STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 23, 2011
v	No. 297809 Macomb Circuit Court
ANTONIO JAVON CUMMINGS, Defendant-Appellant.	LC No. 2009-004557-FC

Before: BORRELLO, P.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, resisting or obstructing a police officer, MCL 750.81d(1), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 72 months to 20 years for the robbery conviction, and 16 to 24 months for the resisting a police officer conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

The prosecution alleged that defendant stole the victim's purse at gunpoint and later resisted police arrest by fleeing from a car and leading the police on a two-block foot chase before being captured. Two other men also fled from the car. Codefendant Todd Stephens was arrested, while a third unidentified man eluded capture. The police did not recover a firearm. Defendant did not deny stealing the victim's purse, but denied possessing a firearm.

I. PROSECUTOR'S CONDUCT

Defendant first argues that a new trial is required because of misconduct by the prosecutor during trial. Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved. Accordingly, we review this issue for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor improperly vouched for the victim's testimony by arguing, during closing argument, that the victim had no reason to lie. The prosecutor stated:

> Is she going to gain from this? She had to have somebody pick her up and bring her to court, no gain. She's not getting anything from this. She has nothing to gain from coming in here to court, and lying to you about what happened.

A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, a prosecutor is free to argue from the facts that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996), overruled in part on other grounds in *People v Houthoofd*, 487 Mich 568, 583; 790 NW2d 315 (2010); see also *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Viewed in context, the challenged remarks did not suggest that the prosecutor had special knowledge that the victim was credible. The prosecutor's argument was responsive to the defense implication and assertions during trial that the victim's testimony that defendant possessed a gun was not credible. Immediately before making the challenged remark, the prosecutor informed the jury that "the judge is going to read you an instruction, what motivation would she have to come into this court and lie to you?" In connection with the challenged remark, the prosecutor urged the jury to evaluate the evidence, discussed the reliability of the victim's testimony, and argued that there were reasons from the evidence to conclude that the victim was credible. In particular, the prosecutor highlighted the evidence that the victim had consistently described the gun immediately after the robbery, in her police statement, at the preliminary examination, and at trial. The prosecutor also highlighted that the police did not look for a gun after defendant's arrest and that a third man was never captured. The prosecutor's argument was based on the evidence at trial, and there was no plain error.

Relying on the above-quoted passage, defendant also argues that the prosecutor improperly argued facts not in evidence when he stated that the victim "had to have somebody pick her up and bring her to court[.]" A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). We agree that there was no evidence to support the prosecutor's statement regarding how the victim was transported to court. Thus, defendant has established that this remark was a plain error. However, defendant has not established that this error affected his substantial rights, i.e., affected the outcome of the proceedings. *Carines*, 460 Mich at 763. Defendant bears the burden of showing actual prejudice, see *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if a plain error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *Carines*, 460 Mich at 763-764.

It is highly unlikely that the prosecutor's brief and isolated remark caused defendant's conviction. The remark was focused on establishing that the victim had no motivation to come to court to falsely accuse defendant. Apart from the prosecutor's remark, there was evidence that defendant admitted stealing the victim's purse and that the victim did not know defendant and had no apparent reason to falsely accuse him. While there was no evidence that the victim had to arrange transportation to court, there was evidence that the victim had taken a bus on the night of the robbery. It was simply not significant that the victim obtained a ride to court.

Further, a timely objection could have cured any perceived prejudice by allowing defendant to obtain an appropriate cautionary instruction. See, generally, *Watson*, 245 Mich App

at 586. Moreover, even though defendant did not object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the case should be decided on the basis of the evidence, and that it was to follow the court's instructions. These instructions were sufficient to protect defendant's substantial rights. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also contends that the prosecutor infringed on his right not to testify when the prosecutor made the following emphasized remark during closing argument:

> I think you can't find there's any other verdict than guilty beyond a reasonable doubt on all four[1] of these charges. There's just absolutely, undisputed testimony. Nothing was disputed here to say that she was lying. *He didn't call her out as a liar***.** [Emphasis added.]

A prosecutor may not comment on a defendant's failure to testify because such an argument infringes on the right against self-incrimination. *People v Davis*, 199 Mich App 502, 517; 503 NW2d 457 (1993); *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). However, it is permissible for a prosecutor to observe that evidence against a defendant is undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Viewed in context, the prosecutor's remark was not referring to defendant's failure to testify. Instead, the prosecutor was responding to defendant's assertions made throughout trial and arguing that the jury, based on the uncontradicted evidence, should reject the defense theory that the victim lied about the gun. Moreover, defendant cannot demonstrate that the challenged remark affected his substantial rights. *Carines*, 460 Mich at 763. Despite defendant's failure to object, the trial court specifically instructed the jury that defendant did not have to offer any evidence or prove his innocence, that defendant had an absolute right not to testify, and that the jury could not consider that he did not. See *Long*, 246 Mich App at 588. Defendant is not entitled to a new trial based on the prosecutor's conduct.

II. SENTENCE

Defendant argues that he is entitled to resentencing because he received a higher minimum sentence as punishment for rejecting a plea offer and exercising his right to a jury trial. We disagree.

A defendant "has the constitutional right to a trial and should not be penalized for exercising that right." *People v Mosko*, 190 Mich App 204, 211; 475 NW2d 866 (1991). However, "[i]t is not per se unconstitutional for a defendant to receive a higher sentence on a trial conviction than was promised him if he would plead guilty." *People v Rivers*, 147 Mich App 56, 60-61; 382 NW2d 731 (1985). "Unless there is something in the record which indicates the higher sentence was imposed as a penalty for the accused's assertion of his right to trial by

[1] Defendant faced a fourth charge—conspiracy to commit armed robbery—but was acquitted with respect to it.

jury, the sentence imposed will be sustained." *People v Sickles*, 162 Mich App 344, 365; 412 NW2d 734 (1987).

Defendant contends that he should have been sentenced as if he had accepted the plea offer. However, he rejected the plea offer, so the trial court was not bound by the proposed sentencing agreement. The trial court's remarks during the plea discussion and at sentencing do not disclose anything to support defendant's claim that a longer sentence was imposed because defendant elected to proceed to trial. The trial court imposed a sentence within the sentencing guidelines range, the accuracy of which defendant conceded below and does not challenge on appeal. Because there is nothing in the record to indicate that a higher sentence was imposed as punishment for defendant's rejection of the plea offer, defendant is not entitled to resentencing.

III. JAIL CREDIT

We reject defendant's next claim that he is entitled to an additional nine days of sentence credit because he was sentenced on April 12, 2010, but the trial court did not sign the judgment of sentence until April 20, 2010. At sentencing, defense counsel agreed that defendant was entitled to 202 days of sentence credit, which is the amount the trial court awarded. Although the judgment of sentence was not prepared until April 20, 2010, the judgment clearly states that defendant's sentences begin on April 12, 2010. Thus, the judgment of sentence accurately reflects the starting date and the number of days of sentence credit in relation to this date. The fact that the judgment was not signed until a later date does not change the effective starting date of defendant's sentences. Defendant was properly awarded 202 days of sentence credit.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's conduct discussed in section I of this opinion. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceedings would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also demonstrate that the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

As explained in section I, *supra*, the prosecutor's remarks did not deny defendant a fair trial. Further, the trial court's jury instructions were sufficient to dispel any possible prejudice. Defendant cannot demonstrate a reasonable probability that, but for counsel's failure to object, the result of the proceedings would have been different. Thus, defendant has not demonstrated the requisite prejudice to establish a claim of ineffective assistance of counsel.

V. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several additional issues in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

A. RIGHT TO A PUBLIC TRIAL

Defendant argues that his right to a public trial was violated when the trial court closed the courtroom to the public during jury selection. Defendant did not object to the partial closure at trial.

A criminal defendant has a constitutional right to a public trial, US Const, Am VI; Const 1963, art 1, § 20, and that right extends to jury selection. *Presley v Georgia*, 558 US ___; 130 S Ct 721, 725; 175 L Ed 2d 675, 681 (2010). However, a defendant may relinquish his right to a public trial by failing to object to the trial court's decision to close the courtroom to the public during jury selection. See, generally, *United States v Hitt*, 473 F3d 146, 155 (CA 5, 2006), and *Levine v United States*, 362 US 610, 619; 80 S Ct 1038; 4 L Ed 2d 989 (1960). Recently, in *People v Vaughn*, ___ Mich App ___; ___ NW2d ___ (Docket No. 292385, issued December 28, 2010), slip op at 7, this Court rejected a defendant's claim that reversal was required when, as in this case, the trial court closed the courtroom to the public during jury voir dire without objection by the defendant. This Court stated that "the failure to timely assert the right to a public trial forecloses the later grant of relief," and held that because the "defendant's trial counsel did not object to the trial court's decision to close the courtroom to the public during the selection of his jury[,] . . . the error does not warrant relief." *Id.* Like the defendant in *Vaughn*, defendant here, with knowledge of the closure of the courtroom, failed to object. Therefore, relief is not warranted. *Id.*

We also reject defendant's alternative argument that a new trial is required because defense counsel was ineffective for failing to object to the closure of the courtroom during jury selection. The public-trial right benefits a defendant by ensuring a fair trial, ensuring that the judge and prosecutor carry out their duties responsibly, discouraging perjury, and encouraging witnesses to come forward. See *Waller v Georgia*, 467 US 39, 46; 104 S Ct 2210; 81 L Ed 2d 31 (1984). Defendant does not contend, and there is no indication, that any of these values were jeopardized in this case. Further, considering that a trial court may justifiably limit attendance of the public at a trial due to the size of a courtroom, *Detroit Free Press v Recorder's Court Judge*, 409 Mich 364, 386-387; 294 NW2d 827 (1980), defense counsel's failure to challenge the trial court's action was not objectively unreasonable. See also *Vaughn*, ___ Mich App at ___, slip op at 8. Accordingly, defendant has failed to establish that defense counsel was ineffective in this regard.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to call codefendant Todd Stephens as a witness to support the defense theory that defendant did not possess a gun at

the time of the robbery. Because defendant did not raise this issue in the trial court, our review is limited to mistakes apparent on the record.[2] *Ginther*, 390 Mich at 443; *Sabin (On Second Remand)*, 242 Mich App at 658-659.

Counsel's decisions about what witnesses to call are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The failure to call a witness constitutes ineffective assistance of counsel only if the failure deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id*.

Defendant concedes in his original appellate brief that codefendant Stephens "*would have undoubtedly invoked the Fifth Amendment Privilege had he been called as a witness*." (Emphasis added.) Defendant does not explain how his attorney could have avoided Stephens's unavailability. Given defendant's acknowledgment that Stephens would not have actually testified even if called, defendant has not sufficiently demonstrated that he was deprived of a substantial defense.[3] Additionally, considering Stephens's circumstances and his status as an alleged co-conspirator with the ability to corroborate pertinent portions of the prosecution's case,[4] it is not apparent that defense counsel's failure to call him as a witness was objectively unreasonable. Consequently, defendant cannot establish a successful claim of ineffective assistance of counsel.

C. *BRADY* VIOLATION

Defendant's last claim is that he was denied his right to due process because the prosecutor failed to provide exculpatory information, contrary to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Again, we disagree. Because defendant did not raise a *Brady*-violation claim below, we review this unpreserved claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

A criminal defendant has a due-process right of access to certain information possessed by the prosecution if that evidence might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998), citing *Brady*, 373 US 83. To establish a *Brady* violation, a defendant must prove:

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[2] This Court has already denied defendant's motion for a remand, and we decline to revisit that decision.

[3] Although defendant attaches to his supplemental brief an affidavit from Stephens indicating that he would have testified at defendant's trial, this assertion was, as noted, contradicted by the assertion in defendant's original appellate brief.

[4] Before defendant's trial, Stephens pleaded no contest to unarmed robbery and resisting or obstructing a police officer. At the time of defendant's trial, Stephens was awaiting sentencing; he was ultimately sentenced nearly four weeks after defendant's trial was completed. Stephens thereafter sought a delayed application for leave to appeal in this Court.

> (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester,* 232 Mich App at 281-282.]

Defendant has not established a *Brady* violation. There is no indication that the prosecutor suppressed exculpatory information allegedly provided by Stephens. Moreover, Stephens is defendant's associate, the two were together in a car on the night of the robbery, and Stephens was actually driving defendant's car. Accordingly, defendant could have discovered with reasonable diligence any information that his own associate allegedly had and was willing to provide about the robbery. Finally, as previously indicated, defendant acknowledges that Stephens would not have testified. Consequently, defendant has failed to show an error, plain or otherwise, in connection with this issue.

Affirmed.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro