

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ALLAN WINFIELD,

Defendant-Appellant.

UNPUBLISHED

March 15, 2002

No. 228209

Saginaw Circuit Court

LC No. 99-018144-FC

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of armed robbery, MCL 750.529, and two counts of assault with intent to commit armed robbery, MCL 750.89. Defendant was sentenced as a third habitual offender, MCL 769.11, to four concurrent terms of twenty to forty years' imprisonment. We affirm.

This case arises out of the armed robbery and attempted armed robbery of four construction workers at a construction site. Defendant was arrested in the vicinity of the construction site within thirty minutes of the commission of the crimes. At the scene, the construction workers immediately identified defendant as the robber.

Defendant first asserts that the trial court erred by permitting the prosecution to introduce improper hearsay rebuttal testimony on a collateral matter. We disagree. Defendant failed to preserve this issue for appeal because he did not timely and specifically object to the alleged error in the trial court. *People v Furman*, 158 Mich App 302, 329-330; 404 NW2d 246 (1987). Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Rebuttal testimony is admissible to contradict, repel, explain, or disprove testimony offered by the other party, and if it tends to directly weaken or impeach the testimony. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The test of whether rebuttal evidence was properly admitted is whether the evidence was responsive to evidence introduced or a theory developed by the defendant. *Id.* Evidence is properly classified as rebuttal if it is responsive to material presented by the defense. *Id.*

We initially note that the disputed testimony is not hearsay because it was not offered to prove the truth of the matter asserted – that defendant was given the two one-dollar bills¹ earlier in the day or whether the witness saw two unknown men running – but was introduced to contradict, refute, and disprove the defense witness’ testimony. MRE 801(c). Further, the testimony was proper rebuttal testimony because it simply responded to the defense witness’ testimony, which suggested that someone other than defendant committed the crimes. Although extrinsic evidence cannot be introduced to impeach a witness on collateral matters, *People v Hernandez*, 423 Mich 340, 352; 377 NW2d 729 (1985), we cannot deem the rebuttal evidence presented here as pertaining to collateral matters, where the issues raised by defendant regarded money allegedly given to defendant which equaled the amount taken from one of the victims, and regarded the possibility of other suspects. Moreover, assuming the rebuttal testimony was improper extrinsic evidence introduced to impeach the witness on a collateral matter, the error did not affect defendant’s substantial rights considering the overwhelming evidence of defendant’s guilt and the defense witness’ admission on cross-examination that she told the detective that she had not seen anything.

Defendant next asserts that he was denied effective assistance of counsel when his attorney failed to (1) move to suppress the on-scene identification, and (2) object to the alleged improper hearsay rebuttal testimony. We disagree. A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Our review here is limited to the existing record because defendant failed to develop a testimonial record in support of this claim. *Id.*

To establish a claim for ineffective assistance of counsel, a defendant must show that his attorney’s performance was deficient under an objective standard of reasonableness, and that there is a reasonable probability that, but for the deficiency, the jury would not have found the defendant guilty. *Snider, supra* at 423-424. An attorney is presumed to provide effective assistance of counsel; therefore, a defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Before the preliminary examination, defendant requested the district court to order a lineup or, in the alternative, to suppress the on-scene identification, arguing that the defense *did not know* whether the police made any suggestive remarks to the witnesses before they identified defendant. Defendant’s attorney conceded that there was no factual basis for the motion at that point in time. Accordingly, the district court denied the request to suppress the on-scene identification, and the court refused to order a lineup because defendant had no constitutional right to a lineup. On appeal, defendant argues that counsel was ineffective in failing to renew the motion in the trial court because the on-scene identification was unduly suggestive, and because defendant was entitled to counsel at the time of the identification. Additionally, defendant argues that trial counsel should have made inquiry into the details concerning the on-scene identification in order to determine whether it was unduly suggestive.

Defendant’s arguments lack merit. Nothing in the existing record suggests that the identifications were burdened with improper suggestiveness. Regarding the lack of counsel at

¹ Two one-dollar bills were taken from one of the robbery victims.

the on-scene identification, no right to counsel exists where there is a promptly conducted on-scene identification as occurred here. *People v Winters*, 225 Mich App 718, 727-728; 571 NW2d 764 (1997). An attorney does not render ineffective assistance for failing to raise a meritless or frivolous motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Regarding defense counsel's failure to investigate or request an evidentiary hearing on the matter, we cannot speculate as to what additional facts may have been uncovered as our review is limited to the existing record; therefore, we cannot conclude that counsel was ineffective. *Snider, supra* at 423.

Further, defendant's argument that his attorney rendered ineffective assistance by failing to object to the allegedly improper rebuttal testimony is meritless because, as discussed, the testimony was properly admitted. Moreover, assuming that the testimony was improper and should have been objected to, there was not a reasonable probability that, but for the deficiency, the jury would not have found defendant guilty.

Next, defendant asserts that he was denied a fair trial when the prosecution attempted to shift the burden of proof during its closing argument. We disagree. Defendant failed to preserve this issue for appeal because he did not object to the alleged prosecutorial misconduct at trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Therefore, we review this issue for plain error affecting substantial rights. *Carines, supra* at 763.

This Court reviews allegations of prosecutorial misconduct case by case, *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), to determine if a defendant has been deprived of a fair and impartial trial. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). "Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). A prosecutor may argue that the defendant or another witness is not worthy of belief or is lying. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Further, a prosecutor's closing argument must be considered in light of defense arguments. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

After reviewing the relevant portions of the record and considering the prosecutor's remarks in context, we do not find that the prosecutor shifted its burden of proof in this case. Furthermore, any possible prejudice was dispelled when the trial court gave a cautionary instruction to the jury reminding it that the prosecution must prove a defendant guilty beyond a reasonable doubt, and that a defendant is not obligated to produce any evidence or prove his innocence. Defendant failed to show plain error that affected his substantial rights.

Defendant next argues that his sentence should not have been enhanced pursuant to MCL 769.11 because he was not convicted on one of the underlying felonies. We disagree. A review of the record clearly reflects that defendant had felony convictions for larceny over \$100 and for breaking and entering an occupied dwelling.

Defendant finally argues that his due process rights were violated when the supplemental information, noticing the sentence enhancement under MCL 769.11, was untimely filed in violation of the twenty-one-day limit found in MCL 769.13(1). We disagree. A review of the

record indicates that an original information and the supplemental information timely notified defendant of the prosecutor's intent to seek sentence enhancement under MCL 769.11.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra