

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
July 3, 2014

v

WILLIE JAMES JONES,  
Defendant-Appellant.

No. 314171  
Oakland Circuit Court  
LC No. 2012-241361-FC

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Before: CAVANAGH, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of two counts of armed robbery, MCL 750.529, four counts of felony-firearm, second offense, MCL 750.227b, one count of carjacking, MCL 750.529a, and one count of felon-in-possession, MCL 750.224f. We affirm.

On April 23, 2012, at about 11:00 p.m., three women were the victims of a carjacking, and two of them were robbed of their purses at gunpoint, while their vehicle was parked in front of a senior citizen apartment complex. Shortly thereafter the vehicle was located by police and a chase ensued. Eventually defendant jumped from the moving vehicle and ran. After a foot chase by police, defendant was apprehended and the purses were recovered from the vehicle. The next day defendant was identified in a lineup as the perpetrator.

On appeal, defendant raises several claims of ineffective assistance of counsel in his initial brief on appeal and in his Standard 4 brief. Our review of these claims is limited to errors apparent on the record because a *Ginther*<sup>1</sup> hearing was not held. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result would have been different. *Id.* A defendant must overcome a strong presumption that defense counsel was effective and counsel's performance constituted sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d

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

246 (2002) (citation omitted). This Court “will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel’s competence.” *People v Unger*, 278 Mich App 210, 242-243; 749 NW2d 272 (2008).

First, defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to locate an expert on eyewitness identification prior to his motion for appointment of an expert witness. On the first day of trial, defense counsel requested that an expert witness on eyewitness identification be appointed to testify regarding the “common occurrence of misidentification and what people perceive in the ability to identify.” Defense counsel explained that the crux of the case came down to an identification that was premised on a short and stressful criminal event; thus, testimony from an expert witness “would at least shed some light to the jury on people’s perceptions.” The trial court denied the motion, holding that there was not “enough here to appoint an expert at this time.” That is, to obtain appointment of an expert “an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert.” *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003) (internal quotation marks and citation omitted). Defendant’s motion was denied because this nexus was not demonstrated; the motion was not denied because his counsel failed to name an expert. Accordingly, this claim of ineffective assistance of counsel is without merit.

Second, defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to request that the jury be instructed on the proper assessment of eyewitness identification testimony. In particular, defendant argues that his counsel should have requested that CJI2d 7.8, the “identification” standard jury instruction, be read to the jury, which advises the jury that it should consider different variables that may have affected a witness’ ability to offer identification testimony. However, in this case, the trial court instructed the jury consistent with CJI2d 3.6, which also deals with the credibility of witness testimony and sets forth different variables that the jury might consider with regard to the credibility of witness testimony. Jury instructions are read as a whole to determine if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011); *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012). Thus, defense counsel’s failure to request that CJI2d 7.8 be read to the jury did not prejudice defendant’s case and his ineffective assistance of counsel claim premised on this ground is without merit. Further, and for the same reasons, defendant’s claim that he was denied his right to have a properly instructed jury is without merit.

Third, defendant argues that he was denied the effective assistance of counsel because his trial counsel arranged for him to take a polygraph examination, but was not present during the preceding interview or during the polygraph examination. We disagree.

During sentencing the prosecutor reminded the trial court that defendant had taken a polygraph examination. Defendant interrupted, stating that his attorney had requested the polygraph examination and defense counsel agreed that he had suggested the examination to the prosecutor before trial. This is the only record concerning the polygraph examination. There is no record as to what was communicated to defendant regarding the polygraph examination or whether his counsel was present during it. In any case, defendant participated in the polygraph examination and does not allege that he had requested that his counsel be present during the examination. Further, the polygraph examination was not mentioned at trial. On this record,

defendant failed to show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result would have been different. See *Jordan*, 275 Mich App at 667. Thus, all of defendant's claims of ineffective assistance of counsel fail to warrant appellate relief.

Next, defendant argues in his initial brief on appeal and in his Standard 4 brief that he was denied a fair trial by several instances of prosecutorial misconduct. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). To preserve a claim of prosecutorial misconduct, a defendant must object to an alleged prosecutorial impropriety and request a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). The failure to timely and specifically object to alleged prosecutorial misconduct precludes review unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *Unger*, 278 Mich App at 234-235. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Id.* at 235. A plain error is one that is clear or obvious, and affects the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence. *Id.* at 774.

First, defendant argues that the prosecutor impermissibly vouched for a key prosecution witness, Officer David McCormick, by asking him whether anyone found "more stolen cars than you," and by stating, after defense counsel's objection, "Honestly, I don't know anybody who has had his kind of success and I want to mention why he's having the success." A prosecutor is not permitted to vouch for the credibility of a witness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, in this case, the trial court sustained defense counsel's objection to the question and instructed the jury to disregard the question. The trial court also instructed the jury to disregard the prosecutor's comment. Jurors are presumed to follow the instructions of the court and, in this case, any prejudicial effect of the prosecutor's improper brief question and brief comment was cured by the trial court's instruction. See *Unger*, 278 Mich App at 235.

Second, defendant argues that the prosecutor impermissibly appealed to the jury to sympathize with the victims throughout the trial. A prosecutor is not permitted to appeal to the jury to sympathize with the victims. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, defendant challenges the prosecutor's opening statement which described the circumstances of this crime, including that the female victims were sitting in a vehicle, on a dark night at about 11:30 p.m., after picking up the 73-year-old victim from the hospital earlier in the day, when they "encountered someone [they] didn't plan on encountering ever in [their] life." Defendant did not object to these remarks and did not request a curative instruction. See *Bennett*, 290 Mich App at 475. Nevertheless, the opening statements were not blatant appeals to the jury's sympathy and were not so inflammatory as to be prejudicial; rather, they were proper comments referring to the evidence the prosecutor intended to present regarding the precise circumstances of this carjacking and armed robbery. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999).

Defendant also challenges the questioning of certain witnesses. First, defendant apparently takes issue with the testimony of Officer Theriault, who responded to the scene of the crime, which included that the crime occurred at an apartment complex that houses elderly and disabled people. This testimony was elicited after the prosecutor asked the officer what was located at the address of the crime. This question did not constitute prosecutorial misconduct. Second, defendant takes issue with the prosecutor's questioning of one of the victims about the 73-year-old victim's health on the day these crimes were committed, as well as the fact that she had been discharged from the hospital on that day. The 73-year-old victim was not able to attend the trial because of health issues. Defendant did not object to the questioning on grounds of prosecutorial misconduct and did not request a curative instruction. In any case, this questioning did not constitute prosecutorial misconduct that denied defendant a fair and impartial trial warranting appellate relief. Third, defendant challenges the prosecutor's questioning of Officer Wojciechowski with regard to whether he knew of anyone else who would be able to identify the perpetrator in a lineup. The officer responded that the 73-year-old victim would have been able to identify the perpetrator but, because of health reasons, she was not questioned in that regard. Defendant did not object on grounds of prosecutorial misconduct. In any case, the prosecutor's question did not constitute an appeal to the jury's sympathy.

Defendant also argues that the prosecutor committed misconduct during closing argument. First, defendant claims that, in rebutting defendant's testimony that he was beaten by the police during his arrest, the prosecutor impermissibly stated that if he was beaten, "his lawyer could have referred it to some federal agency" and there was "no evidence at all that such a referral was made." Defendant claims that by this argument the prosecutor improperly argued facts not in evidence. However, a prosecutor may contest evidence presented by the defendant, *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999), and if a defendant chooses to testify, his credibility can be tested, *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). Further, even if the argument was improper, defendant has not established plain error affecting his substantial rights. See *Carines*, 460 Mich at 763. Likewise, defendant's second challenge to the prosecutor's closing argument—that the prosecutor improperly introduced evidence of a hole in defendant's jacket—does not warrant appellate relief. That is, during closing argument the prosecutor implied that a hole in the right pocket of defendant's jacket could have been caused by a gun. Again, no objection was made to the brief comment. But the jacket was introduced as evidence at trial, as was testimony regarding a hole in its right pocket. A prosecutor is entitled to argue the evidence and all reasonable inferences arising from the evidence; thus, this claim is without merit. See *Bahoda*, 448 Mich at 266-267.

In his Standard 4 brief, defendant argues that the prosecutor committed misconduct by arguing to the jury that, before trial, defendant had not told police his version of the events that occurred on the night the crimes were committed. However, in fact, the prosecutor properly argued that, while defendant had spoken with police before trial, he had never disclosed to the police many of the alleged facts that he testified to at trial. Thus, contrary to defendant's claim, the prosecutor did not make a statement of fact to the jury that was unsupported by the evidence. See *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Defendant also argues that the prosecutor knowingly elicited false testimony from the arresting officer because the officer's police report indicated that he had pulled his vehicle directly behind defendant's vehicle once defendant was located following the carjacking, but at trial the officer testified that there was another vehicle situated between his vehicle and defendant's vehicle. However, there is no

indication in the record that the prosecutor knowingly permitted false testimony. See *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). Accordingly, defendant has failed to establish that he was denied a fair and impartial trial as a consequence of prosecutorial misconduct. Further, defendant's claim that he was denied the effective assistance of counsel because his attorney failed to object to some of the alleged instances of prosecutorial misconduct is without merit. That is, defendant has failed to establish that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result would have been different. See *Jordan*, 275 Mich App at 667.

Next, defendant argues that the trial court abused its discretion when it denied his request for an adverse witness instruction regarding the 73-year-old victim who was absent from the trial, and when the trial court denied his motion for a new trial premised on his inability to confront this witness. We disagree.

"We review a trial court's determination of due diligence and the appropriateness of a 'missing witness' instruction for an abuse of discretion." *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004). Similarly, we review for an abuse of discretion a trial court's decision on a motion for a new trial. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). A trial court's decision that falls outside the range of reasonable and principled outcomes constitutes an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). Generally, this Court reviews de novo a confrontation clause issue as a question of constitutional law. *People v Nunley*, 491 Mich 686, 696-697; 821 NW2d 642 (2012).

"A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial." *Eccles*, 260 Mich App at 388. The prosecutor may be relieved of the duty by showing that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). "Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of res gestae witnesses . . ." *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988) (citation omitted). If the trial court finds that due diligence was not exercised it may instruct the jury, pursuant to CJI2d 5.12, that it may infer that the missing witness' testimony would have been unfavorable to the prosecution's case. *Eccles*, 260 Mich App at 388.

In this case, the 73-year-old victim was endorsed as a witness by the prosecutor. However, the prosecutor explained at trial that he attempted to produce this witness but she could not appear because of poor health. Defense counsel acknowledged that he had been informed the week before trial began that, "for various health reasons," it was unlikely that she would be able to testify at the trial. The trial court noted on the record that letters were received from this victim's physicians which set forth various health problems. One letter explained that this victim had decompensated heart failure and a court appearance could cause an exacerbation of the condition. Another letter explained that she had a positive stress test and could not "endure any undo stress at this time, as it could further endanger her life as well as her mental state and physical well-being." Under these circumstances it is clear that the prosecutor's inability to produce this witness at trial cannot be attributed to a lack of due diligence. Accordingly, the trial court did not abuse its discretion when it denied defendant's request for CJI2d 5.12 to be read to the jury. See *Eccles*, 260 Mich App at 389. Likewise, the trial court did not abuse its discretion

when it denied defendant's motion for a new trial premised on this argument. See *Rao*, 491 Mich at 279.

Further, defendant was not denied his constitutional right of confrontation as a consequence of this victim being absent from the trial. The Confrontation Clause bars the admission of testimonial statements by a witness who is absent from trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). “[T]he right of confrontation is concerned with a specific type of out-of-court statement, i.e., the statements of ‘witnesses,’ those people who bear testimony against a defendant.” *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011) (citation omitted). In this case, the prosecution did not introduce into evidence any prior testimonial statements from the 73-year-old victim; thus, she did not “bear testimony against” defendant for purposes of the Confrontation Clause. See *id.* Accordingly, this constitutional right was not implicated by the prosecution's failure to produce this witness at trial.

Finally, in his Standard 4 brief, defendant argues that his due process rights were violated because the corporeal lineup was impermissibly suggestive and there was no independent basis for the in-court identification; thus, the in-court identification testimony should have been excluded. We disagree.

Before trial began, defense counsel brought an oral motion for a *Wade*<sup>2</sup> hearing, arguing that the lineup was unduly suggestive because the victim who identified defendant as the perpetrator had been driven to the police department by the detective who was handling the investigation. The prosecutor opposed the motion, arguing that there was no basis to claim that there was anything about the lineup that warranted a *Wade* hearing. In fact, the prosecutor argued, an attorney had been appointed to preside over the lineup and she had made no objections of any kind that would merit a hearing on the witness' ability to identify the defendant. The trial court concluded that defendant failed to establish that a *Wade* hearing was necessary and denied defendant's motion.

As this Court explained in *People v Kevin Williams*, 244 Mich App 533; 624 NW2d 575 (2001):

An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process. In order to challenge an identification on the basis of lack of due process, a defendant must show that the pretrial identification was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification. If the trial court finds the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established that is untainted by the suggestive pretrial

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<sup>2</sup> *United States v Wade*, 388 US 218, 240; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

procedure. [*Williams*, 244 Mich App at 542-543 (internal citations and quotations omitted).]

The relevant inquiry, however, is whether the identification procedure was unduly suggestive, in light of all of the circumstances surrounding the identification, rendering the identification unreliable. *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993); *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002).

On appeal, defendant again argues that the lineup was unduly suggestive because the victim who identified defendant as the perpetrator had been driven to the police department by the detective who was handling the investigation. However, this argument fails to identify a factual basis on which to conclude that the detective improperly or unduly suggested that defendant was the perpetrator. Thus, the trial court properly denied defendant's pretrial request for a *Wade* hearing. See *People v Johnson*, 202 Mich App 281, 285-287; 508 NW2d 509 (1993).

Defendant also argues on appeal that the lineup was unduly suggestive because the police returned the victims' purses to them before the lineup was conducted, the identifying victim's selection of defendant was "tentative," and defendant had less facial hair than the other men in the lineup. However, the victim who identified defendant from the lineup testified that she was not told that the perpetrator would actually be in the lineup, no one suggested who she should select from the lineup, she was aware that an attorney was present at the lineup and represented defendant, and she was "sure" about her identification of defendant as the perpetrator. When she was asked if she was "certain," she replied "Yes." When she was asked: "No doubt about it," she replied "No doubt." Further, it appears from the photograph of the lineup that all of the men in the lineup had facial hair. But, in any case, such physical differences generally relate only to the weight to be afforded the identification, not its admissibility. See *Hornsby*, 251 Mich App at 466. Thus, the record does not establish a basis to conclude that an improper or unduly suggestive pretrial identification procedure led to a substantial likelihood that defendant was misidentified. See *Williams*, 244 Mich App at 542. Therefore, it was not necessary for the trial court to determine whether an independent basis for the victim's in-court identification existed and the trial court's decision to admit the identification evidence was not clearly erroneous. See *Kurylczyk*, 443 Mich at 303.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Donald S. Owens

/s/ Michael J. Kelly