STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2004
v	No. 250140 Wayne Circuit Court
FREDDY KATO-HARRIS LOVE, Defendant-Appellant.	LC No. 02-011058-01

Before: Cavanagh, P.J., and Kelly and H Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), 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, two years' imprisonment for the felony-firearm conviction, and one to five years' imprisonment for the felon in possession of a firearm conviction. We affirm.

On July 14, 2002, the victim was sitting in his mother's car with two friends in front of his house in Detroit. Shantel Williams arrived and walked up to them, talking to them through the open driver's window. When Williams saw a man run up to the vehicle with a rifle, she backed up and saw the man fire somewhere around twenty gunshots into the driver's window. The victim died, and at least seventeen gunshot wounds were found on his body. Both of the victim's friends were injured but survived. At a police lineup, Williams identified defendant as the shooter.

According to the testimony of several witnesses, defendant and the victim had an ongoing feud. Two witnesses recounted an incident where defendant fired a gun at the victim three to four months before the victim was killed, and one of them testified that the victim may have fired one gunshot back at defendant. A third witness testified that the victim fired gunshots at defendant three to four months before the victim was killed.

Defendant first argues that an extraneous influence on the jury constituted error requiring reversal and that the trial court abused its discretion in denying his motion for a mistrial. A trial

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

court's decision to grant or deny a mistrial is reviewed for an abuse of discretion. *People v Lett*, 466 Mich 206, 223; 644 NW2d 743 (2002).

A defendant in a jury trial has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). During their deliberations, jurors may only consider evidence presented to them in open court. *Id*. A defendant is denied his Sixth Amendment rights of confrontation, cross-examination, and assistance of counsel when the jury considers extraneous facts not introduced in evidence. *Id*.

In order to ascertain that the extrinsic influence was error requiring reversal, the defendant must first prove two points. *Budzyn, supra* at 88. Initially, the defendant must prove that the jury was exposed to an extraneous influence. *Id.* at 89. Then, the defendant must establish that this extraneous influence created a real and substantial possibility that it could have affected the jury's verdict. *Id.* In proving this second point, the defendant generally demonstrates that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. *Id*. The following factors may also be considered in determining whether the extrinsic influence created a real and substantial possibility of prejudice:

> (1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [*Budzyn, supra* at 89 n 11.]

If the defendant establishes this initial burden, the burden shifts to the prosecution to demonstrate that the error was harmless beyond a reasonable doubt, which may be accomplished by proving that either the extraneous influence was duplicative of evidence produced at trial or that the evidence of guilt was overwhelming. *Budzyn, supra* at 89-90.

During deliberations, Juror No. 2 went to the scene of the shooting to determine how close a dark-skinned person had to be to someone to enable a nighttime identification. Juror No. 2 solicited the help of a man who was in the area, and who happened to be the victim's stepbrother. Juror No. 2 had the victim's stepbrother walk toward her car, which was parked in the same location that the victim's car had been parked when he was shot. Juror No. 2 returned to deliberations the following morning and told the other jurors about her experiment. The other jurors began to protest to her words and told her that they did not want to hear her conclusions. They then told the court what had occurred. Juror No. 2 told the rest of the jury that the result of her experiment was that "it was too dark. You could not see."

There is no dispute that Juror No. 2 conducted this experiment, and that she attempted to tell the other jurors about the outcome. This occurred after deliberations began. Juror No. 2 stated that the other jurors' response was that they wanted her to tell the court what she had done and that they "wouldn't say anything to [her] but holler and fuss." The trial court immediately voir dired the jurors. All of the other jurors indicated that they had not personally been to the scene, that they tried to stop Juror No. 2 from revealing the results of her experiment, and that they would not be influenced by what she did tell them. All the jurors independently stated that

they would base their decision solely on what they had seen and heard in the courtroom and not on any extrinsic evidence. Juror No. 2 was excused, and the trial court seated an alternate juror.

This case was primarily based on Williams' identification of defendant, because she was the sole eyewitness capable of identifying the shooter. Whether the lighting was adequate for Williams to identify defendant was a material aspect of the case. We do not, however, find a direct connection between the extrinsic material and the adverse verdict. Juror No. 2's statement that it was too dark to identify defendant could not have led to the adverse verdict. If the jurors had been influenced by the extrinsic evidence, they would have exonerated defendant. Further, the trial court conducted voir dire of the jurors, each of whom stated that any extraneous influence would not influence his or her verdict. Accordingly, we find that there was no error requiring reversal, and the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant next argues that he was denied affective assistance of counsel because defense counsel did not request an expert witness on eyewitness identification. Because defendant failed to file a motion a for new trial on these grounds or request a *Ginther*[1] hearing, the issue of effectiveness of counsel has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To show that counsel's representation fell below the standard of reasonableness, a "defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). We will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, we will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Counsel's failure to call witnesses is presumed to be trial strategy, and defendant has not overcome the strong presumption that defense counsel's decision not to retain an expert witness constituted sound trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997).

Defense counsel vigorously questioned Williams on her identification, raising a possible discrepancy in her earlier testimony. Corroborating Williams' identification of defendant as the

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

shooter was defendant's ongoing feud with the victim and its violent background. It was reasonable for defense counsel not to call an expert witness in eyewitness identification because he thoroughly examined Williams and she explained the discrepancy in her earlier testimony. At trial, Williams stated that she had seen the shooter's face. Defense counsel confronted Williams with her testimony from the preliminary examination as follows:

> *Q.* Mr. Hall the Prosecutor at that time asked you, I am starting at 117.
>
> "Q You said that the person who was approaching you, he was within a couple of feet away. Were you able to see his face."
>
> And you gave an answer, correct?
>
> *A.* Right. Read my answer.
>
> *Q.* "A At that time I was backing away from [the victim]'s car so I couldn't really see his face."
>
> *A.* Right, at that time, but I had saw his face prior to that.
>
> *Q.* I think you said you saw his face when he was about two to four feet away?
>
> *A.* Not while I was moving back. I seen his face when he got to the car; when he got to, like the back end of the car. While I was backing up, I didn't see his face, no, I didn't. But I had already seen him before then.

Because defense counsel used the cross-examination to weaken Williams' identification testimony, counsel could have reasonably believed that expert testimony was unnecessary. Further, defendant's ongoing feud with the victim gave him a possible motive for the shooting. Accordingly, defendant has failed to demonstrate that trial counsel's performance was objectively unreasonable or that defendant was prejudiced by counsel's performance.

Defendant next argues that the prosecutor committed misconduct during closing arguments when he tried to illicit sympathy for Williams, denigrated the defense, and made civic duty arguments. Because defense counsel failed to object to the prosecutor's statements, this issue is unpreserved and will be reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). We will only reverse defendant's convictions if he is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 763-764. Thus, 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).

Defendant first argues that the prosecutor improperly attacked defendant and defense counsel. A prosecutor is not permitted to personally attack defense counsel or the credibility of defense counsel. *McLaughlin, supra* at 646; *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996). Similarly, a prosecutor may not suggest that defense counsel is intentionally

attempting to mislead the jury, but may respond to defense counsel's arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001).

Defendant claims that the prosecutor prejudiced him by suggesting that his case was silly and that there was no real issue to decide. Even if the comments were improper, they did not rise to the level of denying defendant a fair trial. Because defendant did not object to the comments, if a curative instruction could have alleviated any prejudicial effect, the appellate court will not find reversible error. *Ackerman, supra* at 448-449. The court instructed the jury that the lawyers' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, ___; 687 NW2d 342, 352 (2004). Therefore, the prejudicial effect, if any, would have been cured by the jury instructions.

Defendant next argues that it was improper for the prosecutor to appeal to the sympathy of the jury. After reviewing the record, however, we find that the prosecutor's comments about Williams did not blatantly appeal to the jury's sympathy, and the comments were not so inflammatory that they prejudiced defendant. The comments were only a brief part of the overall case that the prosecutor presented. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). The court instructed the jury that the lawyers' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *Matuszak, supra* at 352. Therefore, the prejudicial effect, if any, would have been cured by the jury instructions. Under these circumstances, even if improper, defendant was not prejudiced by the prosecutor's comments, and reversal is not required. *Watson, supra* at 591-592.

Defendant next argues that the prosecutor appealed to the jurors' civic duty to obtain a conviction. However, defendant does not state any instances of a civic duty argument. Defendant has merely cataloged this allegation of misconduct, and he does not attempt to support his allegation by indicating specific language that was improper or otherwise explain how it prejudiced him.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).]

Defendant next argues that the trial court erred in excluding testimony of a statement that the victim allegedly made regarding "Cleland." A trial court's decision whether to admit evidence is reviewed for abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defendant attempted to introduce evidence that the victim had told his friend that he was afraid of someone named "Cleland." Defendant argued that, although hearsay, the statement should be admitted pursuant to MRE 803(3) as a then-existing mental, emotional, or physical condition. The trial court did not admit the statement because it was not a material issue or relevant to the case.

Normally, relevant evidence is admissible, and irrelevant evidence is not. MRE 402. If it has any tendency to make the existence of a fact that is of consequence to the action more

probable or less probable than it would be without the evidence, then the evidence is relevant. MRE 401. To be material and relevant, evidence does not need to relate to an element of the charged crime or an applicable defense, but may concern the relationship of the elements of the charge, the theories of admissibility, and the defenses. *People v Brooks,* 453 Mich 511, 518; 557 NW2d 106 (1996); *Kevorkian, supra* at 442.

We conclude that the trial court did not abuse its discretion in refusing to admit the victim's statement that the victim was afraid of someone named "Cleland." There was no evidence linking "Cleland" to the shooting, or evidence of an "ongoing feud" between Cleland and the victim that would tend to make it more likely that Cleland was involved in the victim's death. The fact that the victim may have been afraid of someone else in no way made it more or less probable that defendant was the shooter.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood