

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2012

v

JAKIMA SCHERIE PATTERSON,

Defendant-Appellant.

No. 305821
Kalamazoo Circuit Court
LC No. 2011-000668-FC

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for armed robbery, MCL 750.529. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 132 to 360 months' imprisonment. For the reasons stated in this opinion, we affirm.

On April 8, 2011, defendant and Ebony Crayton entered the victim's apartment. Defendant was armed with a box cutter knife and demanded the victim's money. After taking the victim's money, defendant and Crayton fled the scene. Crayton left a cellular telephone at the scene, which led to her arrest. After her arrest, Crayton told the police that defendant was her accomplice. The police later returned to the victim's apartment and showed him two computer generated photographic lineups; one included defendant and one included Crayton. The victim picked defendant and Crayton out of the photographic lineups as the two robbers. Ultimately, Crayton pleaded guilty to the lesser offense of unarmed robbery and testified at defendant's trial.

On appeal, defendant first argues that he was denied his right to due process and a fair trial. Specifically, defendant maintains that Officer Mark Burkett's testimony violated his due process rights because it was "impermissible opinion testimony that usurped the role of the jury in determining guilt or innocence," in that Burkett's testimony that another individual was eliminated as a suspect implied that defendant was guilty, and constituted improper testimony vouching for defendant's guilt.

Defendant failed to object to Burkett's testimony on the basis of due process or his right to a fair trial; accordingly, this issue is not properly preserved for review.¹ We review unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

Defendant's arguments on appeal are based on Burkett's testimony regarding his investigation of a possible suspect, Bobby Shears:

[*The Prosecutor*]: Let me ask you, officer, again, obviously without saying anything that Mr. Shears told you, did you make contact with him?

[*Officer Burkett*]: Yes I did.

[*The Prosecutor*]: [A]gain, without telling me any specifics . . . did you learn anything that led you to consider him a suspect in this matter?

[*Officer Burkett*]: I was able to eliminate him as a suspect.

While it is improper for a witness to comment on the guilt or innocence of the defendant, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), a review of the record reveals that Burkett never specifically opined about defendant's guilt or innocence; rather, Burkett testified that he investigated his lead regarding Shears and that his investigation ultimately led him to eliminate Shears as a suspect. In *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010), this Court addressed a similar situation. In *Bennett*, the defendants challenged the trial testimony of a police officer regarding "the nature of his investigation and the exoneration of prior suspects." *Id.* This Court found that the police officer's testimony in *Bennett* was not improper because the testimony "pertained merely to the exoneration of other suspects, none of whom were on trial or witnesses against defendants" in that case. *Id.* at 477. This Court explained that the credibility of other suspects was "not directly relevant to [the] defendants' guilt or innocence." *Id.* Accordingly, the fact that Burkett eliminated Shears as a suspect is not relevant to defendant's guilt or innocence. Because the elimination of Shears as a suspect has little bearing on defendant's guilt or innocence, Burkett's testimony did not constitute improper

¹ While defendant did object to Burkett's testimony on hearsay grounds, that objection was not sufficient to preserve his argument on appeal regarding due process and a fair trial. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996) ("An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.").

opinion testimony regarding defendant's guilt. Therefore, we conclude that defendant has not demonstrated plain error affecting his substantial rights in regard to Burkett's testimony.²

Defendant also argues that "the prosecutor further exacerbated the error" by stating that Crayton and the victim were truthful and honest during the prosecutor's rebuttal argument.

Because defendant failed to object to the prosecutor's comments, we similarly review this issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753, 764.

Defendant's prosecutorial misconduct argument is based on the prosecutor's rebuttal argument that Crayton agreed to testify "truthfully" and that she received "a benefit for her truthful testimony," and that the victim and Crayton were "real people who were honest with you."

It is improper for the prosecutor to vouch for the credibility of a witness or question a witness in a way that conveys the message that the prosecutor has some special knowledge regarding the truthfulness of the witness. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995). However, "[a] prosecutor is afforded great latitude regarding his or her arguments and conduct at trial." *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). Accordingly, "a prosecutor may comment on his or her own witnesses' credibility, especially when credibility is at issue. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness's credibility." *Bennett*, 290 Mich App at 478.

In support of his prosecutorial misconduct argument, defendant briefly discussed *United States v Francis*, 170 F3d 546 (CA 6, 1999), and cited two decisions from this Court. However, defendant fails to explain the relevance of the cited cases in regard to his claim on appeal. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Therefore, we conclude defendant has failed to demonstrate plain error affecting his substantial rights in regard to the prosecutor's statements in rebuttal argument.

² We note that defendant also argues on appeal that Burkett's testimony constituted improper hearsay, and that the trial court abused its discretion in permitting the testimony's admission. This issue is not properly preserved for appeal because defendant failed to include it in his statement of the question presented. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008); MCR 7.212(C). However, we note that defendant has not demonstrated error requiring reversal. "[A] preserved, non-constitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. Errors regarding the admission of evidence are nonconstitutional. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2007). Based on the evidence in this case, we cannot conclude that it is more probable than not that admission of the hearsay testimony was outcome determinative.

Nevertheless, to the extent that defendant's argument can be interpreted as a claim that the prosecutor committed misconduct in his rebuttal statements, we note that "a prosecutor may comment on his or her own witnesses' credibility, especially when credibility is at issue. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness's credibility." *Bennett*, 290 Mich App at 478. In this case, the prosecutor's closing argument clearly asserted that the testimonies of the victim and Crayton were credible regarding defendant's guilt. However, the prosecutor based his argument on "the evidence and its reasonable inferences" and did not imply that he had special knowledge regarding the credibility of the victim or Crayton. *Id.* at 478. Moreover, the defense introduced the issue of witness credibility by challenging the credibility of the victim and Crayton throughout the trial. *Id.* Accordingly, the prosecutor's comments regarding the credibility of his witnesses did not constitute prosecutorial misconduct. *Id.* Moreover, even if the prosecution's argument was improper, any possible prejudice could have been cured by a timely objection and cautionary instruction. This Court will not find error requiring reversal if a curative instruction could have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Defendant alternatively argues that defense counsel was ineffective for failing to object to the alleged errors. Defendant did not move the trial court for a new trial on the basis of ineffective assistance of counsel, and the trial court did not hold a *Ginther*³ hearing; accordingly, this issue is not preserved for appellate review. *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). Because defendant's ineffective assistance of counsel claim is unpreserved, our review is limited to mistakes apparent on the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994).

In this case, defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness because counsel is not ineffective for failing to make a meritless objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). As discussed *supra*, Burkett's testimony did not constitute improper opinion testimony vouching for the guilt of defendant. The prosecutor's comments during his closing argument were similarly not improper because the argument was based on the evidence and was responsive to defendant's argument. Accordingly, defense counsel's failure to raise any objection to the alleged errors did not constitute ineffective assistance of counsel. *Id.*

Next, defendant argues that the trial court should have suppressed the victim's in-court identification because the photographic lineup was unduly suggestive.

Defendant did not object to the photographic lineup procedure in the trial court; accordingly, we review defendant's unpreserved claims that the use of the photographic lineup

³ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

denied him his right to due process and that the in-court identification should have been suppressed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Defendant was shown two separate arrays of six photographs each. A computer randomly generated the order in which the photographs appeared. Crayton's photograph was in the top left position of one array, and defendant's photograph was in the top left position of the other array. Defendant argues that the position of his photograph within the array including his picture was unduly suggestive.

"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, 110; 577 NW2d 92 (1998). "[I]mproper suggestion in photographic identification procedures may arise when the witness is shown . . . a group of people in which one person is singled out in some way." *People v McAllister*, 241 Mich App 466, 472; 616 NW2d 203 (2000). "[T]he remedy for an unduly suggestive identification procedure is suppression of the in-court identification unless there is an independent basis for its admission." *People v Davis*, 241 Mich App 697, 702; 617 NW2d 381 (2000).

Generally, the photo spread is not suggestive as long as it contains some photographs that are fairly representative of the defendant's physical features and thus sufficient to reasonably test the identification. Thus, differences in the composition of photographs, in the physical characteristics of the individuals photographed, or in the clothing worn by a defendant and the others pictured in a photographic lineup have found not to render a lineup impermissibly suggestive. [*People v Kurylczyk*, 443 Mich 289, 304-305; 505 NW2d 528 (1993).]

Nothing in the record indicates that the photographic lineup did not contain photographs that were fairly representative of "defendant's physical features and thus sufficient to reasonably test the identification." *Id.* at 304. Defendant has not shown, and we do not conclude, that the mere position of his photograph at the top left within the lineup was "so impermissibly suggestive that it [gave] rise to a substantial likelihood of misidentification." *Gray*, 457 Mich at 110. Accordingly, defendant has not shown the existence of a plain error. *Id.*

Further, we reject defendant's concomitant argument that defense counsel was ineffective for failing to moving to suppress the victim's in-court identification. *Ericksen*, 288 Mich App at 201 (counsel is not ineffective for failing to advance a meritless argument). We also reject defendant's argument that counsel was ineffective for failing to request a corporeal lineup. Defendant does not have a right to any lineup unless he has shown "that there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve." *McAllister*, 241 Mich App at 471. Defendant has not shown a reasonable likelihood of mistaken identification that a live lineup would resolve and, thus, defense counsel was not ineffective for not requesting such a lineup. *Id.*; *Ericksen*, 288 Mich App at 201.

Defendant next argues that Officer Burkett's reference to defendant's invocation of his right to silence violated his Fifth and Fourteenth Amendment rights. We disagree. We find that

under the doctrine of invited error, defendant waived review of whether Officer Burkett's reference to defendant's silence violated his Fifth and Fourteenth Amendment rights. *People v McPherson*, 263 Mich App 124, 138-139; 687 NW2d 370 (2004). At trial, defense counsel cross-examined Officer Burkett regarding the police investigation. Defense counsel asked Officer Burkett "Did anybody take a statement from [defendant]?" Officer Burkett answered "I believe Detective Erlandson attempted to interview [defendant] and he invoked his right to remain silent." "Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error." *Id.* at 139. Here, Officer Burkett's challenged statement was responsive to defense counsel's question about whether any police officer had interviewed defendant. See *People v Dennis*, 464 Mich 567, 575; 628 NW2d 502 (2001). Moreover, defense counsel did not object to Officer Burkett's reference to defendant's silence, but instead continued asking questions about defendant's statements to the police. Accordingly, because defendant invited the alleged error, i.e., Officer Burkett's reference to defendant's silence, and did not object to Burkett's response, defendant "lost his right to assert this issue on appeal." *McPherson*, 263 Mich App at 139. Thus, we need not consider this issue on appeal. *Id.*

We also reject defendant's concomitant argument that defense counsel was ineffective for inviting Officer Burkett's response and failing to object to Burkett's reference to defendant's silence. In order to show that defense counsel's performance fell below an objective standard of reasonableness, defendant must "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). We find that while defense counsel invited Officer Burkett's reference to defendant's silence, counsel's line of questioning appears to have been directed at developing the defense's theory that the police failed to conduct an adequate investigation. Defense counsel's cross-examination of Officer Burkett sought to show that the police failed to follow viable leads or investigate defendant's side of the story. On the record before this Court, defendant has not "overcome the strong presumption that" defense counsel's cross-examination "constituted sound trial strategy under the circumstances." *Id.* see also *McPherson*, 263 Mich App at 139 n 12 (holding that although defense counsel's cross-examination invited the error and waived appellate review of the issue, the defendant's alternative claim of ineffective assistance of counsel must fail because the defendant did "not overcome the presumption that" counsel's conduct was "a matter of trial strategy").

Next, defendant argues that the prosecutor denied defendant his right to a fair trial by denigrating him during the rebuttal argument. During his rebuttal argument, the prosecutor stated, in relevant part:

Officer Burkett told you that he ruled out the other suspects. Again, like . . . the victim . . . [Officer Burkett] has no interest in seeing the wrong person get convicted of a crime. The reason he didn't follow up with this other *boogieman* of Bobby Shears is because he believed in his ten years of police experience that he wasn't the right guy. He had reason to believe that [defendant] was the right guy, and that reason was confirmed when he put together a photo lineup that he stuck in front of [the victim]. And why was it a photo lineup? *When the facts aren't on your side, you start to create these boogiemens like Bobby Shears and live lineups.* [Emphasis added.]

Defendant claims the prosecutor committed misconduct during his rebuttal argument by accusing the defense of intentionally misleading the jury by creating “boogiemen.” “[A] prosecutor ‘must refrain from denigrating a defendant with intemperate and prejudicial remarks[.]’” *People v Cox*, 268 Mich App 440, 452-453; 709 NW2d 152 (2005). “[T]he prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury.” *Fyda*, 288 Mich App at 461. However, “the prosecution’s remarks must be considered in light of defense counsel’s comments and . . . an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *Unger*, 278 Mich App at 238 (quotation omitted).

Here, the prosecutor made his challenged comments during his rebuttal argument and in direct response to defense counsel’s argument that the jury should acquit defendant on the basis of Shears and the absence of a live lineup. Accordingly, we find that “the prosecutor’s comments were responsive to [defendant’s] arguments” and “properly addressed the weaknesses of [defendant’s] theory of defense[.]” *Fyda*, 288 Mich App at 462; see also *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007) (holding that “[a]lthough the prosecutor’s comments might have suggested that defense counsel was trying to distract the jury from the truth, the comments were, in general, properly made in response to defense counsel’s” argument). Moreover, “[t]he fact that the prosecutor employed colorful rhetoric does not make the response to” the defendant’s arguments improper. *Fyda*, 288 Mich App at 462; see also *People v Matuszak*, 263 Mich App 42, 55-56; 687 NW2d 342 (2004) (citation omitted) (“While the prosecution’s assertion that the defense argument was ridiculous may have been characterized differently, a prosecutor need not state arguments in the blandest possible terms.”). Accordingly, we find that defense counsel was not ineffective for failing to object to the prosecutor’s rebuttal argument because such an objection would be meritless. *Cox*, 268 Mich App at 453.

Finally, defendant argues that he is entitled to a new trial because the verdict constitutes a miscarriage of justice in light of the fact that his alibi defense was not presented to the jury. Alternatively, defendant argues that defense counsel was ineffective for failing to present his alibi during trial. In a motion to remand filed with this Court, defendant included an affidavit executed by Linda Capp that attests that on the day the robbery occurred, she picked defendant up at 6:30 a.m. and they remained at her home for several days. Accordingly, defendant maintains that Capp’s affidavit demonstrates that he could not have committed the armed robbery for which he was convicted. However, defendant does not claim that his attorney was aware of his alleged alibi defense; nor does he claim that he sought to pursue an alibi defense during trial. Under these circumstances, we conclude that defendant has failed to demonstrate a miscarriage of justice. Further, defendant has failed to establish the factual predicate for his claim of ineffective assistance of counsel since there are no facts in the record indicating that defense counsel was aware of defendant’s possible alibi; thus, defendant has failed to demonstrate ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens