

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 15, 2011

v

JERMAINE LAMAR PHIPPS,

Defendant-Appellant.

No. 300051
Kalamazoo Circuit Court
LC No. 2010-000232-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a habitual offender, third offense, MCL 769.11, to six months in jail and three years of probation. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in denying his oral motion to dismiss based on the prosecution's failure to provide a photograph of defendant that was shown to the witnesses by the police. We disagree.

We review a trial court's decision regarding the appropriate remedy for discovery violations for an abuse of discretion. *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). MCR 6.201(J) provides:

If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the materials not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.

“When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.” *Banks*, 249 Mich App at 252.

In denying defendant’s motion, the trial court carefully considered the circumstances of the violation. It found that neither attorney had any knowledge that there were any other photographs of defendant shown to the witnesses by police other than the one that the prosecutor had provided to defendant before trial. The trial court concluded that the discovery violation was not willful and that any undisclosed photograph of defendant shown to the witnesses by the police had only marginal relevance. On this record, it was not outside the range of reasonable and principled outcomes for the trial court to deny defendant’s motion to dismiss and instead order that Detective Gregory Cordes be available to testify and produce all photographs that had not been disclosed.

Defendant also argues that he was denied a fair trial because Detective Cordes testified that defendant and his girlfriend Shenette Norwood had lied to him and the prosecutor made comments concerning this evidence in his closing argument. We disagree. Defendant did not preserve these issues because he did not make timely objections. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382-383; 741 NW2d 61 (2007); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review these unpreserved errors for plain error affecting the defendant’s substantial rights—that is, defendant must have been prejudiced by the error. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

“It is generally improper for a witness to comment or to provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury.” *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). In this case, Detective Cordes repeatedly opined that defendant and Norwood had lied to him. These statements were improper, and the prosecution compounded matters by repeating Detective Cordes’ opinion in his closing argument.

However, we have reviewed the record and it does not appear that defendant was prejudiced by these errors. There were three eyewitnesses to the crime who each testified that defendant was the assailant. Further, the prosecutor also impeached Norwood’s credibility with a substantial amount of unobjectionable material. It is unlikely that the jury would have found Norwood credible even if the detective had not made his inappropriate remarks. Thus, the errors did not affect defendant’s substantial rights. *Carines*, 460 Mich at 762-763.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro