

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 18, 2014

v

JONNIE TYRELL JOHNSON, JR.,
Defendant-Appellant.

No. 313112
Genesee Circuit Court
LC No. 11-029033-FC

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

This appeal concerns the June 14, 2009 shooting death of Demario Dupree in Flint, Michigan. Defendant appeals from his jury trial convictions of first-degree murder, MCL 750.316, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life in prison for first-degree murder, 76 months to 40 years for felon-in-possession, and 10 years for felony-firearm. Because defendant has not demonstrated error requiring reversal, we affirm.

I. REQUEST TO ADD WITNESS

Defendant first contends that the trial court abused its discretion by denying his request to add Chavez Ross as a witness on the day trial began.

We review trial court's decision to permit or deny the late endorsement of a witness for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.*

“A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses.” *Id.* This right is not absolute: “the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Id.* (quotation marks and citation omitted).

MCR 6.201(a)(1) requires that parties disclose their witness lists no later than 28 days before trial. Because Ross was not even mentioned by defendant until the first day of trial, defendant clearly did not comply with this rule nor did he provide any reason for the delay.

Thus, the trial court's denial of defendant's request to add Ross as a witness on the first day of trial was not an abuse of discretion on this basis alone. *Yost*, 278 Mich App at 379.

Moreover, defendant failed to demonstrate how Ross's testimony would have been relevant. The record is scant on any details about Ross, other than the fact that he supposedly spoke with Damaris Jourdan, a prosecution witness, about Jourdan's testimony. Defendant asserts that Ross's testimony would have cast "reasonable doubt" on Jourdan's testimony and that Jourdan did not come forward until receiving a reduced sentence on unrelated charges. First, Jourdan's reduced sentence and motivation for testifying were brought out at trial on direct and cross-examination. Second, defendant made almost no offer of proof that Ross ever actually spoke with Jourdan. Defendant also did not proffer what Ross would have said about Jourdan's testimony. Third, even when given the opportunity to address the issue of Ross with Jourdan on cross-examination, defendant declined to do so. Lastly, even if we assume that Ross would have testified that Jourdan fabricated his testimony in exchange for leniency, that testimony would have been merely duplicative. Defense witness Darryl Rodgers testified that Jourdan and others were "plotting" against defendant by fabricating testimony to obtain early release.

Accordingly, the trial court did not abuse its discretion by denying defendant's untimely request to add Ross as a witness.

II. DUE PROCESS

Defendant next argues that his constitutional right to due process was violated when the trial court admitted evidence of his silence after being questioned by his friend, Dallas Green, about Dupree's murder. Unpreserved claims of error are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Green testified for the prosecution regarding a conversation he had with defendant during which he told defendant that people were saying that defendant was involved in Dupree's murder. Green testified that defendant responded by denying any involvement in the murder. The prosecutor subsequently impeached Green's trial testimony with evidence that Green had previously told police that defendant was merely silent in response to Green's statement as opposed to stating a denial. Defendant now argues that Green's statement that defendant was silent in the face of an accusation was admitted in error.

Green's statement about defendant's silence in the face of an accusation did not violate defendant's Fifth Amendment rights because Green was not a state actor nor was defendant in custody at the time he remained silent. See *People v Borgne*, 483 Mich 178, 186-187; 768 NW2d 290 (2009).

Defendant also claims that the introduction of Green's statement was unfairly prejudicial under MRE 403, which provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The statement was not offered to prove that defendant murdered Dupree. The statement was admitted because Green's trial testimony was in direct conflict with his previous statement made to police and it was relevant for that purpose. Further, the statement did not unfairly prejudice defendant; indeed, if anything, it damaged Green's overall credibility. Defendant relies on the Supreme Court's holding in *People v Hackett*, 460 Mich 202, 214-215; 596 NW2d 107 (1999): "A criminal defendant's failure to respond to an accusation is not probative evidence of the truth of an accusation." As discussed, defendant's silence was not admitted in an attempt to prove his guilt, but rather because it demonstrated that Green's trial testimony was in conflict with his prior statement to police.

Accordingly, defendant has not established a violation of his due process rights.

III. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor committed misconduct by impermissibly vouching for the credibility of two witnesses during her closing argument. We review this unpreserved claim for plain error affecting substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

"[A] prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, "a prosecutor may comment on his own witnesses' credibility during closing argument[.]" *Id.* A prosecutor is free to argue all the facts in evidence and the reasonable inferences arising therefrom. *Id.* at 454.

Defendant takes issue with the prosecutor's statement that prosecution witness Damaris Jourdan, who testified that he witnessed defendant shoot Dupree, "testified and testified truthfully." However, Jourdan testified at trial that he was telling the truth and the prosecutor did not imply that he had any special knowledge of Jourdan's veracity. Accordingly, the prosecutor's statement did not constitute misconduct. *Id.* at 454-455.

Similarly, defendant contends that the prosecutor impermissibly vouched for a witness's credibility when she stated that Erma Jones "was coming forward and telling the truth because it was the right thing to do." Jones testified that following a discussion with defendant, who urged her to tell the police that defendant left with Jones on the date of the murder, she lied to the police about defendant's whereabouts on the night of the murder. Like Jourdan, Jones then testified that she was being truthful at trial. Accordingly, because the prosecutor argued from the testimony in evidence and did not imply any special knowledge of Jones's truthfulness, the statement did not constitute misconduct. *Id.* at 454-455.

Further, even if the prosecutor's statements were misconduct, the trial court instructed the jury that the lawyers' statements and arguments were not evidence. And, "[j]urors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, any potential misconduct during the prosecutor's closing arguments was cured by instruction.

IV. POLYGRAPH EXPERT

Defendant argues that the trial court erred by admitting evidence that Bradford J. Beyer, a special agent with the Federal Bureau of Investigation, had polygraph expert credentials. Beyer testified for the prosecution regarding inculpatory statements made by defendant to him. However, his testimony did not include any mention that defendant took a polygraph examination. Defendant does not allege that Beyer's testimony about his inculpatory statements was inadmissible but rather that Beyer's mention of his credentials for administering polygraph examinations was an impermissible attempt by the prosecution to tell the jury that defendant took a polygraph examination. We reviewed this unpreserved claim for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Testimony concerning the results of a polygraph examination is not admissible at trial. *People v Barbara*, 400 Mich 352, 377; 255 NW2d 171 (1977). When Beyer was questioned about his credentials, he mentioned that, "I have a certificate of graduate study from what's now referred to as the National Center for Credibility Assessment in the Psychophysiological Detection of Deception." This certificate indicates that Beyer was trained in using a polygraph. However, there was no mention of the word "polygraph" or implication that defendant took a polygraph examination in Beyer's testimony. Beyer certainly did not testify to any *results* of any polygraph taken by defendant. *Id.* Accordingly, the trial court did not err by allowing, without objection, Beyer's statement regarding his qualifications.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Lastly, defendant alleges several instances of the ineffective assistance of his trial counsel.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

The right to the effective assistance of counsel is guaranteed by the United States and Michigan constitutions. US Const Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039, 80 L Ed 2d 657 (1984); *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Effective assistance of counsel is presumed, and a defendant bears a heavy burden to prove otherwise." *Swain*, 288 Mich App at 643. "To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *Id.*

A. PRESENCE AT POLYGRAPH EXAMINATION

Defendant first argues that his trial counsel was ineffective for failing to accompany him during his aforementioned polygraph examination, wherein defendant made inculpatory statements that were revealed at trial.

In *People v Bladel (After Remand)*, 421 Mich 39, 66; 365 NW2d 56 (1984), abrogated in part by *People v Cipriano*, 431 Mich 315; 429 NW2d 781 (1988), the Supreme Court held that once a defendant has invoked his right to counsel, police may not question the defendant without counsel present unless the defendant initiates further communications. When a defendant requests a polygraph, the defendant initiates an interrogation. *Wyrick v Fields*, 459 US 42, 47; 103 S Ct 394; 74 L Ed 2d 214 (1982). As long as a defendant is given a *Miranda* warning before he waives his right to counsel at a polygraph examination, the waiver is normally sufficient to effectuate a knowing and intelligent waiver of that defendant's right to counsel. *Bladel*, 421 Mich at 66.

Defendant makes no argument on appeal that his signing of his *Miranda* rights form, as well as his attorney's signing of a similar form, before the polygraph examination was administered was involuntary. Also, no facts on the record support a conclusion that any error occurred with respect to defendant being informed of his right to counsel which he had obviously invoked because he was represented at the time of the polygraph examination.

Defendant contends that trial counsel's specific ineffective act occurred when counsel failed to accompany him into the interrogation room. Because defendant waived his rights to have counsel present during the interrogation, defendant did not have the right to have counsel present during his polygraph examination.

Thus, the final question is whether counsel's decision to allow defendant to sign the waiver and attend the polygraph examination alone constituted ineffective assistance. Because the record only provides that a waiver was signed by defendant and defense counsel and no *Ginther*¹ hearing was held, we can only speculate what information the rights form actually contained. Nonetheless, the presumption is that defense counsel performed effectively, *Swain*, 288 Mich App at 643, and there is no evidence in the record to support a conclusion that counsel's decision to allow defendant to sign the waiver to take the polygraph examination was not either something the two discussed or was part of an acceptable trial strategy. Thus, counsel's performance did not fall below an objective standard of reasonableness. *Id.*

B. INVESTIGATION OF IMPEACHMENT WITNESS

Defendant next argues that his trial counsel failed to investigate and present a crucial impeachment witness. Counsel's failure to reasonably investigate a defendant's case may constitute ineffective assistance of counsel if that defendant is deprived of a substantial defense. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Defendant claims that his counsel should have sought testimony from Nikkia Larry, whom defendant alleges would have contradicted Jourdan's testimony that she was with him when he witnessed defendant shoot Dupree. Defendant has provided no affidavit or other evidence that Larry would have so testified. Moreover, defendant's counsel adequately questioned Jourdan's credibility. On cross-examination, Jourdan admitted that Larry was the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

mother of his children, that he was living with her, and that he did not want her involved in defendant's trial. Defendant's counsel strongly implied that Jourdan told Larry not to testify because she would not corroborate his story. Defendant's counsel also adequately questioned Jourdan about the reduced sentence he received for his testimony and presented testimony from Rodgers that Jourdan fabricated his story to obtain leniency. Thus, counsel's alleged failure to investigate Larry's testimony did not fall below an objective standard of reasonableness. *Swain*, 288 Mich App at 643.

C. INVESTIGATION OF JOURDAN'S VAN

Defendant contends that his trial counsel failed to investigate evidence that Jourdan was driving "a particular van" on the night of Dupree's murder and that Jourdan did not actually purchase the van until July 2009, after the murder. Had counsel investigated this claim, defendant argues, the jury would have given less weight to Jourdan's testimony.

The issue of what vehicle Jourdan drove on the night of Dupree's murder was not testified to at trial. Rather, the issue was only mentioned during defendant's preliminary examination. At the preliminary examination, Jourdan testified that he purchased a Chevy Venture van on July 4, 2009 and stated that it was the vehicle he drove on the night of the murder. This is factually impossible because Dupree's murder occurred on June 14, 2009.

Defendant argues that had defense counsel investigated this issue, he could have presented evidence of this factual inconsistency to the jury. However, "[d]ecisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are [also] presumed to be matters of trial strategy[.]" *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). As discussed above, defense counsel adequately attacked Jourdan's credibility and motivation to lie. Further, there is no evidence that counsel was unaware of Jourdan's inconsistent statement regarding the van, and counsel's decision not to question him about the issue in light of the stronger impeachment evidence was a reasonable trial strategy. Defendant has failed to overcome the presumption of reasonable trial strategy in questioning witnesses, and, therefore, his counsel's performance did not fall below an objective standard of reasonableness. *Swain*, 288 Mich App at 643.

D. PRESENTATION OF ADDITIONAL SUSPECT

Finally, defendant contends that trial counsel was ineffective for failing to present evidence of Cleophas Gibbs as an additional suspect. An attorney's performance may be ineffective if he failed to investigate evidence which would have created a substantial defense for a defendant. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). At trial, an investigating detective testified that the police determined Gibbs was not a viable suspect. No evidence exists in the record to suggest that an investigation into Gibbs would have created a substantial defense for defendant. Thus, defendant's trial counsel's failure to investigate Gibbs did not fall below an objective standard of reasonableness. *Swain*, 288 Mich App at 643.

E. OUTCOME DETERMINATIVE

Assuming, arguendo, that defendant's trial counsel's performance fell below an objective standard of reasonableness, we do not find a reasonable probability that, but for those asserted

errors, the outcome of defendant's trial would have been different. *Id.* There was ample evidence to support the jury's verdicts. There was testimony from several witnesses that placed defendant in the area of the shooting at the relevant time. Defendant's girlfriend at the time of the murder testified that defendant believed that Dupree had killed her brother. She testified that, mere hours after Dupree's murder, defendant told her that "he got him," and subsequently asked her to lie about his whereabouts on the night of the murder. Accordingly, there was sufficient evidence to support the jury's verdicts independent of the alleged errors on the part of defendant's trial counsel and, thus, defendant is not entitled to reversal. *Id.*

Affirmed.

/s/ Kathleen Jansen

/s/ Donald S. Owens

/s/ Douglas B. Shapiro