

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY D. TURNER,

Defendant-Appellant.

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UNPUBLISHED

March 18, 2003

No. 237038

Wayne Circuit Court

LC No. 00-010268-01

Before: Markey, P.J., and White and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), felony murder, MCL 750.316(1)(b), assault with intent to commit murder, MCL 750.83, first-degree home invasion, MCL 750.110a(2), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for the first-degree murder conviction, thirty to fifty years for the assault with intent to commit murder conviction, ten to twenty years for the home invasion conviction, and five years for the felony-firearm conviction.<sup>1</sup> He appeals as of right, and we affirm.

Defendant first argues that he was denied due process, and his right to testify in his defense was chilled, when the prosecutor failed to timely disclose prior bad acts and the trial court failed to issue a clear ruling on the admissibility of the prior bad acts evidence. We disagree. The issue arose in the context of defendant's pre-trial motion to redact portions of defendant's statement in which he referred to a prior felonious assault on the victim and prior possession of a gun. Defendant sought to suppress all references to the prior convictions and bad acts. At that point, it was unclear whether defendant intended to testify. After some discussion, the court ruled that the information could not be mentioned in opening statement, and could not be mentioned at all until the court determined that defendant had "opened the door" by testifying that the shooting was an accident, or that he never carried a gun, or that he had a reputation for being peace loving. Defendant never testified, and the information was never provided to the jury. We find no error. The court's ruling was adequate to provide guidance to defendant in deciding whether to testify. The court made clear that the information would not reach the jury unless defendant opened the door by testifying in a certain manner. While defendant argues that

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<sup>1</sup> Defendant received no sentence for the felony murder conviction.

both the defense and the court were “in the dark” regarding the prior bad acts because the prosecutor failed to provide discovery, it is clear that the defense was aware of the prior incident. We further note that counsel did not object that the ruling was too vague to guide defendant’s decision.

Defendant next argues that he was denied a fair trial due to several instances of prosecutorial misconduct. We disagree. Defense counsel objected to only one of these alleged instances of prosecutorial misconduct. Preserved claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Unpreserved issues of prosecutorial misconduct are reviewed for a plain error which affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant’s only preserved prosecutorial misconduct claim is that the prosecutor presented a civic duty argument to the jury and improperly told the jury that defendant was seeking a conviction of manslaughter by stating: “That’s why he wants to be convicted now of the lesser included [offense.]” “Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant’s guilt or innocence and because they encourage the jurors to suspend their own powers of judgment.” *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Here, the prosecutor’s remark about the lesser included offense did not inject a civic duty argument into the case. When evaluated in context, the prosecutor made this comment while informing the jury how manslaughter differs from first-degree murder, and the comment was not made to broaden the factual issues beyond defendant’s guilt or innocence.

Defendant points to the following remarks to argue that the prosecutor made assertions which were unsupported by the evidence: “Mr. Turner killed their mother before their very eyes.”; “[Defendant] Shot and killed the woman that he had been with, Felicia Watson, in front of their-her two kids, Chonte and Charlotte and like I said, their testimony is going to be compelling.”; “I mean the—it is impossible to think of a struggle that would have incurred [sic] that would’ve put that gun an inch to a half an inch away from her chest and her head at two different points of time.”; and “The idea, you know, talk about domestic violence . . . .”

Any prejudice resulting from the remaining instances of alleged prosecutorial misconduct could have been cured had there been timely objections. Further, it is unlikely that any of the prosecutor’s statements affected the outcome of the trial.

Defendant also asserts that he was denied effective assistance of counsel. We disagree. Because there has been no evidentiary hearing, our review of this issue is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

For claims of ineffective assistance of counsel, the burden is on the defendant to show:

with regard to counsel’s performance, “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” [*People v LeBlanc*, 465

Mich 575, 578; 640 NW2d 246 (2002), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

Defendant claims that trial counsel was deficient for failing to press the trial court for a firm ruling on his motion to suppress the prior bad acts evidence. However, this inaction by trial counsel cannot form the basis of defendant's ineffective assistance of counsel claim because the trial court did, in fact, make a clear ruling on defendant's motion to suppress the prior bad acts evidence. A defendant cannot base a claim of ineffective assistance of counsel on his attorney's failure to make a futile objection or motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant also claims that he was denied effective assistance of counsel due to counsel's failure to request a copy of defendant's criminal record from the prosecution and by failing to fully inform the court of the circumstances surrounding defendant's prior convictions. These two claims of ineffective assistance of counsel also fail because defendant has failed to show how counsel's actions were deficient or how they affected his decision to forgo testifying. The court had ruled that the evidence was inadmissible except under certain specific circumstances. Defendant has not shown how further information would have affected his decision.

Lastly, defendant claims that he was denied effective assistance of counsel when trial counsel failed to object to alleged instances of prosecutorial misconduct. In each instance, the prosecutor's conduct was either proper or had no impact on the outcome of the trial. Defendant has thus failed to show prejudice and his claim of ineffective assistance must fail.

Affirmed.

/s/ Jane E. Markey  
/s/ Helene N. White  
/s/ Brian K. Zahra