STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
v	No. 298381 Oakland Circuit Court
PARIS DEMOND CAGE, Defendant-Appellant.	LC No. 2009-228954-FC

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, assault with intent to rob while armed, MCL 750.89, and two counts of felony firearm, MCL 750.227b. He was sentenced to concurrent terms of two to ten years' imprisonment on the assault with intent to do great bodily harm less than murder conviction and 81 months' to 20 years' on the assault with intent to rob while armed conviction, to be served consecutive to two-year terms of imprisonment for each of the felony firearm convictions. We affirm.

On June 12, 2009, Stallone Long met defendant on a social networking internet site. The two men agreed to meet at Long's apartment later that evening for sexual purposes. Defendant did, in fact, go to Long's apartment and after the two engaged in sexual relations, they conversed for approximately an hour, and then agreed to go to the store. According to Long, he was in the bathroom, getting ready, when defendant approached him and put a gun in his face. Defendant thereafter ordered Long into the bedroom and demanded money and Long's cell phone and car keys. Long went into the bedroom but refused to give defendant anything. Long testified that defendant pointed the gun at him and pulled the trigger, but when the gun did not fire, he attacked defendant. The two struggled, fighting their way out of the bedroom and into the living room of the apartment, where defendant pulled the trigger of the gun again and successfully shot Long in his left arm. Defendant ran from the apartment and Long pursued him for a few moments before going back to his apartment. Long was able to identify defendant by his social networking screen name and later through a photographic line up. A fingerprint retrieved from a glass at Long's apartment matched defendant.

On appeal, defendant first asserts that the prosecutor made inappropriate comments during his closing argument, thereby committing misconduct which denied defendant his rights of confrontation, due process, and a fair trial. We disagree.

Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). But when, as here, defense counsel fails to object to the prosecutor's statements, we review those claims for plain error that affected the defendant's substantial rights. *Id*.

"Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). Prosecutors are afforded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). They may argue the evidence, and any reasonable inferences from the evidence, related to their theory of the case. *Id.* Thus, the prosecutor's comments must be considered in light of the defendant's arguments and the evidence presented at the trial. *Dobek*, 274 Mich App at 64.

Defendant first directs us to the prosecutor's rebuttal argument, wherein he stated:

> The two people that we know that were there, Paris Cage and Stallone Long. And when you're leaving the courthouse today, I want you to take a quick pe[e]k as you're walking down the first floor, the statue of Lady Liberty sitting in the hallway down there-there's another one in front of the courthouse-and you'll notice something about Lady Liberty, she's wearing a blindfold, and that blindfold represents equality under the law for everybody, whether it's a homosexual, cross-dressing individual, whether it's a prostitute or whether it's an armed robbery. Everyone's entitled to the same protections under the law.

According to defendant, the above serves to label defendant as a prostitute. While a prosecutor must refrain from denigrating a defendant with intemperate and prejudicial remarks, (*Bahoda*, 448 Mich at 283) when viewing the above in context, is does not appear that the prosecutor was labeling anyone involved with the case a prostitute, but was instead merely providing an example of a potentially offensive lifestyle that nevertheless still merits equal protection as far as our judicial process is concerned. The prosecutor was pointing out that no matter how different a person's preferences or lifestyle may be to the jury, that person is nonetheless still afforded the same protections as one who enjoys a more typical lifestyle. To the extent that the quick reference to a prostitute's deserving the same protections under the law could have been understood to have been referencing defendant, it could equally have understood to have been referencing Long. Directly before mentioning the word prostitute, the prosecutor mentioned cross-dressing and Long testified that he was a cross-dresser and had been dressed as a female when defendant first came to his apartment on the night of the incident. Given the above, it cannot be concluded that the prosecutor denigrated defendant or injected non-evidence into the trial mandating reversal based upon this comment.

Defendant also takes issue with the following of the prosecutor's statements, which defendant asserts suggest that the prosecutor had a special knowledge of facts material to trial or of defendant's guilt:

> What we know for a fact is that Paris Cage was in the apartment. Mr. Long told you Paris Cage shot him.
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> ***
>
> [Defense counsel] indicated and surmised that we didn't know that there was another person in that apartment. Well, you know what ladies and gentlemen, there's no evidence to show that . . . You got a suspect. The person that got shot said Paris Cage is the one that shot me. He's there. Well, we can do all the DNA testing in the world. That would probably take a year to get that information back just to learn what we already know. Now let's forget about those, you know, those 25-30 other homicides and those several hundred other shootings and focus on something that we already know. You don't need to do that ladies and gentlemen.

The prosecutor's statement that "what we know for a fact is that Paris Cage was in the apartment" is consistent with the evidence presented at trial. Long testified that defendant was in his apartment and fingerprint evidence placed him in the apartment as well. The prosecutor thus properly argued facts in evidence. See, *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Defendant challenges the second part of the prosecutor's statements because he excused the failure to test the DNA and blood at the scene and indicated that the results would show "what we already know." Viewed in context, however, the prosecutor's remarks were not improper. The prosecutor did not imply that he had personal knowledge of defendant's guilt, but, rather, that the evidence heard by him and the jury (collectively "we") had already established defendant's guilt. The prosecutor suggests that the DNA evidence was immaterial where the victim unequivocally testified that defendant was the one who shot him. "Placed in context, the prosecutor's remark did not urge the jury to improperly suspend its own powers of critical analysis and judgment in deference to those of the . . . prosecutor, but rather urged the jury to resolve the case on the basis of reasoned consideration of the evidence . . ." *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995) (internal citations and quotation marks omitted).

The final allegation of prosecutorial misconduct turns on the prosecutor's recounting of Molly Hunt's trial testimony. In his closing argument, the prosecutor stated:

> Let's switch our perspective to Melanie [sic] Hunt . . . Well she goes up to the top of the stairs. She gets to the top of the stairs, looks down the hallway to see a man crunching down picking something up and then he locked eyes with her

> and the moment he locked eyes with her he took off running toward her . . . And I submit you ladies and gentlemen that that individual's the Defendant . . .

While defendant claims that this is a personally revised version of the testimony which adds new and untrue facts, the above is not inconsistent with Ms. Hunt's testimony. Ms. Hunt testified that she went up the stairs to the second floor and saw two men fighting, one of whom she recognized as Long. She testified that Long was in the doorway to his apartment and the other man was in the hallway outside. Ms. Hunt testified that the other man, whom she did not recognize and did not get a good look at, was bent down in the hallway as if he were going to pick something up, when he looked up and saw her. Ms. Hunt testified that as soon as the man saw her, he started running toward her and she turned and ran. The prosecution's summary of Ms. Hunt's testimony, then, was not untrue. While Ms. Hunt did not testify that that the man she saw was defendant, the prosecutor did not tell the jury that Ms. Hunt identified defendant as the man she saw. Instead, the prosecutor told the jury "I submit" that the person that Ms. Hunt saw was defendant, suggesting that the evidence as a whole pointed to defendant as the person Ms. Hunt saw. The challenged testimony does not present new or untrue facts that would constitute prosecutorial misconduct. Moreover, this Court will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). A timely curative instruction could have eliminated any alleged prejudice that the prosecutor's comments may have caused. Also, absent an objection, the trial court's instruction that the remarks of counsel are not evidence was sufficient to eliminate any possible prejudice. *Thomas, supra* at 456.

Defendant next argues that he was denied the effective assistance of counsel. We disagree.

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 Sabin (On Second Remand)*, 242 Mich App 656, 658–659; 620 NW2d 19 (2000). 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 proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also overcome the presumption that the challenged action or inaction was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant's claims of ineffectiveness rest on trial counsel's failure to investigate whether there was a third person present at Long's apartment on the night of the incident, and his failure to request the appointment of an expert or investigator for purposes of examining for additional fingerprints at the apartment and testing the blood and body fluid in the condom at the apartment. Defendant's theory was that a third party was at Long's apartment on the night of the incident and was responsible for the shooting. He claims that this theory was supported by prosecution witness Molly Hunt's testimony concerning her observations of the event and the perpetrator, and that testing of physical evidence may have led to a different outcome. While Hunt did provide a different description of the perpetrator's attire than that which Long described defendant as wearing, Hunt's description was not the sole evidence presented at trial.

Long positively identified defendant as the shooter, both in a photographic lineup shortly after the incident and at trial. Defendant's fingerprint was also found at Long's apartment. Given the above, defense counsel's decision to forgo testing of the fluid found in the condom at Long's apartment or to further investigate the possibility of the presence of a third person at the apartment may have been a matter of trial strategy, specifically made to avoid exposing additional potentially inculpatory evidence against defendant. If, for example, the bodily fluid were positively identified as defendant's or there was conclusive testimony from other witnesses that defendant was the only person in the apartment on the night of the incident, such evidence would have worked to help seal the prosecution's case against defendant.

As stated in *Harrington v Richter*, _ US _; 131 S Ct 770, 790; 178 L Ed 2d 624 (2011), "To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates. All that happened here is that counsel pursued a course that conformed to the first option." Moreover, decisions concerning what evidence to present are presumed to be matters of trial strategy, *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), and we will not substitute our judgment for that of trial counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant's claim of ineffective assistance of counsel is thus without merit.

Defendant next contends that he was denied his right to due process and a fair trial by virtue of the government's failure to preserve and test the blood and the fluid content of the condom found in Long's apartment or to test for other fingerprints at the crime scene. Because defendant did not object or request a new trial on this basis below, we review his claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Notably, while defendant contends that the government failed to test the evidence at issue, he has not claimed or presented any evidence suggesting that the evidence at issue was destroyed, that he was denied access to the evidence, that he was denied the opportunity to test the evidence himself, or that the evidence was exculpatory. These facts alone would be fatal to defendant's claim. However, as stated in *Arizona v Youngblood*, 488 US 51, 59; 109 S Ct 333; 102 L Ed 2d 281 (1988), the police do not have a constitutional duty to perform any particular chemical test to establish evidence. And, the police have no constitutional duty to assist a defendant in developing potentially exculpatory evidence. *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006). Defendant's claim thus fails.

Defendant lastly argues that the verdicts are against the great weight of the evidence. The test for determining whether a verdict is against the great weight of the evidence "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The focus is on whether there is "'a real concern that an innocent person may have been convicted' or that 'it would be a manifest injustice' to allow the guilty verdict to stand." *People v Lemmon*, 456 Mich 625, 644; 576 NW2d 129 (1998). Where, as here, however, defendant failed to preserve this issue by raising it in a motion for a new trial, review of this issue is limited to plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

Here, defendant's convictions are supported by the evidence. Long identified defendant as the individual who came to his apartment and with whom he had consensual sexual relations and who pulled a gun on him, tried to rob him, then shot him. Defendant's fingerprint was found on a cup located in Long's apartment, placing him at the scene. A police officer testified that Long was able to identify defendant in a photo lineup several days after the incident as the individual who had shot him. While one witness testified that the man she saw fighting with Long, and then running from Long's apartment, was dressed in something other than what Long described defendant as wearing, the discrepancies in testimony go to witness credibility, which is an issue left exclusively to the province of the jury. See, e.g., *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). In short, defendant has not shown that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly