

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT B. MCWRIGHT,

Defendant-Appellant.

UNPUBLISHED

November 15, 1996

No. 185888

LC No. 94-008522

Before: Gribbs, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions of assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to fifteen to thirty years' imprisonment on the assault with intent to commit murder conviction, consecutive to a two-year sentence for the felony-firearm conviction. We affirm.

On appeal, defendant first contends that several instances of prosecutorial misconduct denied him a fair trial. However, defendant failed to object to the conduct he now claims improper. Therefore, appellate review of this unpreserved issue is foreclosed unless the failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994); *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994); *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990); *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989).

After reviewing the prosecutor's questions and comments in context, we find no miscarriage of justice. *Gonzalez, supra* at 535; see *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995); *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990); see also *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part on other grounds 450 Mich 94; 538 NW2d 356 (reversal is not required unless a timely objection could not have cured the error). The prosecutor's questions regarding the death of a potential witness were not improper because they were based on the victim's prior testimony. *People v Moreno*, 112 Mich App 631, 634; 317 NW2d 201 (1981). The prosecutor's questions regarding defendant's activities subsequent to the death of the

prospective witness were not prejudicial because the trial court instructed the jury not to consider the attorneys' questions as evidence. *People v Drake*, 142 Mich App 357, 361; 370 NW2d 355 (1985).

Furthermore, the prosecutor's questions about defendant's alleged attempt to bribe the complaining witness were not improper under MRE 404(b) because evidence that defendant attempted to bribe a witness is admissible to show consciousness of guilt. *United States v Mendez-Ortiz*, 810 F2d 76, 79 (CA 6, 1986); *United States v Mack*, 868 F Supp 207 (ED Mich, 1994). See also *People v Abernathy*, 153 Mich App 567, 573; 396 NW2d 436 (1985). After a thorough review, we are not persuaded that the prosecutor's closing argument improperly invoked the jurors' sympathy, vouched for the victim's credibility, denigrated defense counsel, commented of the Fifth Amendment privilege of two potential witnesses, see *People v Dyer*, 425 Mich 572; 390 NW2d 645 (1986), or misled the jury, see *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Finally, even if the prosecutor's comments had been improper, the evidence against defendant was so overwhelming that the errors, if any, were harmless. MCR 2.613; MCL 769.26; MSA 28.1096; *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992); *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995).

Next, defendant claims that the trial court abused its discretion in allowing the late endorsement of a prosecution witness without a showing of good cause. We disagree. Under MCL 767.40a; MSA 28.980(1), the prosecution may add to the list of witnesses it intends to call at trial "at any time upon leave of the court and for good cause shown." *People v Burwick*, 450 Mich 281, 290; 537 NW2d 813 (1995). A late endorsement or deletion of a prosecution witness is within the discretion of the trial court. *Id.* at 291. Further, violation of § 40a does not require automatic dismissal. Rather, the trial court must exercise its discretion in fashioning a remedy for noncompliance with a discovery statute, rule, order, or agreement. *People v Lino (On Remand)*, 213 Mich App 89, 92; 539 NW2d 545 (1995).

We hold that the trial court did not abuse its discretion in allowing the late endorsed prosecution witness to testify. See, generally, *People v Travis*, 443 Mich 668, 681-682; 505 NW2d 563 (1993). The prosecutor told the trial court that she did not discover the need for the witness until hearing defense counsel's opening statement. We agree that the prosecutor established good cause for adding the witness late. Further, by allowing defense counsel the opportunity to interview the witness before he testified, the trial court fashioned an appropriate remedy that protected defendant's rights. *Lino, supra* at 92; see *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant also claims that he was denied the effective assistance of counsel. However, there was no evidentiary hearing on this issue below. Therefore, appellate review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). After a thorough review of the record, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994).

Next, defendant argues that his sentence is disproportionate. However, defendant's sentence is within the sentencing guidelines' range and is therefore presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Cutchall*, 200 Mich App 396, 410; 504 NW2d 666 (1993). Defendant has failed to rebut the presumption of proportionality. Indeed, defendant shot a man five times at close range to avenge the victim's apparent attempt to complain to his employer that he did not like defendant selling drugs at the victim's place of employment.

Finally, defendant asserts that the cumulative effect of the errors at trial resulted in an unfair trial. In view of our resolution of the preceding issues, this claim is without merit.

Affirmed.

/s/ Roman S. Gibbs
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin