

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALRELIO EVANS,

Defendant-Appellant.

UNPUBLISHED
September 30, 2003

No. 236351
Wayne Circuit Court
LC No. 00-009715-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLYDE D. TAYLOR,

Defendant-Appellant.

No. 236352
Wayne Circuit Court
LC No. 00-009715-02

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Defendants Alrelio Evans and Clyde Taylor were tried jointly before separate juries. They were each convicted of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b, and each was sentenced to mandatory life imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. They each appeal as of right. We affirm in both cases.

Defendants' convictions arise from the drive-by shooting death of Donnie McCorkle. A few weeks before the shooting, McCorkle was involved in an altercation with defendant Taylor's girlfriend. The prosecution's principal witness at trial was defendant Taylor's sixteen-year-old cousin, Richard Brooks, who testified that he was present inside a Ford Expedition with the two defendants at the time of the shooting. According to Brooks, defendant Evans fired at McCorkle as defendant Taylor drove the vehicle. Defendant Taylor's jury also heard evidence of Taylor's

confession to the police, wherein he explained that he participated in the offense to get back at McCorkle for the earlier confrontation with his girlfriend.¹

I. Docket No. 236351

A

Defendant Evans first argues that his trial counsel was ineffective. Because this issue was not preserved by an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

In order for this Court to reverse because of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on the defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant Evans claims that counsel was ineffective for failing to present an alibi defense. A defendant is entitled to have his counsel prepare, investigate and present all substantial defenses. A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. *Id.* A defendant "is not free to sit back and not inform his attorney of possible defenses, then claim that counsel's failure to assert them as evidence is incompetence." *People v Duff*, 165 Mich App 530, 545; 419 NW2d 600 (1987). Although Evans has submitted affidavits in support of an alibi defense, he has failed to show, nor does the record demonstrate, that he made a good-faith effort to avail himself of this defense by advising his attorney of the facts in support of it. Indeed, we note that, at sentencing, Evans complained of several alleged defects with his case, but did not mention an alleged alibi. The record does not support Evans' claim that counsel was ineffective in this regard.

Defendant Evans also claims that counsel was ineffective for failing to move to suppress Brooks' custodial statements to the police. We find no merit to this claim. First, the record does not indicate that Brooks' custodial statements were offered into evidence. Instead, defense counsel used those statements to cross-examine Brooks in an attempt to impeach his trial testimony. Second, to the extent Evans argues that Brooks' custodial statements were involuntary under the Fifth Amendment, that argument lacks merit. As this Court stated in

¹ The ongoing argument related to accusations by the victim that defendant's girlfriend had her acquaintances drive over his lawn.

People v Jones, 115 Mich App 543, 547; 321 NW2d 723 (1982), aff'd 419 Mich 577 (1984), "[t]here is no authority to extend the personal right of a defendant against coerced self-incrimination to include statements made by witnesses. In addition, [a] defendant ha[s] no standing to raise the issue of violation of the rights of third parties." Third, although prosecutorial intimidation of witnesses may amount to a denial of a defendant's constitutional right to due process of law, *People v Canter*, 197 Mich App 550, 569; 496 NW2d 336 (1992), see also *People v Stacy*, 193 Mich App 19, 25; 484 NW2d 675 (1992) (where threats are made by law enforcement officers, they may be attributed to the prosecution), the existing record does not indicate that a motion to suppress Brooks' statements or testimony on this ground would have been successful. At trial, Brooks consistently denied having been coerced or intimidated into making the statements. Although he admitted being told that he would be charged in this matter if he did not give a statement, he also testified that the police told him to tell the truth. The totality of the circumstances, including Brooks' young age, does not suggest that Brooks' statements were unreliable as a matter of law because of egregious police misconduct. See *Douglas v Woodford*, 316 F3d 1079, 1092 (CA 9, 2003). Accordingly, counsel's failure to move to suppress either Brooks' statements or his trial testimony did not amount to ineffective assistance of counsel.

Next, defendant Evans claims that counsel was ineffective because he failed to raise the issue of juror misconduct. After trial, defense counsel stated that he spoke to the two jurors who had been excused before deliberations and one mentioned to him that she "felt" that some of the other jurors had discussed amongst themselves that Evans might be guilty. Counsel admitted that he did not pursue the matter further. On these facts, Evans has not demonstrated that juror misconduct substantially prejudiced his right to a fair and impartial trial. *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998). Absent a showing of prejudice, Evans cannot sustain his claim that trial counsel was ineffective.

The record also fails to support defendant Evans' claim that his attorney prevented him from testifying. Although a defendant's right to testify is a constitutional right guaranteed under due process principles, whether a defendant testifies at trial is considered a strategic decision. *People v Simmons*, 140 Mich App 681, 683-684; 364 NW2d 783 (1985). If the defendant expresses a desire to testify, he must be permitted to testify, even over his own attorney's objection. *Id.* at 685. However, if the defendant acquiesces in his attorney's decision that he not testify, his right to testify will be deemed waived. *Id.* A review of the record fails to disclose support for Evans' claim that counsel refused to permit him to testify. Therefore, this claim fails.

Defendant Evans lastly claims that counsel was ineffective for failing to object to the prosecutor's closing argument. For the reasons explained in our subsequent discussion of this substantive issue, we find no merit to this claim. The prosecutor's comments were based on the evidence and reasonable inferences drawn therefrom and, therefore, counsel's failure to object is not a basis for finding that his performance was deficient. *Pickens, supra*.

To the extent that Evans requests this Court reconsider his motion to remand for an evidentiary hearing regarding counsel's performance, we conclude that his offer of proof is insufficient to justify a remand for further proceedings. *Simmons, supra* at 685-686.

B

Defendant Evans next argues that the jury was improperly given a tape recording of trial testimony after the trial court, in response to the jury's request to rehear certain testimony, instructed the jury that it could not rehear the testimony at that time. Because this issue was not raised before the trial court, Evans must show that a plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

Defendant Evans' argument is based on a note that appears in the court file, apparently made by a court clerk, which indicates that a "[r]eporter tape recorder [was] given to the panel." Contrary to what Evans argues, there is no indication in the record that the tape recording involved trial testimony.² To the contrary, the record discloses that, in response to a jury request to rehear testimony, the court instructed the jury that it should resume deliberations without rehearing the requested testimony at that time. Furthermore, unlike the situation in *People v Page*, 41 Mich App 99, 103; 199 NW2d 669 (1972), on which Evans relies, there is no indication here that the jury was provided with access to information that was not admitted at trial. A plain error affecting Evans' substantial rights has not been shown. Additionally, we are not persuaded that a remand for further development of the record is necessary.

C

Next, defendant Evans argues that the prosecutor engaged in misconduct by vouching for Brooks' credibility during closing arguments. Because there were no objections to the prosecutor's comments at trial, we review this unpreserved issue for plain error affecting Evans' substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is not warranted if a cautionary instruction could have cured any prejudice caused by the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). In closing arguments, a prosecutor is afforded great latitude. He is permitted to argue the evidence and make reasonable inferences to support his theory of the case. *Id.* at 284. However, the prosecutor must refrain from making prejudicial remarks. *Id.* While prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when it is supported by the evidence and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness. *Bahoda, supra* at 276. In this case,

² According to the prosecution, this was a tape recording of the court's jury instructions, which the court apparently routinely supplies to its juries, as allowed by MCR 6.414(G). However, the accuracy of this representation has not been established because the matter was never properly developed in the trial court.

however, viewing the prosecutor's comments in context, it is apparent that the prosecutor was not using his position or special knowledge to improperly bolster Brooks' credibility. The prosecutor confined his comments to why Brooks' testimony was credible based on the evidence and reasonable inferences that could be drawn from the evidence. Further, explaining away inconsistencies in Brooks' testimony does not involve improper vouching for the witness. Evans has failed to show that the prosecutor's comments amounted to plain error. *Schutte, supra*.

D

Defendant Evans next argues that the trial court erred in denying his motion for a new trial on the ground that the jury's verdict was against the great weight of the evidence. We disagree. A trial court's denial of a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that a miscarriage of justice would result from allowing the verdict to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). The trial judge is not permitted to sit as the "thirteenth juror" and grant a new trial because he disagrees with the jurors' assessment of credibility. *Id.* at 647.

We are not persuaded that Brooks' testimony was so incredible or unreliable that allowing the jury's verdict to stand would result in a miscarriage of justice. Even if there were some inconsistencies in his testimony, they were insufficient to justify a new trial. The trial court did not abuse its discretion by denying Evans' motion for a new trial.

E

Defendant Evans also argues that the trial court erred in failing to ascertain on the record if Evans knowingly waived his right to testify at trial. This Court has consistently followed the majority rule that a trial court is not required to place a waiver on the record of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991); *Simmons, supra* at 683-685. In so doing, this Court has declined to adopt the minority view. *Simmons, supra* at 684. Therefore, defendant's argument is without merit.

F

Defendant Evans also raises several issues in a supplemental brief, none of which require reversal.

He first argues that he was denied his right to a fair trial because the only two African-American jurors who were seated on the jury panel were excused by blind draw before deliberations. We disagree. Fourteen jurors were selected to serve as jurors for this case. As permitted by MCL 768.18 and MCR 6.411, the court's clerk randomly selected the names of two jurors to be excused just before deliberations began. The two jurors who were randomly selected for removal were the only two African-American who served on the jury. The trial court found nothing inappropriate about either the selection procedure or the final composition of the jury.

The right to a fair trial under the Sixth Amendment requires that juries be drawn from a fair cross-section of the community. For this reason, distinct groups represented in the

community may not be systematically excluded. *People v Hubbard*, 217 Mich App 459, 472-473; 552 NW2d 493 (1996). This case, however, does not involve the systematic exclusion of minority members during the jury selection process. Instead, the only two African-American jurors were excused by random draw. Evans does not contest the fairness of the procedure used to select the two jurors for removal. Because the selection of minority jurors is not an inherent byproduct of a random drawing, *People v Smith*, 463 Mich 199, 205; 615 NW2d 1 (2000), Evans has failed to show that his rights under the Sixth Amendment were violated. Similarly, he has not shown that his right to equal protection under the Fourteenth Amendment was violated. *People v Williams*, 241 Mich App 519, 527-528; 616 NW2d 710 (2000).

Defendant Evans argues that the trial court's instructions concerning the use of a dangerous weapon require reversal. Because he failed to object to the court's instructions at trial, we review this issue for plain error affecting his substantial rights. *People v Gonzalez*, 468 Mich 636, 643; 664 NW2d 159 (2003). The trial court instructed the jury in accordance with CJI2d 16.21 that it "may" find that Evans intended to kill from the use of a dangerous weapon in a way that was likely to cause death. Evans argues that the instruction either shifted the burden of proof or did not give the jury the option of finding that he did not intend to kill, even if the jury believed he used a weapon. We disagree. The court's instructions used the permissive term "may" and, therefore, did not suggest that the jury must find that Evans acted with an intent to kill if it found that he used a dangerous weapon. Moreover, we reject Evans' argument that the court's instruction conflicted with the defense of duress. The record does not indicate that Evans presented a duress defense at trial.

Next, defendant Evans argues that the trial court's response to a jury request to rehear testimony improperly discouraged the jury from making a subsequent request for the testimony. Evans did not object to the court's instruction at trial. To avoid forfeiture of this unpreserved issue, Evans must show a plain error that affected his substantial rights. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *Carines, supra*. The court instructed the jury

to discuss the case and see what you can agree with. And then if need be, we'll play the recorder back.

Read as a whole, the court did not improperly discourage the jury from submitting a subsequent request to rehear testimony, if necessary. See MCR 6.414(H). Plain error did not occur.

Defendant Evans also argues that his sentence of mandatory life imprisonment without parole for first-degree murder is unconstitutional under Const 1963, art 4, § 45. This Court has addressed and decided this issue contrary to Evans' argument. As this Court determined in *People v Snider*, 239 Mich App 393, 426-428; 608 NW2d 502 (2000), and *People v Cooper*, 236 Mich App 643, 660-664; 601 NW2d 409 (1999), both the current wording of Const 1963, art 4, § 45, and the history behind that provision, indicates that the Legislature is not prohibited from enacting a statute that requires determinate sentencing. We also reject Evans' argument that a sentence of mandatory life imprisonment without the possibility of parole for first-degree murder is either cruel or unusual under our state constitution, Const 1963, art 1, § 16. *People v Hall*, 396 Mich 650, 657-658; 242 NW2d 377 (1976); *People v Launsburry*, 217 Mich App 358, 363-364; 551 NW2d 460 (1996).

G

Lastly, we address defendant Evans' argument that he is entitled to a new trial because of the cumulative effect of multiple errors. Because we do not believe that any substantive errors occurred in this case, Evans is not entitled to a new trial on the basis of cumulative error. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

II. Docket No. 236352

A

Defendant Taylor first argues that the trial court erroneously allowed the jury to consider hearsay evidence. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An abuse of discretion involves much more than a mere difference of opinion. *Id.* This Court will typically not find an abuse of discretion where a close question is involved. *Id.*

The trial court allowed the officer in charge to testify about other possible suspects in this case and their possible motives for killing the victim, including Taylor's girlfriend, Lynne Griggs, and Jermaine Powers. Over defense objections, the trial court also allowed the officer to testify about threats Griggs allegedly made to the victim regarding an incident in which Powers drove over the victim's lawn. The officer in charge believed that both Griggs and Powers may have had a "beef" with the victim shortly before the shooting. The court admitted the testimony on the ground that it was not being offered for the truth of the matter asserted.

"Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted." *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule contained in the Rules of Evidence. *Tanner, supra*; MRE 802.

Here, the defense attorneys opened the door to testimony regarding other possible suspects during their cross-examination of the officer in charge. The prosecutor thereafter properly explored the testimony about Griggs' and Powers' possible motives for shooting the victim on redirect examination. Both individuals were investigated as possible suspects, but not prosecuted. The prosecutor offered the testimony about threats made by Griggs to the victim to explain why Griggs was investigated as a possible suspect, not for its truth, and, therefore, the testimony was not hearsay. Even if the testimony could be considered hearsay, it was cumulative of other evidence, including Taylor's own statement, presented to Taylor's jury about the threats that Griggs made to the victim. Thus, reversal is not required.

B

Defendant Taylor also argues that the prosecutor engaged in misconduct. Because Taylor did not object to the challenged conduct at trial, he must show that plain error affected his substantial rights. *Schutte, supra*.

First, we disagree with defendant Taylor's claim that it was improper for the prosecutor to argue in his rebuttal closing argument that there was no evidence that Taylor's statement was

coerced. The prosecutor's arguments were not a comment on Taylor's failure to testify. Rather, they were responsive to the closing arguments by defense counsel, who stated that Taylor had been coerced into making his statement. Where a prosecutor's comments are responsive, they must be considered in light of the defense arguments raised. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal where the remarks are made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Because the prosecutor's comments were directed at rebutting defense counsel's claims that Taylor's statement was coerced, they did not amount to plain error.

Next, defendant Taylor claims that the prosecutor improperly injected his personal knowledge when discussing Rico Hence's testimony. For the most part, the prosecutor's comments about this witness' hostility were based on the evidence and reasonable inferences drawn therefrom. To the extent the prosecutor went beyond the evidence by commenting about how upset he was that Hence had ignored orders to remain at the courthouse, and spoke about a bench warrant having been issued for Hence, the remarks did not involve matters critical to a determination of Taylor's guilt or innocence. Further, any perceived prejudice in this regard could have been cured by a cautionary instruction had Taylor objected. Accordingly, this unpreserved issue does not require reversal.

Defendant Taylor also claims that the prosecutor disparaged defense counsel by suggesting that counsel attempted to mislead the jury by discussing the concept of reasonable doubt, and also by belittling counsel's expectation that a witness to a violent crime would be thorough and consistent in describing everything that occurred. After reviewing the challenged comments in context, we are not persuaded that the prosecutor engaged in an improper personal attack on Taylor's counsel. Plain error has not been shown. We likewise reject Taylor's claim that the prosecutor made an obvious plea for the jury to sympathize with the victim or his family. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

C

Defendant Taylor also argues that his attorney was ineffective. Because Taylor failed to raise this issue in an appropriate motion in the trial court, our review is limited to mistakes apparent on the record. *Riley, supra*.

Similar to defendant Evans' claim addressed *supra*, defendant Taylor also claims that counsel was ineffective for not moving to suppress Brooks' statements or testimony on the basis that he was coerced by the police. Consistent with our analysis of this issue with regard to defendant Evans, we likewise conclude that defendant Taylor's counsel was not ineffective for failing to challenge Brooks' statements or testimony on this ground.

We also find no merit to defendant Taylor's claim that counsel should have objected to the admission of Taylor's statement on the basis that it was not electronically recorded. This Court has declined to require that a defendant's statement be recorded by audio or video equipment. *People v Fike*, 228 Mich App 178, 183-186; 577 NW2d 903 (1998). Thus, Taylor has failed to show that, based on existing authority, there is a reasonable likelihood that his statement would have been excluded had his attorney objected on this ground.

Next, defendant Taylor claims that counsel was ineffective for not properly objecting to the hearsay evidence – relating to the altercation between Powers, Griggs and the victim – previously discussed in this opinion. Counsel did initially challenge the testimony on the basis of hearsay. Considering the trial court’s ruling, we do not believe that counsel was deficient for failing to make the same objection to subsequent testimony on the same subject. Further, Taylor has failed to show that a different outcome would have resulted had an objection been made and, therefore, has not established that he was prejudiced by counsel’s conduct. *Pickens, supra*.

We also find no merit to defendant Taylor's claim that counsel was ineffective for not objecting to opinion testimony from the officer in charge regarding whether Powers was a possible suspect. The testimony in question did not involve the officer's personal opinions, but concerned his investigation of other possible suspects.

Defendant Taylor also claims that his attorney was ineffective for failing to object to the prosecutor's comments during closing argument, failing to object to the court's instructions concerning reasonable doubt, and failing to raise the issue of cumulative error before the trial court. Consistent with our resolution of these issues in previous parts of this opinion, as well those addressed *infra*, we conclude that Taylor has not shown that counsel's performance affected the outcome of this case. *Pickens, supra*. Furthermore, we are not persuaded that this matter should be remanded for an evidentiary hearing on Taylor's claims of ineffective assistance of counsel. *Simmons, supra* at 685-686.

D

Defendant Taylor argues that the trial court erroneously instructed the jury concerning "reasonable doubt." Because Taylor did not object to the court's instructions at trial, we will reverse only if plain error affected his substantial rights. *Gonzalez, supra*. The record reveals that the court instructed the jury consistent with CJI2d 3.2(3). This Court has repeatedly held that such an instruction adequately defines the concept of "reasonable doubt" for a jury. *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002); *Snider, supra* at 420-421. Moreover, this Court recently rejected the argument that a trial court erred in giving a reasonable doubt instruction that mirrored CJI2d 3.2 but did not include "hesitate to act" language. *People v Hill*, 257 Mich App 126, 151-152; 667 NW2d 78 (2003). Although the United States Supreme Court has approved of instructions that include "hesitate to act" language, it has also held that the federal constitution does not require the use of a specific instruction to define the concept of reasonable doubt. *Victor v Nebraska*, 511 US 1, 5, 20; 114 S Ct 1239; 127 L Ed 2d 583 (1994). Thus, the trial court's instructions, following CJI2d 3.2(3), did not amount to plain error.

E

Defendant Taylor also argues that his mandatory life sentence is unconstitutional. As previously addressed with regard to defendant Evans’ issue, defendant Taylor's sentence of life imprisonment without parole for first-degree murder likewise does not violate Const 1963, art 4, § 45. *Snider, supra* at 426-428; *Cooper, supra* at 660-664.

F

Finally, defendant Taylor has not established that he was denied a fair trial because of the cumulative effect of several errors. *Daoust, supra*.

Affirmed.

/s/ William C. Whitbeck

/s/ Michael J. Talbot

/s/ Brian K. Zahra