

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE EDWARD KING,,

Defendant-Appellant.

UNPUBLISHED

July 26, 1996

No. 161886

LC No. 92-006200-FC

Before: Michael J. Kelly, P.J., and Bandstra and S.B. Miller,* JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423, following a jury trial. Defendant was acquitted of a charge of armed robbery, MCL 750.529; MSA 28.797. Defendant was sentenced to two mandatory sentences of life without parole for the murder convictions, one life sentence for the assault conviction, and three to five years' imprisonment for the weapon conviction. He appeals as of right, and we affirm.

Defendant first argues that he was denied due process and a fair trial because the prosecutor failed to inform defense counsel that witness Call had changed his testimony in a manner making it consistent with that of other witnesses establishing defendant's guilt and that, as a result, defendant had erroneously called this witness to testify. This matter was subject to a motion for mistrial that was denied by the trial court. We review that decision for an abuse of discretion, and reversal is only warranted if the trial court's ruling was so grossly in error as to deprive defendant of a fair trial or to amount to a miscarriage of justice. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). We do not conclude that defendant was denied a fair trial or that there was a miscarriage of justice as a result of defendant calling witness Call to the stand, even assuming that the prosecutor acted improperly in failing to disclose the changed testimony to defense counsel, an issue we need not decide in resolving this argument. It is highly likely that Call would have testified even if he had not been called by defendant at trial; his changed testimony was consistent with that of other witnesses and helped

* Circuit judge, sitting on the Court of Appeals by assignment.

establish the prosecutor's case. Defendant had an opportunity to challenge Call's credibility regarding his changed statement before the jury. Finally, there was overwhelming evidence of defendant's guilt apart from Call's testimony.

Defendant also argues that the trial court abused its discretion when it denied a motion for mistrial based on the argument that the prosecutor violated the discovery order with regard to the time test that was done on the cash register. However, the time at which the cash register was robbed was not relevant to defendant's guilt of the murders and associated crimes of which he was convicted, crimes for which there was overwhelming evidence apart from the register tape. The register tape was only material evidence on the question whether defendant took money from the register. If the money was taken at a later time than the tape indicated, that fact would help absolve defendant of guilt of the robbery. Because defendant was acquitted of that charge, he was not prejudiced by the admission of the tape register evidence.

Defendant argues that venue should have been changed in this case and that all jurors who had viewed the reenactment of the crime on "America's Most Wanted" should have been excused. The existence of pretrial publicity, standing alone, does not necessitate a change of venue. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992). To be entitled to a change of venue, the defendant must prove that (1) there was a pattern of strong community feeling against him and the publicity was so extensive and inflammatory that a juror exposed to it could not remain impartial, (2) the jury was actually prejudiced, or (3) the atmosphere surrounding the trial was such that it would create a probability of prejudice. *Id.* The denial of a motion for change of venue is reviewed under an abuse of discretion standard, *id.*, and an abuse of discretion will be found only if an unprejudiced person would find no justification or excuse for the ruling made. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

Our review of the record, including the voir dire transcript, shows that the trial court was well aware of the fact that this case had been the subject of widespread publicity. Accordingly, the trial court was careful to ask each perspective juror regarding that publicity and, specifically, the "America's Most Wanted" coverage. The trial court discharged for cause potential jurors who appeared to be substantially tainted by the program or other publicity. The trial court determined that the few remaining jurors who had seen the "America's Most Wanted" program did not have enough of a memory of that program to form an opinion.

Defendant has failed to establish that any of the three tests set forth in *Passeno, supra*, were satisfied. Although this case was a matter of public interest, there was no showing that the publicity was inflammatory, that the jury, which was chosen to decide defendant's case, was actually prejudiced, or that the atmosphere surrounding the trial was such that it would create a probability of prejudice. The trial court was satisfied that the jurors who were not excused could try the case impartially, based on their voir dire testimony and oaths, and we do not find any abuse of discretion. *DeLisle, supra* at 662-663.

Defendant argues that he should have been allowed to impeach witness Perez regarding his pending charge for assault with intent to do great bodily harm, notwithstanding the prosecutor's objection to that line of questioning. However, when this objection was raised at trial, defense counsel acquiesced to the decision of the trial court, in response to arguments by the prosecutor that defense counsel was limited to impeaching Perez with his convictions rather than pending charges. Defendant now argues that he was entitled to impeach Perez regarding pending charges. Because this ground for the questioning was not presented for the trial court's consideration, this issue is not properly preserved for appellate review. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Even if we were to review this issue and conclude that the trial court had abused its discretion, the error would be harmless beyond a reasonable doubt. Perez's substantive testimony against defendant would not have changed, and Perez's credibility had already been undermined with testimony regarding four prior convictions, testimony similar to that which defendant was prohibited from eliciting regarding pending charges.

Defendant argues that evidence that Michelle Evans had filed a report of abuse, that defendant had taken cocaine, that Evans was concerned about defendant taking things from their home and going to New York, that defendant had intimidated Perez, and that defendant had committed fraud on his application to Perry Drug Store was improperly introduced by the prosecutor. Objection was not made at trial regarding these issues and defendant did not request a curative instruction; we review to determine whether there was a miscarriage of justice. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1994). Because there was overwhelming evidence of defendant's guilt in this case through eyewitness accounts and his own testimony, we conclude beyond a reasonable doubt that defendant would have been convicted even if this unobjected-to evidence had not been introduced. Defendant's convictions do not constitute manifest injustice.

Defendant claims that his trial counsel was ineffective for failing to object to this evidence and also for opening the door to evidence regarding a police report made by Michelle Evans alleging that defendant had abused her. To prevail in this claim, defendant "must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). We will not substitute our judgment for that of trial counsel in matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). A review of the record shows that defense counsel's strategy was to show that defendant was a nice and gentle person, one the jury would conclude could not possibly have committed the heinous crimes at issue in this case. We do not conclude that this strategy constituted ineffective assistance, notwithstanding the police report Evans had made indicating abuse. Defendant does not suggest any other strategy that might have been used in light of his own admission that he was in the store at the time Epting was assaulted, that he ran away from the store shortly thereafter, and the testimony of other eyewitnesses, including Epting, who saw defendant at the store at the time of the crimes. If defendant had not taken the stand against his counsel's advice, the strategy employed by defense counsel would have no doubt been stronger because the jury would not have had defendant's damaging admission that he was present when Epting was being hit. Our review of the record convinces us that defense counsel was extremely vigilant and that defendant's claims of ineffective

assistance are without merit.

Defendant argues that the court abused its discretion in refusing to order a neuropsychological evaluation of complainant Epting. In Michigan, criminal defendants do not have general rights to discovery, *Stanaway, supra* at 680, and discovery requests are left to the discretion of the trial court, *id.*; *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988). Understandably, defendant wanted to find a way to discredit Epting because he was the chief witness for the prosecution and gave an unwavering identification of defendant as the person who committed the crimes. However, defendant provided no more than speculation about the possibility that Epting may have suffered some memory loss. In fact, the evidence presented supported the contrary position; Epting slept well, had the same relationship with his wife, could drive his car, and had continued working as a pharmacist since the incident. Neuropsychologist Jones' testimony did not establish that there was a probability that Epting had suffered any brain damage to contradict the impression from Epting's testimony that he had not. A neuropsychological evaluation of Epting would have been a "fishing expedition" and the trial court properly denied defendant's motion. *Graham, supra*.

Finally, defendant argues that he was denied a fair trial because of prosecutorial misconduct and that defense counsel's failure to object to that misconduct constituted ineffective assistance of counsel. He first argues that the prosecutor improperly asked him if certain prosecution witnesses were lying and then repeatedly argued this testimony in closing argument. The prosecutor's questions were improper, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985), but again, we do not conclude that they resulted in manifest injustice against defendant, in the absence of any objection at trial, considering the overwhelming evidence showing that defendant committed the crimes for which he was convicted. Defendant argues that the prosecutor repeatedly impeached defense witnesses with inadmissible prior convictions, but the jury already knew, by the nature of their testimony, that these witnesses were in jail at the time about which they were testifying and that they were in jail at the time of their testimony. Any prosecutorial impropriety was, therefore, harmless. Defendant argues that the prosecutor improperly bolstered the testimony of Epting. Although a prosecutor may not vouch for the credibility of a witness or put the weight of his office behind the credence of a witness, he may argue the credibility of witnesses to the jury where the testimony is conflicting and the result depends upon which of two witnesses is to be believed. *People v Embry*, 68 Mich App 667, 671; 243 NW2d 711 (1976). We do not find that, considering this standard and the lack of objection below, manifest injustice resulted as a result of the prosecutor's comments about Epting in the course of extremely long closing arguments by both parties.

Again, defendant claims he was denied the effective assistance of counsel because no objection was made regarding these alleged instances of prosecutorial misconduct. Again, we disagree. Although it is troubling that defense counsel failed to object to the questioning of defendant regarding other witnesses' credibility and to the improper impeachment of defense witnesses, these shortcomings did not affect the outcome of this case. Further, this prosecutorial misconduct would not have occurred if defendant had followed counsel's advice not to testify. Considering the entire record, we conclude that defendant clearly received effective assistance of counsel at trial. Defense counsel worked vigorously on defendant's behalf making numerous

motions for mistrial, for sequestration, for suppression of statement, for change of venue, etc. As the trial court stated after entry of the verdicts:

I want to congratulate both counsel on trying an excellent suit in terms of their effort, and their expertise. It's a privilege for me to be a witness to the kind of lawyering that went on in this case.

Errors were undoubtedly committed in this lengthy trial, but defendant is entitled to a fair trial, not a perfect one. *People v Reed*, 449 Mich 375, 379; 535 NW2d 496 (1995). Defendant was convicted because of the overwhelming evidence of his guilt, not as a result of counsel's ineffectiveness, the prosecutor's misconduct, or the error of the trial court.

We affirm.

/s/ Michael J. Kelly

/s/ Richard A. Bandstra

/s/ Stephen B. Miller