

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

McARTHUR AARON,

Defendant-Appellant.

UNPUBLISHED

June 2, 2000

No. 210010

Wayne Circuit Court

Criminal Division

LC No. 96-006400

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHADRACH RICHEY,

Defendant-Appellant.

No. 210013

Wayne Circuit Court

Criminal Division

LC No. 96-006397

Before: White, P.J., and Sawyer and Griffin, JJ.

White, J. (*concurring*).

Following a three-week joint jury trial, defendant McArthur Aaron was convicted of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to rob while armed, MCL 750.89; MSA 28.284, 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). He was sentenced to concurrent prison terms of forty to seventy years for the second-degree murder conviction, thirty to fifty years for the assault with intent to rob conviction, forty to sixty years for the assault with intent to commit murder conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant Shadrach Richey was convicted of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to rob while armed, assault with intent to commit murder, and felony-firearm, MCL 750.227b; MSA 28.424(2). Richey was sentenced to life imprisonment without parole for the first-

degree murder conviction, thirty to sixty years' imprisonment for the assault with intent to rob conviction, life imprisonment for the assault with intent to commit murder conviction, and a consecutive two-year term for the felony-firearm conviction. Both defendants appeal as of right, and we affirm.

I

Defendants' convictions arise from the shootings of Kenneth James and Anthony Simmons in the basement of James' house on December 15, 1995, causing Simmons' death and extensive injuries to James. James testified that at the time of the shootings he and Simmons were handcuffed together and made to lie on the basement floor by defendants, both of whom were armed. James testified that Richey shot Simmons in the head at point-blank range, that multiple shots were then fired, and that he heard Richey say to Aaron that "Ken was still moving" and that Aaron should shoot him. James testified that after being shot at again, he lay still until defendants left James' house, then managed to get out of the handcuffs and to get to a neighbor's house. James later identified both defendants from a photo array, and testified at trial that he was 100% sure that defendants were the shooters, that he had known Richey for years before the shootings, and that Aaron had removed a mask from his face prior to the shootings.

Pursuant to a plea agreement under which he had not yet been sentenced at the time of the instant trial, Nathaniel Burns, an alleged accomplice and formerly a co-defendant with Aaron charged with the same charges as defendants, testified that he was at James' house, on the main floor, when the incidents at issue occurred, that defendants were the shooters, and that drugs, as well as money, were involved. Burns testified that he and Richey had a drug business together, which included selling crack cocaine, and that the robbery was motivated by them owing James \$1,800 for drugs, a downturn in their drug business, and the depletion of business funds from having to pay Richey's bond after he went to jail. Burns testified that a fourth person, Michael Harris, who did not testify at trial, participated as a getaway driver.

Defendant Richey presented an alibi defense, disputed Burns' claim that he and Burns operated a drug business, and disputed that he sold crack cocaine after 1994. Richey claimed that he worked for James as a middleman arranging large quantity sales of powder cocaine and, in this capacity, had arranged for James and Burns to meet on the night the shootings occurred. Defendant Aaron presented no proofs.

II

Both defendants allege numerous instances of prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). This Court addresses prosecutorial misconduct issues on a case-by-case basis, and examines pertinent portions of the record to evaluate the challenged remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). We examine prosecutorial comments as a whole and evaluate them in light of defense arguments and the relationship they bear to evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Review of unpreserved allegations of prosecutorial misconduct is foreclosed unless

an objection could not have cured the error or a failure to review the alleged misconduct would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

Defendants correctly characterize certain conduct of the prosecutor as improper. After agreeing pre-trial that prior convictions and charges would not be the subject of cross-examination “unless the door is opened in another manner,” the prosecutor questioned Richey about prior arrests and convictions without first informing the court that she intended to raise the subject, and in spite of the court’s repeated admonitions to stop. While some of the testimony elicited was relevant to the question whether Richey and Burns were in the drug business together, much of the examination was improper, as was the prosecutor’s repeated defiance of the court. Additionally, the prosecutor overreached in her handling of the issue of Burns’ credibility as assertedly established by his plea agreement requiring that he tell the truth and the prosecutor’s decision to use him as a witness. And, the prosecutor’s invocation of God and Scripture, her treatment of James’ injuries, her indictment of alibi defenses generally (as distinguished from her argument directed to the evidence defeating Richey’s alibi in the instant case), and her appeals to sympathy crossed the line of fair argument.

However, reversal is not required. The evidence of guilt was overwhelming. Burns’ testimony was corroborated by James.¹ Although the prosecutor overreached at various times during the three-week trial, a thorough review of the record shows that defendants both received a fair trial and the jury’s decision on the merits was based on the overwhelming evidence and not the prosecutor’s misconduct. Under the standards set forth in *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), defendants have not established that reversal is warranted.

III

A

On appeal, defendant Richey raises an argument not made below, that the police report the prosecutor used to interject evidence of Richey’s prior criminal activity constituted inadmissible hearsay, and that the prosecutor improperly posed the report as refreshing Richey’s recollection. These objections are unpreserved, and Richey has not shown that his substantial rights were affected. *Id.* As recognized above, although dealing with prior bad acts, the evidence elicited through cross-examination regarding the police report was admissible to impeach Richey’s testimony regarding his dealings with Burns. Thus, the real issue is simply the method by which the prosecutor placed the evidence before the jury.

B

Richey’s claim that MCL 775.7; MSA 28.1244 is applicable to Burns’ plea agreement fails. The lodestar of statutory construction is to determine the legislative purpose or intent. *People v Adair*, 452 Mich 473, 479; 550 NW2d 505 (1996). Because it is plain that MCL 775.7; MSA 28.1244 is only concerned with the monetary reimbursement of certain witness’ expenses, defendant Richey’s claim that the plea agreement should be treated as an unauthorized “fee” for testifying is without merit.

C

Richey further argues that his trial attorney's failure to object to the prosecution's cross-examination of him constituted ineffective assistance of counsel. Richey did not move for a new trial or *Ginther*² hearing below, thus our review is limited to errors apparent on the record. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). In his supplemental brief, defendant Richey argues that his trial attorney rendered ineffective assistance by not presenting a character defense, not preserving prosecutorial errors, and cross-examining James about his prior statements in an inappropriate manner. Based on the record before this Court, Richey has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *Plummer*, *supra* at 307-308. Further, Richey has not demonstrated adequate basis for a remand to pursue his claim regarding his trial attorney's performance.

IV

A

Defendant Aaron first claims that the trial court deprived him of his right of confrontation by sua sponte precluding the defense from establishing that Burns avoided the possibility of a mandatory life sentence for first-degree murder by his agreement to plead guilty of assault with intent to commit armed robbery and felony firearm. Defendant Aaron and Burns originally faced the same charges and the same mandatory sentence of life imprisonment without parole if convicted of first-degree murder, MCL 750.316; MSA 28.548.

The prosecution agrees that defendant should have been able to probe Burns' bias by questioning him about the exact nature of the possible penalties he faced, but argues that defendant's cross-examination of Burns about the plea agreement yielded the same result.

The general rule is that a jury should not be informed of a defendant's possible punishment for conviction. *People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990). However, the credibility of witnesses is a crucial issue in every case, and evidence of a witness' bias or interest is highly relevant to his or her credibility. *Id.* at 152. "Due to the undeniable relevance of evidence of a witness' motivation for testifying, the prosecutor must, upon request of defense counsel, disclose to the jury 'the fact that immunity or a plea to a reduced charge has been granted to the testifying accomplice [or coconspirator].'" *Id.* quoting *People v Love*, 43 Mich App 608, 613; 204 NW2d 714 (1972). A limitation of cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation. *Mumford*, *supra* at 153, quoting *United States v Garrett*, 542 F2d 23, 25 (CA 6, 1976). "The sentencing consideration received in return for testimony is undeniably a fact which is relevant to a witness' credibility." *Mumford*, *supra* at 153. Where the jury is made well aware of facts motivating a prosecution witness to give certain testimony by means of thorough and probing cross-examination by defense counsel, the disclosure requirement may be considered satisfied. *People v Atkins*, 397 Mich 163, 174; 243 NW2d 292 (1976); *Mumford*, *supra* at 152-153. A claim that a court's denial of cross-examination wholly prevented exploration of a witness' bias is subject to

the harmless error analysis of *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967). *People v Bushard*, 444 Mich 384, 391-392 n 7; 508 NW2d 745 (1993).

At trial, the prosecution elicited testimony from Burns that he had pleaded guilty of assault with intent to rob in exchange for the charges of first-degree murder and assault with intent to murder being dismissed, and that the prosecution had promised to recommend leniency at sentencing. During cross-examination, Aaron's counsel elicited testimony that Burns' motivation for testifying was the plea agreement, and that Burns considered the plea agreement a "very good deal." However, the trial court prevented defense counsel from eliciting testimony regarding the possible penalties for the various charges:

Q. Right? And you knew what those charges, what kind of possible sentences those charges carry, right?

A. Yes.

Q. Let's start with felony firearm. What does that carry?

THE COURT: No.

[PROSECUTOR]: Your Honor, thank you.

THE COURT: That is not for this jury.

[AARON'S COUNSEL]: Okay. All right.

Q. But you know what it carries, right?

A. Right.

Q. And as a result of that, you had to do some thinking about your position?

A. Yes.

Q. Right. . . . You wanted to accept the blame after you thought that you were going to get some consideration on those charges, right?

A. Yeah.

Q. I mean, you didn't say, just whatever, I'm willing to say I did this or that without any sort of consideration from the police and the Prosecutor, right?

A. Right.

Q. The police and the Prosecutor came to you, isn't that right, and suggested that you testify in exchange for leniency, right?

A. Yeah.

Q. In exchange for elimination of certain charges against you, right?

A. Right.

Q. Which charges did they eliminate?

A. First degree murder and assault with intent to commit murder.

* * *

Q. Okay. And so that's a pretty good deal, right?

A. Yes.

Q. A very good deal, right?

A. Yes.

On the next day of trial, Aaron's counsel elicited from Burns that he faced life sentences for all the original charges against him, with the exception of the felony-firearm charge:

Q. Okay. Do you know what we talked about, the different charges that you originally faced, right?

A. Right.

Q. And the Prosecutor, not me but the Prosecutor said those are life offenses, right?

A. When I got arraigned the judge said that they were life offenses.

Q. Not felony firearm; we know that's not life?

A. No.

Q. But the life offenses were the other ones, right?

A. Right.

Q. And she asked you that, right?

A. No.

Q. Oh. Okay. Well --

THE COURT: She didn't and you shouldn't have.

[AARON'S COUNSEL]: Pardon me?

THE COURT: She didn't and you shouldn't have.

[AARON'S COUNSEL]: Okay.

THE COURT: Penalty is not a matter to be brought before a jury.

[AARON'S COUNSEL]: If I may make a record, I'm not going to make a speech.

THE COURT: Penalty is not a matter to be brought before a jury. Period.

At the close of Burns' testimony the trial court instructed the jury:

. . . . Nathaniel Burns has already been convicted of charges arising out of the commission of those crimes. The evidence suggests that Nathaniel Burns may be guilty of the same crimes the Defendant is charged with. Nathaniel Burns has been promised that he will not be prosecuted for some crimes the Defendant is charged with committing. Such a witness is called an accomplice.

You should examine an accomplice' [sic] testimony closely and be very careful about accepting it

When you decide whether you believe an accomplice, consider the following: . . . Has the accomplice been promised that he will not be prosecuted? Or promised a lighter sentence, or allowed to plead guilty to a less serious charge? If so, could this have influenced his testimony?

The jury was instructed after closing arguments:

Again, you have heard testimony that a witness, Nathaniel Burns, made an agreement with the Prosecutor about charges against him in exchange for his testimony in this trial. You have also heard evidence that Nathaniel Burns faced a possible penalty as a result of those charges. You are to consider this evidence only as it relates to Nathaniel Burns' credibility, and as it may tend to show Nathaniel Burns' bias or self-interest.

Thus, the jury was informed that in return for Burns' testimony, the prosecution had dropped the first-degree murder and assault with intent to commit murder charges and that those were "life offenses;" that Burns considered the plea agreement a "very good deal" and that it was his motivation for testifying; and that pursuant to the agreement, the prosecution had promised to recommend leniency in sentencing on the assault with intent to rob charge.. Although the trial court's precluding defendant from establishing that Burns avoided a *mandatory* life sentence for first-degree murder was an abuse of discretion under *Mumford, supra* at 152-153, defendant was not precluded entirely from exploring Burns' bias and motivation derived from the plea bargain, and the difference between the jury's being

informed that the sentence for first-degree murder is mandatory life imprisonment, as opposed to the offense being a “life offense,” does not account for the jury's verdict of guilty.

