

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE L. YOUNG,

Defendant-Appellant.

UNPUBLISHED

September 25, 2003

No. 240832

Wayne Circuit Court

LC No. 01-008222-01

Before: Owens, P.J., and Griffin and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of the lesser-included offense of second-degree murder, MCL 750.317; one count of assault with intent to commit armed robbery, MCL 750.89; one count of felony-firearm, MCL 750.227b; and one count of felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to concurrent terms of forty-five to seventy years' imprisonment for the second-degree murder convictions; forty to sixty years' imprisonment for the assault conviction; and two to five years' imprisonment for the felon in possession of a firearm conviction. These sentences are to be served consecutively to a two-year term of imprisonment for felony-firearm. Defendant appeals as of right. We affirm.

Defendant contends that the trial court erred by failing to sua sponte provide a cautionary instruction regarding accomplice testimony. Defendant concedes, however, that he did not object to the trial court's instructions below. Accordingly, this issue is forfeited, and defendant is not entitled to relief unless he can show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

In *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974), our Supreme Court ruled that it was "reversible error . . . to fail upon request to give a cautionary instruction concerning accomplice testimony and, if the issue is closely drawn, it may be reversible error to fail to give such a cautionary instruction even in the absence of a request to charge." In *McCoy*, the prosecution's case was based upon the uncorroborated testimony of an accomplice. *Id.* at 238. The defendant testified on his own behalf, and presented the testimony of a witness to support his alibi. *Id.* at 238. The *McCoy* Court observed that resolving the case came down to a credibility contest between defendant (and his alibi witness) and the accomplice. *Id.* at 239. Therefore, the *McCoy* Court ruled that it was reversible error for the trial court to not have sua sponte provided a cautionary instruction regarding accomplice testimony. *Id.* at 239-240.

The instant matter, however, did not present nearly the same level of a credibility contest. First, unlike *McCoy*, there was not just one prosecution witness that was a purported accomplice, but two, and each provided support for the other's testimony. In other words, there was not merely the uncorroborated testimony of one accomplice. Moreover, also unlike *McCoy*, there was another witness placing defendant both at the scene of the crime shortly before the murders and away from the scene fifteen minutes later. Yet another witness testified that defendant was looking for a gun on the day of the murders. Thus, there was additional testimony supporting the two purported accomplices' testimony. In addition, defendant did not present any evidence that would have reduced the instant matter to a "closely drawn" credibility contest. Instead, resolving the issue of defendant's guilt focused on the *general* "believability" of the prosecution's witnesses—purported accomplices and otherwise.

Finally, it is not clear that either Michael Martin or Eugene Lawrence was truly an accomplice. Although the witnesses were questioned by the police, there is no indication that they were potential suspects who testified out of self-interest. Further, to whatever extent Martin accompanied defendant on the day of the murders, even though he may not have done enough to discourage defendant from arming himself or robbing someone, the evidence did not suggest that Martin was at all willing to actually help defendant. Similarly, although Lawrence provided defendant a gun, Lawrence's testimony indicated that defendant told him he needed the gun for self-defense. There is absolutely no indication in the record that Lawrence knew what defendant planned to do with the gun. Because CJI2d 5.5(2) instructs the jury that an accomplice is someone "who knowingly and willfully helps or cooperates with someone else in committing a crime," it is doubtful that either Martin or Lawrence actually qualified as accomplices. Accordingly, we are not persuaded that the trial court erred in failing to provide the accomplice instructions. Consequently, in the absence of plain error, defendant may not avoid forfeiture of this issue. *Carines, supra* at 763-765.

Next, defendant contends that the trial court abused its discretion in denying his motion for a mistrial. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Here, defendant's motion for a mistrial was based on a juror voluntarily disclosing that certain testimony led him to believe that he may have known one of the victims. After questioning the juror, the trial court denied defendant's request to excuse the juror. However, the parties eventually stipulated to the dismissal of this juror. After dismissing the juror, the trial court questioned the remaining jurors to determine whether they had been tainted. None of the jurors indicated that he or she had heard anything other than the fact that the excused juror may have known someone involved in the case. Further, none of the jurors indicated that this one fact would impact their individual abilities to be fair and impartial. In the absence of any indication that the remaining jurors were unfair or biased, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Alter, supra* at 205.

Defendant also contends that he was denied a fair trial because the trial court conducted the jury voir dire. This issue is forfeited because defendant did not raise it below. *Carines, supra* at 763-765.

We note that MCR 6.412(C) states as follows:

Voir Dire of Prospective Jurors.

(1) Scope and Purpose. The scope of voir dire examination of prospective jurors is within the discretion of the court. It should be conducted for the purposes of discovering grounds for challenges for cause and of gaining knowledge to facilitate an intelligent exercise of peremptory challenges. The court should confine the examination to these purposes and prevent abuse of the examination process.

(2) Conduct of the Examination. The court may conduct the examination of prospective jurors or permit the lawyers to do so. If the court conducts the examination, it may permit the lawyers to supplement the examination by direct questioning or by submitting questions for the court to ask. On its own initiative or on the motion of a party, the court may provide for a prospective juror or jurors to be questioned out of the presence of the other jurors.

A defendant does not have the right to have his or her counsel conduct voir dire. *People v Washington*, 468 Mich 667, 674; 664 NW2d 203 (2003). “However, where the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause can be intelligently exercised.” *Id.* “A defendant is entitled to relief from a verdict because of disallowance of voir dire only if he can prove that he was actually prejudiced by the presence of the juror in question or that the juror was properly excusable for cause.” *Id.* at 675.

Here, defendant does not indicate what questions he would have asked the potential jurors, nor does he challenge any of the questions actually used by the trial court. Indeed, the trial court’s questioning was more than sufficient to determine whether any juror was potentially biased. Although defendant contends that the trial court erred in denying his motion for a mistrial based on the aforementioned stipulation to excuse one juror, he does not argue that voir dire questions would have led to the juror being excused for cause.¹ Further, we are not persuaded that the trial court erred in denying defendant’s motion to excuse that juror. There is no indication that defendant would have been prejudiced by that juror’s presence on the jury. *Washington, supra* at 675. Accordingly, defendant may not avoid forfeiture of this issue. *Carines, supra* at 763-765.

Defendant further contends that he was denied a fair trial because of several instances of purported prosecutorial misconduct. Generally, we review claims of prosecutorial misconduct “case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where the prosecutorial misconduct issue is preserved, we evaluate “the challenged conduct in context to determine if the defendant was denied a fair and impartial trial.” *Id.* However, where,

¹ Unfortunately, this juror simply did not recognize the name of one of the victims.

as here, “a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error.” *Id.* “[T]o avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings.” *Id.*

First, defendant contends that prosecutorial misconduct occurred when the prosecution summarized the facts from one of the deceased victim’s point of view. “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). Here, although the prosecutor used a unique method to present her theory of the case, we are not persuaded that it was an unreasonable method. Accordingly, in the absence of plain error, defendant may not avoid forfeiture of this issue. *Aldrich, supra* at 110.

Second, defendant contends that the prosecutor improperly vouched for the credibility of the police force. Indeed, a “prosecutor is prohibited from vouching for a witness’ credibility or suggesting that the government has some special knowledge that a witness will testify truthfully.” *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, although the prosecutor certainly vouched for the police force’s general competence, her argument did not directly vouch for the credibility of any particular witness. Further, the few police witnesses that testified provided only general information, none of which was material to resolving the disputed questions of fact. Thus, defendant’s argument is misplaced and defendant has failed to establish that the argument was plainly erroneous. *Aldrich, supra* at 110.

Third, defendant contends that the prosecutor’s argument improperly contained her opinion of the case. As noted above, however, the prosecutor may “argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case.” *Schutte, supra* at 721. Accordingly, this issue is plainly without merit. *Aldrich, supra* at 110.

Fourth, defendant contends that prosecutorial misconduct occurred when the prosecutor’s rebuttal argument improperly bolstered Martin’s credibility. We note that defense counsel’s closing argument suggested that this witness was not credible because he was initially “a suspect.” We have ruled that “an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Regardless, it is not clear that the argument was improper. The prosecutor did not “vouch” for Martin’s credibility; instead, she merely argued a reasonable inference from the facts. See *Schutte, supra* at 721. Accordingly, defendant’s contention of error is without merit. *Aldrich, supra* at 110.

Defendant’s final contention of prosecutorial misconduct argues that the prosecutor improperly sought to invoke sympathy for the victims. Generally, a prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Although there is some merit to defendant’s contention that the argument may have been improper in this regard, we note that the argument was more of a plea to not treat the victims worse because of their presence in a crack house. The prosecutor’s argument merely reminded the jurors that the rules that protect society also apply to protect people with drug problems. Regardless, we are not persuaded that the prosecutor’s argument denied defendant a fair trial. *Aldrich, supra* at 110. The victims did not testify, so additional sympathy for them would not have increased their credibility. Instead, defendant’s guilt was based on the credibility

of several non-victim witnesses. Also, the jury ultimately found defendant guilty of second-degree murder, the lesser-included offense. Thus, it is doubtful that the prosecutor's argument swayed the jury into an emotional verdict. Moreover, the comments were brief and any prejudice could have been cured with a timely objection and appropriate curative instruction. Consequently, defendant may not avoid forfeiture of this final contention of prosecutorial misconduct. *Id.*

Next, defendant contends that there was insufficient evidence supporting his conviction for assault with intent to commit armed robbery. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "The elements of assault with intent to rob while armed are: (1) an assault with force and violence; (2) an intent to rob or steal; and (3) the defendant's being armed." *People v Cotton*, 191 Mich App 377, 391; 478 NW2d 681 (1991). Here, Martin testified that defendant was planning on using a gun to "hit a lick," or rob someone. Martin further testified that defendant admitted that he "had to shoot the guy and the girl." Viewed in a light most favorable to the prosecution, this evidence suggested that defendant did attempt to rob the victims, while armed, and that a violent assault occurred. Accordingly, there was sufficient evidence supporting defendant's conviction of this charge. *Nowack, supra* at 399.

However, defendant contends that the basis for his conviction was his statements to the Martin, which were inadmissible until the prosecutor established the corpus delicti of the crime.² "The purpose of the corpus delicti rule is to prevent the use of a defendant's confession to convict him of a crime that did not occur." *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). The *Ish* panel further opined: "The rule bars the prosecution from using a defendant's confession in any criminal case unless it presents direct or circumstantial evidence independent of the defendant's confession that the specific injury or loss occurred and that some criminal agency was the source or cause of the injury." *Id.* at 116. The panel noted that it "is not necessary that the prosecution present independent evidence of every element of the offense before a defendant's confession may be admitted." *Id.* at 117. Thus, in *Ish*, a police officer's testimony that defendant was found in a home that had a ripped screen was sufficient to allow the introduction of his inculpatory statement as proof of his specific intent to commit a first-degree home invasion. *Id.* at 117-118.

In the instant matter, the two victims were found dead in a crack house under circumstances strongly suggestive of homicide. In light of the homicide, it stands to reason that the victims were assaulted. Once this showing was made, defendant's statement could be used to establish the "aggravating circumstance" of assault with intent to commit armed robbery. See *Cotton, supra* at 389 (noting that once the corpus delicti rule is established, a defendant's confession may be used to elevate a crime to one of a higher degree or to establish an aggravating circumstance). This, of course, was accomplished through Martin's testimony.

² Because defendant did not raise the corpus delicti rule below, we review this issue for plain error. *Carines, supra* at 763-765.

It should be noted, however, that Martin's testimony preceded the evidence establishing that the victims were found shot to death. Thus, Martin's testimony should not have been admitted until after this evidence was introduced. An argument could be made that it was plainly erroneous to allow the introduction of Martin's testimony until after the corpus delicti was introduced. On the other hand, a timely objection would only have led to a change in the order of the witnesses. Eventually, Martin would have been able to offer that testimony. Therefore, we are not persuaded that the plain error, if any, had any impact on the outcome of the proceedings. *Carines, supra* at 763-765. Consequently, defendant's contention of error is without merit.

Defendant also contends that the trial court abused its discretion in admitting DNA evidence. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999).

"There is no general constitutional right to discovery in a criminal case." *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). However, in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the Supreme Court imposed on prosecutors a limited duty to disclose certain information. See *Aldrich, supra* at 133-134. The *Aldrich* panel explained that *Brady* has been interpreted to mean that a defendant is not entitled to a new trial unless he or she establishes:

(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Id.* at 134.]

Here, there is no indication that the prosecution suppressed "favorable evidence." If anything, the fact that defendant's DNA was found at the scene of the crime would tend to be inculpatory. The evidence was certainly not favorable to defendant. Accordingly, we reject defendant's contention of error.³ *Cain, supra* at 122.

Defendant also contends that he was deprived of his constitutional right to effective assistance of counsel. Defendant did not request a new trial or an evidentiary hearing on this issue below; accordingly, this issue is largely forfeited and our review is limited to the facts on

³ On appeal, defendant raises, for the first time, MCR 6.201(H), which states that a party is under a continuing obligation to comply with a discovery order (defendant's brief, 32). MCR 6.201(A) and (B) require a prosecutor to disclose various exculpatory and inculpatory evidence, but only upon request. Here, the trial court record does not contain a copy of any general discovery request. Regardless, we note that the prosecutor promptly informed defense counsel of the DNA report as soon as she became aware of its existence. As such, it would appear that the prosecutor complied with MCR 6.201. As a result, the existence of a general discovery order merely provides an alternate ground for affirming the trial court's decision to not suppress the evidence (a sanction authorized by MCR 6.201(J) for a discovery violation). *Cain, supra* at 122.

the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A successful claim of ineffective assistance of counsel requires a defendant to “show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant.” *Id.* at 423-424.

Defendant contends that his trial counsel was ineffective for failing to request accomplice instructions. Again, however, the evidence did not suggest that Martin and Lawrence were accomplices. Accordingly, there was no basis for providing that instruction. Trial counsel is not ineffective for failing to advocate a meritless position. *Snider, supra* at 425.

Defendant also contends that trial counsel was ineffective for failing to object to the purported prosecutorial misconduct. Having concluded that the prosecutor’s arguments were either fair commentary or did not have any impact on the outcome of the proceedings, trial counsel was not ineffective for failing to object. *Snider, supra* at 423-425.

In his supplemental brief, defendant contends that trial counsel was ineffective for failing to obtain an affidavit from the sheriff who conducted a physical lineup. We note that the record does not indicate that trial counsel was aware of the sheriff’s existence. Nor does the record confirm that the sheriff would have testified as defendant suggests. Accordingly, there is no basis in the record for a conclusion that trial counsel was deficient. *Snider, supra* at 423-424.

Defendant also contends that trial counsel was ineffective for failing to move to exclude evidence relating to a witness, Ronald Mathis, identifying him during the physical lineup. Although there is some basis in the record to support a challenge to that identification, we note that the testimony of Martin and Lawrence was far more damaging to defendant than this identification. Thus, we are not persuaded that a motion to exclude the identification, even if successful, would have had any impact on the outcome of the proceedings. Therefore, we reject defendant’s contention of error. *Snider, supra* at 423-424.

Defendant also contends that counsel was ineffective for failing to challenge Mathis’s second round of testimony, where he ended up identifying defendant. Specifically, defendant contends that it was improper for the lead police officer to talk with Mathis in the witness room. However, defendant cites no authority indicating that the police officer’s conduct was improper. Moreover, trial counsel may have surmised that Mathis’s initial refusal to identify defendant was sufficient to create reasonable doubt regarding that identification, while also undermining his overall credibility. Further, it is likely that the trial court would have rejected any challenge to the identification based on Mathis’s suggestion that his refusal to testify was based on fear. In fact, an objection may have caused Mathis to explain or justify his fear, causing more prejudice to defendant than just letting Mathis reverse his stance on identifying defendant. For all these reasons, we reject defendant’s challenge to the effectiveness of trial counsel regarding this identification. *Snider, supra* at 423-424.

Finally, defendant contends that trial counsel should have objected to a prosecutor’s question on the basis of prosecutorial misconduct. We note that trial counsel did object to the question as leading, and the objection was sustained. Accordingly, there is no basis for a conclusion that trial counsel was somehow deficient. Regardless, we are not persuaded that the question was improper. Consequently, we reject defendant’s contention of error. *Snider, supra* at 423-424.

Affirmed.

/s/ Donald S. Owens
/s/ Richard Allen Griffin
/s/ Bill Schuette