

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 19, 2013

v

FRANK HARDY,

No. 305234
Wayne Circuit Court
LC No. 11-002921-FC

Defendant-Appellant.

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his convictions of first-degree premeditated murder, MCL 750.316(1)(a), assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and carrying or possessing a firearm when committing or attempting to commit a felony (felony-firearm)-second offense, MCL 750.227b. The trial court sentenced defendant to life imprisonment for first-degree murder; 30 to 60 years' imprisonment for assault with intent to commit murder; one to five years' imprisonment for felon in possession; and five years' imprisonment for a second offense of felony-firearm. We affirm.

I. DEFENDANT'S BRIEF ON APPEAL

Defendant argues: (1) the trial court violated his confrontation rights by allowing a surrogate fingerprint expert to testify regarding the findings of the analyst who performed the analysis, (2) the trial court violated defendant's right to a public trial by partially closing the courtroom during the jury voir dire, and (3) defense counsel deprived defendant of his right to the effective assistance of counsel by failing to object to the trial court's rulings. We disagree.

First, defendant argues that his confrontation right was violated when Robert May testified about fingerprint analysis in lieu of Amanda Crooker. Crooker was unavailable because she had been called to duty with the National Guard. The trial court gave defense counsel the opportunity to object to May's testimony, but defense counsel declined any objection. This decision by counsel was a waiver of the confrontation right. *People v Buie*, 491 Mich 294, 315; 817 NW2d 33 (2012) ("[I]f the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record.")

Because there was no objection by defendant or defense counsel on the record in this case, the remaining inquiry is whether counsel's decision to abstain from objecting constituted reasonable trial strategy. *Buie* makes clear that there is a strong presumption that counsel's decisions constitute sound trial strategy. *Id.* at 311, 315. Moreover, the record in this case demonstrates at least two possible reasons that defense counsel may have had for allowing May to testify in lieu of Crooker. For example, May was Crooker's supervisor, so he could readily testify about fingerprint analysis. Also, May specifically reviewed the fingerprint analysis and testified about his findings and conclusions on the basis of that review. In sum, we conclude that the confrontation issue was waived, and that counsel's conduct regarding the issue was reasonable trial strategy.

Second, defendant argues that his right to a public trial was violated when, due to the limited capacity of the courtroom, the trial court limited the number of spectators to only two people from each side, without provision being made for members of the press, despite the media attention surrounding the case. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011), quoting *People v Metamora Water Service, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). The trial court did not specifically ask defense counsel and the prosecution whether they had any objections, and neither attorney objected to this partial closure of the courtroom. "[T]he failure to assert a constitutional right ordinarily constitutes a forfeiture of that right." *People v Vaughn*, 491 Mich 642, 654; 821 NW2d 288 (2012). Therefore, this issue is unpreserved.

The right to a public trial extends to voir dire proceedings. *Vaughn*, 491 Mich at 650-652. Forfeiture of a Sixth Amendment right to a public trial does not foreclose the defendant's opportunity to raise the issue on appeal. *Vaughn*, 491 Mich at 664. In *Vaughn*, the Michigan Supreme Court held that the forfeiture requirements established in *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), "applies to defendant's forfeited claim that the trial court violated his Sixth Amendment public trial right." *Id.* For a defendant to receive relief pursuant to a "forfeited claim of constitutional error, defendant must establish (1) that the error occurred, (2) that the error was 'plain,' (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 664-665. "Whether the circuit court violated defendant's right to a public trial presents a question of constitutional law[.]" which this Court reviews de novo. *Id.* at 650.

In this case, before the jury venire entered the courtroom, the trial court explained to counsel that because of space constraints, the large number of potential jurors, and the public interest in the trial, the courtroom would not be able to accommodate everyone. As a result, the trial court limited both sides to two supporters each, for a total of four members of the public, and indicated that, as the number of potential jurors decreased, "we can certainly expand matters." The trial court did not specifically ask defense counsel or the prosecution whether they had any objections, and neither attorney objected to this closure of the courtroom.

The trial court's limitation to two supporters was a partial closure of the courtroom. "[T]he effect of a partial closure of trial does not reach the level of a total closure and only a substantial, rather than compelling, reason for the closure is required." *People v Russell*, 297

Mich App 707, 720; 825 NW2d 623 (2012), quoting *People v Kline*, 197 Mich App 165, 170; 494 NW2d 756 (1992). Limited space in a courtroom constitutes a substantial reason for partially closing the courtroom to the public. See *id.* Because the trial court's partial closure of the courtroom in this case did not constitute an error, defendant's right to a public trial was not violated.

Third, defendant argues that defense counsel's failure to object to the admission of May's testimony and the partial closure of the courtroom violated his right to the effective assistance of counsel. We review these challenges for errors that are apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). Ineffective assistance of counsel claims involve both questions of fact and constitutional law. *People v Marshall*, ___ Mich App ___, ___ NW2d ___ (Docket No. 297115, issued October 4, 2012), slip op at 1-2, lv app pending. This Court reviews constitutional questions de novo and a trial court's findings of fact, if any, for clear error, and "[a] finding is clearly erroneous when, although there is evidence to support it, the reviewing court, on the whole record, is left with the definite and firm conviction that a mistake has been made." *Id.* at 2.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish: (1) "counsel's performance was deficient[, which] requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) "that the deficient performance prejudiced the defense[, which] requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). "[T]he defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable." *Armstrong*, 490 Mich at 290. Trial counsel's failure to either "advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). This Court presumes counsel was effective, and there is a presumption that "counsel's performance constituted sound trial strategy[]" that defendant must overcome. *Marshall*, ___ Mich App at ___ (slip op at 2). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.*

Because the waiver of a confrontation objection to May's testimony was reasonable trial strategy and because the partial closure of the courtroom did not violate defendant's right to a public trial, an objection by counsel would have been futile in both of these instances. Therefore, counsel's failure to raise these objections does not constitute ineffective assistance of counsel. See *Ericksen*, 288 Mich App at 201.

II. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises additional arguments in his standard 4 brief: (1) the prosecutor's withholding of pretrial testimony and the prosecutor's improper statements during closing argument violated his right to a fair trial, and (2) defense counsel's conduct throughout trial constituted ineffective assistance of counsel. We disagree.

First, defendant argues in his standard 4 brief that the prosecutor's failure to disclose JuJuan Harrison's prior testimony and the prosecutor's improper statements during closing arguments constitute prosecutorial misconduct that deprived defendant a fair trial. Generally, "to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Regarding defendant's claim that statements made during the prosecutor's closing argument constituted misconduct, defendant and defense counsel failed to object to the prosecutor's statements. Regarding defendant's claim that the prosecutor failed to disclose to defendant the investigatory subpoena and preliminary examination testimony pertaining to Henry Brown, one of the original suspects in the shooting, this issue could have been preserved if defendant had moved for a new trial pursuant to MCR 2.611(A)(1)(f) or for relief from judgment pursuant to MCR 2.612(C)(1)(b), which defendant failed to do. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). This Court "reviews forfeited claims of allegedly improper conduct by the prosecutor for plain error that affected the defendant's substantial rights. Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.* (footnote omitted). To warrant reversal, the plain error must be outcome determinative. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Because a prosecutor is responsible for seeking justice, "the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

"A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt." *Cox*, 268 Mich App at 448. Pursuant to MCR 6.201(B)(1), a prosecutor must "provide a defendant with any exculpatory information . . ." *Id.* at 449. "Similarly, pursuant to *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), the prosecutor must disclose any information that would materially affect the credibility of his witnesses." *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009), *aff'd* 488 Mich 922 (2010). The *Brady* rule also encompasses impeachment evidence, not just exculpatory evidence, "because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998), quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

To establish a *Brady* violation, a defendant must prove:

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it 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. [*Cox*, 268 Mich App at 448.]

However, "[t]he failure to disclose impeachment evidence does not require automatic reversal, even where . . . the prosecution's case depends largely on the credibility of a particular witness." *Lester*, 232 Mich App at 281. This Court must determine whether the undisclosed evidence was

material to the case, meaning that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 281-282.

Even if we assume for the purposes of this appeal that the prosecution failed to disclose the testimony at issue, defendant has not established a *Brady* violation. Defendant and his counsel could have, with reasonable diligence, discovered Harrison’s pretrial testimony. Moreover, defendant has failed to show any probability that the outcome of his trial would have been different if the defense had received this evidence. “[I]mpeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness’ credibility would have undermined a critical element of the prosecutor’s case.” *Lester*, 232 Mich App at 282.

In this case, the main factual issue was the identity of the shooter. The prosecutor presented significant evidence (other than Harrison’s testimony) that linked defendant to the crime, namely, the DNA and fingerprint evidence. An expert determined that defendant’s DNA matched the major donor DNA from the sweatshirt, sweatpants, and gloves that were found in the alley near the scene of the shooting. The bullet found in the victim’s arm was determined to be from the gun found in the alley. Another expert testified that the fingerprint on a snack bag folded inside the sweatshirt matched defendant’s right thumb print.

Further, Harrison’s credibility in identifying defendant was called into question during trial in two ways: (1) the prosecutor raised Harrison’s initial identification of Brown as the shooter and defense counsel cross-examined Harrison about it, and (2) defense counsel cross-examined Harrison regarding the fact that Harrison identified two individuals during the live lineup involving defendant. Therefore, because Harrison’s credibility regarding his ability to identify the shooter, based on his observation of the shooter on the day of the incident, had already been called into question in these two significant respects, it is not reasonably probable that introduction of the impeachment evidence would have altered the outcome of the trial.

Defendant next argues that several statements made by the prosecutor during closing argument constituted prosecutorial misconduct and denied defendant a fair trial. “Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor’s remarks in context.” *Dobek*, 274 Mich App at 64. “A prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.” *Id.* Prosecutors are not permitted to make statements of fact to the jury during their closing arguments that are not supported by the evidence presented at trial. *Ericksen*, 288 Mich App at 199. In making their arguments, prosecutors are given “great latitude” and “are free to argue the evidence and all reasonable inferences from the evidence as they relate to their theory of the case.” *Marshall*, ___ Mich App at ___ (slip op at 6). If a curative instruction would have alleviated any prejudice resulting from an improper statement, this Court cannot find that such an error requires reversal, and “the prejudicial effect of most inappropriate prosecutorial statements” can be cured by a curative instruction. *Unger*, 278 Mich App at 235. Defendant takes issue with nine separate statements made by the prosecutor during closing argument.

This Court has reviewed these statements and concludes that the majority of these statements constituted proper argument by the prosecutor. However, one statement made by the

prosecutor may have been improper: a statement suggesting that the trial court stated defendant caused the victim's death, when the trial court was merely reading from the felony information at the beginning of trial.¹

However, the jury instructions given by the trial judge after closing arguments cured any potential prejudicial effect. The trial court specifically instructed the jury that “[the court’s] comments, [his] rulings, questions and even [his] instructions . . . are not evidence[,]” and that it is his “duty to see that the trial is conducted according to the law and to tell you the law that you need to apply.” The trial court also instructed the jury that defendant is to be presumed innocent until he is proven guilty beyond a reasonable doubt. This Court presumes that the jury follows the instructions given by the trial court. See *People v Fyda*, 288 Mich App 446, 465; 793 NW2d 712 (2010). Therefore, any prejudice or confusion created by these statements was cured by the trial court’s instructions. Defendant also argues that defense counsel’s failure to object to the prosecutor’s misrepresentation of facts and statements of opinion during the prosecutor’s closing argument constituted ineffective assistance of counsel. However, because the trial court’s instructions cured any prejudicial effect resulting from these statements, defendant has failed to show that a different result would be reasonably probable absent counsel’s failures.

Further, defendant argues that the cumulative effect of the instances of prosecutorial misconduct warrant reversal and a new trial. “The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted.” *Dobek*, 274 Mich App at 106. The prosecutor’s possible error did not undermine the confidence in the reliability of the verdict, and no outcome determinative plain error occurred.

Second, defendant argues in his standard 4 brief that several failures by defense counsel during the course of trial constituted ineffective assistance of counsel. First, defense counsel, who knew there was another individual, Brown, who had been charged with the shooting, failed to properly investigate this matter and file a pretrial motion for discovery of defendant’s file and Brown’s file, and, absent these failures, defense counsel could have used testimony of Harrison for impeachment. Second, defense counsel failed to file several pre-trial motions. Defendant requests that this Court remand for an evidentiary hearing, if the Court finds the record is insufficient to support these claims.

Counsel’s failure to reasonably investigate can “constitute ineffective assistance of counsel.” *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). In the present case, the record shows that defense counsel did know about Brown being the initial suspect in the case, given the statements made by counsel when discussing discovery issues. During this discussion, defense counsel explained that she was missing the lineup sheets and photos for the lineup conducted when Brown was arrested as the first suspect. Therefore, it can be inferred that defense counsel did do some investigation regarding Brown and did engage in discovery.

¹ On appeal, the prosecution suggests that the reporter erroneously transcribed the prosecutor’s statement in this regard.

However, even if we assume defense counsel failed to investigate properly, the error does not constitute ineffective assistance of counsel because defendant has failed to show that these investigatory failures prejudiced him. Evidence was presented that links defendant to the inside of the barbershop and to the gun that fired the bullet found in the victim. Defendant's DNA was found on clothing that contained a snack bag, on which defendant's fingerprint was found, and a vending machine inside the barbershop had been broken into. A page from a magazine was also found in the clothing, which was determined to have come from a magazine inside the barbershop. A gun was found near these items in the alley, and the bullet found in the victim's arm was determined to be from this gun. Further, at trial, Harrison's credibility regarding his ability to identify the shooter was significantly called into question with evidence that Harrison initially identified Brown as the shooter and evidence that Harrison identified two individuals during the live lineup that included defendant. Therefore, it is not reasonably probable that Harrison's inconsistent statements regarding how certain he was that Brown was the shooter when Harrison identified him in the lineup would cause the jury to disbelieve Harrison's factual account of the shooting such that the result would have been different.

Defendant argues counsel also failed to file a proper alibi notice, as required under Michigan law, because the notice failed to include contact information and proper names for the witnesses listed. MCL 768.20(1) provides:

The [alibi] notice shall contain, *as particularly as is known to the defendant or the defendant's attorney*, the names of witnesses to be called in behalf of the defendant to establish that defense. The defendant's notice shall include specific information as to the place at which the accused claims to have been at the time of the alleged offense. [Emphasis added.]

Therefore, counsel was not required to provide any more information than was known to counsel when the notice was filed. The alibi notice lists several individuals, some only by first name and two general categories of individuals. Further, defense counsel indicated in a June 1, 2011, final conference that she was having problems finding witnesses because of the delay in defendant being charged. Defense counsel also expressly stated, "I gave all I know." Ultimately, one of the individuals listed, Ali Haakim, did testify at trial. Therefore, defendant has failed to demonstrate that defense counsel failed to list these witnesses as particularly as she could.

Defendant contends that defense counsel failed to move for an adjournment or continuance before trial in order to secure witnesses, and defense counsel's failure to produce witnesses, where their testimony could have changed the outcome of defendant's case, constitutes ineffective assistance of counsel. The record indicates that during a final conference held on May 18, 2011, defense counsel indicated that she was having trouble tracking down witnesses because the crime happened in June, but defendant was not charged until the following March. Defense counsel also indicated that she had an investigator looking for witnesses. In a June 1, 2011, motion and final conference hearing, defense counsel again indicated her difficulty in finding witnesses due to the delay in charging defendant, but that her investigator was still looking for witnesses. The record indicates defense counsel was actively investigating witnesses. Therefore, defendant has failed to overcome the presumption that counsel's decision not to file a motion for an adjournment or continuance before trial in order to secure witnesses, after active investigation for witnesses, constituted sound trial strategy.

Defendant argues counsel failed to file a motion to dismiss defendant's charges because of the 12 month delay in his arrest, which, defendant contends, forced defendant to prove his innocence while being uncertain about his alibi defense. To prove a defendant's due process rights were violated due to a pre-indictment delay, "a defendant must show actual and substantial prejudice to his right to a fair trial. A general claim that the memories of witnesses have suffered is insufficient to demonstrate prejudice." *People v Musser*, 259 Mich App 215, 220; 673 NW2d 800 (2003). However, the prosecution bears the burden to persuade the court that the prejudice was justified by the reason for the delay and was not deliberate. *People v Cain*, 238 Mich App 95, 109; 605 NW2d 28 (1999).

Defendant essentially argues that the time lapse prejudiced defendant because it affected his ability to develop an alibi through witnesses. However, the facts in the record indicate that the reason for the delay was essentially that law enforcement was pursuing a different individual, Brown, until they discovered fingerprint and DNA evidence that identified defendant. Therefore, the evidence in the record does not suggest the delay was a deliberate attempt by the prosecution to gain a tactical advantage. Further, defendant did have an alibi witness, Haakim, testify; therefore, the evidence on the record does not demonstrate that defendant was unduly prejudiced. Because it is not apparent from the evidence in the record that it is reasonably probable that defendant's motion to dismiss would have been effective, defendant has failed to demonstrate ineffective assistance of counsel. *Musser*, 259 Mich App at 221.

Alternatively, defendant requests that if this Court finds the evidence in the record is insufficient to resolve the ineffective assistance of counsel issues, this Court remand the case for an evidentiary hearing. However, this Court has stated, "If the appellate record does not support defendant's assertions, he has waived the issue." *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Jane M. Beckering