

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS EARL QUICK,

Defendant-Appellant.

UNPUBLISHED

October 11, 2005

No. 256843

Grand Traverse Circuit Court

LC No. 03-009237-FH

Before: O’Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for breaking jail through an assault on a prison employee, MCL 750.197c. He was sentenced to 13 to 48 months in prison. We affirm.

This case arose after defendant refused to allow his jail keeper to check his mouth following a distribution of medication. The jailer stood at the ajar door of defendant’s cell and insisted that defendant return for an inspection of defendant’s mouth. Rather than complying, defendant removed his glasses and then charged the jailer, shoving him back through the doorjamb and into some lockers. Outside the cell, defendant continued to struggle with the jailer until more officers arrived to subdue him.

Defendant first argues that he was denied the right to due process and a fair trial because of prosecutorial misconduct. We disagree. We review de novo a claim of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Unless a miscarriage of justice will result, we will not reverse a conviction because of a prosecutor’s comments if a timely objection would have cured any prejudice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first challenges the prosecutor’s comment that some of defendant’s cellmates did not testify because they were uncooperative. There was testimony before the jury that defendant was lodged in a six-man cell, so the jury knew that there were other witnesses to the altercation between defendant and the victim. The prosecutor did not argue that these witnesses would have been beneficial to either the prosecution or the defense, but merely offered the

information as an explanation for why they were not called. These neutral comments did not deprive defendant of a fair trial.

Defendant also challenges the prosecutor's comment that there was nothing that anyone could do to the cellmate who testified because he was already in prison. Defendant asserts that this comment was improper because it implied that the witness was impartial. However, because the prosecutor did not vouch for the witness's credibility by suggesting that he had special knowledge that the witness was testifying truthfully, the prosecutor could properly argue that the witness had no reason to lie.

Defendant further argues that the prosecutor improperly interjected his opinion as to defendant's guilt into his closing argument by repeatedly attacking defendant's character and referring to false evidence in his closing argument. It is true that prosecutors should not "express their personal opinions of a defendant's guilt, and must refrain from denigrating a defendant with intemperate and prejudicial remarks" *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, defendant does not refer us to any specific remarks made by the prosecutor that attack defendant's character, and he does not point to any specific objections on the record. Therefore, we do not find any manifest injustice arising from the prosecutor's statements and conclude that a timely objection could have cured any prejudice. *Stanaway, supra*.

Next, defendant argues that his trial counsel was ineffective in the following ways: (1) by defense counsel's failure to object to the prosecutor's improper remarks during closing argument; (2) by defense counsel's failure to call witnesses requested by defendant; (3) by defense counsel's failure to adequately prepare for trial; (4) by defense counsel's failure to point out the victim's alleged perjury in his closing argument; (5) by defense counsel's failure to properly cross-examine witnesses; and (6) by defense counsel's failure to object to admission of the photographs of the victim's injuries. We disagree. Because defendant did not raise these issues in the trial court or seek a *Ginther*¹ hearing, we limit our review of defendant's claims to mistakes that are apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. [*Id.* at 140, citations omitted.]

As discussed above, the challenged prosecutor's remarks did not deny defendant a fair trial. Thus, failure to object to those remarks cannot support an ineffective assistance of counsel claim. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). Likewise, defendant has not shown that trial counsel was ineffective for failing to object to the admission of the photos of the

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

victim's injuries because defendant presents no evidence to support his allegation that they were false evidence. While defendant argues that trial counsel did not adequately prepare for trial, he has not established any prejudice due to the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant's remaining claims of ineffective assistance of counsel are matters of trial strategy that this Court will not second-guess. *Riley, supra*. Defendant also argues that he was denied his right to counsel when he expressed to the trial court his desire to have new counsel appointed and was not given an opportunity to articulate his reasons for his request. However, defendant has abandoned this issue by giving it only cursory treatment. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). Besides, the trial court promptly appointed counsel the day of defendant's request.

Finally, we reject defendant's argument that he was selectively prosecuted in violation of his right to equal protection of the law. We review a prosecutor's charging decision under an "abuse of power" standard to determine whether the prosecutor acted contrary to the law. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). Selective enforcement is not, by itself, a constitutional violation. *People v Monroe*, 127 Mich App 817, 819; 339 NW2d 260 (1983). Defendant has not presented us with any evidence that he was singled out for prosecution while other, similarly situated violators were ignored. *People v Ford*, 417 Mich 66, 101-102; 331 NW2d 878 (1982). Nor has he demonstrated that his selection for prosecution was based on an unjustifiable classification. *Monroe, supra*. Therefore, his argument is meritless.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy