

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CASPER BROWN JR.,

Defendant-Appellant.

UNPUBLISHED

January 31, 2003

No. 231969

Calhoun Circuit Court

LC No. 00-002861-FH

Before: Cooper, P.J., and Jansen and R. J. Danhof*, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of breaking and entering a building with intent to commit larceny, MCL 750.110, and sentenced to 18 to 120 months in prison. Defendant appeals as of right. We affirm.

I

Defendant alleges that several errors by defense counsel denied him effective assistance of counsel. We disagree. Defendant failed to preserve his claim of ineffective assistance of counsel by filing a motion for new trial or otherwise by creating a record in the trial court; therefore, appellate review is limited to the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant bears the burden of overcoming the strong presumption that counsel was effective. *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms, and that the deficiency was so prejudicial that defendant was deprived of a fair trial. *Strickland, supra*, 687-688; *People v Pickens*, 446 Mich 298, 309, 312-313; 521 NW2d 797 (1994). Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

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

In the present case, defendant has failed to overcome the strong presumption that counsel's performance was within the broad range of reasonable professional conduct and has not shown that any alleged error by counsel affected the outcome of the trial. *LeBlanc, supra* at 578; *Toma, supra* at 302-303. The record does not support defendant's alleged error that counsel failed to object to defendant appearing at trial in jail clothing. If defendant was dressed in jail clothing when the jury selection process began, it was because he failed to accept the trial court's offer of other clothing. Thus, defendant waived the underlying issue. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985). He also has failed to establish that even if he wore jail garb at his trial, it was the result of an error by counsel rather than his own choice, for which relief is not available. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176.

Defendant also argues that his trial counsel erred by not calling Josh Buchanan, the person defendant claimed committed the crime, as a defense witness. Whether to present or question a witness is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The failure to call a witness or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Ineffective assistance of counsel is not demonstrated simply because a trial strategy does not work. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant was not deprived of a substantial defense by counsel's failure to call Buchanan as a witness because defendant presented his theory that Buchanan was the real culprit through his own testimony and through his sister's testimony. Moreover, defendant offers only speculation that Buchanan would have testified at all and that his testimony would have been favorable. See, e.g., *Pickens, supra* at 327. Defendant's argument that counsel may have been able to elicit an assertion of the Fifth Amendment from Buchanan before the jury is also without merit. "[A] lawyer may not . . . call a witness knowing that he will claim a valid privilege not to testify." *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). Therefore, defendant has failed to establish either that counsel committed an error by not presenting Buchanan as a witness or that he suffered any prejudice. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant also claims that trial counsel erred by not pursuing evidence concerning the theft of the vehicle used by the perpetrator of the offense. Again, we find this merely a reasonable strategic choice. *LeBlanc, supra* at 578. The presentence report indicates that the vehicle in question was stolen from a residence across the street from defendant's ex-girlfriend's house on the evening of the break-in. Because both defendant and his ex-girlfriend testified that defendant was at her residence on the evening in question, exploration of this issue at trial would have undercut rather than helped the defense. This record does not establish prejudicial error by counsel. *Carbin, supra* at 600.

Defendant's remaining allegations of error by counsel lack substance. Counsel put forth a substantial defense, and attacked the admissibility of defendant's statement and the credibility of the testifying officer. Counsel's performance here put the prosecutor's case to "meaningful

adversarial testing,” *United States v Cronin*, 466 US 648, 656; 104 S Ct 2039; 80 L Ed 2d 657 (1984), and fell within the bounds of professional reasonableness to ensure that defendant received a fair trial, *Strickland, supra* at 689-690; *LeBlanc, supra* at 578.

II

Defendant next claims he was denied a fair trial because the prosecutor argued in closing that, to acquit defendant, the jury must disbelieve the investigating officer, and because the prosecutor misstated the evidence by arguing there was no testimony from defendant or his sister that Buchanan committed the crime. We disagree.

Defendant did not preserve his claim of improper argument by timely and specifically objecting, and failed to preserve his claim regarding misstatement of the evidence by specific objection and requesting a curative instruction; therefore, appellate review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW 2d 130 (1999); *People v Pfaffle*, 246 Mich App 282, 288 632 NW2d 162 (2001). Thus, if a curative instruction could have alleviated any prejudicial effect, error mandating reversal will not be found. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Allegations of prosecutorial misconduct are reviewed on a case-by-case basis, and this Court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context, and in light of defense arguments and all the evidence of the case. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *Rodriguez, supra* at 30; *Schutte, supra*. Viewed in this light, the prosecutor’s comments were proper. The prosecutor did not inject extraneous issues into the determination of guilt or innocence. *Rice, supra* at 438. Rather, the comments about the officer’s testimony were simply argument concerning the weight of the evidence and credibility of the witnesses, which are entirely appropriate when based on the evidence adduced at trial or reasonable inference. *People v Bahoda*, 448 Mich 261, 276, 282; 531 NW2d 659 (1995); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor need not state his argument or inferences from the evidence in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001); *Launsburry, supra*.

Likewise, the prosecutor’s misstatements in his closing argument to the effect that there was no testimony that Josh Buchanan admitted committing the offense did not deny defendant a fair trial. A well-trying case should not be reversed when prejudice from isolated remarks is subject to being cured by timely instruction. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Here, defendant’s right to a fair trial was preserved because the trial court specifically instructed the jurors, before and after closing arguments, that evidence consisted of the sworn testimony of witnesses, not attorneys’ statements, and that they should rely on their own recollection of the testimony and disregard any contrary statements of the attorneys. Any prejudice from the prosecutor’s comment was thus dispelled by the trial court’s instructions. *Bahoda, supra* at 281.

III

Next, defendant argues that he was denied a fair trial when the trial court would not order production of police reports of unrelated investigations concerning Buchanan. We disagree. The trial court's decisions concerning discovery are reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998); *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). MCR 6.201(B)(1) requires that a prosecutor provide known exculpatory information upon request, consistent with due process principles that a prosecutor may not suppress information that "is both favorable to the defendant and material to the determination of guilt or punishment." *Fink, supra*, 453-454; see also *Stanaway, supra* at 666.

Here, defendant requested police reports concerning statements made by Josh Buchanan. The prosecutor averred, and the investigating officer testified, that Buchanan made no statement concerning the instant offense. Defendant offers no argument on how any statements Buchanan may have made to the police concerning other offenses could possibly be material to the instant offense; any admission Buchanan may have made regarding an unrelated offense was inadmissible. MRE 404(a); MRE 404(b)(1). Buchanan's credibility was not at issue because neither party called him as a witness. Thus, defendant has failed to demonstrate that the evidence he requested was exculpatory, MCR 6.201(B)(1), or a "police report concerning the case," MCR 6.201(B)(2). The trial court did not abuse its discretion in denying defendant's motion because disclosure was not required by court rule and the reports were not necessary for defendant's defense. MCR 6.201(B); *Fink, supra* at 458; *Laws, supra* at 455. Moreover, defendant has not shown a violation of due process because the undisclosed reports were not material to the instant case, i.e., defendant has not demonstrated the reports would have likely resulted in a different outcome at trial. *Fink, supra* at 453-454; *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

IV

Next, defendant argues that the trial court abused its discretion by limiting the cross-examination of the investigating officer when it precluded defendant from asking where the officer lived and by ending cross-examination about what the officer did or did not include in his report. We disagree. An accused's right to confront and cross-examine witnesses against him does not include the unlimited right to admit all relevant evidence or cross-examine on any subject. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998); *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Trial courts "have discretion to place limits on cross-examination where questions are intended merely to harass, annoy, or humiliate the witness, or where inquiries would tend to endanger the personal safety of the witness." *People v Sammons*, 191 Mich App 351, 367; 478 NW2d 901 (1991), citing *Smith v Illinois*, 390 US 129; 88 S Ct 748; 19 L Ed 2d 956 (1968), White, J., concurring; see also *People v Pleasant*, 69 Mich App 322; 244 NW2d 464 (1976), and *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 143; 486 NW2d 326 (1992). The marginal benefit to defendant of this line of inquiry did not outweigh concerns for officer safety, and given the ample alternative means to test Picketts'

credibility, defendant's Sixth Amendment right of cross-examination was not violated. *Adamski, supra* at 138; *Sammons, supra*; *In re Forfeiture, supra* at 143; *Pleasant, supra*. Accordingly, the trial court did not abuse its discretion by limiting defendant's cross-examination regarding Picketts' personal address.

Likewise, the trial court did not abuse its discretion by curtailing defendant's cross-examination of what was in Picketts' report. At the point that the trial court ended examination of Picketts, defense counsel had already enjoyed a full and fair opportunity to cross-examine Picketts concerning his investigation, the contents of his police report and the differences between Picketts' version of defendant's statement and defendant's trial testimony. Defendant has failed to establish what further light could possibly have been shed on the credibility of Picketts by further exploration of his police report, or could have been explored during the first and second cross-examinations of Picketts. Accordingly, the trial court did not abuse its discretion by ending the examination of Picketts. MRE 611(a); MRE 403; *People v Sexton*, 250 Mich App 211, 221-222; 646 NW2d 875 (2002). Further, defendant was not denied his Sixth Amendment right to a reasonable opportunity to test the credibility of the witness. *Ho, supra* at 190; *Adamski, supra*.

V

Last, we address defendant's contention that the trial court erred in its scoring of offense variable 13. Defendant was sentenced on December 7, 2000 to a minimum sentence of eighteen months and was given ninety-five days credit for time served. Therefore, he completed his minimum sentence on March 4, 2002. Where a defendant has already served his minimum sentence, we will decline to review the sentence because it is impossible to fashion a remedy. The issue is therefore moot. *People v Rutherford*, 208 Mich App 198, 204 (1994). Likewise, defendant's claim of ineffective assistance of counsel regarding sentencing is also moot.

Affirmed.

/s/ Jessica R. Cooper

/s/ Kathleen Jansen

/s/ Robert J. Danhof