STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON SCOTT MAHONEY,

Defendant-Appellant.

UNPUBLISHED
April 1, 1997

No. 178729
Genesee Circuit Court
LC No. 94050190 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES FRANK KOHN,

Defendant-Appellant.

No. 178730
Genesee Circuit Court
LC No. 94050191 FC

Before: Sawyer, P.J., and Marilyn Kelly and D.A. Burress,* JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from their jury trial convictions of conspiracy to commit first-degree murder, MCL 750.157(a); MSA 28.354(1), MCL 750.316; MSA 28.548, first-degree murder, MCL 750.316; MSA 28.548, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), conspiracy to commit armed robbery, MCL 750.157(a); MSA 28.354(1), MCL 750.529; MSA 28.797, and two counts of armed robbery, MCL 750.529; MSA 28.797. Defendant Mahoney also appeals as of right from his jury trial conviction of habitual offender second offense. MCL 769.10; MSA 28.1082. Defendant Kohn appeals as of right from his jury trial conviction of habitual offender third offense. MCL 769.11; MSA

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* Circuit judge, sitting on the Court of Appeals by assignment.

28.1083. Both defendants were sentenced to life imprisonment. We affirm defendants' convictions and sentences.

No. 178729

I

Defendant Mahoney first asserts that he was denied the effective assistance of counsel. Because defendant did not move for a new trial or for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To prevail on a claim of ineffective assistance of counsel, a defendant must establish that his counsel's performance failed to meet an objective standard of reasonableness and so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

Defendant argues that he was denied the effective assistance of counsel, because his counsel neglected to object to various instances of alleged hearsay. The testimony defendant complains about was either not hearsay, or its admission was harmless. Therefore, he failed to establish that he was prejudiced by his counsel's failure to object. Consequently, we cannot conclude that defendant was denied the effective assistance of counsel. *Pickens, supra*.

Defendant Mahoney also asserts that he was denied the effective assistance of counsel, because his counsel failed to object to testimony that defendant had committed prior felonies. Defendant fails to identify where in the record such testimony was admitted, as he was required to do by court rule. MCR 7.212(C)(7). Because he has not identified where such error allegedly occurred, we reject his ineffective assistance of counsel claim with regard to any such evidence.

II

Next, defendant argues that he sustained manifest injustice as the result of admission of hearsay at trial. We disagree. The testimony defendant cites was either cumulative of other in-court testimony and thus harmless, or was admissible under hearsay exceptions. See *People v Meeboer*, 181 Mich App 365, 373; 449 NW2d 124 (1989), aff'd 439 Mich 310 (1992).

III

Defendant Mahoney alleges that he was denied due process of law, because two prosecution witnesses testified falsely regarding the agreements they made with the prosecution before testifying at trial. We disagree. Due process requires that a prosecutor correct false testimony, even if not solicited and if the testimony concerns only the witness' credibility. *People v Wiese*, 425 Mich 448, 453-455; 389 NW2d 866 (1986). Defendant fails to make any showing, other than by supposition, that either witness testified falsely about agreements with the prosecution or failed to make full disclosure of the agreements to the jury. Accordingly, we conclude that defendant was not denied due process of law.

IV

Defendant next asserts that he sustained manifest injustice as a result of remarks the prosecution made during its rebuttal argument, and that he was denied the effective assistance of counsel by his counsel's failure to object to these remarks. We disagree. The remarks were made in response to arguments made by defendant's counsel during his closing argument, and thus do not constitute reversible error. *People v Sharbnow*, 174 Mich App 94, 100-101; 435 NW2d 772 (1989). Because defendant was not prejudiced by his counsel's failure to object, we reject his ineffective assistance of counsel claim. *Pickens, supra*.

V

We find that reversible error did not occur when defendant was shackled during the habitual offender trial. A defendant may be shackled only on a finding supported by record evidence that it is necessary to prevent escape, injury to persons in the courtroom or to maintain order. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). Here, the record does not support the trial court's order requiring defendant to be shackled. However, we find that any error was harmless. There was no evidence that any juror saw defendant's shackles. *Id*. The trial judge should avoid having a shackled defendant appear before a jury and should employ alternate means to provide adequate courtroom security.

VI

Defendant argues that the prosecution improperly appealed to the sympathy of the jury during his habitual offender trial by stating that defendant killed more than one person. In fact, defendant was found guilty of killing only one person. However, looking at the statement in context we find that, even if the prosecutor misspoke, the statement was innocuous and not intended to inflame the jury. See *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). Moreover, any prejudicial effect could have been cured by a timely cautionary instruction. *People v Swartz*, 171 Mich App 364, 373; 429 NW2d 905 (1988). Once again, because defendant has failed to establish prejudice, his ineffective assistance of counsel claim must fail. *Pickens*, *supra*.

VII

In a supplemental brief, defendant argues that he was denied his right of confrontation where the court excluded reference to the key prosecution witness having failed a polygraph examination. He also asserts that the polygraph results should have been admitted.

Under current Michigan precedent, polygraph results are inadmissible as evidence in criminal trials. *People v Barbara*, 400 Mich 352, 359; 255 NW2d 171 (1977). In *Barbara*, the Court refused to abandon the *Davis*/*Frye* rule[1] in determining whether polygraph test results are admissible. It refused to change its determination regarding the admissibility of such results for three reasons: (1) The *Frye* test remained the accepted standard for the admission of polygraph testimony in most jurisdiction; (2) serious questions remained concerning the state of the art of the polygraph; (3) policy considerations remained to be resolved.

Defendant asserts that the rationale underlying *Barbara* is no longer valid, because the United States Supreme Court abandoned the *Frye* rule in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Even though defendant submits a strong argument, as an intermediate court, we are required to follow *Barbara*. This Court does not have the power to overturn a decision of the Michigan Supreme Court. *Schwartz v Flint (After Remand)*, 120 Mich App 449, 462; 329 NW2d 26 (1982), rev'd on other grounds 426 Mich 295 (1986). It is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete. Until that Court takes such action, all lower courts are bound by that authority. *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

It has been almost twenty years since *Barbara* was decided. Before *Barbara*, the Court addressed the issue of polygraph testimony in *People v Becker*, 300 Mich 562; 2 NW2d 503 (1942) and *Davis, supra*. We believe in light of *Daubert* it is time to revisit the issue.

No. 178730

I

Defendant Kohn argues that his right to silence was violated when the prosecution referred to his request for immunity and subsequent silence as substantive evidence of his guilt. We disagree.

The record indicates that the police conducted and taped an interview with defendant. Before it began, defendant was advised of his constitutional rights, including his right to remain silent. Defendant waived those rights and stated that he wanted to speak. Later in the day, he requested immunity. Lieutenant Compeau, to whom the request was made, advised him that he did not have authority to offer immunity. During closing argument the prosecution stated to the jury:

> You heard then that Mr. Kohn was taken back and told the officers that he wanted immunity before he could give them any more information. When that was turned down, they didn't receive any more information from Mr. Kohn.

During rebuttal, the prosecution made a similar statement about defendant's request for immunity.

We disagree with defendant that the prosecutor improperly impinged upon his right to remain silent. Where a defendant's silence is attributable to an invocation of his Fifth Amendment privilege, use of his silence in argument is error. *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990). However, here, defendant expressly waived his right to remain silent and agreed to the interview. Anything defendant said thereafter was admissible as a statement of a party opponent, so long as it was relevant. MRE 801(d)(2)(A), *McReavy, supra* at 203. This is not a case where defendant's silence might be construed as his exercise of his constitutional rights. *McReavy, supra* at 211. Defendant's actions were relevant as tacit indications of a guilty conscience. *Id*. at 213. Therefore, the prosecutor's statements did not violate defendant's constitutional rights. Moreover, defendant was not denied the effective assistance of counsel due to his failure to object to the statements.

II

Defendant Kohl next argues that he was denied a fair trial, because the jury was not given the option to convict him as an accessory after the fact. We do not agree. Even if defendant was entitled to such an instruction, any error was harmless. The jury rejected the intermediate charges of second degree murder and manslaughter. This indicates that they had no reasonable doubt about his guilt on the charged offenses and would not have adopted the lesser charge of accessory after the fact. *People v Perry*, 218 Mich App 520, 536-537; 554 NW2d 362 (1996).

III

Next, defendant Kohl contends that he sustained manifest injustice as a result of the admission of the rebuttal testimony of Kathleen Howe. We disagree. Howe's testimony was properly admitted to rebut defendant's witness' testimony that the victim was seen alive after September 10th. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

IV

Finally, defendant asserts that he was denied the effective assistance of counsel as the result of various errors by his trial counsel. First, he claims that his counsel should have objected to hearsay admitted at trial. We find that, in each instance, the evidence was either admissible, harmless, or the error, if any, was caused by defendant's counsel. *Meeboer, supra*, *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). Because defendant could not have obtained a new trial as a result of any erroneous admission of this evidence, even if defendant's counsel had objected, defendant cannot show the prejudice required for an ineffective assistance of counsel claim. *Pickens*, *supra*.

Defendant also claims that he was denied the effective assistance of counsel because his counsel did not object to testimony by a state trooper about statements another witness made to the trooper. Because the witness testified at trial and was available for cross-examination, the trooper's testimony was cumulative and harmless. *Meeboer, supra*. Defendant cannot show that he was prejudiced by a failure to object, and thus he was not denied the effective assistance of counsel.

Affirmed.

/s/ David H. Sawyer
/s/ Marilyn Kelly
/s/ Daniel A. Burress

[1] *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923); *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955).