B

Defendant Aaron complains that the trial court allowed police testimony that years earlier, a notorious drug dealer, “Maserati Rick,” was assassinated at Grace Hospital, where James was hospitalized after the instant shootings. Aaron argues that the acts were not connected to him, were not relevant, and were highly inflammatory and prejudicial.

Aaron did not object when the prosecutor elicited testimony that the police had concern for James’ safety while he was in Grace Hospital because “Maserati Rick” had been shot there, and this questioning occurred after James testified that he left the hospital two days before he was supposed to be discharged because he was concerned about his safety and, in that regard, that a female friend not listed on his visitor list had gotten in to the hospital to visit him by simply wearing a white coat. The prosecutor asked James if he was afraid somebody would come to the hospital and “finish the job,” and James responded “yes.” Officer Russell later testified that the police were concerned for James’ safety because this had been a drug-related shooting, and because they later found out that a relative of defendant Richey’s worked at the hospital, that James was moved to another floor, and that James’ location was not supposed to have been given out to anyone other than family and friends listed on his visitation sheet. The prosecutor then asked Officer Russell whether something had happened at Grace Hospital which led her to believe that a security breach could exist, and Russell responded:

A Yes. Once at that same hospital a known drug dealer was killed in his own hospital bed at the same hospital. So it’s possible for people to get into the hospital, even though, you know, you are supposedly, security is supposed to be really tight at the hospital. But it is always possible for someone to get in and do something if they really want to.

Q Was that Mazzaretti [sic Maserati] Rick?

A That’s correct.

The prosecutor’s mention of the murder of Maserati Rick was brief and came after defense counsel attacked James’ veracity by suggesting that James had left Grace Hospital early to stay out of prison because he was on escape status from prison. Defendant has not shown that MRE 404(b)(2) was implicated, as there was no evidence that either defendant was involved in the Maserati Rick shooting. Thus, failure to review this issue will not result in a miscarriage of justice. *Stanaway, supra* at 687.

C

Aaron also argues that a reference at trial to a police identification form which would list previous crimes committed implied that he had committed various previous crimes. The reference occurred during the prosecutor’s questioning of a police officer about aliases Aaron used. The officer

testified that he found no aliases other than the nickname “Man,” which he testified he had already known. Over defendant’s objection, the prosecution attempted to refresh the officer’s recollection by showing him an identification sheet of Aaron’s, which had a section entitled “various crimes.” However, the officer testified he had not seen the identification sheet before and no reference was made to Aaron having committed other crimes. Even assuming there was error, reversal is not warranted because in light of the overwhelming evidence of Aaron’s guilt, he has not shown that it is more probable than not that the error determined the outcome. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999); *Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

D

Aaron further argues that the prosecution’s questioning of a rebuttal police witness regarding statements made to the officer by Harris, an alleged accomplice of defendants who did not testify at trial, suggested inadmissible hearsay statements implicating defendants in the offenses. Aaron argues that the thrust of the prosecutor’s questions went to alleged involvement and threats by or on behalf of co-defendant Richey, not Aaron, and if such threats existed they would not have been admissible against Aaron.

The prosecution’s theory was that Harris participated in the crimes as the driver. The prosecutor asked Officer Russell whether she had spoken to Harris regarding what he knew about the incident, and asked a series of questions about what Harris had said about defendant Richey. The prosecutor’s improper attempts to elicit hearsay were unsuccessful, as the trial court repeatedly sustained hearsay objections to this testimony, and no hearsay testimony was elicited from the officer. Considering that defendant Richey himself testified that he arranged the meeting between Burns and James for a cocaine sale, that Officer Russell testified that she was already looking for Burns and defendants when she interviewed Harris, and that the jury was instructed that the lawyers’ questions are not evidence, Aaron has not established that he was prejudiced by this testimony.

E

Aaron argues that the prosecution prejudicially infringed on his Fifth Amendment right to remain silent by emphasizing that he did not testify or make a statement to the police, while Burns testified because he had nothing to hide, thereby implying that Aaron’s failure to testify was proof of guilt. The challenged remarks occurred when the prosecutor suggested to co-defendant Richey that “the code on the street” was that when you do a crime with someone “you don’t snitch,” and then elicited from Richey that Aaron did not take the witness stand, and argued to the jury in closing that Burns did not hide what he did, and that the prosecution used Burns because “[w]e didn’t have any statements of admission. Defendants have a right to exercise their constitutional right to remain silent. They have that right.”

Even assuming that the prosecutor’s questions and remarks constituted comment on Aaron’s failure to testify, Aaron has not shown “a plain error that affected substantial rights, and that he is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Carines, supra* at 774. The jury was instructed that defendant had an absolute right not

to testify, and that when they decided the case they must not consider the fact that he did not testify or let it affect their verdict in any way. Given the evidence of Aaron's guilt, and the jury instruction, he has not shown that his substantial rights were affected or that reversal is warranted. *Id.*

F

Aaron's argument that the prosecutor erroneously argued that the crimes were already established facts and that the presumption of innocence disappears when jury deliberations begin also fails. There was no objection to the challenged remarks, which are unfairly characterized on appeal, and the jury was instructed that the accused were presumed innocent, that the presumption continued throughout the trial, that the prosecution must prove each element of the crimes beyond a reasonable doubt, and that the defendants were not required to prove their innocence or to do anything. Any prejudicial effect of the remarks were cured by the instructions or could have been cured by a further timely cautionary instruction. *Stanaway, supra* at 687.

Defendant Aaron did not preserve the three remaining instances of prosecutorial misconduct he urges on appeal,³ and timely cautionary instructions could have prevented any prejudice. *Id.*

G

Aaron's claim of reversible error in the prosecution's introduction of testimony from James' neighbor about prior occupants of James' home and the possible source of drugs found at the crime scene also fails. Although there was an initial objection, Aaron's attorney withdrew his objection after the prosecution made its offer of proof, and Aaron has not established a plain error affecting substantial rights because the challenged evidence was not relevant to the crucial question whether James mistakenly identified him as one of the perpetrators. *Carines, supra* at 774.

H

Aaron next claims that the trial court erred by allowing a police witness to give an opinion about the number of shooters from the location of firearms evidence at the scene of the shooting. However, the trial court did not abuse its discretion in allowing the lay opinion because it did not require firearms expertise. The police witness made it clear that he could not determine if the nine millimeter casings all came from the same weapon because he was not a firearms expert. MRE 701; *Lukity, supra* at 488; *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454; 540 NW2d 696 (1995).

I

Aaron also argues, for the first time on appeal, that the trial court erred in allowing the prosecution to introduce testimony regarding the number of homicides handled by the Detroit Police Department. Because defendant Aaron has not established either plain error or that his substantial rights were affected, this unpreserved claim does not warrant relief. *Carines, supra* at 774.

J

Aaron next argues that the trial court erred by failing to investigate juror contact after this issue was raised by the prosecution. Because Aaron did not request further investigation, this issue is unpreserved. We note, however, that the trial court did conduct some investigation by presenting a note received from one juror to the attorneys for review, and hearing the prosecution's argument about another juror. Although the trial court did not question jurors individually, a trial court has discretion in dealing with problems of juror contact. See *People v Dean*, 103 Mich App 1, 5; 302 NW2d 317 (1981). Even in instances where a defendant seeks a new trial or mistrial based on improper juror contact, prejudice will not be presumed. *People v Hayes*, 126 Mich App 721, 729; 337 NW2d 905 (1983). Further, defendant Aaron has not established plain error affecting substantial rights. *Carines, supra* at 774.

K

Aaron next claims that the trial court erred in failing to suppress James' in-court identification of him on the ground that it was tainted by a prior identification in a photographic showup. Aaron argues that the trial court erred because it either misapplied or failed to apply the factors set forth in *People v Kachar*, 400 Mich 78, 90; 252 NW2d 807 (1977). The need to apply the *Kachar* factors does not arise unless an invalid identification procedure is found. See *People v Gray*, 457 Mich 107, 114-115; 577 NW2d 92 (1998); *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). Because Aaron has failed to brief any basis for the conclusion that the identification procedure was invalid or unreliable, he has abandoned this issue. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).

L

Aaron next claims that he was denied the effective assistance of counsel by his trial counsel's failure to object to the police repeating hearsay statements of Kenneth James'; failure to move to suppress a photograph of Aaron taken after a warrantless felony arrest in his home, from which James identified him; and failure to object to improper instructions and seek proper instructions on misidentification and reasonable doubt.

In order to establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687. This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999).

This Court previously denied Aaron's motion to remand for a hearing on this issue. Regarding Aaron's first challenge, we agree with the prosecution that part of Aaron's trial counsel's strategy was to highlight the fact that the police focused only on Richey and did not get descriptions of the other two perpetrators from James, and that trial counsel extensively cross-examined the officers that took the challenged statement from James. This Court will not second-guess counsel regarding trial strategy matters, *Rice, supra*, and given the overwhelming evidence of Aaron's guilt, the outcome would not have differed even had trial counsel made the objections urged. *Id.*

A hearing was held below on Aaron's motion to suppress identification or alternatively for an evidentiary hearing, which argued that the photographic show-up was unduly suggestive and that he was denied the presence of counsel. Aaron provides no cites to that hearing or other portions of the record to support his additional claim that the police made a nonconsensual entry to his home to make a felony arrest. Similarly, Aaron has provided no support for his claim that the police lacked probable cause to arrest him, and we have found none in the record. Aaron's claim fails.

Aaron's claim regarding the jury instructions is without merit. The trial court gave the standard instruction on identification after the prosecutor pointed out that it had not been read by the court. Defendant Aaron argues that his trial counsel should have sought more comprehensive identification instructions that warned of the grave dangers of misidentification, but does not cite such an instruction. With regard to the challenged reasonable doubt instruction, this Court held in *People v Hubbard*, 217 Mich App 459; 552 NW2d 493 (1996), that failure to include "moral certainty" language in the reasonable doubt instruction was not error warranting reversal. See also *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991) (noting that the instruction read, which was virtually identical to CJI2d 3.2(3), "adequately presented the concept of reasonable doubt to the jury.") There is no error when jury instructions fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Based on the record before us, Aaron has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See generally *Plummer, supra* at 307-308; see also *Sammons, supra* at 372.

V

Lastly, the argument, made by both defendants, that the cumulative effect of the alleged prosecutorial misconduct and other errors denied them a fair trial is rejected. Most of the remarks were not objected to, and there was overwhelming evidence of defendants' guilt in testimony of both James and Burns. While some of the prosecutor's tactics were improper, defendants were not denied a fair trial and reversal for cumulative error is not warranted.

Affirmed.

/s/ Helene N. White

¹ The surviving victim, James, testified that on the evening in question, defendant Richey, whom he knew as “Big Fella,” paged him and asked him to stop by Richey’s mother’s house. James testified he had been to Richey’s mother’s house three or four times before and had known “Big Fella” around two years. James testified that he returned Richey’s page and that he and his friend, Anthony Simmons, drove there. When they arrived, James called Richey from his cell phone and three men came out of the house. Richey stuck a gun in James’ face, and the two other men, who were wearing ski masks, were also armed--the tall one with a long rifle and the other with a small handgun. The men had James and Simmons climb into the back seat, the two with ski masks on removed them, and James and Simmons were handcuffed to each other. They drove to James’ house and on the way the tall man with the rifle took money from James’ pocket. After arriving at James’ house, James and Simmons, still handcuffed together, were taken to the basement and defendant Richey told them to lie down. Defendant Richey and Burns asked James repeatedly where the money was, and James said he had no money. Richey and Burns went upstairs and James could hear movement and rumbling. James testified that after a time Richey and the tall guy came down to the basement with couch pillows, where James and Simmons were lying on the floor, Richey told Simmons that if he had any money to give it to them, Simmons responded that he had money at his mother’s house and that his mother was at home, and Richey then shot Simmons in the head with his handgun. James testified that after a pause, a bunch of gunfire started and he could feel he was being hit. The shooting stopped, James heard Richey say to the tall guy that Ken (James) was still moving and “shoot him with that one.” James heard another shot, felt the wind knocked out of him and lay still. Richey and the tall guy left the basement. James testified that after he heard the men leave the house, he managed to get the handcuffs off Simmons and staggered up the basement stairs to the neighbor’s house, whom he asked to call an ambulance. James testified that he was hospitalized and in critical condition for about five days. He testified that Burns was not in the basement when the shootings occurred. James testified that he picked defendant Aaron out of a photo array as soon as he saw his face, that no one but Aaron had held the long gun, and that Aaron was the shooter that shot him in the back.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ The three challenges are that the prosecutor improperly personally attacked his attorney and thus infringed on his presumption of innocence, that the prosecutor improperly vouched for the Detroit Police Department’s Homicide division by stating that it was one of the best in the country, and that Michigan had not had the death penalty for years but defendants had imposed the death penalty on the deceased.