

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUFUS L. SPEARMAN,

Defendant-Appellant.

UNPUBLISHED

April 17, 2003

No. 230510

Wayne Circuit Court

LC No. 99-011871

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to life imprisonment without parole for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I

Defendant argues that the trial court erred in denying his motion for an adjournment to allow newly retained counsel time to prepare for trial. We review the trial court's decision for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

In *Echavarria*, *supra* at 369, this Court identified five factors to consider in reviewing a trial court's decision to deny a defense attorney's motion to withdraw combined with a defendant's motion for a continuance to obtain another attorney:

(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*Id.*]

Although defendant had a constitutional right to counsel, consideration of the remaining factors do not weigh in defendant's favor. See *id.*

First, defendant failed to identify a bona fide reason for replacing his court-appointed attorney with newly retained counsel. Defendant sought a new attorney because (1) he disagreed with his appointed attorney's decisions not to file certain pretrial motions, (2) his appointed attorney failed to give notice of two alleged alibi witnesses, Candace Givens and Daynelle Barksdale, and (3) his appointed attorney allegedly failed to investigate a claim that the police coerced Darshuan Barksdale to incriminate defendant. According to the record, appointed counsel did not give notice of the alibi witnesses because defendant never gave him their names. Moreover, defendant has never factually shown that these alleged alibi witnesses would have provided favorable testimony. Defendant also has not factually established that the police coerced Darshuan Barksdale into giving false testimony against him (a point we discuss in greater detail below). Appointed counsel's decisions regarding the filing of motions were a matter of professional judgment and strategy, which do not warrant substitution of counsel. See *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001).

Further, defendant was negligent in asserting his right because he waited until a week before trial to retain substitute counsel. In addition, the trial court determined, justifiably, that the trial of the case, which was the oldest on the court's docket, should not be delayed further, especially where the court had previously granted defendant an adjournment. Finally, we find no indication in the record that defendant was prejudiced by the denial of his motion. On the contrary, our review of the trial transcript shows that defendant's appointed attorney was well-prepared to defend him, and thoroughly cross-examined the prosecution witnesses. Accordingly, the trial court's denial of defendant's motion was not an abuse of discretion.

II

Defendant contends that he is entitled to a new trial because the trial court's clerk administered a defective oath to the jurors. Because defendant did not object to the jurors' oath, this issue is unpreserved and reviewed for plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCR 6.412 governs jury selection in criminal trials and requires the trial court to "have the jurors sworn," but does not prescribe a particular oath. The staff comment to MCR 6.412(F) refers to the oath contained in the Criminal Jury Instructions as being acceptable, see CJI2d 2.1(3), which in turn incorporates the oath prescribed in MCR 2.511(G), but the Criminal Jury Instructions are not binding on the courts. *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000). We are not persuaded that the court clerk's failure to strictly comply with a court rule that does not require strict compliance, but rather merely references a non-binding standard jury instruction, amounts to plain error.

Defendant also relies on MCL 768.14, which provides a mandatory form of oath, but this oath also is not binding on the courts. Because the statute requires a particular oath, and the court rules leave the particular form of oath to the trial court, they are in conflict. Const 1963, art 6, § 5, provides that our Supreme Court "shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." When a court rule established by the Supreme Court conflicts with a statute, the court rule governs if, as here, the matter pertains to practice and procedure. *People v Conat*, 238 Mich App 134, 162; 605 NW2d 49 (1999). Consequently, the court rule takes precedence and the trial court is free to fashion its own appropriate oath. The oath administered here was satisfactory because it plainly and simply

stated that the jurors would follow the trial court's instructions and decide the case according to the evidence. Consequently, we find no plain error.

III

Defendant argues that the evidence was insufficient to support his conviction of first-degree murder. We disagree. To convict a defendant of first-degree, premeditated murder, the prosecution must show that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). "The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing." *Id.*, quoting *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Proof of the actor's state of mind can be proven by minimal circumstantial evidence. *Ortiz, supra*. Evidence that the defendant had time to consider his actions is sufficient circumstantial evidence of deliberation and premeditation. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

Here, three witnesses testified that defendant told them that he killed Toma Johnson. Further, defendant admitted details that were consistent with Cassandra McIntosh's account of the killing. The evidence also demonstrated that defendant had time to reflect on what he was doing when he walked from the party store to McIntosh's house, and again during the brief exchange he had with Johnson before shooting him. Physical evidence also corroborated the prosecution's theory. Specifically, gunshot residue was found on the clothes that defendant wore, and the gun that defendant hid in the alley was loaded with hollow point bullets, which was consistent with the type of bullet that killed Johnson. Additionally, after the shooting, defendant hid his clothes, hid his gun, and boasted about the killing with the toast, "One shot to the dome." Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish defendant's guilt of first-degree murder beyond a reasonable doubt. See *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Defendant argues that he could not have formed the requisite intent for first-degree murder because he was intoxicated on the night of the killing. However, defendant did not raise an intoxication defense in the trial court. In any event, evidence that defendant drank and smoked marijuana did not establish that his intoxication was so great that he could not form the necessary intent. See *People v Mills*, 450 Mich 61, 82; 537 NW2d 909, modified 450 Mich 1212 (1995).

IV

Defendant also argues that his conviction was against the great weight of the evidence. MCR 2.611(A)(1)(e) provides that the trial court may grant a motion for a new trial on the ground that the verdict was against the great weight of the evidence. Such a motion should be granted only if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). We review the trial court's decision for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000).

Here, defendant's argument is based entirely on discrepancies in the witnesses' testimony. Generally, conflicting testimony, even when impeached, is not a sufficient ground for

granting a new trial. *McCray, supra* at 638. The trial court may not act as a “thirteenth juror” when deciding a motion for a new trial, and this Court “may not attempt to resolve credibility questions anew.” *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). In *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998), our Supreme Court recognized only a narrow exception to the general principle that a new trial may not be granted based on questions of witness credibility, namely, when the witnesses’ testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it.

In this case, defendant’s arguments concerning discrepancies in the witnesses’ testimony involve inconsequential matters, such as the inconsistency between McIntosh’s testimony that she did not hear anyone push open the door, and Vaneeka and Darshuan’s testimony that defendant told them he pushed open the door when Johnson tried to close it on him. Discrepancies such as these do not render the verdict contrary to the great weight of the evidence.

V

Defendant argues that the trial court violated MCR 6.414(H) when it denied the jurors’ request for transcribed witness testimony. Because defendant did not object to the trial court’s response, we review this issue for plain error. See *Carines, supra* at 763.

MCR 6.414(H) governs jury requests for evidence or testimony:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, the trial court informed the jurors that the court reporter’s notes were “basically equivalent to Egyptian hieroglyphics” and that they would not be typed “in the very near future.” The trial court did not suggest the possibility of having the court reporter read back the testimony. However, the trial court did advise the jurors that it might be able to consider a “very specific” future request.

We agree that the trial court was not as clear as it could have been in raising the possibility of the court reporter reading back testimony. The trial court’s instruction did carry the risk of suggesting to jurors that it was simply not possible to supply them with transcribed testimony. On the other hand, the trial court’s reference to “very specific” requests should have conveyed the message that some narrow requests might be satisfied. Because the jurors should have understood this, the trial court’s response was not plain error under *Carines*. Furthermore, we see no likelihood that the trial court’s response prejudiced defendant. This was not a case involving complicated details or difficult factual issues. The case principally involved whether the jurors believed or doubted the Barksdale witnesses’ testimony that defendant told them he had killed Johnson. Moreover, the jurors’ broad, general request for testimony, along with a request for other exhibits, suggests that the jurors did not have any particular inquiries about the

testimony, but merely wanted as much information before them as possible. Under these circumstances, we cannot conclude that any error affected defendant's substantial rights. See *id.*

VI

Defendant raises numerous instances of alleged misconduct by the prosecutor during closing statement and rebuttal argument. A defendant must preserve a claim of prosecutorial misconduct by specific objection and request for a curative instruction. *Kelly, supra* at 638. Here, the record shows only that defendant objected to some unspecified remarks, and that the trial court sustained them in an off-the-record sidebar. Accordingly, these issues are not preserved and we review them for plain error affecting defendant's substantial rights. See *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

This Court decides prosecutorial misconduct issues case by case, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Whether the prosecutor's remarks were improper depends on all the facts of the case. *Id.* The prosecutor's comments must be read as a whole and evaluated in light of their relationship to defense arguments and the evidence admitted at trial. *Id.*

Defendant argues that the prosecutor vouched for his witnesses' credibility. A prosecutor may not vouch for a witness' credibility or suggest that the government has some special knowledge that a witness' testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Although defendant cites numerous examples of what he claims constituted improper vouching, we find that only one statement, the prosecutor's remark that Darshuan "told the truth," constituted improper witness vouching. However, because the trial court could have corrected this brief remark if a timely objection had been made, reversal is not warranted. *Knapp, supra* at 382-383.

Defendant claims that the prosecutor injected his personal opinion when he discussed premeditation. We disagree. The prosecutor merely argued, in reference to the evidence, that the jury could infer that defendant had time to contemplate his actions before shooting Johnson. We also find that the prosecutor did not improperly base his argument on an appeal to the jurors' sympathy; rather, he advised the jurors that they could not act out of sympathy for defendant any more than they could decide the case based on sympathy for the victim.

Defendant contends that the prosecutor argued facts not in evidence when he commented on the police investigation. "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We have examined the prosecutor's remarks and the only instance where the prosecutor arguably referred to facts not in evidence was when he surmised that the police told Vikki Woods and Darshuan Barksdale, before questioning them, that they had already questioned Vaneeka Barksdale. This statement, however, was not an important part of the argument and, therefore, did not affect defendant's substantial rights. See *Carines, supra*.

Defendant maintains that the prosecutor tried to shift the burden of proof by arguing that defendant failed to prove his own innocence. This is not an accurate characterization of the prosecutor's argument. In reality, the prosecutor permissibly argued that defendant's testimony was not worthy of belief. See *People v Fields*, 450 Mich 94, 108-110; 538 NW2d 356 (1995); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor did not call upon defendant to prove his own innocence; rather, he illuminated weaknesses in defendant's defense theory. Once defendant decided to become a witness on his own behalf, defendant put his own credibility in issue. See *Fields, supra* at 109-110. The prosecutor was thus entitled to attack his credibility with facts based on the evidence.

Defendant argues that the prosecutor denigrated his character by referring to him as wild, crazy, and dangerous. Viewed in context, the prosecutor's statements were not improper. The prosecutor was arguing that the Barksdale witnesses were credible because they testified against defendant despite their fear of him. We agree that the prosecutor's remark that the prosecution's witnesses were also afraid of defendant's family went beyond Darshuan's testimony that defendant's niece contacted her before the trial. However, this remark was too brief to constitute plain error affecting defendant's substantial rights. See *Carines, supra*.

VII

Defendant argues that he was denied the effective assistance of counsel. Because this Court previously denied defendant's motion to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

"To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Ortiz, supra* at 311.

Defendant claims his counsel was ineffective because he failed to advance defendant's alibi theory by calling Candace Givens and Daynelle Barksdale as witnesses. However, defendant has never offered any factual support for his claim that these witnesses could have provided favorable testimony. He therefore cannot establish that defense counsel erred in failing to call them, or that any alleged error was outcome-determinative. Similarly, defendant cannot establish that counsel erred in failing to ask the prosecutor's assistance in locating these witnesses pursuant to MCL 767.40a(5).

Defendant argues that counsel should have moved to suppress Darshuan's testimony on the ground that it was the product of police coercion. However, defendant has not offered evidence (except two belatedly submitted affidavits) that the police coerced Darshuan into falsely incriminating him. See *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Although Darshuan testified at the preliminary examination and at trial that she incriminated defendant after the police threatened to remove her child, she stated that this prompted her to tell

the truth about defendant's involvement in the charged offense. This does not establish defendant's claim that Darshuan perjured herself when she testified against him.

Furthermore, even if defense counsel had erred in failing to pursue the strategy of suppressing Darshuan's testimony, defendant has not demonstrated that the error was outcome-determinative. Two other witnesses testified that defendant admitted shooting the victim. Additionally, even if Darshuan had not testified about defendant's admission, she still could have testified about her discovery of defendant's gun after he told her where it was hidden. Thus, there was other substantial evidence of defendant's guilt.

Finally, defendant complains that trial counsel was ineffective for allowing him to be tried in his prison attire. The record does not support this claim. "A defendant's timely request to wear civilian clothing must be granted." *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). Here, defendant did not make a timely request for civilian clothing because he erroneously expected the trial court to adjourn the trial. It was thus defendant's own dilatoriness, not ineffectiveness of trial counsel, that caused defendant to appear before the jury in prison garb.

VIII

Defendant argues that the cumulative effect of the aforementioned errors deprived him of a fair trial. The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. *Knapp, supra* at 388. Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial. *Id.* Here, the few minor errors we have found were not seriously prejudicial. This case essentially turned on whether the jurors found the three main witnesses to be credible, and there is no apparent reason why the alleged errors, even when taken together, would have been the determining factor in how the jurors weighed their credibility. Accordingly, defendant is not entitled to a new trial on the basis of any cumulative effect of multiple errors.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper