

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
May 19, 2015

v

JAKWAUN RONDELL SCOTT,  
Defendant-Appellant.

No. 320232  
Wayne Circuit Court  
LC No. 13-005536-FC

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Before: TALBOT, C.J., and CAVANAGH and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). We affirm.

The 16-year-old murder victim was shot several times in the back during an altercation between two groups of young men in the City of Detroit. Defendant was identified as the shooter.

I. PROSECUTORIAL MISCONDUCT

Defendant first contends that the prosecutor committed misconduct requiring reversal of his convictions for appealing to the jury's civic duty and vouching for the credibility of prosecution witnesses. We disagree.

This issue is unpreserved for appeal because there was no contemporaneous objection to any of the alleged instances of misconduct and no request for a curative instruction in regard to any alleged error. See *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Therefore, our reviewed is for plain error that affected defendant's substantial rights. *Id.*

The role and responsibility of a prosecutor is to seek justice and not merely to convict. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *Id.* Issues regarding prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). A prosecutor may not urge the jury to convict a defendant as part of its civic duty. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008).

Defendant first claims that the prosecutor improperly elicited testimony regarding crime statistics. During the prosecution's direct examination of Detroit police officer Eugene Fitzhugh, the prosecutor asked him to explain what he had denoted on his sketch of the crime scene, which led to the following response:

Well, what I do when I do a sketch is first of all I indicate what the crime is. And in this case it's a homicide. What the complainant's name is, which is Terry Jones. The location I show is 14375 Terry. The date is May 4, 2013 and the page is page four of a three-page report, and the sketch making the fourth page.

It has a lab number. For every scene that we do, be it a home invasion or homicide, part of our record keeping is to make a lab number. The lab number goes in sequential order according to the scene that we go to.

So if, for example, today we are at lab number 100. The next scene be it a home invasion or armed robbery, will be 101. So it just goes in a continuous cycle through the end of the year. We usually wind up with about close to 4000 lab numbers at the end of the year.

Immediately after Fitzhugh finished his explanation regarding the lab reports his office routinely creates, the prosecutor directed him to discuss whether the sketch in this case was drawn to scale.

Based upon Fitzhugh's statement that the city creates approximately 4,000 lab numbers a year, defendant argues that the prosecutor elicited this information "for shock value and nothing more." But it does not appear that the prosecutor purposefully elicited this information; rather, it appears the information was volunteered by the witness. And it appears that the prosecutor was merely laying the foundation for Fitzhugh's report and sketch. Further, nothing in the prosecutor's questions, before or after Fitzhugh's statement, provides any support for defendant's contention that "by his line of questioning [the prosecutor] was pointing out the fact that the instant crime is just one of many crimes in Wayne County, and [the jurors] can do their part to stop the number from rising more than it already has." Again, it appears the prosecutor wanted to provide the jury with an explanation of the information set forth on the lab report that Fitzhugh created at the scene. Therefore, defendant has not shown that this line of questioning constituted plain error affecting his substantial rights. See *Brown*, 279 Mich App at 134.

Defendant also alleges that the prosecutor committed misconduct by asking the jury to convict defendant "for justice reasons." During closing arguments, the prosecutor made the following statement, to which defendant now objects:

[Defendant] murdered Terry Jones. Terry Jones did not deserve to die on that date, and for that and for justice reasons, I ask you to find him guilty.

Defendant claims that this statement urged the jurors to convict him as part of their civic duty. However, a prosecutor's request for the jury to "do justice" may not be an improper civic duty argument if it is tied to the evidence presented at trial. *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987). And here, considered in context, the prosecutor argued that the eyewitness testimony proved defendant shot and killed the victim; thus, the jury should convict

him. A prosecutor is free to argue the evidence and all reasonable inferences arising from it, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and need not do so by the least prejudicial means available, *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995). Plain error was not established.

Defendant also claims the prosecution committed misconduct by vouching for the credibility of its own witnesses. During closing arguments, the prosecutor stated that one eyewitness “did honestly tell [the jury] the truth,” and that both of the eyewitnesses “were able to honestly tell [the jury] what they saw, what they heard.” A prosecutor may not vouch for the credibility of a witness in a manner that implies he has some special knowledge of the truthfulness of the witness’s testimony. *Bahoda*, 448 Mich at 276. However, a prosecutor may argue from the facts in evidence that a witness is worthy of belief. *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012), vacated in part on other grounds 495 Mich 874 (2013). And, in this case, as in the *Cain* case, defense counsel argued that the prosecutor’s witnesses were not credible and the prosecutor permissibly responded that those witnesses had no motive to lie. See *id.* at 37. That is, defense counsel’s clear strategy was to attack the eyewitnesses’ recollections of what happened and attempt to impeach their testimony; thus, the prosecutor properly responded with argument that these eyewitnesses were credible.

## II. PHOTOGRAPHIC LINEUP

Next, defendant argues that the trial court erred in admitting evidence of a witness’s prior identification of defendant as the shooter because the photographs used in the photographic array and the surrounding procedures were impermissibly suggestive. We disagree.

We review for clear error a trial court’s decision to admit identification evidence. *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993). “Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Id.*

A photographic identification procedure can be so suggestive as to deprive a defendant of due process. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness of an identification procedure is evaluated in light of the total circumstances. *Kurylczyk*, 443 Mich at 311. The test is whether the procedure was so impermissibly suggestive as to have led to a substantial likelihood of misidentification. *People v McDade*, 301 Mich App 343, 357; 836 NW2d 266 (2013). Factors to consider include whether there was an opportunity for the witness to view the perpetrator and the length of time between the crime and the confrontation. *Kurylczyk*, 443 Mich at 306, quoting *Neil v Biggers*, 409 US 188, 199-200; 93 S Ct 375; 34 L Ed 2d 401 (1972).

Defendant argues that he was much larger and of a lighter complexion than the other members of the photographic lineup. However, small differences in the appearances of lineup participants will not render a lineup unduly suggestive. See *People v Barnes*, 107 Mich App 386, 389-390; 310 NW2d 5 (1981); *People v Gunter*, 76 Mich App 483, 490; 257 NW2d 133 (1977); *People v Taylor*, 24 Mich App 321, 323; 180 NW2d 195 (1970). And, in this case, there was nothing about defendant’s photograph that would have led to a substantial likelihood of misidentification. All of the individuals in the lineup had the same haircut, were wearing similar clothing, and had similar complexions. Any physical differences were minor. Further, one

eyewitness identified defendant shortly after the shooting, and testified that he saw defendant's face and knew him prior to the shooting. The trial court did not clearly err when it admitted the challenged identification evidence. See *Kurylczyk*, 443 Mich at 303.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his counsel was ineffective for failing to object when the prosecutor mentioned that defendant had spent time at Starr Vista, a facility used by the Wayne County Department of Juvenile Justice to provide services for youthful offenders. Again, we disagree. Because this issue is raised for the first time on appeal, it is unpreserved and our review is for errors apparent on the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To establish ineffectiveness of counsel, a defendant generally 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 errors, the result of the proceedings would be different. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Decisions regarding what evidence to present and whether to object to arguments are presumed to be matters of trial strategy which we will not second-guess. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *Unger*, 278 Mich App at 242-243.

Defendant claims that the prosecutor's references to defendant spending time at Starr Vista allowed the jury to infer that he had a criminal record; thus, his counsel should have objected to such references. However, the reference to defendant having spent time at Starr Vista was first elicited during questioning by defense counsel. The questioning occurred when defense counsel was trying to impeach an eyewitness's statement to police that he knew defendant from school, although he testified at trial that he knew defendant from Starr Vista. Nevertheless, defendant argues that his counsel should have objected to the reference to Starr Vista during the prosecutor's redirect examination of that same eyewitness. But once defense counsel attempted to impeach the eyewitness with a prior inconsistent statement, the prosecutor was permitted to rehabilitate the witness by showing that he later told police that his statement was wrong; he knew defendant from Starr Vista, not school, MRE 613(b). Thus, an objection to the eyewitness's testimony regarding defendant's time at Starr Vista would have been meritless, and defense counsel is not required to make meritless or futile objections. See *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (citation omitted).

Defendant also contends that his trial counsel was ineffective for failing to object to the prosecutor's mention of Starr Vista during closing arguments. However, as discussed above, a prosecutor is free to argue the evidence elicited at trial and all reasonable inferences arising from it. *Bahoda*, 448 Mich at 282. During the eyewitness's testimony, both parties elicited from him that he knew defendant from Starr Vista. Thus, this was evidence that supported his identification of defendant as the person who shot the victim to death. The prosecutor had the right to argue it in closing arguments, *id.*, and any objection defense counsel might have made

would have been futile, *Eisen*, 296 Mich App at 329. Accordingly, defendant has failed to establish his ineffective assistance of counsel claim.

Affirmed.

/s/ Michael J. Talbot  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter