STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2006
v	No. 262997 Ingham Circuit Court
TYRONE DEMETRIUS SLUSSER, Defendant-Appellant.	LC No. 04-001265-FC

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of one count of first-degree murder, MCL 750.316, two counts of assault with intent to murder, MCL 750.83, and one count of possession of a firearm during commission of a felony (felony-firearm), MCL 750.227b(a). Defendant was sentenced as a second offense habitual offender, MCL 769.10, to concurrent prison terms of life without parole for the first-degree murder conviction and 39 to 60 years for each assault with intent to murder conviction, and to two consecutive years for the felony-firearm conviction. We affirm.

Defendant first claims that he was denied a fair trial because the prosecutor improperly impeached his alibi witness on a collateral issue. We disagree. We review a trial court's decision whether to admit evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). "MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters[.]" *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003). Extrinsic evidence is "[e]vidence that is calculated to impeach a witness's credibility, adduced by means other than cross-examination of the witness." Black's Law Dictionary (8th ed), p 597. Plaintiff did not attempt to enter any extrinsic evidence to impeach Neil, but only cross-examined her. Therefore, the rule against impeachment using extrinsic evidence on a collateral matter was not violated. Moreover, the questions pertained to the witness's potential bias in favor of family members, and bias is "almost always relevant." *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001).

Defendant next claims that multiple instances of prosecutorial misconduct necessitate reversal. We disagree. Prosecutorial misconduct claims are reviewed on a case-by-case basis, looking at the prosecutor's comments in context and in light of the defense arguments and their relationship to evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Because defendant did not timely object, these claims are unpreserved and reviewed

for plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Plain error affecting substantial rights is error that resulted in the conviction of an actually innocent person or which seriously affects the fairness, integrity, or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003). Moreover, reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Callon*, *supra* at 329-330.

Defendant first claims that plaintiff improperly shifted the burden of proof to defendant and improperly made an issue of defendant's post-*Miranda*[1] silence by noting that defendant did not claim innocence in the recorded phone calls he made from jail. We disagree. The prosecutor did not attempt to suggest that defendant's silence indicates guilt. Rather, defendant spoke multiple times on a police telephone that he knew was recording his calls, and the prosecutor permissibly commented on the content of those conversations, including what was not discussed. A prosecutor is permitted to argue the evidence and all reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); see also *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999).

Defendant next claims that the prosecutor improperly commented on the credibility of witnesses by stating that Maria Neil would lie for defendant and stating that he did not find it unusual that Sam Hernandez lied to the police about his name. Regarding the former, the prosecutor reasonably commented on evidence that Neil had a reason to lie because of a shared child with defendant. Regarding the latter, the prosecutor reasonably commented on evidence that Hernandez had a reason to lie about his name because he believed he would otherwise be arrested for unpaid child support. The prosecutor did not impermissibly vouch for any witnesses or indicate possession of special knowledge that was not presented to the jury. *Bahoda*, *supra* at 276. A prosecutor may argue, on the basis of the evidence, that a witness is worthy or unworthy of belief. *Thomas*, *supra* at 455.

Defendant also claims the prosecutor improperly pressured the jury to return a guilty verdict to bring defendant to justice when he stated, "I ask you to find him guilty of these charges and to be sure that he never forgets that night as well." This was no more than a poetic flourish echoing the remarks of several witnesses who said that they would never forget the night of the shooting. A prosecutor may use emotional language and "is not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). In any event, the trial court instructed the jury to base its verdict only on the evidence, not on the lawyers' statements and arguments, and "jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, defendant claims the prosecutor improperly denigrated defendant's counsel, questioning his veracity by stating in rebuttal argument "[t]hat's his [defense counsel's] job, to mislead you." We agree that this is clearly improper. A "prosecutor may not question defense counsel's veracity." *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). "When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality." *Id*. at 102 (citation omitted). See also *People v Moore*, 189 Mich App 315, 322; 472 NW2d 1 (1991). Plaintiff's argument that this remark was simply a comment on the defense theory, not defendant's counsel personally, is unpersuasive and somewhat unsettling considering that prosecutors are not merely advocates but also "sworn ministers of justice." *People v Carr*, 64 Mich 702, 708; 31 NW 590 (1887).

Though the error is clear, there was overwhelming evidence of defendant's guilt, including multiple witnesses who saw him shoot the victim, a shell casing found on the ground by his car, and similar shells found inside his residence. The prosecutor's inappropriate remark was not objected to and did not rise to the level of plain error affecting defendant's substantial rights, so reversal is not warranted. *Callon*, *supra* at 329-330. Moreover, even if it had been preserved, the error was harmless beyond a reasonable doubt because this one short sentence is unlikely to have changed the jury's verdict in the six-day trial. *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995).

Defendant next claims that the trial court should have excluded evidence seized from his residence because the search warrant for his residence was not signed and was not supported by a proper affidavit. The warrant and affidavit were not admitted at trial, and this was not raised as an issue below, so there is no basis for this Court to consider this claim because the record cannot be expanded on appeal. *Detroit Leasing Co v Detroit*, 269 Mich App 233, 237; 713 NW2d 269 (2005).

Defendant next claims that there was insufficient evidence to support his murder and assault with intent to murder convictions because the eyewitnesses were tainted, he was never shown to "possess" a shell casing found near his car, there was no indication that he intended to kill anyone, and thus no evidence his killing was premeditated. We disagree. We review challenges to the sufficiency of evidence de novo, in the light most favorable to the prosecution, to determine whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant argues that the witnesses who identified him were tainted by talking to each other just after the shooting, and the witnesses who did not identify him in a photo lineup were further tainted by having defendant pointed out to them in a hallway prior to the preliminary examination. At least one witness, Lisa Clark, did identify defendant in a photo lineup after the shooting. Clark, Violet Garza, and Hernandez all indicated that the photo of defendant in the photo lineup looked different than defendant looked on the night of the shooting because his hair was different. Once they saw him in person, they all identified defendant as the shooter. Any potential problems with their identification were all laid out before the jury by defendant as part of his case, and it is ultimately up to the jury, as trier of fact, to decide whether to believe or disbelieve each witness. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Other evidence suggested that defendant was the shooter, including testimony from Clark and Hernandez that the shooter's car matched defendant's black Cadillac, a shell casing identical to the ones used in the shooting found next to defendant's car, and shells of the same type and brand also found in defendant's residence. When viewed in the light most favorable to the

prosecution, there was sufficient evidence to support a jury finding beyond a reasonable doubt that defendant was the shooter. *Johnson*, *supra* at 723.

Defendant's contention that he was not properly found to be in "possession" of the shell casing found near his car is irrelevant. Plaintiff did not attempt to show defendant "possessed" the shell. Its value as evidence is based on the fact it was of the same type used in the shooting and was found next to defendant's car the next morning, because it would be an unlikely coincidence to find such a shell casing in that location at that time if defendant were not the shooter. A juror need not find that he "possessed" the shell to understand its significance to the case, and none of the crimes charged require proving beyond a reasonable doubt that defendant "possessed" a shell casing after the fact.

Defendant argues that he could not have reasonably mistaken Hernandez's truck for Lorenzo DeYoung's truck, and he could not have intended to kill anyone if he fired multiple shots into the truck from only ten feet away and only hit one occupant with one of those shots. Defendant concludes that he therefore could not have intended to kill anyone. We disagree. It does not matter who defendant believed was inside the truck. An intent to kill the occupant is sufficiently established merely by firing five shots into the front of a vehicle known to be occupied. At most, defendant has established poor aim, which is unremarkable given the testimony regarding his intoxication that night. There is sufficient evidence for a juror to find it established beyond a reasonable doubt that defendant intended to kill all of the occupants of the vehicle, satisfying the intent element for both premeditated murder and assault with intent to commit murder.

We also find unpersuasive defendant's argument that there was insufficient evidence of premeditation. That defendant fared poorly in a fight with DeYoung earlier in the evening, was angry at him and wanted to retaliate, and warned Williams "to go inside" just before he left the bar is evidence of premeditation the trier of fact could find to be sufficient. When viewed in the light most favorable to the prosecutor, these facts suggest that defendant was thinking of doing something to DeYoung even before he left the bar. This is further supported by testimony that defendant first drove away and dropped off his girlfriend before turning around and going back to the bar and the shooting. Thus, there was ample evidence of time for reflection and no evidence that the shooting was done in the heat of the moment. There was sufficient evidence for the jury to find beyond a reasonable doubt that defendant's intent to kill was premeditated.

Finally, defendant claims he was denied effective assistance of counsel based on his lawyer's alleged failure to properly investigate the law related to voluntary intoxication, to object to evidence obtained with an improper warrant, to call an additional witness to testify about the content of defendant's phone calls from jail, to properly file notice of defendant's alibi witness, and to object to multiple instances of prosecutorial misconduct. We disagree.

To establish ineffective assistance of counsel, defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Where there is no evidentiary hearing, appellate review of defendant's claim of ineffective assistance of counsel is limited to the existing record.

People v Snider, 239 Mich App 393, 423; 608 NW2d 502 (2000). Defendant's trial counsel's alleged failure to properly investigate the law related to voluntary intoxication, his alleged failure to object to evidence obtained with an improper warrant, and his alleged failure to call an additional witness to testify about the content of defendant's phone calls from jail involve factual issues not part of the existing record. Therefore, those issues are precluded from review.

Defendant's trial counsel did not file a notice of alibi for Neil's testimony, but she was nevertheless permitted to testify as an alibi witness. Therefore, defendant cannot show that failure to file the notice affected the outcome of the case. Defendant's trial counsel did not object to or attempt to suppress the eyewitness identifications by Hernandez and Garza. However, counsel used their testimony to bring out all of the deficiencies and potential problems with their identification at trial, including their intoxication, their failure to identify defendant in the photo lineup, and their encounter with defendant in the hallway before his preliminary hearing. Counsel could not otherwise have demonstrated that some of the eyewitnesses failed to identify defendant as the shooter at the time of the shooting. This was a valid trial strategy to put reasonable doubt in the mind of jurors about the identification of defendant as the shooter at the time of the shooting. That it "ultimately failed does not constitute ineffective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant's trial counsel was not ineffective for failing to object to most of defendant's claims of prosecutorial misconduct because, as discussed, those actions by the prosecutor were not misconduct. There is no obligation for counsel to advocate a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). The prosecutor engaged in misconduct by stating that it was defense counsel's job to mislead the jury. Although failing to object to such a blatantly prejudicial comment may be below an objective standard of reasonableness under professional norms, we need not decide whether it was. Given the overwhelming evidence of defendant's guilt, there is no reasonable probability that this comment altered the result at trial. *Strickland*, *supra* at 694.

Finally, there is no cumulative error as to the failure to object to the alleged prosecutorial misconduct because the only possible mistake here involved the prosecutor's improper comment about defendant's counsel misleading the jury.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis