

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARRIN L. BRASSWELL,

Defendant-Appellee.

UNPUBLISHED

June 3, 2004

No. 246328

Wayne Circuit Court

LC No. 02-007221

Before: Owens, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, assault with intent to murder, MCL 750.83, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to life in prison for the first-degree murder conviction, forty to eighty years' imprisonment for the assault with intent to murder conviction, ten years' imprisonment, enhanced as a third offender, for the felony-firearm conviction, and thirty to sixty months' imprisonment for the felon in possession of a firearm conviction. In a supplemental brief filed in propria persona, defendant asserts that appointed appellate counsel has rendered ineffective assistance, among other claims. We affirm.

Defendant first argues that he is entitled to a new trial because the prosecutor engaged in misconduct by appealing to the sympathy of the jury, by attacking the defense and defense counsel, by placing the power and prestige of the prosecutor's office behind the case, and by appealing to the jurors' civic duty. We disagree.

To preserve the issue for appellate review, defendant must timely and specifically object to the prosecutor's improper conduct. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Here, defendant failed to object to the prosecutor's statements in the trial court. Appellate review of an unpreserved claim of prosecutorial misconduct is for plain error affecting substantial rights. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceeding independent of the defendant's innocence. If a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Here, the jurors were informed during voir dire that the victim's mother was waiting in the hallway, and that the prosecutor was going to have to report to her. This type of questioning was repeated with a number of potential jurors. Defense counsel stated that it was a case against defendant, and the question was if the jurors could be fair to defendant. The prosecutor objected, stating the question was if the jurors could be fair to everyone. The court responded by stating that each side could ask their own questions. In context, the prosecutor's reference to the victim's mother was made to stress the need for the jurors to be thoroughly honest in their responses to the questions presented in voir dire, particularly those addressed to whether they could put their own experiences aside and be fair. We find no reversible error.

During closing argument, the prosecutor made references to the fact that the victim was a devoted father of five girls and elicited testimony about toys, clothing and candy belonging to the girls that was found in the victim's car, and that defendant dumped the victim at the hospital like "garbage." The comments were only a brief part of the overall argument. Defense counsel did not object, but addressed the comments in closing, noting that the victim was not on trial and that the observations had nothing to do with the question whether defendant was guilty. The trial court instructed the jury not to be influenced by sympathy or prejudice. Under these circumstances, while the prosecutor's comments were gratuitous and improper, defendant was not prejudiced, and reversal is not required. *Watson, supra*, 245 Mich App 591-592.

Defendant next argues that the prosecutor improperly attacked the defense and defense counsel. A prosecutor is not permitted to personally attack defense counsel, *McLaughlin, supra*, 258 Mich App 646, or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra*, 245 Mich App 592.

Some of the prosecutor's arguments were legitimate comment on the case; e.g., the prosecutor expressed that any shortcomings in his witnesses were defendant's fault, stating "he picked them" when he committed the crime. Other comments were clearly improper; e.g., in rebuttal the prosecutor made several comments impugning defense counsel, and several comments fairly characterized as improper "civic duty" arguments. Nevertheless, we conclude that reversal is not required because any prejudice could have been cured by a timely objection, *Ackerman, supra*, 448-449, and the comments were not so inflammatory as to cause the jury to decide the case based on impermissible considerations, rather than the evidence presented.

Defendant next argues that he is entitled to a new trial because counsel was ineffective in failing to object to improper comments by the prosecutor. We disagree. To establish an ineffective assistance of counsel claim a defendant must show that counsel's performance failed to meet an objective standard of reasonableness and that the deficient performance so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Defendant claims that counsel was ineffective by failing to object to the prosecutor's comments. The Court will not second-guess matters of trial strategy. *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). It is probable that counsel determined, as a matter of trial strategy,

that he should not object to the prosecutor's statements because it could have been harmful in the eyes of the jury by making the jury focus on the prosecutor's arguments. Also, defense counsel specifically stated, "I rarely object during closing," which is where most of the comments referred to by defendant as inappropriate occurred. Failure of a trial strategy does not necessitate a conclusion that the strategy constituted ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant has not shown that had counsel objected to the comments, and had the objections been sustained, it is reasonably probable that the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

In a supplemental brief filed in propria persona, defendant asserts that his appellate counsel has rendered ineffective assistance by failing to raise issues that would compel reversal, including failing to file a motion for new trial and evidentiary hearing in the trial court on the ground of ineffective assistance of counsel, and failing to seek correction of trial transcripts that according to defendant omitted meritorious objections made by trial counsel. We disagree.

