STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 14, 2013
v	No. 310799 Macomb Circuit Court
THOMAS WAYNE JOHNSON, Defendant-Appellant.	LC No. 2011-001635-FC

Before: OWENS, P.J., and JANSEN and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of four counts of assault with intent to rob while armed, MCL 750.89, for which he was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 25 to 40 years. We affirm.

Defendant first argues that the prosecution violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by suppressing the details of his codefendant's plea agreement. A defendant has a due-process right to obtain evidence possessed by the prosecution if it might lead a jury to entertain a reasonable doubt as to the defendant's guilt. *People v Lester*, 232 Mich App 262, 280; 591 NW2d 267 (1998); see also *Brady*, 373 US at 87; *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972). "The prosecution must turn over such evidence regardless of whether the defendant makes a request." *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Lester*, 232 Mich App at 280-281, quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). We review de novo defendant's constitutional due-process claim. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

To establish a *Brady* violation, a defendant must prove:

> (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not 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.]

With regard to the first element, the terms of the codefendant's plea agreement were that he would plead to four counts of assault with intent to rob while armed in exchange for being sentenced as a juvenile. The codefendant did not receive any benefit in exchange for his testimony in defendant's case. Thus, the prosecution did not possess favorable impeachment evidence in this case. Additionally, there is no indication in the record that the prosecutor suppressed the details of the codefendant's plea agreement or that defense counsel could not have obtained those details with reasonable diligence. Finally, even if the details of the codefendant's plea agreement had been presented to the jury, there was no reasonable probability that the result of the proceeding would have been different because the agreement did not provide the codefendant with any motivation to lie during his testimony against defendant. The trial court did not err by finding that there was no *Brady* violation in this case. See *Lester*, 232 Mich App at 281-282.

Defendant argues in the alternative that defense counsel rendered ineffective assistance by failing to investigate and introduce into evidence the details of the codefendant's plea agreement. However, when claiming ineffective assistance because of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Because the agreement did not provide the codefendant with any motivation to lie during his testimony at defendant's trial, there is no reasonable probability that the introduction of the details of the plea agreement would have affected the outcome of the proceeding. Defendant has failed to establish a meritorious claim of ineffective assistance of counsel in this regard. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant also argues that the trial court erred by admitting other-acts evidence that was inadmissible under MRE 404(b).

In *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004), quoting *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), our Supreme Court set forth the test for the admissibility of other-acts evidence under MRE 404(b):

> First, the prosecutor must offer the "prior bad acts" evidence under something other than a character or propensity theory. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)." Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105.

Defendant claims that the trial court erred by admitting evidence that he was arrested for domestic violence approximately one week before the incident at issue in this case. The evidence relating to defendant's domestic-violence charge and subsequent bond violation served to inform the jurors of why defendant was arrested. However, the reason for defendant's arrest did not make the existence of any consequential fact more or less probable. Accordingly, the evidence of defendant's domestic-violence charge was irrelevant under MRE 401 and MRE 402. Moreover, there was a danger that the evidence of defendant's domestic-violence arrest would be given undue or preemptive weight by the jurors. MRE 403. In reaching our conclusion, we reject any claim by the prosecution that this evidence was res gestae evidence. The evidence did

not involve or explain the incident at issue in this case. *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

Defendant also claims that the trial court erred by admitting a police officer's testimony that defendant stated that he was not involved in the assault because he "just got out of prison for robbery, and . . . when [I] rob[] people they come away with no money. [I] know[] how to do it." This evidence concerning defendant's statement to the police officer was inadmissible. Defendant's statement that he knew how to successfully rob people and that he had been incarcerated for robbery in the past is precisely the type of propensity evidence that is impermissible under MRE 404(b)(1). This evidence was not offered for a proper purpose under MRE 404(b)(1), was irrelevant under MRE 401 and MRE 402, and was unduly prejudicial under MRE 403. Further, this evidence was not, contrary to the prosecution's argument, part of the res gestae of the offense. *Delgado*, 404 Mich at 83.

Nevertheless, although we find plain error in the admission of the challenged evidence, defendant has failed to establish prejudice with respect to these unpreserved claims. The codefendant testified that he and defendant had attempted a robbery on March 10, 2011, under circumstances that matched the testimony of the four victims. All four victims testified that one of the two assailants wore a red bandana, and three of the victims testified that the same assailant wore other pieces of red clothing. A police officer testified that when he arrested defendant approximately five hours after the incident, defendant was wearing a red bandana and a red shirt. Two of the victims heard the assailants affiliate themselves with the gang "LA Blood." During defendant's interview with the police on the night of the incident, defendant said that he was a member of the LA Bloods. In addition, defendant told the police that his codefendant "had the knife," without being told that the assault involved the use of a knife. There was accordingly strong evidence that defendant perpetrated the crimes, wholly independent of the impermissible references to defendant's criminal history. Defendant has not shown prejudice from the admission of challenged evidence. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Alternatively, defendant argues that defense counsel was ineffective for failing to object to the police officer's testimony that defendant stated that he had just been released from prison for robbery. To establish that counsel was ineffective, a defendant must overcome the strong presumption of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Choosing not to raise an objection may be consistent with sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Indeed, there are times when it is best not to draw attention to an objectionable statement. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Defendant has failed to overcome the presumption that defense counsel acted according to sound trial strategy. *Carbin*, 463 Mich at 600. Even more importantly, given the other, independent evidence of defendant's guilt in this case, defendant has failed to demonstrate a reasonable probability that the result of the proceeding would have been different if defense counsel had objected to the police officer's testimony. *Toma*, 462 Mich at 302-303.

Defendant next argues that the prosecutor committed two instances of misconduct during his closing argument. Alternatively, defendant argues that trial counsel rendered ineffective assistance by failing to object. Claims of prosecutorial misconduct are reviewed case by case,

with the prosecutor's remarks evaluated in the context of the entire record. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *Id*. at 63-64. This occurs, for instance, when the prosecutor appeals to the jurors' sense of civic duty. *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004).

We acknowledge that the prosecutor argued that the codefendant's willingness to provide unfavorable testimony about himself suggested that he was telling the truth about defendant's involvement. But contrary to defendant's contention, the prosecutor's reference to the codefendant's guilty plea and testimony was not calculated to denigrate defendant's decision to go to trial and did not appeal to the jurors' civic duty. A prosecutor is permitted to comment on the credibility of the witnesses if his or her comments are supported by the evidence. *Dobek*, 274 Mich App at 67. We perceive no plain error with regard to this portion of the prosecutor's argument. *Carines*, 460 Mich at 763. Defense counsel was not ineffective for failing to make a meritless objection to this argument. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant also challenges a second portion of the prosecutor's argument in which the prosecutor asserted that defendant should be convicted because (1) the victims deserved justice, (2) it would be unfair for the codefendant to be convicted of the crimes and for defendant to "get away with it," and (3) defendant deserved to be held accountable for his actions. We conclude that, in context, these specific comments went beyond the issue of defendant's guilt or innocence and appealed to the jurors' sense of civic duty. These specific comments constituted prosecutorial misconduct. See *Thomas*, 260 Mich App at 455-456; see also *Unger*, 278 Mich App at 237.

However, defendant cannot establish that he was prejudiced by the prosecutor's objectionable statements. The trial court instructed the jurors to consider only "the evidence that has been properly admitted in this case," that "[t]he lawyers' statements and arguments are not evidence," and that "[y]ou must not let sympathy or prejudice influence your decision." These instructions to the jury were sufficient to alleviate the prejudicial effect of the inappropriate prosecutorial arguments. *Id.* at 240-241. Similarly, a timely objection and request for a curative instruction could have cured the prejudice from the prosecutor's civic duty argument. *Id*. Accordingly, we can find no outcome-determinative error requiring reversal.[1]

Defendant lastly argues that the trial court erred by impaneling an anonymous jury. "An 'anonymous jury' is one in which certain information is withheld from the parties, presumably for the safety of the jurors or to prevent harassment by the public." *People v Williams*, 241 Mich App 519, 522; 616 NW2d 710 (2000). The use of an anonymous jury poses potential harm to a

[1] "[D]eclining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Defendant has not overcome the strong presumption of sound trial strategy. Moreover, defendant cannot establish that but for counsel's failure to object to these instances of prosecutorial misconduct, the result of the proceedings would have been different. *Id*. at 243.

defendant's interest in conducting a meaningful examination of the jury and maintaining the presumption of innocence. *Id.* at 522-523. In this case, however, the record reveals that the parties had access to the prospective jurors' names and that the trial court, prosecutor, and defense counsel were free to ask extensive questions about the jurors' backgrounds and attitudes. It is true that the trial court referred to the jurors by number, but no information about the jurors was otherwise withheld from the parties. The trial court's mere use of juror numbers, standing alone, did not render the jury "anonymous" in this case. *Id.* at 523. We perceive no error with respect to this issue.

Affirmed.

/s/ Donald S. Owens
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra