

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYANT C. ARMOUR,

Defendant-Appellant.

UNPUBLISHED

February 27, 1998

No. 199559

Genesee Circuit Court

LC No. 96-053871-FC

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), first-degree criminal sexual conduct, MCL 750.520b(1); MSA 28.788(2)(1) (multiple variables), kidnapping, MCL 750.349; MSA 28.581, carjacking, MCL 750.529a(1); MSA 28.797(a), conspiracy to commit carjacking, MCL 750.157a; MSA 28.354(1), armed robbery, MCL 750.529; MSA 28.797, carrying a concealed weapon, MCL 750.227(2); MSA 28.424(2), and felony-firearm, MCL 750.227b(1); MSA 28.424(2)(1).

The trial court sentenced defendant to life imprisonment without parole on the first-degree murder conviction; 30 to 60 years' imprisonment on the first-degree criminal sexual conduct conviction; 25 to 50 years' imprisonment on the kidnapping conviction; 20 to 40 years' imprisonment on the carjacking conviction; 30 to 60 years' imprisonment on the conspiracy conviction; 20 to 40 years' imprisonment on the armed robbery conviction; three to five years' imprisonment on the carrying a concealed weapon conviction; and two years' imprisonment on the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his trial counsel was ineffective in that when he was questioning witnesses, he consistently informed the jury when he was asking those questions specifically requested by defendant. We disagree.

Because defendant failed to object or preserve the issue below, this Court's review is limited to the record. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). A defendant who asserts a denial of effective assistance must show that counsel's performance was so deficient that

counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment, and that the deficient performance prejudiced the defense to the extent that the defendant was deprived of a fair trial with a reliable result. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also overcome the presumption that the challenged action was trial strategy. *Id.*

Defendant contends that his trial counsel’s indication to the jury that questions were asked specifically at defendant’s request demonstrated to the jury that counsel did not agree with him, and therefore, defendant’s credibility and presumption of innocence was destroyed. However, defendant has not provided any authority for his theory that a demonstration of differences in trial strategy between a defendant and his or her trial counsel somehow destroys the defendant’s credibility and presumption of innocence. Defendant did not claim that his counsel questioned his veracity or somehow misled the jury. Defendant’s counsel did not directly make any statements to the jury indicating that he did not believe in his client’s innocence. Moreover, there was overwhelming evidence of defendant’s guilt presented at trial. Several witnesses testified that defendant admitted to carjacking and killing the victim. Antonio Hardy, testifying under a plea agreement, stated that he saw defendant shoot the victim once, and later heard two gunshots after defendant forced the victim into the woods. In light of this overwhelming evidence of defendant’s guilt, it is unlikely that, absent counsel’s alleged error, defendant would have been acquitted. Accordingly, defendant has failed to establish the requisite prejudice to sustain his ineffective assistance of counsel claim. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Next, defendant argues that the trial court erred when it excused the prosecution from producing two witnesses, Kenneth and Delorean Owens, who were included on its final list of endorsed witnesses. Because defendant failed to raise this issue below in a motion for a post-trial evidentiary hearing or in a motion for new trial, it was not preserved, and we decline to review it. See *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). In any event, defendant failed to demonstrate how he was prejudiced by the prosecution’s failure to produce these witnesses. A review of the transcript also indicates that the witnesses were out of the state, and neither the prosecutor nor defendant knew of their locations. Accordingly, the prosecutor showed good cause in requesting their deletion, and the court did not abuse its discretion in permitting the prosecutor to delete these witnesses from the witness list. MCL 767.40a(4); MSA 28.980(1)(4); *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996).

Next, defendant argues that he was denied a fair trial as a result of the prosecutor’s alleged attacks on his character and credibility during the opening statement. While defendant objected during the prosecutor’s opening statement, he did not indicate the grounds for his objection until after the prosecutor completed his opening remarks, depriving the court of an opportunity to provide a timely curative instruction. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). However, this Court will still reverse if a curative instruction could not have eliminated the prejudicial effect of the remarks or where failure to review the issue would result in a miscarriage of justice. *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996).

Prosecutors have a duty to see that defendants receive a fair trial while attempting to convict those guilty of crimes. *Id.* at 678. Nevertheless, prosecutors may use “hard language” when it is supported by evidence and are not required to phrase arguments in the blandest of all terms. *Id.* Following a review of the transcript, we find that the prosecutor did not improperly attack defendant’s character, and that defendant was not denied a fair trial. While the prosecutor used strong language during opening statement, including a reference to the act of murder as “evil,” the prosecutor primarily discussed the charges against defendant and the evidence supporting those charges. Although defendant did not request a curative instruction during his objection, the trial court instructed the jury that the lawyers’ statements and arguments are not evidence. This instruction likely cured any impropriety in the prosecutor’s opening statement. Accordingly, defendant was not denied a fair trial.

Finally, defendant argues that the trial court erred in refusing his request to give CJI2d 5.7, the “addict-informer” jury instruction which was necessary because of Tyrone Mahan’s testimony. We disagree. This Court has held that failure to give JCI2d 5.7 is not error where the testimony of the addict is supported by other evidence. *People v McKenzie*, 206 Mich App 425, 432; 522 NW2d 661 (1994).

In this case, there was substantial evidence linking defendant to the offenses other than the Mahan’s testimony. Accordingly, the trial court did not err in failing to give CJI2d 5.7. Moreover, we note that the trial court instructed the jury on factors to consider in weighing the credibility of a witness, including whether the witness seemed to have a good memory, and whether the witness had any special reason to tell the truth or to lie. These instructions covered many of the same factors as CJI2d 5.7, and sufficiently protected defendant’s rights. Therefore, reversal is not required on this basis. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Joel P. Hoekstra