STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2009
v	No. 278735 Wayne Circuit Court
BERNARD B-GREGORY ALLEN, Defendant-Appellant.	LC No. 07-005400-01

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for two counts of armed robbery, MCL 750.529. Defendant was sentenced to 15 to 25 years' imprisonment for each armed robbery conviction, to be served concurrently. We affirm.

I. Facts

This case arose out of a robbery that occurred at approximately 5:30 a.m. on January 20, 2007, when the victims, Damien Boyd and Lamarco Greenwood, stopped at a gas station on Fenkell Street in the city of Detroit to fill Greenwood's 1996 Ford Taurus with gas on their way to work. They were subsequently robbed by two men, who pulled up to the gas station in a 1994 gold Chevrolet Lumina. Boyd gave detailed testimony regarding the circumstances surrounding the armed robbery. He also identified defendant in court as the driver of the Lumina. Three days after the robbery, police officers attempted to stop a Lumina that fit the description of the vehicle that Boyd had given. When the police activated the lights and siren, the Lumina accelerated, turned right and crossed through an open field. A chase ensued, and ultimately, the Lumina stopped and the occupants fled on foot. One of the officers observed defendant exit the Lumina from the driver's seat. The officer chased defendant and ultimately found defendant hiding in a large black trash receptacle, where defendant was apprehended.

On January 24, 2007, Sergeant Robert Lalone conducted a lineup with defendant and the other perpetrator. Officer Lalone and Boyd both testified at trial that Boyd identified defendant in the lineup. Officer Lalone further testified that Greenwood identified defendant in the lineup.

Although Greenwood was expected to appear and testify at trial, he failed to appear. The prosecution sought to introduce Greenwood's testimony from defendant's preliminary

examination. The trial court determined that this was permissible, and Greenwood's testimony from the preliminary examination was read into the record.

Defendant presented an alibi defense at trial, claiming that he was with his girlfriend. Defendant's girlfriend testified that at the time of the armed robbery, defendant was at home with her and the couples' children.

A jury convicted defendant of two counts of armed robbery. It is from these convictions that defendant appeals as of right.

II. Analysis

Defendant first argues that the trial court erroneously determined that the prosecution exercised due diligence in procuring victim Greenwood's attendance at trial, and therefore improperly admitted Greenwood's preliminary examination testimony. Defendant raised this evidentiary objection at trial. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). We review the trial court's decision to admit evidence "for a clear abuse of discretion." *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). Defendant's alternate Confrontation Clause objection, which he did not preserve, is reviewed for plain error. *Bauder*, *supra* at 177-178, 180, citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

It is axiomatic that defendant has a constitutional right to confront the witnesses against him. US Const, Ams VI, XIV; Const 1963, art 1, § 20; *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998). However, the prosecution may use preliminary examination testimony "whenever the witness giving such testimony can not, for any reason, be produced at the trial." MCL 768.26. MRE 804 provides that such former testimony may be introduced at trial where the witness is unavailable. An unavailable witness is one who "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). The test for due diligence is whether the prosecutor made "a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean*, *supra* at 684.

The trial court did not abuse its discretion in finding that the prosecutor exercised due diligence in attempting to procure Greenwood's attendance at trial. The record reflects that the prosecution and police made reasonable, good faith efforts in light of the circumstances. *Id.* The parties and the trial court were all under the impression that Greenwood was prepared to provide his testimony voluntarily and willingly, without a subpoena. He previously attended the preliminary examination and testified without problem. The first subpoena, sent to his Detroit address, was returned, and the police then learned that Greenwood moved to Grand Rapids. They maintained contact with Greenwood and he indicated that he would appear for trial. Greenwood was aware of the trial date and made arrangements to stay at the other victim's house the night before trial. Police spoke with Greenwood the day before trial and he indicated that he was "en route" to Detroit. He gave no indication that he would fail to show. When Greenwood unexpectedly failed to appear on the morning of trial, the prosecution and police, in the short time available, unsuccessfully attempted to contact him on his cellular telephone. They also contacted other law enforcement agencies. The trial court properly exercised its discretion in

admitting the preliminary examination testimony. Greenwood was thoroughly cross-examined during the preliminary examination regarding the central issue at trial, the identification of defendant. There was no Confrontation Clause violation.

Defendant next claims that hearsay was erroneously admitted when Sergeant Lalone testified regarding Greenwood's statements at the lineup where he identified defendant. We agree. A statement of prior identification, offered by a third party at trial, is defined as nonhearsay, "provided the witness is available for cross-examination." *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994); MRE 801(d)(1)(C). At trial, Lalone testified that Greenwood identified defendant at the lineup, and did so within approximately five seconds. The prosecution concedes that Greenwood did not testify at trial. Thus, the trial court abused its discretion in admitting hearsay testimony, which was inadmissible as a matter of law, because the witness was not available for cross-examination at trial. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

However, this error was harmless. "An erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony." *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Given the other evidence at trial, it was not more probable than not that the erroneous admission of this hearsay testimony affected the outcome of the trial. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Victim Boyd's testimony provided a detailed account of the robbery and strong identification evidence; he looked directly at defendant during the commission of the robberies, testified that defendant demanded the keys to the Taurus, described defendant's clothing, quickly picked defendant out of the lineup, and identified defendant at trial. Moreover, Greenwood's preliminary examination testimony, admitted at trial, also provided strong identification evidence. Greenwood identified defendant as the individual who drove the Lumina and then approached him, stood outside the car door while the victims were being robbed at gunpoint, then took the keys and threw them, telling the victims they could fetch the keys after defendant and the unknown perpetrator left.

Defendant also argues that there was insufficient evidence presented at the preliminary examination to support a finding of probable cause to support a bindover. This issue is unpreserved. *People v Sparks*, 53 Mich App 452, 454; 220 NW2d 153 (1974). Moreover, any error in the bindover was harmless where defendant was convicted of the offenses at trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Further review of this issue is unwarranted, except to acknowledge that defendant also claims that the district court's bindover decision was based on bias against defendant as a "black" male. However, this claim lacks merit because the allegedly biased remarks by the district court were made after the bindover and in reference to its decision on the prosecution's request to increase defendant's bail. The district court ruled in favor of defendant on that issue.

Defendant next alleges several instances of prosecutorial misconduct. These claims are unpreserved because defendant failed to object during trial. Review is therefore precluded unless a timely objection would have failed to cure the error, or a miscarriage of justice would result. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We must view the conduct in context to determine if defendant was denied a fair trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

After reviewing the prosecution's opening statements, we conclude that, while it appears that the prosecution confused "defendant" with his codefendant, "the unknown perpetrator," in a few instances during her opening statement, the statements as a whole did not deprive defendant of a fair trial. *Goodin*, *supra* at 432. The prosecution's few misstatements were minor and were countered by other accurate statements. Further, the trial court instructed the jury that the attorneys' statements were not evidence and that they should reject statements that were unsupported by the evidence, which was sufficient to cure any unpreserved error. *People v Taylor*, 275 Mich App 177, 185; 737 NW2d 790 (2007). The jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

We also find that the prosecution's statement that the two perpetrators used force or threat of force was appropriate and supported by the evidence that the unknown perpetrator used a gun and defendant assisted him. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *Carines*, *supra* at 768.

Defendant next argues that the prosecution's closing argument relating to flight only provided a portion of the relevant law. However, the record reflects that the prosecution did not clearly misstate the law in arguing that, "[flight] can be evidence of a guilty mind and then they run." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). She did not argue that flight evidence necessarily proves guilt. Furthermore, the trial court correctly instructed the jury on flight evidence,[1] directed the jury that it "must take the law as I give it to you," and to disregard a contradictory statement by the lawyers. Thus, defendant's claim is precluded. *Id.*

Defendant next asserts that the prosecution impermissibly quoted the Bible in closing arguments:

> Officer Skender positively identified this Defendant as the person who was driving the car. He saw this Defendant jump out of the car and he was the driver, but the thing about when the police came up and they activated the sirens the Defendant flees. He doesn't have any reason to flee and I'm reminded of Proverb 28, the wicked will flee,[2] when the righteous will stand fast like a lion.

The prosecution may not inject issues broader than guilt or innocence into the trial. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). This prohibition includes extraneous religious matters. *People v Rohn*, 98 Mich App 593, 597; 296 NW2d 315 (1980), overruled on other grounds by *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). However, we conclude that the prosecution's Biblical reference in this case did not constitute misconduct. The isolated reference, without elucidation, was a much briefer reference than the statements and explanation by the prosecution in *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987), where the prosecution quoted the same Biblical passage at issue here several times, interpreted the passage for the jury, and there was a pastor on the jury. The context of the challenged argument supports that it was also not an attempt to call on the jurors to convict

[1] The trial court's instructions mirrored the model jury instruction on flight, CJI2d 4.4, cited with approval in *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992).

[2] Proverbs, chapter 28, verse 1: "The wicked flee when no man pursueth."

defendant because of their responsibility to a higher authority, as in *Rohn*, *supra* at 598 n 1. Defendant has failed to demonstrate the existence of a plain error affecting his substantial rights. *Callon*, *supra* at 329.

Lastly, defendant's assertion that the prosecution's cumulative errors denied defendant a fair trial is also unavailing. There were no errors in this case to accumulate. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Defendant next alleges that the trial court failed to give a "mere presence" instruction. Defendant did not request this instruction, and indicated that he approved of the instructions as given. This claim is not preserved. *People v Fletcher*, 260 Mich App 531, 557-558; 679 NW2d 127 (2004) (To preserve an error in the failure to give jury instructions, a party must make a request on the record.); see also *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). It is therefore reviewed for plain error. *Carines*, *supra* at 763-764. Moreover, defendant must show manifest injustice, which occurs when a missing instruction "pertains to a basic and controlling issue in the case." *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997).

While an instruction on mere presence is appropriate where a defendant is charged as an aider and abettor, *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999), the record reflects that this defense was never argued or presented at trial. Indeed, defendant provides no factual support from the record to substantiate his claim that a mere presence instruction was warranted, and there was no manifest injustice present because "mere presence" was not a "basic and controlling issue in the case." *Torres (On Remand)*, *supra* at 423. Defendant's theory at trial was that he was misidentified and he had an alibi; the instructions as given did not omit a material defense that was supported by the evidence. *People v Bartlett*, 231 Mich App 139, 143-144; 585 NW2d 341 (1998). Additionally, the trial court instructed the jury that "to prove aiding and abetting the prosecutor must show that . . . Defendant did something to assist in the commission of the crime and . . . Defendant must have intended the commission of the crime alleged or must have known that the other person intended its commission . . . ." Based on these instructions, the jury would have acquitted defendant if it believed he was merely present. Reversal is not required.

Defendant next contends that a new trial is warranted on the basis of newly discovered evidence; he failed to preserve this issue by moving for a new trial in the trial court. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998); MCR 2.611; MCR 2.612. It is therefore reviewed for plain error that affected defendant's substantial rights. *Carines*, *supra* at 763-764. A new trial is warranted where the defendant shows that: "(1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); MCR 6.508(D).

We conclude on the record that defendant's allegedly newly discovered evidence, the testimony of Brandon Hampton exculpating defendant, was known to defendant well in advance of trial. In fact, the record reflects that defendant at one time listed Hampton as a witness and attempted to implicate Hampton when defendant spoke with police after the lineup, and knew

that Hampton pleaded guilty to the crime. Thus, Hampton was not a newly discovered witness, and his possible testimony that he committed the robberies, not defendant, was also not newly discovered evidence. See *People v Dixon*, 217 Mich App 400, 409-410; 552 NW2d 663 (1996) (The defendant claimed newly discovered evidence in the form of an eyewitness that would allegedly substantiate the defendant's innocence, but the defendant knew of the existence of the eyewitness well before trial commenced.) Defendant has also failed to argue or show that this information, even if new, could not have been discovered before trial with reasonable diligence, or that a different result would be probable on retrial. *Cress*, *supra* at 692. Defendant has failed to demonstrate the existence of plain error that affected his substantial rights. *Carines*, *supra* at 763-764.

Defendant also asserts both that his conviction was against the great weight of the evidence and that there was insufficient evidence to support his conviction. Defendant did not move for a new trial; his great weight of the evidence claim is unpreserved. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). It is therefore reviewed for plain error. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). With respect to defendant's sufficiency of the evidence claim, we review the evidence de novo, in the light most favorable to the prosecution, in order to determine whether any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

We find that both of defendant's claims are unavailing. The evidence presented at trial did not preponderate "so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, *supra* at 218-219. Boyd saw and identified defendant, and any factors affecting his ability to identify defendant constitute weight and credibility issues that are left to the jury. *People v Lemmon*, 456 Mich 625, 642-643, 647; 576 NW2d 129 (1998). Even though Boyd's testimony was questioned to some extent, this is insufficient grounds for granting a new trial. *Musser*, *supra* at 219. Boyd's testimony was not so inherently implausible or contradicted by indisputable physical realities that the jury could not believe it. *Id.* Similarly, the evidence was also sufficient to establish, beyond a reasonable doubt, that defendant aided and abetted in the robberies. Again, with respect to the victims' identifications of defendant, the only issue challenged on appeal with regard to sufficiency, the evidence must be viewed in the light most favorable to the prosecution, and it is the jury's role to assess how much weight to give the evidence. *Fletcher*, *supra* at 562; *Wolfe*, *supra* at 514-515.

Defendant's final contention on appeal is that he was denied the effective assistance of counsel. Our review of this unpreserved issue is limited to the existing record. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). To prevail, defendant must demonstrate that defense counsel's performance was deficient because the errors counsel made were so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment and deprived him of a fair trial. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). Defendant was deprived of a fair trial if "there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider*, *supra* at 424. Defense counsel's actions are presumed effective and to constitute sound trial strategy. *Hoag*, *supra* at 6.

Initially, we note that defendant's claims that defense counsel's performance was deficient because she did not move to quash, move for a new trial or a directed verdict, or request a mere presence instruction, are unavailing. As discussed, these efforts would have been futile,

and defense counsel is not ineffective for failing to advocate a meritless position. *Snider*, *supra* at 425.

Defendant next asserts that a *Wade*[3] hearing was necessary because the lineup was suggestive. Defense counsel's decision whether to move for a *Wade* hearing is a matter of trial strategy that is generally not disturbed on appeal. *People v Carr*, 141 Mich App 442, 452; 367 NW2d 407 (1985). Defendant does not articulate why he believes the lineup was suggestive, and offers absolutely no evidence that would indicate that the lineup was tainted. He has not established the factual predicate of his claim. *Hoag*, *supra* at 6. Based on the record available, the victims were told that they did not have to identify anyone, they viewed the lineup at separate times, and an attorney was present. The record does not support a basis to conclude that the lineup was so suggestive that there was a substantial likelihood that he was misidentified. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Thus, there was no basis upon which to request a *Wade* hearing. *People v Laidlaw*, 169 Mich App 84, 96; 425 NW2d 738 (1988). Defense counsel was not ineffective for not moving for a *Wade* hearing. *Snider*, *supra* at 425. Moreover, we note defense counsel also used the lineup evidence to discredit Greenwood's identification. Accordingly, defendant has failed to overcome the presumption that defense counsel's decision was a matter of sound trial strategy. *Carr*, *supra* at 452.

Defendant next alleges that defense counsel should have moved to suppress the post-lineup statements that he made to police on *Miranda*[4] grounds. As review of defendant's unpreserved claim is limited to the record, nothing in the record supports a finding that defendant's statements to the police were involuntary or should otherwise have been suppressed. *Snider*, *supra* at 424. The record reflects that defendant validly waived his *Miranda* rights after being advised of them. Defendant fails to articulate the reasons for his belief that this waiver was invalid, or any factual allegations to support his contention. Defendant has failed to provide a factual predicate for his claim. *Hoag*, *supra* at 6. On the record available, the evidence shows that the statements were admissible. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). Thus, defendant's motion to suppress would have been futile, and defense counsel was not ineffective for failing to pursue this motion. *Snider*, *supra* at 425.

Finally, defendant also argues that defense counsel failed to adequately prepare and investigate his case or subject the prosecution's case to a meaningful testing. However, defendant fails to provide the factual predicate for this claim, besides his assertions that defense counsel should have made the meritless motions previously described. *Hoag*, *supra* at 6. Moreover, the record reflects that defense counsel did in fact prepare for trial; defense counsel prepared and presented an alibi defense, argued that defendant was misidentified, and challenged

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[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). A lineup may violate a defendant's due process rights where it is unnecessarily suggestive or conducive to irreparable misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Defendant bears the burden of proving that, considering the totality of the circumstances, the lineup was so suggestive that there was a substantial likelihood that he was misidentified. *Id.*

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

the prosecution's witnesses. Defense counsel's representation of defendant did not amount to a complete failure in challenging the prosecution's proofs. Defense counsel's performance is therefore presumed effective, and defendant has failed to overcome this presumption. *People v Frazier*, 478 Mich 231, 243-244; 733 NW2d 713 (2007).

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher