

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 12, 2011

v

ORLANDO TERRELL ROBINSON,

Defendant-Appellant.

No. 296565
Wayne Circuit Court
LC No. 09-006896-FC

Before: SAAD, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree murder, MCL 750.316, four counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life imprisonment for each first-degree murder conviction, 30 to 60 years' imprisonment for each assault with intent to commit murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant was sentenced as a third habitual offender, MCL 769.11. We affirm.

I. BASIC FACTS

This case concerns a shooting following a high school party in Detroit. On January 17, 2009, DeMarco Johnson and his girlfriend, Aysha Smith, hosted a high school party at Masonic Hall ("the hall"), located at 14183 Wyoming Street, Detroit. Terrell Hicks arrived at the hall around 6:00 p.m. to work security for the high school party with three other men. Hicks's job was to control the crowd, check the doors, and check the people entering and exiting the hall. The crowd began arriving around 7:30 p.m. to 8:00 p.m. Included among the crowd was Dominique Hunter, Johnson's friend and defendant's cousin.

At some point, Hunter and her friends got into an argument with another group of six or seven girls. After Hicks observed hands flying and head movements, he walked over to the groups and broke them apart. However, Hunter continued to argue, so Hicks began to escort her to the front door. Before Hicks could take Hunter outside, Johnson told Hicks to let Hunter remain inside. Immediately after the argument ended, Dajuhn Griffin saw Hunter begin to argue with Abdur Moffet and another person. Griffin, Johnson, and Hicks then observed Hunter walk away from her group of friends, take out her cell phone, and place a call. After Hunter ended her phone conversation, she returned to the party. Hunter denied calling anyone after the fight.

Meanwhile, Jonathan Brown, who was defendant's friend, testified that on January 17, 2009, he was with defendant at a house on Pinehurst and Foley in Detroit. Brown and defendant left the house that evening to go to the hall after defendant told Brown that he had gotten a call from Hunter, his cousin, informing him that she had gotten slapped at the hall. Brown agreed to go to the hall because he wanted to be there to help defendant if a fight broke out.

Defendant and Brown were patted down and searched upon arriving at the hall. No weapons were found on their persons. Johnson observed Hunter approach defendant and hug him. After defendant and Hunter spoke, defendant and his friends walked around the party. Hunter denied seeing defendant at the hall. Soon after arriving at the hall, defendant and his friends got into an argument with ten of Johnson's friends. Hicks and the other security guards went over to the two groups of boys. Hicks and Johnson told everyone to calm down, but defendant did not listen. Defendant kept yelling and acting in an aggressive manner. At that point, defendant was disturbing the party, and Johnson told Hicks to take defendant outside. Hicks grabbed defendant and turned him around to throw him outside. While Hicks was escorting defendant to the front door, Griffin heard defendant say that he would "shoot" the place up.

Outside of the hall, Johnson heard defendant say, "I got guns for [n*****s] like you all." After Hicks finally pushed defendant out of the front door, defendant began stating that he needed to come back inside and get his female cousin. Hicks told defendant that defendant could not reenter to get his cousin. Hicks also told defendant that he would have to wait outside until his cousin came out. Hicks then shut the door on defendant.

About ten minutes later, sometime between 11:00 p.m. and 12:00 a.m., the hall owner shut the party down and told everyone to leave. Hicks opened the front door to let people outside. When Hicks opened the front door, he saw defendant standing by himself next to the front door.

Marshall Ross testified that once he was outside, he saw Moffet and defendant arguing in the parking lot while Hicks stood in between them. As Ross walked by defendant to go home, defendant suddenly took a swing and tried to punch Ross. Ross and defendant then began fist fighting. While fighting, Ross and defendant backed up against a large snow pile in front of a brick wall at the end of the hall's parking lot. Ross hit defendant in the face during the fight. The fight ended when Ross knocked defendant over the snow pile and defendant fell to the ground. Afterward, defendant and Ross exchanged words. Ross did not want to fight defendant again, so he turned his back on defendant and began to walk away, towards the front of the hall.

As Ross was walking away from him, defendant pulled a gun from his hip and began shooting at the crowd. After defendant shot a couple of bullets, Johnson and Ross heard defendant's gun click because it jammed. Defendant then continued to shoot additional bullets. Defendant did not aim as he shot into the crowd. In total, defendant fired the gun six or seven times and seven people were injured: Demetrius Campbell, Edward Jones, Steven Williams, Moffett, Brandon Baker, Ross, and Griffin. Williams and Jones ultimately died as a result of gunshot wounds to their backs.

After the shooting was over, Johnson, Hicks, and Griffin saw defendant running away from the hall's parking lot. No one saw a weapon in defendant's hands as he was departing.

A number of witnesses testified on behalf of defendant that Amare Duncan, wearing a green and white hooded sweatshirt, shot the gun and not defendant. Still, defendant was convicted. He now appeals.

II. PRIOR CONVICTION

Defendant argues that he was denied due process when he stipulated to the fact that he had a prior felony for purposes of his felon in possession of a firearm conviction, MCL 750.224f. We need not address this issue because it was waived by defendant and is moot. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal quotation marks omitted). Because defendant stipulated to having a prior felony conviction, his stipulation has waived any error. Furthermore, we reviewed the lower court record and conclude that while defendant was charged with felon in possession of a firearm, this count was ultimately dismissed by the trial court. "An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). Thus, because defendant was not convicted of felon in possession of a firearm, this issue is moot, and we decline to address it.

III. JUDICIAL MISCONDUCT

Defendant next contends that the trial court denied him a fair and impartial trial when it improperly informed the potential jury pool that defendant's prior felony conviction was for conspiracy to commit unarmed robbery. We disagree. We review unpreserved errors for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). For a plain error to affect the defendant's substantial rights, the error must be prejudicial, meaning it must have affected the outcome of the proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). The defendant bears the burden of showing prejudice. *Id.*

Criminal defendants have a constitutional right to a fair and impartial trial. US Const, Ams VI, XIV; Const 1963, art 1, § 20; *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). Trial courts have wide discretion and power regarding matters of trial conduct; however, that power is not without limits. *Id.* at 307-308. In determining whether the challenged judicial remarks were improper, this Court considers whether the remarks "were of such a nature as to unduly influence the jury and thereby deprive the [defendant] of his right to a fair and impartial trial." *Id.* at 308, quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975). In reviewing the challenged remarks, "[p]ortions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

After reviewing the record as a whole, we conclude that the trial court's mistaken comment did not have an undue influence upon the jury. Rather, the record reflects that during the jury selection process, immediately after the trial court partially read the felon in possession

of a firearm charge and stated that defendant's prior felony conviction was for conspiracy to commit unarmed robbery, defense counsel asked to approach the bench and the trial court stated on the record to the jury that it made a mistake. Immediately following a brief sidebar conference, the trial court corrected its mistake by instructing the jury to disregard the incorrect charge. Jurors are presumed to follow their instructions. *People v Chapo*, 283 Mich App 360, 370; 770 NW2d 68 (2009). Thus, the trial court's mistaken reading of the felony information to the jury of the felon in possession of a firearm charge did not unduly influence the jury or deprive defendant of a fair trial.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also asserts that defense counsel was ineffective for failing to move for a mistrial following the trial court's remarks regarding defendant's prior conviction. A defendant must "make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes reasonable hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). In this case, defendant did not move for a new trial or seek an evidentiary hearing at the trial court level. Therefore, review is limited to errors apparent on the record. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Moreover, we will not substitute our judgment for counsel's regarding matters of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). Additionally, counsel is not ineffective for failing to make a futile motion. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008).

A mistrial is only appropriate when the prejudicial effect of an error cannot be cured in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Because the trial court properly cured its error by rereading the correct felony information charge and instructing the jury to ignore the improperly read charge, the prejudicial effect of the error was cured. Defendant has not overcome the presumption that counsel's actions constituted sound trial strategy, and thus, defendant has not established that a new trial is warranted. Furthermore, given the evidence against defendant, including the testimony of Hicks, Johnson, Ross, Griffin, and Pierre Welsh-Malone, who all saw defendant shoot into the crowd, and Baker, who heard gunfire coming from the same area where he saw defendant standing moments before the gunfire began, any deficiency in counsel's performance did not prejudice defendant.

V. PROSECUTORIAL MISCONDUCT

Defendant contends that the prosecution committed misconduct when it questioned Allen Henderson, one of defendant's witnesses, regarding the first scheduled trial date and when it argued about the credibility of defendant's four witnesses and Welsh-Malone during its closing and rebuttal arguments. We disagree.

A. CROSS-EXAMINATION OF HENDERSON

Defense counsel objected to the prosecutor's cross-examination of Henderson and requested a curative instruction, which was given. This issue is preserved for appellate review. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the alleged error denied the defendant a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

A prosecutor may not engage in conduct or make an argument that rises to the level of denying the defendant a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct claims are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of [the] defendant's arguments." *Thomas*, 260 Mich App at 454. Prosecutors are generally given "great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotation marks omitted).

During its cross-examination of Henderson, the prosecution inquired whether Henderson was aware of when the trial was initially scheduled to begin. After defense counsel objected and moved for a mistrial, the trial court denied the mistrial, but granted defense counsel's request for a curative instruction. After reviewing the record in context, we conclude that defendant was not denied a fair and impartial trial because the prosecution was making a good faith effort to admit evidence. The question about the initial trial date was intended to support an inference that it was odd for someone with exonerating evidence like Henderson to wait until the month before trial to come forward, especially given the fact that this was not the first trial date. Prosecutorial misconduct cannot be based on good faith efforts to admit evidence. *Noble*, 238 Mich App at 660. "The prosecutor is entitled to attempt to introduce evidence which he legitimately believes will be accepted by the court, as long as that attempt does not actually prejudice the defendant." *Id.* at 660-661. Even if the prosecution's statement was improper, the trial court's instruction to the jury cured any potential prejudicial effect.

B. CLOSING AND REBUTTAL ARGUMENTS

Defense counsel failed to object to the prosecutor's alleged misconduct during his closing and rebuttal arguments. "Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). "To avoid forfeiture of review of this issue under the plain error rule, the defendant must demonstrate that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights." *Id.*, citing *Carines*, 460 Mich at 763-764. To show plain error affecting the defendant's substantial rights,

the defendant must prove prejudice occurred, meaning that “the error must have affected the outcome of the lower court proceedings.” *McLaughlin*, 258 Mich App at 645.

While the prosecution cannot vouch for a witness’s credibility in a manner that suggests that it has special knowledge regarding the witness’s truthfulness, *Bahoda*, 448 Mich at 276, the prosecution is free to argue any reasonable inferences that may arise from the evidence, *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Prosecutors may also argue that a defendant’s witnesses are not worthy of belief. *Dobek*, 274 Mich App at 67. After reviewing the comments in context, it is clear that the prosecution was asking the jurors to evaluate the credibility of all the witnesses based on the evidence using their common sense and experience, and the prosecution was not confined to arguing using only the blandest of possible terms.

Furthermore, a curative instruction can eliminate the possible prejudicial effect that may have resulted from prosecutorial misconduct. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). The trial court instructed the jury that: defendant was innocent until proven guilty; the prosecution must prove each element beyond a reasonable doubt; only sworn testimony and admitted exhibits were evidence; the attorneys’ statements, questions and arguments were not evidence; and the trial court’s rulings, questions, and instructions were not evidence. Thus, any possible prejudicial effect from the prosecution’s closing and rebuttal arguments was eliminated.¹ Defendant has failed to show plain error requiring reversal occurred.

VI. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence is insufficient to uphold his convictions for two counts of first-degree premeditated murder and four counts of assault with intent to commit murder. We disagree. When reviewing a claim of insufficient evidence, we review the record de novo in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). “In reviewing the sufficiency of the evidence, this Court must not interfere with the jury’s role as the sole judge of the facts.” *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of first-degree premeditated murder are: (1) the defendant intentionally killed the victim (2) with premeditation and deliberation. MCL 750.316; *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). “The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” MCL 750.83; *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005) (internal quotation marks omitted). Assault with intent to commit murder requires a specific intent to kill. *Id.* at 148.

¹ To the extent that defendant argues that counsel was ineffective for failing to object during the prosecution’s closing arguments, he has failed to properly present this allegation within the statement of questions presented. See *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). We thus consider it abandoned on appeal.

To prove the defendant's intent "minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). "A factfinder can infer a defendant's intent from his words or from the act, means, or the manner employed to commit the offense." *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001). A jury may infer the intent to kill based on all of the facts and circumstances, including the use of a dangerous weapon. See *People v Dumas*, 454 Mich 390, 403; 563 NW2d 31 (1997).

In reviewing the record in the light most favorable to the prosecution, a rational trier of fact would be able to find that there was sufficient evidence to prove beyond a reasonable doubt that defendant had the intent to kill. The record reveals that after defendant received a phone call from Hunter, he and his friend went to the hall. Upon arriving, defendant walked around the hall before engaging in a verbal argument inside the hall with several of Johnson's friends. When Hicks escorted defendant outside, defendant threatened to shoot several people. Once the party ended and the crowd was outside, defendant engaged in another verbal argument before starting a fist fight with Ross. After defendant's fist fight with Ross ended because defendant fell over a snow pile at the end of the hall's parking lot, defendant stood up and pulled a gun out from his waist. Defendant immediately began shooting the gun several times at random into the crowd. This evidence is sufficient to prove defendant had the intent to kill.

Even though defendant submitted contradictory evidence, including four witnesses who testified that they saw Duncan shoot into the crowd, it was for the trier of fact to determine the credibility of the proofs presented. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The jury heard the evidence and determined each witness's credibility. A rational trier of fact would be able to conclude beyond a reasonable doubt that defendant had the intent to kill when he fired gunshots into the crowd.

We also note that although defendant's statement of questions presented suggests that the jury's verdict was against the great weight of the evidence, defendant's argument section in his brief fails to address this issue. Thus, we consider it abandoned on appeal. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion constitutes abandonment of the issue").

VII. PHOTOGRAPHIC LINEUP

Defendant's final issue on appeal is that the photographic lineup was unduly suggestive. We disagree. Review of unpreserved pretrial identification procedures is limited to determining whether defendant has demonstrated a plain error affecting his substantial rights. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), citing *Carines*, 460 Mich at 763-764.

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). A court must evaluate the fairness of an identification procedure in light of the total circumstances to ascertain whether the procedure qualifies as so impermissibly suggestive that it gave rise to a very substantial likelihood of irreparable misidentification. *People v Kurylczyk*, 443 Mich 289, 311-

312; 505 NW2d 528 (1993); *McCray*, 245 Mich App at 639; *People v Davis*, 146 Mich App 537, 548; 381 NW2d 759 (1985). However, a mere physical difference between the lineup participants does not necessarily render the photographic lineup procedure defective. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Rather, such differences relate only to the weight of the identification and “are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.” *Id.*

In reviewing the photographic lineup, there was nothing so impermissibly suggestive about the other five participants in the photographic array that rendered defendant’s photograph substantially distinguishable to the witnesses. The photographic lineup contained six color photographs of young African-American males, who were of similar height and weight. Three of the participants had similar amounts of facial hair, while the other three participants were clean shaven. While defendant asserts that the black ring around his white t-shirt and a prominent necklace substantially distinguished his photograph from the others in the photographic array, a review of the lineup does not support defendant’s position. Each of the participants was uniquely dressed. Participant number one is the only participant wearing a red button up shirt; participant number two is the only one wearing a black button up shirt; participant number four is the only participant wearing a black hooded sweatshirt; and participants number three and six are the only participants wearing white t-shirts. Additionally, defendant’s characterization of the necklace in his photograph as “prominent” is questionable. A review of defendant’s photograph reveals that the necklace is rather thin and almost completely blends in with defendant’s white t-shirt. Because the clothing of all of the participants in the photographic lineup was varied, the differences in defendant’s clothing were not readily apparent and did not substantially distinguish him. See *Id.* at 467 (“[W]e find nothing significantly distinguishing defendant from the other participants when the participants are viewed as a group.”).

Furthermore, defendant’s assertion that because the shooter was described as having darker skin it was unduly suggestive to have lighter skinned participants in the photographic array is without merit. While it is true that participants one and four had lighter skin complexions, participants two, three, and five all had darker skin complexions. These physical differences in the participants relate only to the weight of the witnesses’ identifications, and not to their admissibility. *Hornsby*, 251 Mich App at 466. Thus, the admission of the photographic lineup was proper.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly