's own testimony that he stopped at various pay phones before going to his cousin's at 8:00 p.m. and again after leaving his house just after 9:00 p.m. and did not make any calls in the interim, during which time the crime was committed. In any event, counsel did present evidence to show that defendant was using pay phones in the Highland Park area not long after 9:00 p.m. and, therefore, could not have committed the crime, which occurred around 8:50 p.m., considering that it took at least half an hour to drive from there to Grosse Pointe Farms. Therefore defendant's claim is without merit and the trial court did not abuse its discretion in denying his motion for a new trial on this ground. *Leonard, supra*.

Defendant next contends that defense counsel was ineffective for failing to object to improper remarks and argument by the prosecutor. The prosecutor's statement during voir dire regarding the

presumption of innocence was a correct statement of the law and was not improper. The prosecutor's argument was properly based on the evidence presented and reasonable inferences drawn therefrom. *Hedelsky, supra* at 385. The prosecutor properly argued from the facts that certain witnesses were credible, *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997), and had no motive to lie, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). He did not claim or imply that he possessed any special knowledge of the witnesses' credibility and thus was not improperly vouching for the same. Nor did his argument constitute an impermissible appeal to the jury to sympathize with the victim. *People v Modelski*, 164 Mich App 337, 347; 416 NW2d 708 (1987). To the extent any error did occur, the court's instructions that the lawyers' arguments were not evidence, that the jury was not to let sympathy influence its decision, and that it was up to the jury to decide which witnesses to believe, effectively dispelled any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Thus, it is unlikely that the outcome would have been different had defense counsel objected to the prosecutor's argument.

Finally, defendant contends that defense counsel was ineffective because certain remarks made by counsel in closing argument conflicted with defendant's testimony and that of an alibi witness. Having reviewed the record, we find that counsel's argument regarding the timing and sequence of defendant's phone calls conformed to the testimony. Counsel's statement that the police traveled from the place where defendant said he had placed the calls to Grosse Pointe Farms was consistent with the officers' testimony. While it contradicted defendant's testimony that he had not given a statement to the police, it was necessary to reconcile the testimony of Officer Good, whom defendant insisted be called to testify, contrary to advice of counsel. Defendant cannot predicate reversible error on his own actions. *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996).

Because defendant's claims regarding ineffective assistance of counsel are without merit and further factual development of those claims raised in his motion for a new trial would not have altered that fact, the trial court did not err in denying his motion for a *Ginther* hearing.

Finally, defendant contends that the trial court abused its discretion in admitting into evidence a photograph taken of him shortly after his arrest. This issue has not been preserved for appeal because defendant did not make a timely objection or motion to strike in the trial court, MRE 103(a)(1), and did not address it in his motion for a new trial. In any event, the photograph was relevant and admissible to corroborate testimony regarding the complainant's description of his assailant. *People v Jones*, 24 Mich App 702, 704; 180 NW2d 818 (1970). The specific prejudice alleged by defendant with respect to the photographs² does not appear to be undue and could have been eliminated had defendant testified to the circumstances under which the photograph was taken. MRE 403; *Sclafani, supra*. Therefore, we conclude that the court did not abuse its discretion in admitting the photograph into evidence.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Michael R. Smolenski
/s/ William C. Whitbeck

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

² In refusing to order the prosecutor to file the photograph with the record for purposes of appeal, the trial court failed to consider MCR 7.210(C). In any event, the legal responsibility for filing this exhibit lay with the prosecutor. MCR 7.210(C); *People v Wilson (On Rehearing)*, 96 Mich App 792, 796; 293 NW2d 710 (1980). However, under the particular circumstances of this case, we conclude that the absence of the photograph does not affect our ability to consider the issue. *Wilson, supra* at 796-798.