

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN JONES,

Defendant-Appellant.

UNPUBLISHED

July 26, 2005

No. 244066

Wayne Circuit Court

LC No. 01-010970

Before: Sawyer, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison without parole for the first-degree murder conviction, two terms of 17½ to 40 years for the assault with intent to murder convictions, and a consecutive term of two years in prison for the felony-firearm conviction. We affirm.

Defendant first argues that a new trial is required because he did not receive the effective assistance of counsel. We disagree.

Whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). A judge must first find the facts and then decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel. *Id.* A trial court's finding of fact is reviewed for clear error. *Id.* Questions of constitutional law are reviewed de novo. *Id.* To establish ineffective assistance of counsel, a defendant must show: (1) that the defense counsel's performance was objectively unreasonable in light of prevailing professional norms; and (2) a reasonable probability that, but for the defense counsel's error, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Carbin, supra* at 600, quoting *Strickland v Washington*, 466 US 668, 687; 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant's ineffective assistance claim is predicated on defense counsel's failure to interview two witnesses, Tamikea Mills and LaTonya Mills, and to call them to testify at trial in support of an alibi defense. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Grant, supra* at 485, quoting *Strickland, supra* at 690-691. Generally, defense counsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment. *Ackerman, supra* at 455. Further, failure to call a witness constitutes ineffective assistance of counsel only if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Here, defense counsel's failure to call the putative alibi witnesses did not deprive defendant of a substantial defense because neither witness could testify with certainty that defendant was with them at the time of the shooting. At the *Ginther*¹ hearing, defense counsel testified that the defense theory was misidentification. Therefore, this is not a case where defense counsel failed to present defendant's only viable defense.

In any case, defendant failed to show a reasonable probability that the outcome of the trial would have been different if the witnesses were presented. Neither witness could verify with certainty that defendant was with them at the time of the shooting. Specifically, Tamika Mills testified regarding her and defendant's daily routine only, and LaTonya Mills testified about a 12:00 p.m. to 3:00 p.m. time frame, not about defendant's whereabouts between 10:00 a.m. and 10:30 a.m., when the offense occurred. In addition, William Beauchamp testified unequivocally that defendant was the shooter. William had known defendant for many years and had a good opportunity to see defendant's face during the shooting. There was no evidence that William had any bias against defendant that would influence his testimony.

Defendant next argues that the trial court abused its discretion by admitting identification testimony that was inadmissible hearsay. We disagree. The decision whether to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, a preliminary question of law underlying the admissibility of evidence, such as whether a rule of evidence precludes admissibility, is reviewed de novo. *Id.*

The issue presented here is whether the admitted statement was one of identification of a person made after perceiving the person within the meaning of MRE 801(d)(1)(C).

A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person [MRE 801(d)(1)(C).]

"As long as the statement is one of identification, Rule 801(d)(1)(C) permits the substantive use of *any* prior statement of identification by a witness as nonhearsay, provided the witness is

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

available for cross-examination.” *People v Malone*, 445 Mich 369, 377; 518 NW2d 418 (1994) (emphasis added). Statements of identification are not limited by whether the declarant denies or affirms the out-of-court statement. *Id.* at 376.

Here, because Timothy Beauchamp’s statement was clearly one of identification of a person after perceiving the person, and because he was available for cross-examination, the statement was not hearsay. Thus, the trial court properly admitted the statement as substantive evidence.

Next, defendant argues in propria persona that the prosecutor committed several acts of prosecutorial misconduct during trial. We disagree.

To preserve the issue for appellate review, a defendant must timely and specifically object to the prosecutor’s improper conduct. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). However, unpreserved allegations of prosecutorial misconduct are reviewed for plain error affecting the defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). If a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *Ackerman, supra* at 448-449.

First, defendant contends that the prosecutor committed misconduct by presenting witness Timothy Beauchamp in “jail clothing” in order to weaken his credibility.² Defendant claims that a witness should be afforded the same protection as a defendant with regard to the attire worn during the witness’s testimony; however, defendant has not presented any case law to support such argument. This Court will not search for such supporting authority. See *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Defendant also contends that the prosecutor committed misconduct when it elicited testimony that Timothy was charged with armed robbery. However, the prosecutor only questioned Timothy regarding his charge after he testified that he did not know whether the charge related to the instant case. Defendant has failed to demonstrate how this testimony affected his substantial rights, and has therefore failed to demonstrate plain error. *Carines, supra*.

Defendant next argues that the prosecutor improperly shifted the burden of proof to defendant during closing arguments.³ It is apparent from the record that the prosecutor’s arguments related to William Beauchamp’s credibility. “[A] prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). We also reject defendant’s argument

² Although defense counsel questioned Timothy with respect to his attire, no objection was made on the record regarding such. Accordingly, this issue has not been preserved for appellate review.

³ No objection was raised at trial; therefore, this issue was not preserved for appellate review.

that the prosecutor attempted to shift the burden of proof by suggesting that there was a possible motive or target for the shooting. Nothing in this portion of defendant's argument even suggests that the prosecutor attempted to shift the burden of proof to defendant. Additionally, the prosecutor did not improperly appeal to the jury for sympathy, rather, the prosecutor argued that the jury should consider the evidence and follow the law in rendering its verdict. Thus, defendant has failed to demonstrate plain error affecting his substantial rights.⁴

Next, defendant again claims that the prosecutor committed misconduct by introducing hearsay testimony through Timothy Beauchamp, and by violating an ongoing discovery order. Following careful consideration of this issue, defendant has failed to demonstrate that he was denied a fair and impartial trial with respect to the admission of Timothy's testimony, as he has made no argument to such and we previously addressed the admissibility issue. To the extent defendant argues the prosecutor violated the discovery order, we also reject this argument. Defendant claims that the prosecutor violated MCR 6.201(B)(1) because he was required to present any exculpatory information or evidence known to the prosecuting attorney. However, Timothy's testimony was not exculpatory to defendant in that he testified he did not see the occupants of the vehicle. Thus, he did not specifically deny defendant's presence in the vehicle, and the evidence was not exculpatory.

Defendant next contends that the prosecutor insinuated through his questioning that defendant intimidated the witnesses.⁵ Given that there was sufficient evidence to support defendant's convictions, defendant has failed to argue or show how the prosecutor's questions affected the outcome of the lower court proceedings.

Defendant lastly argues, in the context of his prosecutorial misconduct issue, that the prosecutor committed misconduct by engaging in the improper questioning of Timothy Beauchamp. As previously stated, the prosecutor's question regarding Timothy's charge came as a follow-up to his answer that he did not know if the charge related to the instant case. Second, the trial court ruled inadmissible Timothy's testimony regarding other prior illegal activity. Aside from his broad assertion that such questions affected the jury's opinion of the witness, defendant has failed to demonstrate that he was denied a fair and impartial trial in that there was sufficient evidence to support his conviction.⁶

Finally, defendant argues in propria persona that the trial court erred when it failed to provide the jury with certain limiting or cautionary instructions. We disagree.

⁴ We similarly reject defendant's argument that the prosecutor improperly appealed to the jurors to perform their civic duty as defendant has failed to support this argument with any citation to the record, and fails to demonstrate or even argue how his substantial rights were affected.

⁵ As there was no objection to the questioning of these witnesses on this basis, we review this claim for plain error.

⁶ Finding that defendant was not denied the right to a fair trial, we find his cumulative error argument meritless. *People v Hill*, 257 Mich App 126, 152-153; 667 NW2d 78 (2003).

Regarding defendant's argument that a cautionary instruction should have been provided following statements made by certain jurors during voir dire, defense counsel indicated satisfaction with the jury panel, thus waiving any alleged error to the selection of the jury. An expression of satisfaction with a jury at the close of voir dire waives the party's ability to challenge the manner in which voir dire was conducted. *People v Hubbard (After Remand)*, 217 Mich App 459, 466; 552 NW2d 493 (1996).

Defendant's argument that a hearing should have been held on the voluntariness of Timothy Beauchamp's statement fails because defendant lacks standing to raise the issue of the violation of the rights of third parties. *People v Jones*, 115 Mich App 543, 547; 321 NW2d 723 (1982). Lastly, defendant's argument that the trial court should have given an instruction regarding the prosecutor's alleged vouching for the credibility of William Beauchamp and Timothy Beauchamp also fails.⁷ Here, the prosecutor did not vouch for the witnesses' credibility, but merely argued that they were or were not worthy of belief. *Thomas, supra* at 455.

Affirmed.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray

⁷ Defendant contends that defense counsel objected to one instance where the prosecutor argued facts not in evidence. However, such objection was made to an issue not raised by defendant. Accordingly, this unpreserved issue is reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.