

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 5, 2014

v

PATRICK ALEXANDER MCCREE,

Defendant-Appellant.

No. 315226
Wayne Circuit Court
LC No. 12-009053-FC

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second-offense, MCL 750.227b. For the reasons stated below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant shot and killed James Becker at a house in Detroit in August 2012. After trial, the jury convicted him of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second-offense, MCL 750.227b. On appeal, defendant argues that: (1) the trial court gave improper preliminary instructions; (2) the trial court abused its discretion when it allowed an ATF agent to testify as a lay witness; (3) the prosecutor committed misconduct and denied him a fair trial; and (4) his trial attorney gave him ineffective assistance. We address each issue in turn.

II. ANALYSIS

A. PRELIMINARY INSTRUCTIONS

“A party must object or request a given jury instruction to preserve the error for review.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). On appeal, defendant concedes that he did not object to the trial court’s specific preliminary instruction. Therefore, this issue is unpreserved for appellate review. Review of defendant’s unpreserved claim is limited to ascertain whether any plain error affected the defendant’s substantial rights. *People v Young*, 472 Mich 130, 135, 143; 693 NW2d 801 (2005). To avoid

forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected substantial rights. *People v Walker (On Remand)*, 273 Mich App 56, 66; 728 NW2d 902 (2006). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.*

Here, defendant wrongly asserts that the trial court diminished the prosecution's burden of proof in its preliminary instructions to potential jurors. The trial court properly instructed the jury by emphasizing the difference between television depictions of a criminal trial and an actual criminal trial. It stressed that the jurors needed to apply their common sense when reviewing evidence presented by both parties, and then determine whether the evidence established defendant's guilt beyond a reasonable doubt. In addition, before opening statements, the trial court correctly instructed the jury in accordance with CJI2d 3.1(3) (in deciding the facts of the case, the jury "must think about all the evidence"), CJI2d 3.2 (explaining proof beyond a reasonable doubt standard and that "a doubt is based on reason and common sense"), CJI2d 3.5(9) (jurors "should use [their] own common sense and general knowledge in weighing and judging the evidence"), and CJI2d 3.6(2) (in deciding witness credibility, the jurors "should rely on [their] own common sense and everyday experience"), among others. Therefore, the trial court properly instructed the jury during its preliminary instructions, and defendant has failed to demonstrate plain error affecting his substantial rights. *Young*, 472 Mich at 135, 143.

B. WITNESS TESTIMONY

A trial court's evidentiary ruling is reviewed for an abuse of discretion. *People v Benton*, 294 Mich App 191, 195; 817 NW2d 599 (2011). An abuse of discretion occurs when the trial court reaches a result that is outside the range of principled outcomes. *Id.* Preliminary questions of law on interpretation of the rules of evidence are reviewed de novo. *Id.*

MRE 702 permits the admission of expert opinion testimony when: "the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . ." A "preserved, nonconstitutional error" is not a ground for reversal unless "it affirmatively appears that the error asserted undermines the reliability of the verdict." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (quotation marks and citation omitted). Reversal is warranted if it is more probable than not that the error was outcome determinative. *Id.*

Here, defendant claims that he did not receive a fair trial because an ATF agent who testified for the prosecution interpreted records on defendant's cell phone use without being qualified as an expert witness per MRE 702. The prosecution should have moved to qualify the ATF agent as an expert witness before he discussed the cell-phone-related evidence, because the presentation involved a fairly complicated explanation of various software programs used to discern defendant's location via his cell phone. Absent the agent's testimony, it is unlikely the jury would have understood exactly how defendant's cell phone records placed him (or his phone) in the area of the house where Becker was murdered. Nonetheless, the trial court's decision not to qualify the ATF officer as an expert witness does not require reversal, because the prosecution presented overwhelming evidence of defendant's guilt. Most importantly, three other witnesses testified to defendant's presence at the house when the shooting occurred—and

one witness stated that he saw defendant pull out a gun and shoot Becker in the head. Therefore, the cell-phone testimony is clearly harmless.

C. ALLEGED PROSECUTORIAL MISCONDUCT

“In order 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). Defendant failed to object to the alleged prosecutorial misconduct. Therefore, the issue is unpreserved for appellate review. This Court reviews defendant’s unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *Walker*, 273 Mich App at 66-67.

“[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor’s remarks in context.” *Bennett*, 290 Mich App at 475. A prosecutor may not appeal to the jury’s sympathy for the victim. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). In addition, “a prosecutor may not urge the jurors to convict the defendant as part of their civic duty.” *Id.* “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation and quotation omitted). “An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008) (citations omitted).

In this case, defendant says that the prosecutor’s statements during a rebuttal to his attorney’s closing argument amounted to misconduct because the prosecutor appealed to the jury’s sympathy and sense of civic duty.¹ Though the prosecutor did make some statements that could be construed in this fashion, this was in response to defense counsel’s offensive insinuation that the victim caused his own death by being at a drug house. Further, defendant’s attorney explicitly alleged that one witness did not want to testify. Although the prosecutor’s remarks were improper, his remarks must be considered in light of defense counsel’s reprehensible statements. *Unger*, 278 Mich App 238.

Moreover, the trial court instructed the jury that the lawyers’ statements and arguments were not evidence and that it must not let sympathy or prejudice influence its decision. Jurors are presumed to follow the trial court’s instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Thus, the trial court’s instructions cured any potential prejudicial effect of the prosecutor’s remarks made during closing argument and rebuttal. *People v Meissner*, 294 Mich App 438, 457; 812 NW2d 37 (2011).

D. ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL

¹ Defendant wrongly asserts that the prosecutor made the statements at issue during the prosecution’s initial closing argument. Actually, the statements were made during the prosecution’s rebuttal and were in direct response to defense counsel’s argument.

To properly preserve an ineffective assistance of counsel claim, a defendant must move for a new trial or seek an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). *People v Armisted*, 295 Mich App 32, 46; 811 NW2d 47 (2011). Defendant did neither. In his standard 4 brief, defendant requests an evidentiary hearing be held, but he failed to file a motion to remand with this Court pursuant to MCR 7.211(C)(1). Therefore, this issue is unpreserved for appellate review.

We review defendant's unpreserved claim of ineffective assistance of counsel for errors apparent on the record. *Id.* Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

Effective assistance of counsel is presumed. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim for ineffective assistance of counsel, a defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must establish that "counsel's representation fell below an objective standard of reasonableness." *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), citing *Strickland*, 466 US at 688. The defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). We then determine whether, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Vaughn*, 491 Mich at 670, citing *Strickland*, 466 US at 690. The defendant must also show that trial counsel's deficient performance prejudiced his defense. *Strickland*, 466 US at 687. To demonstrate prejudice, a defendant must show the existence of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Vaughn*, 491 Mich at 669, citing *Strickland*, 466 US at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), citing *Strickland*, 466 US at 694.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Failure to call a witness or present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009).

A criminal defendant has a constitutional right to testify in his own defense. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *Id.* A decision whether to call a defendant to testify at trial is a matter of trial strategy. *People v Shively*, 230 Mich App 626, 629; 584 NW2d 740 (1998). When a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify," the right to testify is waived. *People v Simmons*, 140 Mich App 681, 685; 346 NW2d 783 (1985).

Here, defendant argues that his trial attorney gave him ineffective assistance because the attorney did not: (1) call a number of alleged alibi witnesses; and (2) tell defendant of his right to testify at trial or call him to testify at trial.² Neither claim has any merit. Defendant's supposed alibi witnesses were either not willing to testify on his behalf, or there is no record evidence on the substance of their potential testimony. And defendant's claim that his attorney did not tell him of his right to testify at trial or invite him to testify is a complete fabrication—defendant was informed of his right to testify and explicitly told the court he did not want to testify. Accordingly, the trial attorney did not give defendant ineffective assistance of counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio

² Defendant also asserts that his trial attorney gave him ineffective assistance of counsel when the attorney did not object to the trial court's preliminary instructions and the prosecutor's rebuttal statement. As noted, the trial court gave proper preliminary instructions and the prosecutor's rebuttal statement was harmless. Defense counsel cannot be ineffective for failing to raise futile or meritless objections. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).