

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY MILLER,

Defendant-Appellant.

UNPUBLISHED
February 26, 2013

No. 307190
Wayne Circuit Court
LC No. 11-004655-FC

Before: RIORDAN, P.J., and HOEKSTRA and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to life imprisonment for his felony murder conviction, to 40 to 60 years' imprisonment for his armed robbery conviction, and to two to five years' imprisonment for his felon in possession conviction. For the reasons stated in this opinion, we affirm.

Defendant's convictions stem from an armed robbery that occurred on April 30, 2010. The armed robbery resulted in the death of Raymond Webster, who died of a single gunshot wound to his stomach. No bullet or casing was ever recovered. It was determined that \$5,000 in cash and marijuana were stolen from Webster's person, and a laptop computer was taken from his home. Police had no leads in regard to the robbery and murder of Webster until May 17, 2010, when Webster's laptop was recovered after the execution of a search warrant at a home located at 19918 Rowe Street in an unrelated investigation. Andre Cottingham was named as a target in the search warrant, and later it was discovered that Tawana Taylor and defendant lived at the home where the search warrant was executed. Eventually, Cottingham, Taylor, and defendant were all arrested and charged in connection with the robbery and murder at issue in this case.

Cottingham originally entered into a plea agreement with prosecutors to testify against defendant and Taylor, who were to be tried together before separate juries. However, at trial, Cottingham asserted his constitutional right to remain silent. Thereafter, Cottingham was declared unavailable, and his testimony from defendant's preliminary examination was read into the record. At the preliminary examination, Cottingham testified that on April 30, 2010, either Taylor or defendant called him to discuss a plan for a robbery. Cottingham went to Taylor's

house, and after some discussion he and defendant went to 19186 Fairport Street. Defendant drove, and parked a block away from the address. Eventually, defendant and Cottingham were standing in front of a home located at 19186 Fairport Street, and Webster was sitting on the porch. When Webster noticed defendant and Cottingham, he threw up his hands and defendant immediately pulled a gun from his waistband and shot Webster in the stomach. Cottingham testified that defendant took money and marijuana from Webster's pockets, and that he went inside the residence and took a laptop. The men returned to Taylor's home and split the money and marijuana; defendant and Cottingham kept \$1,000 each, and Taylor received \$3,000 and the marijuana.

During trial, the prosecution also introduced a telephone conversation recorded on May 19, 2010, initiated by a male individual from the Macomb County Jail to a female at the telephone number (313) 633-4810. The prosecution argued that this telephone conversation was initiated by defendant and that the call was to Taylor. At the trial, defense counsel objected to the introduction of the recorded telephone conversation on foundation grounds. The trial court overruled the objection, and the recording was played unredacted for the jury. The prosecution argued that the telephone conversation corroborated much of Cottingham's preliminary examination testimony implicating defendant in the robbery. The jury found defendant guilty of the charges as previously indicated, and he now appeals his convictions as of right.

I. ADMISSION OF RECORDED TELEPHONE CONVERSATION

On appeal, defendant first argues that he was denied his due process right to a fair trial by the prosecution's introduction of the May 19, 2010 telephone conversation from the Macomb County Jail because portions of the conversation were "irrelevant and inflammatory," and therefore, unfairly prejudicial. First, defendant argues that the jury should not have heard the statement at the beginning of the recording that the call was being made by an inmate at the Macomb County Jail because that led to the inference that he was in custody on criminal charges not related to the instant case. Next, defendant argues that the references to the fact that he was on parole were improper and unfairly prejudicial. Next, he argues that the racially charged language that he used on the recording cast him in a negative light in front of the jury. Next, defendant argues that there were several instances where he made comments that suggested he had been involved in other home invasions, and that these comments should not have been presented to the jury. Finally, defendant objects to the jury hearing his "sexually-charged" request to Taylor for semi-nude photographs.¹

¹ We note that on appeal, defendant argues the entire recording was admitted in violation of MRE 404(b) because defendant maintains that the prejudicial evidence constituted impermissible character evidence. However, we decline to consider defendant's argument in the context of MRE 404(b) because the evidence was not offered or admitted at trial pursuant to MRE 404(b). Rather, the prosecution admitted the telephone conversation as direct evidence that implicated defendant in the robbery and murder. Further, defense counsel did not object to the admission of the evidence on grounds that it was prejudicial or impermissible character evidence.

During trial, defendant objected to the entry of the recording on foundation grounds only; thus, defendant's argument that parts of the recording were unfairly prejudicial and denied him his right to a fair trial is not properly preserved for appeal. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground."). We review unpreserved claims of constitutional error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763. Moreover, "[r]eversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

"Generally, all relevant evidence is admissible, and irrelevant evidence is not." *People v Coy*, 258 Mich App 1, 13; 669 NW2d 831 (2003), citing MRE 402. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Benton*, 294 Mich App 191, 199-200; 817 NW2d 599 (2011). However, MRE 403 permits the exclusion of relevant evidence when the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Here, the telephone recording was about 15 minutes long, and was played in its entirety for the jury. However, we note that the prosecution only discussed certain portions of the recording throughout the trial, and further, only emphasized these particular portions during his closing argument. The portions of the recording on which the prosecution focused included the parts that make it plain that the participants in the conversation were in a romantic relationship, and these portions of the conversation were emphasized for the purpose of proving the identity of the people speaking on the recording as being defendant and Taylor. The prosecution also relied on the portions of the recording wherein the speakers discussed moving a "baby" because the prosecution argued that this portion of the conversation was actually about concealing the gun used to murder Webster. Further, the prosecution emphasized the fact that a laptop was discussed because it maintained that the laptop in question was the one stolen from Webster's home. Finally, the prosecution focused on the references to an individual referred to as "Dre," because the prosecution maintained "Dre" is a name by which Cottingham is known. The fact that the male participant was incarcerated, was on parole, used foul language on the recording, or referenced other home invasions in which he was involved was never referenced by the prosecution during the trial.

Nevertheless, the portions of the recording referencing defendant's parole status were irrelevant to the issues before the jury, and we agree with defendant that these references should not have been played for the jury.² "The fact that defendant was a parolee is irrelevant to his

² We note that defendant concedes the telephone conversation was between him and Taylor for purposes of appeal.

guilt or innocence” *People v DeBlauwe*, 60 Mich App 103, 105; 230 NW2d 328 (1975). Thus, defendant has demonstrated plain error in that regard. However, we conclude that the portions of the recording where defendant’s status as a prisoner in the Macomb County Jail is revealed, where defendant uses foul language, and where defendant asks for sexual photographs were relevant, and not more prejudicial than probative. Defendant’s request for photographs demonstrated that he and Taylor were romantically involved and was relevant to identifying the speakers on the recording. Further, the initial reference to the county jail was necessary to explain how the particular recording came to exist. While a cautionary instruction would have been appropriate, defendant did not request one. Finally, defendant’s use of derogatory language was pervasive and it would have been impractical to omit. Again, had a cautionary instruction been requested, such instruction would have been appropriate. Thus, defendant has failed to demonstrate that admission of these portions of the recording was plain error.

Finally, whether the alleged references to defendant’s involvement in additional home invasions would have been admissible is unclear based on the record. However, even assuming those references were inadmissible, after listening to the recording, whether these were references to additional home invasions is not plain or obvious, and such a conclusion would require several inferences and assumptions. While it is likely that this portion of the recording was irrelevant to the issues before the jury, it is not clear based on the record which parts of the recording defendant is referencing, and thus, we cannot determine whether admission of this portion of the recording was plain error.

Nevertheless, even assuming defendant demonstrated plain error in regard to the admission of the portions of the recording that he objects to on appeal, defendant cannot demonstrate that any plain error constitutes error requiring reversal. First, the prosecution did not mention or emphasize the portions of the recording to which defendant now objects. Thus, any prejudicial effect of those portions of the recording was minimized. Further, defendant failed to object to the recording on the basis of prejudice, failed to ask for any redaction of the recording, and failed to request any cautionary instruction. Finally, any prejudicial effect of the recording is unlikely to have affected the outcome of the proceedings in light of the other evidence implicating defendant in the charged crimes. Specifically, Cottingham’s sworn testimony that he was with defendant during the robbery and observed defendant shoot the victim. Thus, we conclude that reversal is not warranted because defendant has failed to demonstrate any error that affected his substantial rights and the record does not support the conclusion that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

II. REFERENCE TO DEFENDANT’S RIGHT TO REMAIN SILENT

Defendant next argues that Investigator Donald Olsen’s reference to defendant’s exercise of his right to remain silent violated his constitutional right to due process.

It is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution to use a criminal defendant’s silence as evidence of guilt or for impeachment

purposes after a defendant has been given a *Miranda*³ warning. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001); *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976).⁴ “Depending on the circumstances of the case, even a single reference to a defendant’s postarrest, post-*Miranda* silence, either as evidence of substantive guilt or impeachment may violate a defendant’s due process rights.” *People v Shafier*, 483 Mich 205, 218; 768 NW2d 305 (2009). However, a single reference to a defendant’s silence may not automatically amount to a violation of due process “if the reference is so minimal that silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference.” *Id.* at 214-215.

In *Dennis*, 464 Mich at 570, the Court held that the defendant’s due process rights were not violated when a police detective, after being asked what type of investigation follow-up he engaged in, stated that defendant refused to be interviewed and said “he wished to speak to an attorney prior to me asking him any questions.” In finding that the defendant’s due process rights were not violated by the reference to his right to remain silent, the Court emphasized the fact that the reference was the result of a single open-ended question that did not appear to be intended to elicit any reference to defendant’s exercise of his rights. *Id.* at 578. Moreover, the Court noted that there was no further questioning or argument regarding the defendant’s silence, and the trial court gave a curative instruction to the jury. *Id.* Similarly, in *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987), the United States Supreme Court held that a single reference to the defendant’s postarrest silence, which the prosecution did not call attention to, and to which the court gave a broad curative instruction, did not constitute a violation of the defendant’s right to due process.

Similar to *Dennis* and *Greer*, the reference to defendant’s exercise of his right to remain silent in this case was the result of an open-ended question that was clearly not designed to elicit a comment about defendant’s silence, and the immediate objection by defense counsel was sustained by the trial court. The isolated comment was the result of the following exchange between the prosecutor and Olsen:

Q. Okay. Specifically in regards to Bobby Miller, sir, was there any other follow-up investigation or analysis that I’m leaving out that I have not asked you about, sir?

A. I had met with Mr. Miller at the Macomb County Jail.

Q. Okay.

A. And he refused to have a conversation.

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

⁴ While the record does not expressly reflect whether defendant had been advised of his *Miranda* rights, and the prosecution does not present any argument in this regard, we may infer that the prosecution has “effectively stipulated” that “defendant’s refusal to submit to police questioning constituted ‘post-*Miranda*’ silence.” See *Dennis*, 464 Mich at 570-571.

[DEFENSE COUNSEL]: Objection.

THE WITNESS: Sorry.

THE COURT: Okay. Sustained.

Q. Any other, I guess I should have asked my question more focusedly. Any other analysis or anything else looking at any other pieces of evidence, physical evidence?

A. Not that I can recall.

Thereafter, the prosecution did not mention or reference defendant's exercise of his right to remain silent. On cross-examination, in response to defense counsel's specific questions, Olsen testified that every person has a right to remain silent and there is "nothing wrong" with refusing to make a statement. Further, the trial court instructed the jury regarding its duty not to consider evidence that was stricken. Thus, we conclude that the brief, unintended, and isolated reference to defendant's silence did not constitute a denial of defendant's right to due process.

III. RIGHT TO A PUBLIC TRIAL

Next, defendant argues that his constitutional right to a public trial was violated by the alleged closing of the courtroom to the public during the selection of the jury. No objection to the alleged closing of the courtroom was made during the jury voir dire; accordingly, we review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Carines*, 460 Mich at 763.

The Sixth Amendment of the United States Constitution expressly provides that a criminal defendant "shall enjoy the right to a . . . public trial," and this right is incorporated to the states through the Due Process Clause of the Fourteenth Amendment. The Michigan Constitution similarly guarantees the right to a public trial. Const 1963, art 1, § 20. The right to public voir dire proceedings is encompassed in the right to a public trial. *Vaughn*, 492 Mich at 651-652.

Here, the record does not support defendant's claim that the courtroom was closed to the public during jury selection. Rather, it is clear from the record that at least one member of the victim's family was present during jury selection. Nothing in the record suggests that the courtroom was closed. While defendant proffers affidavits from three of his family members claiming they were not permitted into the courtroom during voir dire, these affidavits are not part of the trial court record. Accordingly, we will not consider the affidavits. *People v Canter*, 197 Mich App 550, 557; 496 NW2d 336 (1992) (refusing to consider affidavits and other documentary evidence not submitted to the trial court); *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999) ("it is impermissible to expand the record on appeal"). Thus, defendant has failed to demonstrate plain error.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

In his Standard 4 brief, defendant argues that he was deprived of effective assistance of counsel. No evidentiary hearing was held in regard to defendant's claims of ineffective assistance of counsel; accordingly, our review of defendant's claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

First, defendant argues defense counsel was ineffective for failing to object to the introduction of Cottingham's allegedly perjured testimony. However, defendant does not demonstrate that counsel was aware, or should have been aware, that the testimony was false. Moreover, defendant does not provide sufficient proof that any of Cottingham's testimony was perjured. Accordingly, defendant has failed to establish a factual predicate for his claim, and the challenged performance cannot be found to be ineffective. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Next, defendant maintains defense counsel was ineffective for failing to object to eight specified alleged instances of prosecutorial misconduct. First, defendant alleges that the prosecution made several false statements. Defendant maintains that the prosecution falsely stated that Detective Gregory Hill was investigating defendant in its opening statement. He also maintains that the prosecution falsely claimed that the evidence would show defendant stole Webster's laptop. However, defendant's claims lack merit. First, Hill testified that he did interview defendant in relation to the incident, so the prosecution's statement is not false. Defense counsel is not ineffective for failing to make a meritless objection. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Next, the prosecutor's statement in opening that he believed the evidence would show that defendant stole the laptop was a reasonable prediction of what the evidence would prove given that defendant was one of two individuals who robbed Webster. Because no evidence had been presented, it was reasonable trial strategy for defense counsel not to object during opening argument. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (defense counsel is provided a strong presumption that his performance constituted sound trial strategy).

Defendant also argues that the prosecution improperly stated as a fact that defendant and Taylor were using the term "baby" as code for a gun. However, the prosecutor did not state that "baby" was code for the gun as an absolute fact, rather, he argued that the evidence supported such an inference. "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Here, it is clear that the prosecutor was not making an improper argument, and defense counsel was not ineffective for failing to object. *Matuszak*, 263 Mich App at 58 (counsel need not make a meritless objection).

Similarly, defendant argues that the prosecution improperly quoted him when he was explaining how defendant and Cottingham split up the proceeds of the robbery. However, defendant's argument mischaracterizes what the prosecution said. Given the context of the comment, it is clear that the prosecutor was not insinuating that defendant specifically used any particular words, but instead was merely arguing that the evidence demonstrated that defendant, Cottingham, and Taylor later split items stolen from Webster. Defense counsel exercised sound trial strategy by not objecting to this statement. *Carbin*, 463 Mich at 600.

Defendant also claims that the prosecution improperly vouched for the credibility of its witnesses and improperly implied that it had special knowledge. Specifically, defendant argues the prosecution vouched for Cottingham's credibility when it stated in opening that Cottingham would "testify to the truth of what happened that day," even though Cottingham was only required to "cooperate" with the prosecution. Defendant also maintains the prosecution also improperly vouched for the credibility of Dr. Francisco Diaz in his closing argument when he stated that the testimony of Dr. Diaz corroborated Cottingham's testimony regarding how far defendant was from the victim when he shot the victim. Finally, defendant claims that the prosecution improperly indicated his personal belief when he stated: "We know he stole the money and the laptop and the marijuana."

"[A] prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). While a "prosecutor may not vouch for the character of a witness or place the prestige of his office behind them," there are no "magic words" that automatically indicate prosecutor vouching. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Use of the phrase "we know" does not constitute an attempt to place the credibility of the prosecutor's office behind an argument or suggest that the prosecutor possesses extrajudicial information that the defendant should be convicted. *Id.* Rather, use of the phrase "we know" when based on the evidence presented and the reasonable inferences that can be drawn therefrom is a proper argument that the propositions advanced by the prosecution have been established. *Id.* When the prosecutor's statements in this case are considered in context, all the statements were proper and did not constitute impermissible vouching or an impermissible suggestion that the prosecutor possessed special knowledge. Thus, defense counsel was not ineffective for failing to make a meritless objection. *Matuszak*, 263 Mich App at 58.

Finally, defendant argues that defense counsel was ineffective for failing to present a viable defense. Specifically, defendant argues defense counsel's failure to call several witnesses who defendant alleges were at Taylor's house prior to the robbery constitutes failure to present a defense.

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). In fact, "[t]he failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A defense is substantial only if it would have affected the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). No evidence in the record indicates what these witnesses' would testify to, or whether the testimony would be beneficial or harmful to defendant. Therefore, defendant has failed to

demonstrate that he was deprived of a substantial defense, and has accordingly, failed to demonstrate counsel was ineffective.

Defendant also argues his trial counsel failed to advance the defense that defendant was not a proximate cause of Webster's death. In his closing argument, trial counsel instead focused on the alleged lack of trustworthiness of Cottingham's account of the events. "Defense counsel is given wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and trial counsel's decision to advance a different defense falls within that wide discretion. Thus, defendant has failed to demonstrate counsel's performance fell below an objective standard of reasonableness.

Finally, defendant argues that trial counsel failed to present a viable defense in regard to the trial court's sentence that defendant pay attorney fees, courts costs, restitution, crime victim's assessment, and state minimum fees. Defendant urges the court to rely on *People v Dunbar*, 264 Mich App 240, 253; 690 NW2d 476 (2004), for the proposition that defendant need not repay these assessed costs as long as he is indigent. However, the Michigan Supreme Court explicitly overruled *Dunbar* in *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), holding that "*Dunbar* wrongly held that a trial court is required to assess a convicted defendant's ability to pay before imposing a fee for a court-appointed attorney." *Id.* at 298. Because the law is clear that the trial court need not assess defendant's indigency before imposing the fees, defendant's trial counsel was not obligated to object because it would be meritless. *Matuszak*, 263 Mich App at 58.

Defendant also appears to argue that the prosecutor independently violated his constitutional right to due process by failing to correct Cottingham's allegedly false testimony. This issue was not presented in defendant's statement of the questions presented; accordingly, we need not address this issue. *People v Fonville*, 291 Mich App 363, 383; 804 NW2d 878 (2011) (failure to identify a claim as an issue constitutes waiver of the issue on appeal). Nevertheless, we note that there is nothing in the record to support defendant's claim that Cottingham's testimony was perjured, or that the prosecutor had any reason to believe Cottingham was testifying falsely. Thus, defendant's claim lacks merit.

Affirmed.

/s/ Michael J. Riordan
/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell