STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 2, 2001
v	No. 219571 Wayne Circuit Court
KIRBY AVERY, Defendant-Appellant.	LC No. 98-006184

Before: Markey, P.J., and McDonald and K. F. Kelly, JJ.

PER CURIAM.

Following a jury trial defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial judge sentenced defendant to two years for the felony-firearm conviction, MCL 750.227b; MSA 28.424(2), and natural life for the first-degree murder conviction, MCL 750.316; MSA 28.548. Defendant appeals as of right. We affirm.

I. Defendant's Confession

First, defendant argues that the trial court abused its discretion by admitting his written confession where the confession was obtained without a knowing and voluntary waiver of his rights. We disagree.

The prosecutor has the burden and must establish, by a preponderance of the evidence, that defendant knowingly and voluntarily relinquished his rights. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992); *People v Delisile*, 183 Mich App 713, 719; 455 NW2d 401(1990). Whether defendant's statement was the product of a knowing, intelligent, and voluntary waiver is a question of law that a court must determine considering the totality of the circumstances *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000) We give deference to the trial court's factual findings and will not reverse those findings unless they are clearly erroneous. *Id.* Ultimately, the trial court's decision should be affirmed unless we are left with a definite and firm conviction that a mistake has been made. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

The totality of the circumstances govern whether a particular statement was freely and voluntarily given and thus admissible pursuant to the following factors enumerated in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988):

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made.

In the case at bar, the trial court noted that defendant did not have any difficulty reading or understanding his rights, he was not deprived of food, sleep, or medical attention, he was not physically abused and the police read him his rights before he provided the statement at issue. Under the totality of the circumstances, including the trial court's greater opportunity to evaluate the credibility and demeanor of the witnesses, we find that the prosecution established, by a preponderance of the evidence, that defendant knowingly and voluntarily waived his rights We do not find the requisite clear error necessary to overturn the trial court's determination that defendant's statements were freely and voluntarily rendered.

II. Alleged Prosecutorial Misconduct

Defendant claims that the prosecutor made improper remarks concerning the presumption of innocence during jury voir dire. The predominant concern surrounding alleged prosecutorial misconduct is whether the misconduct effectively denied defendant a fair and impartial trial. *People v Howard*, 226 Mich App 544; 575 NW2d 16 (1997).

Appellate review of alleged prosecutorial misconduct is precluded by the defendant's failure to make a timely objection unless a curative instruction would be insufficient to purge the prejudicial effect or failing to address the issue would result in a miscarriage of justice. *Id*. at 544. In the case at bar, we note that the defendant did not raise a timely objection to the alleged misconduct. Accordingly, this court will review the defendant's contention for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000):

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court

> proceedings . . .[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "`seriously affect[e] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. *Id.* at 720 (quoting *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999)(citations omitted).

Issues pertaining to alleged prosecutorial misconduct are decided on a case by case basis. *Schulte, supra,* at 721. The reviewing court regards the relevant portion of the transcript and considers the statements in context. *Id*. at 721.

In the case at bar, defendant argues that the prosecutor's attempt to explain the presumption of innocence to prospective jurors amounted to misconduct depriving him of a fair and impartial trial. A review of record does not support defendant's claim. The prosecutor explained to the jury that every defendant is presumed innocent "[n]o matter how guilty *we may or may not suspect* that person is."[Emphasis added]. Pursuant to the plain error rule, we do not find prosecutorial misconduct or any prejudice inuring to the defendant that a curative instruction following a timely objection would not have eradicated. In addition, the trial court's instruction to the jury concerning the presumption of innocence was sufficient to remove any stain of prejudice left by the prosecutor's explanation of the presumption. Moreover, a review of the complete record in this matter overwhelmingly demonstrates defendant's guilt. Accordingly, the "[f]orfeited error" did not "[r]esult in the conviction of an actually innocent defendant." *Schutte,* at 721. This court will not find an error requiring reversal in the absence of plain error or where a timely objection and a curative instruction would have precluded any prejudicial effect wrought by the prosecutor's remarks.

III. Defendant's Challenge to the Jury Instructions

Next, defendant alleges error requiring reversal on the grounds that the trial court failed to specifically identify the name of a witness within the context of the jury instruction pertaining to the impeachment of a witness by a prior inconsistent statement. We disagree. This court reviews claims of instructional error de novo. *Case v Consmers Power Co*, 463 Mich 1; 615 NW2d 17 (2000).

To determine whether an error requiring reversal occurred, the reviewing court must consider the jury instructions in their entirety rather than extracting them piecemeal. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). A trial court need not give requested instructions that the facts do not warrant. *Id.* at 648.

Considering defendant's request for an impeachment instruction within the framework of the foregoing, we conclude that the trial court did not commit reversible error in this regard. The defendant requested that the trial court include the specific name of a witness in the impeachment instruction of whom defendant claims was impeached during the trial. A review of the record reveals that the defendant failed to demonstrate that the relevant witness' testimony was indeed impeached thereby entitling defendant to the requested identification of the witness within the instruction. Moreover, the court gave the jury the general instruction regarding witness credibility (CJI2d 3.5). As one court opined, "[e]rror does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction. A trial court

need not give requested instructions that the facts do not warrant." *Piper, supra*, at 648. A review of the record does not definitively establish that the defendant was even entitled to the requested instruction. Moreover, since the omitted instruction concerned witness credibility and the trial judge gave the general instruction relevant thereto, the charge, as a whole, was sufficient to cover the substance of the omitted instruction. Thus, we find no error.

IV. Defendant's Challenge to the Method of Jury Selection

Defendant argues that the use of multiple peremptory challenges during jury selection was a variant of the "struck jury method" previously condemned by our Supreme Court and thus, denied him due process. We disagree. Interpretation and application of the court rules is a question of law that this Court reviews de novo. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998); *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997).

In *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), our Supreme Court denounced the use of the "struck jury method." This method entails calling forth a large group of jurors all at once and thereafter allowing the prosecution and the defense to alternatively "strike" the potential jurors until only the number of required jurors remain. See *People v Green* (On Rem), 241 Mich App 40; 613 NW2d 744 (2000). The "struck jury method" or any variation thereupon directly conflicts with the mandates of MCR 2.511(F) which provides in pertinent part that:

> [a]fter the jurors have been seated in the juror's box and a challenge for cause is sustained or a peremptory challenge exercised, another juror must be selected and examined before further challenges are made. . . .

The court in *Miller* ruled that any failure to comply with the court rules requires *automatic reversal* even in the absence of prejudice. To this end, the court stated:

> [g]iven the fundamental nature of the right to trail by an impartial jury, and the inherent difficulty of evaluating such claims, a requirement that a defendant demonstrate prejudice would impose an often impossible burden . . . .A defendant is entitled to have the jury selected as provided by the rule, Where . . .a selection procedure is challenged before the process begins, the failure to follow the procedure prescribed in the rule requires reversal.

Respecting the court's decision in *Miller*, a panel of the Court of Appeals in *People v Colon*, 233 Mich App 295 (1998) reversed a conviction and remanded for a new trial because the jury was not selected pursuant to the mandates specified in MCR 2.511(F). The court in *Colon* felt constrained to follow our Supreme Court's decision in *Miller* even though there was no indication that the defendant suffered any prejudice as a result of the jury selection process employed by the court. The court stated:

> Although there is no indication that defendant suffered actual prejudice as a result of this procedure, because of the fundamental nature of the right to trial by an impartial jury and the difficulty in examining such claims, prejudice need not be

shown . Thus, *we are compelled to reverse* and remand for a new trial. *Colon*, at 303. (citation omitted). [Emphasis added.]

Recently however, in *People v Green* (On Rem), 241 Mich App 40; 613 NW2d 744 (2000), this court was called upon to construe MCR 2.511(F) in light of MCR 2.511(A)(4), a newly added subsection not existing when the court decided *Colon*, which provides that, "[p]rospective jurors may be selected by any other fair and impartial method directed by the court or agreed to by the parties." *Green*, supra, at 45. The new subsection interjected the notion that as long as the jury selection process itself is "fair" and "impartial" then a deviation from the court rules governing standard jury selection would not necessarily require automatic reversal pursuant to our Supreme Court's decision in *Miller*. In fact, the court in *Green* recognized that in the years since the decision in *Miller*, our Supreme Court, "[h]as distanced itself from the principle of error per se and embraced the notion that `rules of automatic reversal are disfavored.' *Green*, at 241 (citations omitted). The *Miller* court's censure of the "struck jury method" remains viable but affects the automatic reversal rule to the extent that deviations from the standard jury selection do not automatically suggest a "struck jury" requiring automatic reversal. *Green*, at 46.

In the instant case, defendant argues that the jury selection method employed by the trial court amounted to a "struck jury" specifically condemned in *Miller*. We do not agree. Significantly, as previously noted, defendant did not raise an objection to the jury selection method at any point during voir dire or during the trial. Thus, defendant did not properly preserve the issue and raises it for the first time on appeal. Accordingly, reversal is not required even under the rule set forth in *Miller* as defendant argues. The automatic reversal rule established in *Miller* obtains "[w]here . . .a selection procedure *is challenged before the process begins*, the failure to follow the procedure prescribed in the rule requires reversal." *Miller*, at 326. Unlike the situation presented in *Miller*, here, defendant did not object to the jury selection process. Thus, even under the court's decision in *Miller*, defendant herein is not entitled to automatic reversal. Additionally, defendant did not otherwise argue that the method employed by the trial court was not "fair" or "impartial." MCR 2.511(A)(4). As the court decided in *Green*, even though the jury selection process here was "imperfect" in that the trial court did not specifically adhere to the dictates of MCR 2.511(F), a review of the record in this matter indicates that the provisions of MCR 2.511(A)(4) were observed and defendant nevertheless received a fair trial. Accordingly, reversal is neither required nor warranted.

