

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS ANTHONY BROWNLEE,

Defendant-Appellant.

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UNPUBLISHED

June 14, 2002

No. 224538

Macomb Circuit Court

LC No. 99-001092-FH

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3). He was sentenced to four years' probation, with one year to be served in the county jail, and was also ordered to complete boot camp. He appeals as of right. We affirm.

I

Defendant argues that the trial court erred in denying his motion for a continuance, asserted on the ground that his attorney was not prepared for trial. We disagree. A trial court's decision on a motion for continuance is reviewed for an abuse of discretion. *People v Dowell*, 199 Mich App 554, 555; 502 NW2d 757 (1993). In determining whether the trial court abused its discretion, the following factors should be considered: (1) whether the defendant was asserting a constitutional right; (2) whether the defendant had a legitimate reason for asserting that right; (3) whether the defendant was negligent in asserting that right; and (4) whether there have been any prior adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). Defendant is also required to demonstrate prejudice as a result of the trial court's ruling. *Id.*

Here, defense counsel requested an adjournment because he claimed that he was not prepared for trial and had not yet filed a notice of alibi defense. According to the record, however, trial was scheduled more than a month ahead of time. Although defendant had not requested any previous adjournments, counsel failed to offer a good reason for not timely filing a notice of alibi defense or not earlier moving for a continuance. Moreover, although the trial court would not adjourn the case and did not permit counsel to file a late alibi notice, the trial court did allow defense counsel some time to prepare for trial. Further, in denying counsel's request for an adjournment, the court stated that it was familiar with defense counsel, who had a

history of repeatedly adjourning cases. Under these circumstances, the trial court did not abuse its discretion in denying the request for an adjournment.

## II

Defendant also argues that the on-the-scene identification procedure conducted by the police shortly after the charged offense was committed was constitutionally invalid because defendant was not afforded the right to counsel, and because it was impermissibly suggestive. Because defendant did not raise this issue in the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

The cases on which defendant relies, *People v Dixon*, 85 Mich App 271; 271 NW2d 196 (1978) and *People v Turner*, 120 Mich App 23; 328 NW2d 5 (1982), no longer reflect the current state of the law on this issue. As this Court more recently held in *People v Winters*, 225 Mich App 718, 727-728; 571 NW2d 764 (1997), it is proper for the police to promptly conduct an on-the-scene identification procedure without the presence of counsel. Here, the on-the-scene identification was promptly conducted approximately one-half hour after the offense was committed. Defendant was not entitled to the presence of counsel at this on-the-scene identification. Furthermore, the record does not plainly indicate that the identification procedure was impermissibly suggestive. *Id.* at 725, 728 n 7. Having failed to show that the identification procedure was faulty, the prosecutor was not required to prove that there was an independent basis for the homeowner's in-court identification of defendant. *People v Williams*, 244 Mich App 533, 542-543; 624 NW2d 575 (2001).

## III

Defendant's principal issue on appeal is that trial counsel was ineffective. Because the trial court did not conduct an evidentiary hearing on this issue, our review of this issue is limited to mistakes apparent on the record. See, e.g., *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

In order for this Court to reverse on the basis of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). In doing so, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant first asserts that counsel was ineffective because he did not object to the homeowner's identification of defendant as one of the perpetrators. Having concluded previously that there was no basis for excluding the identification testimony, we find that defendant has not shown that counsel was ineffective in this regard. *Pickens, supra*.

Defendant next claims that counsel was ineffective for not timely filing a notice of alibi defense. MCL 768.20(1). Although it is apparent that an alibi notice was not timely filed, it is not apparent from the record that defendant timely notified counsel of a potential alibi defense. Because defendant has failed to establish that he made a timely and good-faith effort to avail himself of the right to present an alibi defense, he has not demonstrated that counsel was ineffective. *Hoag, supra*; see also *People v Kelly*, 186 Mich App 524, 526-527; 465 NW2d 569 (1990).

We also conclude that defendant has failed to show that he was prejudiced by counsel's failure to respond to the prosecutor's motion to admit evidence under MRE 404(b). Defendant has not shown that, had counsel responded to the motion, the evidence would not have been admitted. Indeed, the evidence was properly admissible as *modus operandi* tending to establish defendant's identity as one of the four individuals seen by the victim leaving her home. See *People v Golochowicz*, 413 Mich 298, 308-309; 319 NW2d 518 (1982). Moreover, the record does not sufficiently support defendant's assertion that the evidence involved a prior juvenile disposition barred from admission into evidence by MCL 712A.23. Despite his burden to produce evidence to support his claims, *Hoag, supra*, defendant never established that fact in the trial court.

Defendant also claims that his attorney was ineffective in his attempts to call Antoine Wahls as a witness. However, the record indicates that Wahls did not testify because he invoked his Fifth Amendment privilege against compelled self-incrimination. Defendant has not shown that Wahls' refusal to testify was attributable to any deficiency by defense counsel.<sup>1</sup>

Defendant also requests that this Court remand this matter for an evidentiary hearing on his ineffective assistance of counsel claim. Because defendant has not demonstrated what evidence he would present at such a hearing in support of this claim, we conclude that a remand is not warranted. *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

#### IV

Defendant next argues that reversal is required because of misconduct by the prosecutor. Because defendant did not object to the challenged conduct at trial, this issue is not preserved. Accordingly, defendant must show a plain error that affected his substantial rights. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The prosecutor's presentation of prior bad acts evidence under MRE 404(b) did not amount to plain error. Prosecutorial misconduct cannot be based on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, the trial court ruled that the evidence was admissible and defendant has not shown bad faith by the prosecutor. Thus, this unpreserved issue does not warrant appellate relief. *Carines, supra*.

Defendant has also not shown that plain error resulted from the prosecutor's closing argument. The challenged comments were made in response to defense counsel's remarks

<sup>1</sup> At trial, defendant addressed this issue as bearing on his right to compulsory process. He does not argue that issue on appeal.

during closing argument. Considered in this context, the challenged comments were not plainly improper. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

V

Finally, defendant argues that a new trial is required due to the cumulative effect of several errors. However, because defendant has failed to establish a single error, he is not entitled to a new trial on this ground. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).<sup>2</sup>

We affirm.

/s/ Richard A. Bandstra  
/s/ Michael R. Smolenski  
/s/ Patrick M. Meter

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<sup>2</sup> For this same reason we reject defendant's general contention that the trial court abused its discretion in denying defendant's motion for a new trial, which was based on many of the same grounds raised on appeal. Moreover, because we find no error in the trial court's rulings as challenged on appeal, we similarly reject defendant's claim that the trial court was biased against defendant in its decisions.