A criminal defendant's rights to appeal and to counsel on appeal include the right to effective assistance of counsel. *Evitts v Lucey*, 469 US 387, 396; 105 S Ct 830, 836; 83 L Ed 2d 821 (1985); *People v Pauli*, 138 Mich App 530, 534; 361 NW2d 359 (1984). To establish ineffective assistance of appellate counsel, a defendant must show that counsel's performance was deficient under an objective standard of reasonableness and the deficiency prejudiced the defendant. *Roe v Flores-Ortega*, 528 US 470; 120 S Ct 1029; 145 L Ed 2d 985, 994 (2000); *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994).

We address defendant's last point first. Defendant asserts that missing from the trial transcript is trial counsel's objection to the prosecution's failure to call an endorsed res gestae witness, Hack Welch. Defendant contends that Welch was an essential res gestae witness who transported the victim to the hospital after defendant called Welch on the phone, and that Welch was the last person to speak to the victim. Defendant contends that had Welch been called to testify, defendant may have been convicted of manslaughter rather than murder.

Even though defendant is correct that Welch was an endorsed witness, defendant's claim fails because both defense counsel and defendant requested that the jury not be instructed on lesser offenses to murder, thus foreclosing the possibility of a manslaughter conviction. Thus, any error in failing to produce this witness, and any omission in the trial transcript of counsel's objection thereto could not have affected the trial's outcome.

Relatedly, defendant maintains that appellate counsel filed his appellate brief without attempting to contact trial counsel (presumably, regarding objecting to the prosecution's failure to produce Welch), and without attempting to get the trial transcript corrected. We disagree.

Appellate counsel did attempt to secure the court reporter's tapes for defendant, based on defendant's assertion that the transcript omitted defense objections made to the non-production of Welch. Correspondence defendant attached to his supplemental in propria persona brief indicates that his appellate counsel acknowledged defendant's concern in this regard, requested the court reporter's tapes, was told the tapes are not routinely produced and that a motion would have to be filed, and so advised defendant. Appellate counsel's letter to defendant dated April 9, 2004, stated in pertinent part:

We talked about your desire to have the court recordings made available for inspection because you believe that there are errors or omissions in the transcripts. This office made contact with the court reporter and he indicated that the tapes are not “typical” tapes that can be turned over to me. However, he did indicate that a motion to inspect the tapes can be made in the trial court if you so desire. At this time, I am not sure that we can meet the hurdle set forth in *People v Abdullah* [sic *Abdella*], 200 Mich App 473 (1993).^[1] But if you feel strongly about it, please draft an appropriate argument and I will forward same to the Court for consideration.

Thus, defendant’s claim that appellate counsel did not attempt to correct the transcript is unsupported by the record. Appellate counsel set the process in motion by contacting the court reporter and requesting the tapes, but was told they were not available, and was advised that a motion to inspect the tapes could be filed. Again, any error was harmless, however, because even assuming trial counsel did object to Welch’s non-production at trial, and assuming that Welch had been produced, defendant’s and trial counsel’s request that the jury not be instructed on lesser offenses to murder, as discussed above, foreclosed the possibility of a manslaughter conviction.

Defendant’s claim that appellate counsel failed to file a motion for new trial is also without merit. A motion for new trial must be filed within 42 days of the entry of Judgment of Conviction and Sentence. MCR 6.431(A)(1). If the claim of appeal has already been filed, however, a defendant may file a motion for new trial in the trial court within 56 days after the commencement of the time for filing appellant’s brief. MCR 6.431(A)(2) and 7.208(B)(1). In this case, however, the 56-day period had elapsed, thus counsel had to get this Court’s permission to go back to the trial court; which is accomplished by filing a motion to remand in the Court of Appeals. MCR 7.211(C)(1)(a)(i). Defendant’s appellate counsel in this case did file a motion to remand in this Court. A panel of this Court denied the motion by order entered on 1/29/04. Defendant’s claim thus fails.

We conclude that the issues defendant raised in his brief filed in propria persona do not entitle him to relief.

¹ This Court in *Abdella, supra*, stated that “[w]here a defendant is able to make a colorable showing that inaccuracies in transcription have adversely affected the ability to secure postconviction relief, and such matters have seasonably been brought to the trial court’s attention, the defendant is entitled to a remedy.” 200 Mich App at 476. Further, this Court held:

In light of the competing interests involved, today we hold that in order to overcome the presumption of accuracy and be entitled to relief, a petitioner must satisfy the following requirements: (1) seasonably seek relief; (2) assert with specificity the alleged inaccuracy; (3) provide some independent corroboration of the asserted inaccuracy; (4) describe how the claimed inaccuracy in transcription has adversely affected the ability to secure postconviction relief pursuant to subchapters 7.200 and 7.300 of the court rules. [*Abdella, supra* at 476.]

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gibbs