STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2011
v	No. 289323 Ingham Circuit Court
JAMES EDWARD WALKER, Defendant-Appellant.	LC No. 07-000753-FC

Before: METER, P.J., and SAAD and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.529 and MCL 750.157a; first-degree home invasion, MCL 750.110a(2); conspiracy to commit first-degree home invasion, MCL 750.110a(2) and MCL 750.157a; unlawful imprisonment, MCL 750.349b; conspiracy to commit unlawful imprisonment, MCL 750.349b and MCL 750.157a; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as fourth habitual offender, MCL 769.12, to serve 2 years in prison for the felony-firearm conviction, to be served consecutive to and preceding defendant's concurrent sentences of 350 to 800 months for the armed robbery and accompanying conspiracy convictions, 117 to 500 months for the home invasion and accompanying conspiracy convictions, and 62 to 500 months for the unlawful imprisonment and accompanying conspiracy convictions. Defendant appeals his convictions and, for the reasons set forth below, we affirm.

I. FACTS

During the early morning hours of November 27, 2006, five armed men wearing masks and gloves entered the Dudley family home. The men restrained, threatened, and questioned the occupants about $50,000 in cash the robbers believed to be in the home. When the victims denied having the money, the robbers stole other valuables and ransacked the house.

A police investigation led to four men, Jeffrey Schooler, Brent Dennis, William Green, and Richard Rodriguez, who were arrested and agreed to cooperate with the police and the prosecution. All four men indicated that the fifth participant in the robbery was a man they knew only as "B-Love" at the time of the robbery. All four identified defendant as B-Love at trial. In addition, defendant's DNA was found on a mask recovered during the investigation and identified by the victims as the one worn by one of the robbers.

II. IDENTIFICATION EVIDENCE

Defendant asserts that the trial court should have sua sponte suppressed Schooler's in-court identification of defendant because it stemmed from an unduly suggestive pretrial identification procedure. An identification procedure violates a defendant's right to due process of law when it is "unnecessarily suggestive and conducive to irreparable misidentification." *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). When a pretrial identification procedure is unduly suggestive, the witness's in-court identification will not be allowed unless an independent basis exists sufficient to purge the taint of the improper pretrial identification. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 529 (1993).

Defendant bases his claim on Schooler's testimony that he initially identified another man in a photographic lineup, but later identified defendant when he was shown a second lineup. According to Schooler, a police officer told him that he originally picked the wrong man. However, the officer who showed Schooler both lineups denied telling him that he had initially picked the wrong man. Rather, the officer testified that he informed Schooler that he did not have to pick anyone and to identify someone only if he was certain. Further, the record supports the conclusion that there was an independent basis for Schooler's in-court identification. Schooler testified that he had met defendant a few times before the robbery and he had extensive contact with defendant the night of the robbery. Further, Schooler was not a victim traumatized by the robbery, but an active participant. See *People v Gray*, 457 Mich 107, 116-124; 577 NW2d 92 (1998).

Moreover, were we to find error, defendant cannot show that the outcome of trial would likely have been different. Had the court suppressed Schooler's identification, no evidence suggests that the other informants' identifications of defendant as the fifth robber resulted from a suggestive pretrial procedure.

III. PROSECUTORIAL MISCONDUCT

Defendant argues he was denied a fair trial because of misconduct by the prosecutor. "We generally review de novo claims of prosecutorial misconduct on a case-by-case basis, in the context of the issues raised at trial, to determine whether a defendant was denied a fair and impartial trial." *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010).

Defendant claims the prosecutor engaged in misconduct by eliciting testimony from one of the robbery victims, Drew Dudley, that one of the robbers had threatened to burn the Dudley's house down if they called the police and that, several months after the robbery, the house was burned down. While the relevancy of this evidence is questionable, defendant has failed to establish that it was unfairly prejudicial. Evidence is unfairly prejudicial when it presents a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). The trial court instructed the jury that it could convict defendant only if it found that the prosecution had proven the charged offenses beyond a reasonable doubt and that the jury must not allow sympathy or prejudice to affect their decision. Nothing in the record suggests that the jury failed to follow these instructions. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Further, Darby Dudley provided substantially the same testimony without objection in the trial court, and

defendant does not take issue with this testimony on appeal. Defendant cannot demonstrate that he was prejudiced as a result of the challenged testimony if there was also unchallenged testimony on the matter.

We also reject defendant's claim that the prosecutor engaged in selective prosecution. A claim for selective prosecution requires proof of intentional or purposeful discrimination. *People v Weathersby*, 204 Mich App 98, 114-115; 514 NW2d 493 (1994). Defendant, a man of African-American descent, notes that while each of the informants indicated that another man, Ignacio Bermudez, a man of Hispanic descent, was peripherally involved in the robbery, Bermudez was not prosecuted. That the two men are of different ethnic heritages simply does not prove that the prosecutor purposefully discriminated against defendant.

Defendant argues that the prosecutor improperly commented on the credibility of witnesses during closing argument, but he does not identify the specific remarks at issue. It is not the duty or responsibility of this Court to scour the record for factual support. *McIntosh v McIntosh*, 282 Mich App 471, 485; 768 NW2d 325 (2009); MCR 7.212(C)(7). The same is true of defendant's argument that the prosecution denied him access to requested discovery material.

IV. INEFFECTIVE ASSISTANCE

Defendant contends that he received the ineffective assistance of counsel. Our review of this unpreserved claim is limited to mistakes apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that trial counsel failed to request a *Walker*[1] hearing or otherwise challenge Schooler's in-court identification of defendant as the fifth robber. Because, as discussed, we reject the underlying evidentiary challenge, this argument has no merit.

Defendant maintains that his counsel failed to investigate and call four additional witnesses. According to defendant, the witnesses could have testified that the four informants had agreed to falsely testify against defendant. Defendant claims that three of the proposed witnesses could testify about "jailhouse confessions" that would raise doubts about the testimony of the four informants. However, defendant does not specify the contents of these supposed

[1] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

confessions and, therefore, any assertion that the proposed testimony would show that Rodriguez, Schooler, Green, and Dennis perjured themselves is merely speculation.

Similarly, an affidavit submitted on appeal by a former jail inmate does not undermine the testimony of the four informants in the way claimed by defendant. Defendant asserts that the affiant overheard two people planning to testify falsely in this case. However, the affiant is unable to pinpoint the time period he allegedly overheard the conversation, nor is he able to conclusively identify the people he overheard. Further, presuming that the affiant can identify one of the informants, the testimony of the other three remains unchallenged.

Defendant further claims that he was denied the effective assistance of counsel because trial counsel failed to disclose a conflict of interest. The only support defendant provides for his assertion is a letter from his appellate attorney. In fact, the letter does not support defendant's claim that trial counsel enjoyed a friendship with the victims, but rather acknowledges only a vague acquaintanceship.

IV. INSTRUCTIONAL ERROR

Defendant argues he is entitled to new trial on the basis of two alleged instructional errors. A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must not exclude material issues, defenses, and theories that are supported by the evidence. *People v Crawford*, 232 Mich App 608, 620; 591 NW2d 669 (1998). Jury instructions should be read as a whole, rather than examined piecemeal, to determine if there is error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Defendant asserts that the trial court erred by refusing to provide the addict-informant instruction, CJI2d 5.7, to the jury. The addict-informant instruction should be given only if the uncorroborated testimony of an addict informant is the sole evidence linking the defendant to the offense. *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994). Here, all four informants identified defendant as the fifth robber. Defendant argues that the testimony of the informants cannot serve as corroboration because they too had been using illicit drugs. However, defendant provided no citation to authority for this proposition. A party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *Matuszak*, 263 Mich App at 59.

Moreover, while evidence showed that the informants had consumed either marijuana or cocaine, or both, in the hours before the robbery, this did not establish that all four were "addicts" or that any addiction compromised their facility to testify accurately. CJI2d 5.7(4)(a). Though Schooler testified that he used marijuana daily and Dennis described himself as a cocaine addict, there was no evidence that any possible drug addiction gave either man a "special reason to testify falsely," CJI2d 5.7(4)(b), or that either was fearful that they would be denied access to their drugs if they did not testify favorably to the prosecution, CJI2d 5.7(4)(f).

We also reject defendant's argument that the trial court erroneously failed to provide an instruction on the defense theory of the case. Defendant explicitly declined this instruction

below and, therefore, this issue is waived. See *People v Adams*, 245 Mich App 226, 239-240; 627 NW2d 623 (2001).

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Kurtis T. Wilder