

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME E. CRUTCHER,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 244277

Wayne Circuit Court

LC No. 01-004721

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of twenty to forty years each for the armed robbery and carjacking convictions, and 2-1/2 to 5 years for the felon in possession conviction, and a consecutive five-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Two men, one armed with a gun, robbed Eddie Edwards of his car, money, and other items around noon on March 16, 2001. Edwards identified defendant as the robber who held the gun. Defendant confessed to the crime, but later contended that the confession was coerced. At trial, defendant claimed that Edwards misidentified him, and presented an alibi defense.

I

Defendant claims that the trial court erred in denying his motion to suppress Edwards' photographic identification. Defendant claims that the procedure was impermissibly suggestive because only three of the six photographs in the array depicted dark-complexioned men, and he was the darkest of the three. He argues that Edwards believed that the suspect would be in the array, creating a one-in-three probability that Edwards would choose defendant. We review a trial court's decision to admit identification evidence for clear error. *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

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

At a pretrial *Walker/Wade*¹ hearing, defense counsel, in referring to the photos, argued that three of the men were “light to medium complected. [sic]” and that the other three were “dark complected [sic]” with defendant having the darkest complexion of the three. The trial court rejected defendant’s argument that this factor made the array impermissibly suggestive, reasoning that complexion is a subjective feature, and photographs often do not accurately depict skin tone. No other factor is cited as having been suggestive in the photo array, although defendant argues that the victim was aware that the police had a suspect in the crime when he appeared to view the photos. The latter goes without saying; the police would not waste their time or the victim’s time unless they had a suspect whose photo they could include in an array. We conclude that the trial court’s reasoning was sound, and that it did not clearly err in admitting the photographic identification.

Defendant also argues that Edwards’ courtroom identification should have been suppressed because Edwards stayed in the courtroom during the pretrial *Walker* hearing in violation of a sequestration order. Defendant’s argument is not factually accurate. When the trial court granted defendant’s sequestration motion, it stated, “Please make sure the witnesses are sequestered. That is as to each particular claim, *not as to the case. So if you have a Wade person that’s going to testify in the Wade and not in the Walker, they don’t have to be sequestered.*” Edwards testified in the *Wade* portion of the hearing, but not in the *Walker* portion. Accordingly, he was not obligated to leave the courtroom during the *Walker* testimony.

II

Defendant claims that the trial court should have suppressed his confession, which he contends was given involuntarily. The Due Process Clause of the Fourteenth Amendment prohibits use of an involuntary statement coerced by police conduct. US Const, Am XIV; *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). The question whether a statement was made voluntarily is generally determined by an examination of police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). When this Court reviews a trial court’s determination of voluntariness, it is required to examine the entire record and make an independent determination of the issue as a question of law. *Wells, supra* at 386. However, this Court will affirm the trial court’s decision unless it is left with a definite and firm conviction that the trial court erred. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Factors affecting voluntariness include the repeated and prolonged nature of the questioning, the length of detention, whether the accused was intoxicated or drugged when he gave the statement, and abuse and threats of physical abuse. *Id.* at 753. If the question of voluntariness rests on a disputed factual question that turns on the credibility of witnesses or the weight of the evidence, this Court will defer to the trial court, given its superior opportunity to evaluate these matters. *Id.* at 752

Defendant testified that the officers were “rough” with him when he was arrested, and that he was under the influence of heroin. He stated that officers punched him, pushed him,

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965); *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)

bound him with extremely tight handcuffs, and threatened to sodomize him. He claimed that they ignored his repeated requests for an attorney. He testified that he succumbed to the pressure and gave a statement after several hours of continuous interrogation. In contrast, Officer Michael Russell denied threatening or abusing defendant. He stated that defendant did not appear to be under the influence of heroin. Although defendant testified to circumstances that could establish involuntariness, the trial court found that defendant's testimony was not credible, and denied the motion to suppress. Because we defer to the trial court's determination of credibility, we resolve this issue against defendant.

Defendant also claims that the police disregarded his request for an attorney. Both the United States and Michigan Constitutions guarantee the right against compelled self-incrimination. US Const Am V; Const 1963, art 1, § 17. This right encompasses an accused person's right to cease a custodial interrogation by asserting his right to counsel. *People v Adams*, 245 Mich App 226, 230-231, 235, 237; 627 NW2d 623 (2001). When a defendant claims that his statement should have been suppressed because the police did not honor his request for counsel, this Court reviews the record de novo, but reviews the trial court's factual findings under the clearly erroneous standard. *Id.* Because the trial court's determination that defendant lacked credibility was not clearly erroneous, we defer to that finding and, accordingly, deny defendant's claim for relief on this basis.

Defendant claims that counsel was ineffective at the *Walker* hearing because he failed to demand that the prosecution produce as a witness Michigan State Police Trooper Lil John Drew, who allegedly beat him during the interrogation. (Defendant purportedly did not know Drew's name until he heard it at the *Walker* hearing.) Defendant contends that he would have prevailed at the *Walker* hearing if counsel had demanded Drew's production, and that he would likely have been acquitted if his confession had been suppressed.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted and must overcome the strong presumption that the attorney was exercising sound strategy. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Unless a defendant claiming ineffective assistance of counsel moves for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Here, defendant did not request a *Ginther* hearing, and there is no indication in the record that Drew's testimony could have led to a favorable outcome at the *Walker* hearing. On the contrary, Drew testified as a rebuttal witness at trial and refuted defendant's testimony that Drew coerced his confession through physical abuse. Consequently, there is no basis for concluding that counsel's failure to demand Drew's production was error, or that it affected the outcome of the proceedings.

III

Defendant claims that the trial judge committed misconduct by suggesting to the jurors that Edwards was a credible witness because he was a minister. This Court reviews claims of judicial misconduct to determine whether the trial judge's statements evinced partiality that could have prejudiced the jury against the defendant. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). When reviewing a claim of judicial misconduct, we review the record as a whole, and may not take portions of the record out of context. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

During jury voir dire, the trial judge questioned prospective jurors concerning their opinions about the honesty of various classes of people. He asked the jurors whether they believed men were more honest than women, adults than children. The trial judge also asked jurors which professions they believed were the most honest or dishonest. Four prospective jurors responded that they believed the clergy was the most honest profession. The trial judge did not evince any partiality toward Edwards or against defendant in these exchanges. On the contrary, as the prosecutor asserts, this questioning might have helped defense counsel identify prospective jurors who were inclined to believe that a minister is more honest than others who might testify.

The trial judge later asked a juror which profession the juror believed was the most "exalted" in the community. After the trial judge suggested that religious leaders were the most "exalted," he and the juror discussed prominent ministers in the community, the process of becoming a minister, and how ministers "package" themselves, or persuade others to follow them. The trial judge commented that ministers "don't want people to see a liar" in the pulpit, and that they "want to project a person that walks the walk and talks the talk."

While somewhat unorthodox, considered in context, we do not view the trial judge's comments as improperly bolstering the veracity of Edwards specifically, or the clergy generally. The trial judge did not praise ministers as a group for their honesty, or suggest that all ministers are entitled to belief. Indeed, the trial judge's comments could be viewed as unfavorable to the clergy, by suggesting that ministers market themselves like commercial commodities to achieve better reputations than they deserve. Moreover, it appears that the trial judge asked these questions for the legitimate purpose of advising jurors to assess the witnesses' credibility with an open mind, instead of judging them by their professions. For these reasons, we reject this claim of error.

IV

Defendant argues that the trial court erred in excluding evidence that could have bolstered his alibi defense after it was refuted by a rebuttal witness. Donald Anderson, defendant's alibi witness, testified that he met with defendant around noon on March 16, 2001, to discuss a work assignment at the Kyle Medical Clinic. Anderson explained that defendant worked for Anderson's janitorial service, which had a contract with Dr. Kevin Kyle, the owner of the clinic. Dr. Kyle testified in rebuttal that he had hired Anderson's service for only one month in 1999, and that Anderson had no contract or other work arrangement with the clinic in 2000 or 2001. Defense counsel sought to introduce documents that he claimed were signed contracts between Anderson's business and Dr. Kyle's clinic. The purported contracts were

dated March 7 and 15, 2000, and bore Anderson's signature and a second, illegible signature, followed by the initials M.D. The trial court denied admission of the documents. We review the trial court's evidentiary decision for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

At most, the alleged contracts showed that Anderson performed janitorial work for the clinic in March 2000, a full year before the robbery. Consequently, they were not substantive evidence supporting defendant's alibi, but instead extrinsic evidence to impeach Dr. Kyle's testimony that he ceased to have any relationship with Anderson's business after 1999. MRE 608(b) provides that a party may not use extrinsic evidence of specific instances of a witness' conduct for the purpose of attacking the witness' credibility. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). Therefore, the trial court properly excluded the evidence.

V

Defendant raises several claims of instructional error. This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal, and "Even if somewhat imperfect, [jury] instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

Defendant claims that the trial court failed to instruct jurors that they could not discuss the case among themselves before they were instructed to begin deliberations. Defendant misstates the facts here, because the trial court instructed the jurors during its preliminary instructions that they were not permitted to discuss the case until deliberations began. Although the trial court did not repeat this instruction each time the jury was excused, the initial instruction was sufficient, as jurors are presumed to follow the trial court's instructions. *People v Houston*, 261 Mich App 463, 469; 683 NW2d 192 (2004). Furthermore, defendant did not ask the trial court to repeat the instruction each time the jurors were excused, so appellate relief is not warranted absent a plain error affecting his substantial rights. MCL 768.29; *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Defendant has not shown that the jurors violated the prohibition against premature discussions of the case, so the omission of reminders to the jury did not affect his substantial rights.

Defendant claims that the trial court failed to instruct the jurors on his defenses until after they had been excused to deliberate. The record indicates that defense counsel informed the trial court of this omission immediately after the jury was excused. The trial court recalled the jurors and gave the alibi and identification instructions. The trial court's prompt correction of its error was sufficient to protect defendant's rights. *Gonzalez, supra*.

Defendant claims that the trial court gave an erroneous, nonstandard instruction on deliberations. Essentially, the trial court instructed the jurors not to select a foreperson, so that all jurors would act as both leaders and followers during deliberations, and it instructed the jurors to explain their opinions and listen to each other with open minds. Defendant objected on the ground that the trial court did not instruct jurors as to "whether or not they should render their own opinion for the purpose of reaching a verdict." The trial court responded to this objection by recalling the jurors and instructing them not to give up an honest belief just to reach a unanimous decision.

Although defendant complains that this was a nonstandard instruction, he does not explain how it was deficient, or how it misstated the law, or how it prejudiced him. This issue is therefore waived, because a party “may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.” *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Moreover, except for the exclusion of the foreperson, the trial court’s instructions repeated the substance of CJI2d 3.11, which our Supreme Court has determined to be a “sound instruction.” *People v Pollick*, 448 Mich 376, 385-386; 531 NW2d 159 (1995). Although CJI2d 3.11(1) states that jurors should choose a foreperson, a trial court is not required to adhere to the standard instructions. *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985). We conclude that the trial court’s instruction was sufficient to protect defendant’s rights. *Gonzalez, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs