

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE CALWISE,

Defendant-Appellant.

UNPUBLISHED

April 14, 2005

No. 249187

Wayne Circuit Court

LC No. 02-014891-01

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

A jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), and of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to mandatory life imprisonment without the possibility of parole for the murder conviction and two years' imprisonment for the felony-firearm conviction. Despite the prosecutor's argument that the trial court no longer had jurisdiction, the court granted defendant's motion for new trial after defendant filed this appeal. This Court denied defendant's motion to remand, but permitted the parties to file supplemental briefs regarding the trial court's order granting defendant a new trial. *People v Calwise*, unpublished order of the Court of Appeals, entered September 21, 2004 (Docket No. 249187). We conclude that the trial court lacked authority and jurisdiction to grant defendant's motion for new trial under the appellate court rules. Additionally, we reject defendant's arguments in support of his claim that he is entitled to a new trial, including the arguments relative to production of the crime scene videotape. Assuming a lapse on the part of the prosecution in providing a viewable and usable copy of the videotape prior to trial, any discovery or *Brady*¹ violation was harmless in view of the untainted evidence supporting the conviction and the tape's marginal benefit to defendant. Accordingly, we affirm the convictions and vacate the order granting defendant a new trial.

The interpretation and application of the court rules is a question of law that is reviewed de novo. *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002). When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. *Smith v Henry Ford Hosp*, 219 Mich App

¹ *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

555, 558; 557 NW2d 154 (1996). Accordingly, the inquiry begins with the plain language of the court rules. *Id.*

MCR 7.208 provides in relevant part:

(A) . . . In a criminal case, the filing of the claim of appeal does not preclude the trial court from granting a timely motion under subrule (B).

(B)(1) No later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial

Pursuant to MCR 7.212(A)(1)(a)(iii), an appellant must file a brief within

56 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court or tribunal, whichever is later In a criminal case in which substitute counsel is appointed for the defendant, the time runs from the date substitute counsel is appointed or the transcript is filed, whichever is later. The parties may extend the time within which the brief must be filed for 28 days by signed stipulation filed with the Court of Appeals. The Court of Appeals may extend the time on motion.

Under the plain language of MCR 7.208(B)(1) and 7.212(A)(1)(a)(iii), read in tandem, defendant did not meet the deadline for filing his motion for new trial. Defendant was sentenced and made his request for appellate counsel on May 16, 2003. His claim of appeal and the order appointing his appellate counsel, which appear in the same document in the record, were both filed on June 12, 2003. The trial transcript was filed on October 15, 2003. Thus, the 56-day period began to run after the transcript was filed because that was the later triggering event under MCR 7.212(A)(1)(a)(iii). The 56-day time period expired in December 2003. Defendant did not move for a new trial until January 5, 2004, and it was not argued and granted until June 30, 2004. This Court denied defendant's motion to remand for commencement of a new trial.²

Defendant notes that he filed his motion for new trial within the 28-day extension period for the filing of a timely appellate brief under MCR 7.212(A)(1)(a)(iii). The parties stipulated to extending the briefing period. While MCR 7.212(A)(1)(a)(iii) allows parties to extend the time for briefing, the language of the court rules do not allow extension of the time for filing a motion for new trial. MCR 7.208(B)(1) clearly states that filing a motion for new trial is only allowed "[n]o later than 56 days" after the triggering event, here the filing of the transcript, set forth in MCR 7.212(A)(1)(a)(iii). Determination of the commencement of the 56-day period is the sole function of MCR 7.212(A)(1)(a)(iii) for purposes of MCR 7.208(B)(1). Not even a strained reading of these court rules permits the option of extending the deadline for filing a motion for new trial. The trial court, therefore, did not have jurisdiction when it considered and granted a

² We note that MCR 6.431(A)(2) provides, "If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1)."

new trial for defendant, and the order is vacated. We now address whether this Court should grant defendant a new trial.

We find it unnecessary to determine whether the prosecutor committed a discovery violation under MCR 6.201 or whether *Brady* is implicated. Assuming that the prosecution acted deficiently in failing to produce a viewable and usable videotape before trial, it was harmless. See *People v McLaughlin*, 258 Mich App 635, 657; 672 NW2d 860 (2003). MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), our Supreme Court interpreted MCL 769.26, commonly referred to as the harmless-error rule, and concluded:

Section 26 places the burden on the defendant to demonstrate that “after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice.” . . . [R]eversal is only required if such an error is prejudicial and . . . the appropriate inquiry “focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.” The object of this inquiry is to determine if it affirmatively appears that the error asserted “undermine[s] the reliability of the verdict.” In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. Therefore, the bottom line is that § 26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless “after examination of the entire cause, it shall affirmatively appear” that it is more probable than not that the error was outcome determinative.³ [Citations omitted; second alteration in original.]

The definition of the phrase “miscarriage of justice” in Section 26 as enunciated in *Lukity* necessarily focuses our inquiry on the nature of the error, and a more probable than not standard, if the error was outcome determinative. We conclude that any error or discovery violation did not constitute a miscarriage of justice as defined in *Lukity*.

A fair review of the record indicates that the great weight of the evidence against defendant and the marginal force of the tape in lessening that weight would most likely have still resulted in the jury convicting defendant even if it had viewed the tape. The tape placed

³ In regard to a *Brady* violation, a defendant must likewise prove, in part, that had the evidence been disclosed, a reasonable probability existed that the outcome of the proceedings would have been different. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998).

defendant at the scene of the crime a few short minutes before the shooting. It supported the eyewitness testimony that the victim drove off as the shooter fired into the van from the driver's side. The tape did not clearly implicate another person as the shooter. To the extent that defendant may have used the tape to impeach eyewitness testimony, the value of the tape to his case was minimal. The tape contradicted collateral matters such as who entered and exited the crowded gas station and when those movements occurred. The fact that the eyewitness was mistaken about those details does not significantly erode her identification of defendant as the shooter. She was sitting in the passenger seat and had an unobstructed view of the perpetrator approaching the car within an arm's length, pointing a gun at the victim, and attempting to rob him before firing. The witness recognized defendant as someone she had seen in her neighborhood a few times. She immediately selected him out of a lineup. There was also testimony of an arguably incriminating letter sent by defendant to a gas station attendant.

Moreover, the eyewitness had already been impeached. The jury heard testimony about her hysterical reaction to the shooting. She was impeached particularly in regard to the time the shooting occurred. The time stamp on the tape, though its accuracy was questioned, was presented through the still photographs from the tape for the jury to consider and weigh.

Moreover, the fact that the tape was not shown to the jury may have helped defendant in two ways. First, it meant less evidence for the prosecution to meet its heavy burden. See *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975). Second, it gave defendant the benefit of the argument that the prosecution failed to present the tape, giving rise to reasonable doubt. In fact, defendant emphasized in closing arguments that the prosecution failed to present the tape and suggested a negative connotation associated with this failure.

Next, defendant alleges several instances of prosecutorial misconduct that he claims deprived him of a fair trial. We will consider each in turn.

Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, some of defendant's claims of error were not preserved at trial. Unpreserved issues are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Abraham, supra* at 272. Prosecutorial misconduct is decided case by case, and the reviewing court must consider the relevant part of the record and examine the prosecutor's remarks in context. *Id.* at 272-273.

Defendant argues that the failure to timely provide a viewable copy of the videotape constituted prosecutorial misconduct because the prosecutor had a duty to disclose exculpatory evidence. On the basis of our ruling above on the issue concerning the videotape, we again conclude that, assuming prosecutorial misconduct, it was harmless.

Defendant next argues that the prosecutor's leading questions were improper. Leading questions may be used on direct examination if necessary to develop the testimony. MRE 611(c)(1). To warrant reversal for leading questioning, it is necessary for the defendant to show

some prejudice or pattern of eliciting inadmissible testimony. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Where there is no prejudice due to the leading questions, reversal is not required. *Id.* at 587-588; see also *People v Hooper*, 50 Mich App 186, 196, 212 NW2d 786 (1973). In this case, defendant has not demonstrated pattern or prejudice. On at least one occasion, the court sustained defense counsel's objection to leading questioning. Defendant has not proven a pattern of conduct aimed at introducing inadmissible evidence or at otherwise prejudicing him. Reversal is not warranted.

Defendant next alleges that the prosecution referenced evidence not in the record on two occasions. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Watson, supra* at 588. The prosecutor may, however, argue reasonable inferences that arise from the evidence. *Id.*

First, defendant now objects to the prosecution making an argument referencing the presence of an attorney at defendant's lineup, which is a fact that no testimony supported. But documentary evidence did support the argument. A copy of defendant's lineup sheet indicating the presence of an attorney was admitted into evidence. Defendant's argument on this point therefore lacks merit.

Second, defendant now objects to the prosecutor stating in closing argument that the eyewitness told police on the night of the shooting that she knew the shooter from the neighborhood. The prosecution concedes that by that statement the prosecutor was improperly referencing some of the eyewitness' preliminary examination testimony that was not elicited at trial. The eyewitness did testify that she had seen the shooter in her neighborhood two or three times. The prosecutor's remark was isolated and amenable to correction by jury instruction. According to this Court:

Because a well-tryed, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged, we will reverse in such instances only if a curative instruction could not have eliminated the prejudicial effect of the improper remarks or where our failure to review the issue would result in a miscarriage of justice. [*People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).]

Similarly, the statement the prosecutor made in this case was but one barb in a lengthy trial. It was not so egregious as to warrant reversal. The prosecutor himself cautioned that the jurors should rely on what they remembered in case he was mistaken about any facts. Defense counsel admonished the jurors to not consider as evidence the statements of the attorneys. The court instructed the jury to the same effect. Absent a contrary showing, jurors are presumed to follow their instructions. See e.g., *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). The trial court's instructions therefore corrected whatever prejudice defendant may have suffered. Defendant failed to show plain error affecting his substantial rights and is not entitled to a new trial.

Defendant next claims that the prosecutor, in his closing argument, denigrated defense counsel and appealed to the jurors' fears. We disagree. The prosecutor was merely responding rhetorically to defense counsel's argument about common sense. None of the statements were directed personally at defense counsel. Furthermore, none were meant to exploit jurors' fears.

The remarks simply rebutted the argument that a criminal with common sense would not victimize his or her own neighborhood. The prosecution simply questioned the premise that criminals have common sense in the first place. The argument was proper and did not affect defendant's substantial rights. A prosecutor need not confine his arguments to the blandest of all possible terms. *People v Kris Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Finally, defendant claims multiple instances of ineffective assistance of counsel. In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that his counsel was ineffective for not suppressing all mention of the tape and for not properly informing the court of the inability to view it. This argument is not persuasive. Defense counsel objected to mention of the tape but was overruled. The trial court made abundantly clear that the trial would proceed regardless of any videotape issue. Moreover, counsel used the prosecution's failure to provide a viewable tape as a sword by implicitly suggesting that it was not produced because it would be harmful to the prosecutor's case. Furthermore, considering our ruling above regarding the videotape, there is a lack of the requisite prejudice.

Defendant next argues that counsel was ineffective for failing to challenge the pretrial lineup. He argues that identification was a critical issue and that the eyewitness was improperly told that the shooter was among the five in the lineup or that she was told she had to pick somebody. According to the witness, "[The police] told me to pick him out."

Defendant's argument is weak. The fact that a viewer is told the attacker is in the lineup does not alone render a lineup unduly suggestive. *People v Sawyer*, 222 Mich App 1, 3, 564 NW2d 62 (1997)(citation omitted). Moreover, the comment by police, as testified to by the eyewitness, does not definitively indicate that defendant was indeed in the lineup. On the basis of existing law, the trial court would have denied a motion to suppress the lineup on the grounds defendant argues. Defense counsel came to the same conclusion after he spoke with the attorney

who was at the lineup. Defense counsel is not ineffective for failing to make a futile motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Defendant has presented no other facts that if true would lead us to believe that his counsel was ineffective for not challenging the lineup.

Defendant also maintains that his counsel was ineffective for failing to call an alibi witness. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.* On review of the witness' affidavit, we conclude that defendant was not deprived of a substantial defense because the defendant's witness provided no clear alibi for him when considering the affidavit in conjunction with the evidence presented at trial.

We vacate the order granting defendant a new trial and affirm defendant's convictions and sentences.

/s/ Pat M. Donofrio

/s/ William B. Murphy

/s/ Stephen L. Borrello