V. Defendant's Ineffective Assistance of Counsel Claim

Defendant argues that he was denied the effective assistance of counsel. Pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), claims for ineffective assistance of counsel should be raised by a motion for a new trial or evidentiary hearing. Since defendant did not procure a ruling by the trial court on this issue, defendant's claim for the ineffective assistance of counsel is forfeited save for a review of the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To set forth a viable claim for the ineffective assistance of counsel, defendant must establish deficient performance by counsel and a reasonable probability that but for that deficiency, the result would have been different. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) citing *People v Pickens*, 460 Mich 1; 521 NW2d 797 (1994); *Snider, supra*, at 423-424. In this case, to put forth a viable claim for the

ineffective assistance of counsel, the burden is on the defendant to show that counsel performed in a deficient manner and but for counsel's substandard performance, he would not have been convicted.

A. Test Results

Defendant first claims that he was denied the effective assistance of counsel by trial counsel's failure to secure test results from the lab comparing bullet fragments recovered from the weapon "allegedly tied to defendant" and the bullet extracted from the decedent after the autopsy. A review of the record indicates that neither the prosecutor nor the defendant introduced a report or otherwise proffered expert testimony on this issue at trial.

A review of the entire record reveals that the absence of the report comparing the bullet extracted from the decedent and the weapon recovered, permitted defense counsel to create reasonable doubt by arguing to the jury that the prosecution failed to provide evidence establishing that the weapon recovered actually fired the round that killed the decedent. In fact, during closing argument, defense counsel implored the jury to consider "[t]he lack of evidence . . . in this case" and further argued that if the evidence existed, "[w]ouldn't the prosecutor have said . . .we have this test. We have the bullet from [the decedent]. We have the gun that [defendant] told us about. And they match."

A review of the record indicates that defense counsel's alleged "failure" to procure test results was, at best, part and parcel of defense counsel's trial strategy. As the prosecutor points out, instead of insisting upon a comparison test and risking a conclusive match, defense counsel selected to forego the test and argue lack of evidence. On the record here before us, defendant did not establish and we cannot conclude that defense counsel's failure to insist upon the production of the test herein described was so objectively unreasonable that but for the failure to procure the comparison test, defendant would have been acquitted. Accordingly, reversal is not required. See *People v. Mitchell*, 454 Mich. 145; 560 NW2d 600 (1997)(stating that reversal is for ineffective assistance of counsel is not justified where defendant fails to demonstrate objectively unreasonable performance and resulting prejudice).

B. Instructions Concerning Negative Inference from Missing Witness

Defendant further argues ineffective assistance of counsel for trial counsel's failure to request a jury instruction which would permit the court to charge the jury that since the prosecution had a responsibility to produce a certain witness and the prosecutor failed to do so the jury may infer that the missing witness' testimony would have been unfavorable to the prosecution. CJI2d 5.2. The prosecution's witness list contained 25 endorsed witnesses of which only 6 actually testified at trial. The record does not reflect that defense counsel waived the production of the remaining 19 witnesses. Accordingly, defendant claims ineffective assistance by defense counsel's failure to request the instruction pertaining to missing witnesses. As previously discussed, the jury instructions rendered by the trial court were adequate and the trial court did not otherwise err in this regard. On the record before us, trial counsel's failure to specifically request CJI 5.12 where the instructions provided by the trial court were otherwise adequate, was not so objectively deficient that but for counsel's failure to request that specific instruction, the outcome would have been different. *See People v Cooper*, 236 Mich App 643;

601 NW2d 409 (1999)(opining that trial counsel's failure request specific jury instructions regarding reasonable doubt and witness identification did not constitute the ineffective assistance of counsel where the trial court did not otherwise err in its instructions as regards these matters). Thus, we find no error requiring reversal.

C. Alleged Inappropriate Remarks by the Prosecutor

Finally, defendant argues ineffective assistance of counsel for trial counsel's alleged failure to object to "numerous inappropriate remarks by the prosecutor during voir dire concerning the presumption of innocence." We adequately addressed this issue in our previous discussion regarding the alleged prosecutorial misconduct. See, *infra*, at § 2. We found that any prejudice borne from the prosecutor's discussion concerning the presumption of innocence could have been adequately purged upon a timely objection and a curative instruction from the court. Just as we did not find prosecutorial misconduct, we similarly decline to find that trial counsel's failure to object to the prosecutor's discussion regarding the presumption of innocence was so objectively unreasonable that but for counsel's failure to object in this regard, the jury would have acquitted the defendant.

Affirmed.

/s/ Jane E. Markey
/s/ Gary R McDonald
/s/ Kirsten Frank Kelly