

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE REU CASH,

Defendant-Appellant.

UNPUBLISHED

May 3, 2002

No. 230526

Wayne Circuit Court

LC No. 99-012607

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b, for which he was sentenced as a second habitual offender, MCL 769.10. We affirm.

This case arises out of a shooting outside a bar, in which the victim was struck in the neck by a single bullet.

Defendant first contends that the trial court abused its discretion when it denied his motion for new trial on the basis of newly discovered evidence, i.e., the observations of the bar owner. We disagree.

This Court reviews a trial court's ruling on a motion for new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). To merit a new trial on the basis of newly discovered evidence, a defendant must meet a four-part test showing that: (1) the evidence was newly discovered; (2) the evidence is not merely cumulative; (3) admission of the evidence likely would have resulted in a different outcome; and (4) the evidence could not have been discovered and produced at trial through the exercise of due diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

This Court declined to remand a defendant's case for retrial where the defendant failed to file an affidavit or make an offer of proof in support of his newly discovered evidence motion. *People v Messenger*, 221 Mich App 171, 178-179; 561 NW2d 463 (1997). Here too, defendant has offered no affidavit, deposition, or offer of proof, showing the substance of the witness' testimony for this Court's review.

Where a proposed witness' newly discovered testimony does not support a finding that a different result would have occurred, and the court deems the witness incredible, there is no abuse of discretion. *People v Miller (After Remand)*, 211 Mich App 30, 54; 535 NW2d 518 (1995). Here, the bar owner's testimony, as offered by codefendant's counsel, did not clearly exculpate defendant; in our opinion, her timing, her alleged unavailability and apparent disinterest in light of the pending civil litigation against the bar she owned, and the speculative nature of her testimony itself, was – if not incredible – certainly suspect. We also question whether due diligence was exercised by defendant. What evidence the witness might have actually offered fails the four-part test, and the trial court properly denied defendant's motion for new trial.

Defendant next asserts that if the bar owner's testimony could have been discovered through the exercise of due diligence, then he was denied the effective assistance of counsel because his attorney failed to obtain the information before trial. We do not agree.

Appellate review of a defendant's unpreserved claim of ineffective assistance of counsel is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error warrants reversal only when it was plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A reversal based on ineffective assistance of counsel is justified if a defendant affirmatively shows that his counsel's performance fell below an objective standard of reasonableness and prejudiced him to the extent that he was denied a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). A defendant bears a heavy burden of disproving his counsel's presumption of competence. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). He must also show that actual prejudice resulted from his counsel's ineffectiveness – that is, had his counsel not erred, there existed a reasonable probability that the result of his trial would have been different. *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999).

Defendant has produced insufficient evidence by which this Court can evaluate the diligence or lack thereof with which his counsel attempted to discover and produce the bar owner's testimony. Moreover, there is no evidence to ascertain actual prejudice where there is no affidavit or offer of proof concerning the bar owner's potential testimony. The trial court was only presented with counsel's interpretation of what the bar owner might say if called to testify. Because this Court's review of defendant's unpreserved claim of ineffective assistance of counsel is limited to the existing record, his claim is unsupported. *Snider, supra* at 423.

Defendant next contends that he was denied a fair trial because of prosecutorial misconduct. We disagree.

This Court reviews a defendant's unpreserved claim of prosecutorial misconduct to determine whether a curative instruction could have eliminated any prejudicial effect, or whether failure to consider the defendant's claim would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997).

The prosecution may remark on the evidence admitted at trial and all reasonable inferences that can be drawn from the evidence as they relate to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor's remarks cannot be viewed in isolation – the scope of appellate review must include the context in which the remarks were made. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Remarks that might otherwise be improper do not necessarily require reversal when the remarks are made in response to issues raised by a defendant. *Id.*

Our review of the trial transcript in its entirety reveals that the disputed comments by the prosecution were limited to closing arguments and rebuttal, and were largely – if not entirely – in response to defense counsel's arguments. A vigorously argued and otherwise sound trial will not be reversed on the basis of isolated improper remarks that, had defense counsel timely objected, could have been cured by the trial court immediately. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). We find nothing so prejudicial in the prosecutor's arguments that could not have been cured by a timely instruction from the trial court.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald