STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2001
v ELLIOTT LASHO WHITTINGTON, Defendant-Appellant.	No. 216045 Saginaw Circuit Court LC No. 98-015149

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CALVIN TERRANCE CAMERON, Defendant-Appellant.	No. 216046 Saginaw Circuit Court LC No. 98-015150-FC

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a joint jury trial, defendant Elliott Whittington was convicted of two counts of first-degree murder under alternative theories of premeditated murder and felony murder, MCL 750.316; MSA 28.548, one count of conspiracy to commit first-degree murder, MCL 750.157a; MSA 28.354(1) and MCL 750.316; MSA 28.548, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to concurrent terms of life imprisonment for the first-degree murder and conspiracy convictions, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant Calvin Cameron was convicted of conspiracy to commit first-degree murder and sentenced to life imprisonment. Both defendants appeal by right. We affirm.

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Defendant Whittington argues that his first-degree murder and felony-firearm convictions must be overturned because there was insufficient evidence to identify him as the perpetrator of

the charged crimes. We disagree. We will not interfere with the jury's determination of the credibility of identification testimony. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Norris*, 236 Mich App 411, 422; 600 NW2d 658 (1999). Four witnesses identified defendant Whittington as the shooter who stood at the driver's side of the victims' car. Viewed most favorably to the prosecution, this testimony was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that Whittington was the perpetrator of the charged crimes. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant Whittington also claims that the prosecutor twice engaged in misconduct by presenting evidence falling within the scope of MRE 404(b) without seeking a prior judicial ruling concerning its admissibility pursuant to MRE 404(b)(2). We find no basis for relief with respect to this issue.

With regard to the first alleged instance of misconduct, we conclude that defendant Whittington's reliance on the prosecutor's opening statement to show evidentiary error is misplaced. The opening statement was the proper time for the prosecutor to present a full and fair statement of his case and the facts that he intended to prove. MCR 6.414(B). Because defendant Whittington does not identify any particular evidence presented by the prosecutor, this issue is not properly before us. A defendant may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). We note, however, that the only apparent evidentiary basis for the challenged portion of the prosecutor's opening remarks is the statement of the unavailable witness, Eula Brown, which was introduced pursuant to the parties' stipulation. Having stipulated to the admission of this evidence, we hold that defendant Whittington has waived any claim that the evidence should have been excluded. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Sawyer*, 215 Mich App 183, 195-196; 545 NW2d 6 (1996).

Regarding the second instance of alleged misconduct, we are not persuaded that the prosecutor's redirect-examination of Edna Webb implicated MRE 404(b). Examined in context, it is plain that the prosecutor sought an explanation from the witness regarding her testimony on cross-examination that she told a lady who came to her door to be very careful. Defendant Whittington has failed to show any outcome-determinative plain error in connection with this questioning or that he was otherwise deprived of a fair trial. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995), and *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000); see, also, *People v Lukity*, 460 Mich 484, 495-496, 499; 596 NW2d 607 (1999).

Next, defendant Whittington claims that the trial court's failure to give an alibi instruction deprived him of a fair trial. Our review of the record indicates that defendant Whittington did not request an alibi instruction at trial, therefore he failed to preserve this issue. Further, where Whittington did not present a notice of alibi defense at trial, and where undisputed evidence showed that he was among a group of people at the crime scene shortly after the shooting, Whittington has failed to show any plain instructional error stemming from the court's failure to give an alibi instruction. Therefore, appellate relief is precluded. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

Defendant Whittington's alternative claim of ineffective assistance of counsel is not properly before us because it is not set forth in the statement of the issues. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). Regardless, there is no error apparent from the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). Defendant Whittington has not shown the requisite deficient performance or prejudice necessary for a claim of ineffective assistance of counsel to succeed. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), and *Sabin (On Second Remand), supra* at 660.

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Defendant Cameron argues that the jury verdict finding him guilty of conspiracy to commit first-degree murder is against the great weight of the evidence. In particular, he asserts there was no credible evidence that he was a participant in the charged crimes. We hold that defendant Cameron failed to preserve this issue for appeal because he did not move for a new trial based on a claim that the jury verdict was against the great weight of the evidence. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). The specific grounds raised in defendant Cameron's motion for a "new trial or judgment notwithstanding the verdict" involved only the legal sufficiency of the evidence and the consistency of the jury verdicts. Further, the trial court's ruling denying the motion was limited to those specific issues.

The standard for considering a motion for a new trial based on the great weight of the evidence is distinct from the standard for evaluating the legal sufficiency of the evidence. *People v Lemmon*, 456 Mich 625, 633-635; 576 NW2d 129 (1998). Further, an objection on one ground does not preserve an appellate attack on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Because the trial court was never called upon to exercise its discretion to determine if a new trial should be granted on the basis of the weight of the evidence, defendant's "great weight" argument is not properly before us, and we decline to consider it. *Winters, supra.*

Defendant Cameron also claims that a police officer's testimony concerning his statement to defendant Whittington at the crime scene should have been excluded and its admission violated his Fifth Amendment rights. Because defendant Cameron did not move to exclude the evidence on this ground at trial, he must demonstrate a plain error affecting his substantial rights. *Carines, supra*. Because the record reflects that the statement in question was volunteered, we find no plain error. "[V]olunteered statements of any kind are not barred by the Fifth Amendment and are admissible." *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995).

We affirm.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jeffrey G. Collins