

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE WAYNE PILLETTE,

Defendant-Appellee.

UNPUBLISHED

June 14, 2005

No. 254587

Otsego Circuit Court

LC No. 03-002953-FC

Before: Hoekstra, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to murder, MCL 750.83, two counts of felonious assault, MCL 750.82, and three counts of carrying a weapon with unlawful intent, MCL 750.226. We affirm.

Defendant's first issue on appeal is that he was denied a fair trial because his trial counsel was ineffective by failing to object to an officer's expert testimony when the officer was not qualified as an expert. We disagree.

Whether a person has been deprived of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving claims of ineffective assistance of counsel, provided:

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).

Our review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant argues that Deputy Nicholas Cavanaugh testified extensively regarding ballistics issues even though he was never qualified as an expert in ballistics or firearms. MRE 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Deputy Cavanaugh testified regarding a rifle which was recovered that: (1) ammunition was found in it, (2) there were different reasons why a rifle would be jammed, and (3) the rifle appeared to have been fired based on the spent casings, witness statements and a jammed round. Regarding a shotgun that was recovered, Deputy Cavanaugh testified that: (1) it appeared someone attempted to fire the shotgun because a .20 gauge shell found in the chamber had a primer marking on it, (2) the primer is a cap that sets off a powder charge to propel the BBs, (3) when the trigger is pulled the firing pin hits primer and the shell discharges, and (4) how the barrel is placed on the receiver could keep the gun from firing, and that the weapon in question may have not been put together properly .

In *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989), this Court addressed MRE 701 and concluded that it permitted two police officers to testify that dents in a car could have been made by bullets despite the fact that the officers were not ballistics experts. The *Oliver* Court noted that MRE 701 had been liberally construed in order to assist a jury in developing a clearer understanding of the facts. *Id.* at 50. In support, the Court cited *Heyler v Dixon*, 160 Mich App 130; 408 NW2d 121 (1987), where lay witnesses, on the basis of personal observations, were permitted to render an opinion in regard to whether an individual was intoxicated. *Oliver, supra* at 50. Testimony and reliable conclusions of investigating police officers who have not been qualified as experts have been held to be properly admissible under MRE 701 if the testimony was based upon their observations and not overly dependent upon scientific expertise. *Oliver, supra* at 50; *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 629; 415 NW2d 224 (1987) (observing that testimony by an officer concerning the events surrounding an automobile accident "was proper under MRE 701").

Deputy Cavanaugh's opinions regarding the rifle and the shotgun were rationally based on his perception and helpful to a clear understanding of his testimony. The testimony most reliant on technical expertise was the testimony regarding the jammed round and the primer marking indicating there was an attempt to fire the gun. We find that these opinions were not overly dependent on scientific expertise and constituted rational inferences from Deputy

Cavanaugh's own observations of the guns and the rounds found and removed from the guns. See *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 455-456; 540 NW2d 696 (1995); *Oliver, supra* at 49-51.

Even assuming that Deputy Cavanaugh's challenged testimony ventured into the specialized area of ballistics or firearm expertise, a defense objection on the basis of his opinions likely would have failed. Deputy Cavanaugh properly could have expressed expert opinion testimony pursuant to MRE 702, because he had technical or specialized knowledge concerning firearms as he testified to being a State Certified Firearms Instructor for approximately four years, taught at a police academy, had with advanced law enforcement training firing multiple rounds with both rifles and shotguns. See *De Voe v C A Hull, Inc*, 169 Mich App 569, 578-579; 426 NW2d 709 (1988).

Defendant's claim is that his trial counsel was ineffective in failing to object to the testimony of Deputy Cavanaugh. Defense counsel is not obligated to make meritless or futile objections. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003); *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). And, it would have been futile to object to Deputy Cavanaugh's testimony because the testimony could have been admitted under MRE 701, and if not Deputy Cavanaugh seemingly would have been qualified to give expert testimony on the subject matter. Because Deputy Cavanaugh may have been considered an expert in the area it may have been trial strategy for defense counsel not to further pursue the matter and have Deputy Cavanaugh qualified as an expert which may cause the jury to give more credence to his testimony. Instead, on cross examination, defense counsel brought out that the crime lab report did not support that the shotgun was associated with the primer marking on the shell, and, thus, did not support Deputy Cavanaugh's observations and testimony. Defense counsel also elicited that Deputy Cavanaugh could not say whether the primer marking was on the shell when it was placed in the chamber. During closing argument, defendant's trial counsel also discredited Deputy Cavanaugh's testimony based on the lab report. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Defendant has not overcome the presumption that his trial counsel's decisions were based on sound trial strategy.

Defendant's next issue on appeal is that he was denied a fair trial when the prosecution violated his constitutional right to remain silent by providing evidence of defendant's exercise of his right to silence. We disagree.

Defendant did not preserve this issue, so review is under the test set forth in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), which requires that for relief to be possible there must have been plain error that affected substantial rights. 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 Walker*, ___ Mich App __; ___ NW2d __ (Docket No. 250006, issued March 24, 2005) slip op p 7. The propriety of a prosecutor's questions and remarks depends on all the facts of the case. See *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Deputy Cavanaugh testified that he advised defendant of his *Miranda*¹ rights and that defendant was willing to speak with him. Defendant contends that Deputy Cavanaugh's testimony, elicited by the prosecution, insinuated to the jury that defendant's silence could be used against him because Deputy Cavanaugh testified that defendant became "uncooperative" at a point. However, this statement did not support that defendant's silence was being used against him, as Deputy Cavanaugh went on to explain that uncooperative meant that defendant was making racial slurs, not that he was invoking a silence privilege.

Defendant next contends that his exercise of silence was used against him because the prosecution asked him several questions about what he told the police and continued these questions after he claimed that he remained silent. During questioning from the prosecution, defendant answered "I didn't tell the police anything." However, subsequently, defendant acknowledged that he made statements to the police including derogatory racial comments and that he "didn't point a gun at nobody and I didn't shoot nobody." Defendant testified, upon further questioning from the prosecution, that Deputy Cavanaugh told him what he thought happened and that defendant then said "Well, what if I don't make a statement 'till I have a lawyer?". Subsequently, defendant testified that "he refused to give the police a statement before I had a lawyer. . . . Even now – I have never given them a statement at all."

The constitutional privilege against self-incrimination and the right of due process restrict the use of a defendant's silence in a criminal trial. *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001); *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990). A defendant waives his privilege against self-incrimination when he testifies at trial. *People v Dixon*, 217 Mich App 400, 405; 552; NW2d 663 (1996). But, a defendant's exculpatory testimony at trial may not be impeached with evidence of silence resulting from defendant's assertion of his Fifth Amendment² rights. *Id.* at 405-406. The Fourteenth Amendment³ right to due process bars the use of such silence either as substantive evidence or to impeach the defendant's exculpatory explanation at trial, provided the defendant does not claim to have told the police the same version upon arrest, or to have cooperated with the police. *Id.* at 406; *People v Alexander*, 188 Mich App 96, 102; 469 NW2d 10 (1991). In essence, "where a defendant's silence is attributable to an invocation of his Fifth Amendment right or a reliance on the *Miranda* warnings, the use of his silence is error." *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). A defendant who waived his rights during questioning may not preclude evidence of omissions in his statements as evidence of protected silence, and when a defendant speaks, a failure to answer a question does not invoke the right to silence and evidence of his omissions is admissible at trial. *People v McReavy*, 436 Mich 197, 211-212; 462 NW2d 1 (1990); *People v Cetlinski (After Remand)*, 435 Mich 742, 746; 460 NW2d 534 (1990); *People v Rice (On Remand)*, 235 Mich App 429, 436; 597 NW2d 843 (1999).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² US Const, Am V.

³ US Const, Am XIV.

Here, the facts do not support defendant's assertion that he invoked his Fifth Amendment right to silence. Defendant did not specifically testify that he ever invoked his Fifth Amendment right to silence, but asked "what if" he did not make a statement. Further, defendant testified that he made some statements to the police and then subsequently testified that he refused to give the police a statement. Seemingly, the prosecution was trying to clear up this contradiction. "A defendant does not have a constitutional right to immunity from contradiction." *Schollaert, supra* 163. For the above reasons, defendant has not established any error, plain or otherwise, based on his claim that the prosecutor's comments and questions violated his constitutional protections against self-incrimination.

In the alternative, defendant claims ineffective assistance of counsel on the basis of his trial counsel's failure to preserve this issue for appeal. Counsel is not ineffective for failing to object to properly admitted evidence. *Milstead, supra* at 401. As such, defendant's trial counsel was not ineffective for failing to object to the challenged comments and questions by the prosecution.

Defendant, in pro per, raised several issues in a supplemental brief. He first contends that reversal is required because his trial counsel was ineffective for failing to call witnesses. We disagree.

The failure to call a supporting witness does not inherently amount to ineffective assistance of counsel, and there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998). A trial counsel's decisions concerning what witnesses to call, and what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant has made no showing that his counsel's failure to call any witnesses affected the outcome of the trial. Defendant did not specifically name in the brief what witnesses should have been called to support his defense, or as to how the proffered witnesses were invaluable to his defense or how their testimony would have affected the outcome of the trial. He did attach what is apparently a police report statement of Lacey Duckett to his brief. After review of the statement, we conclude that defendant was not deprived of a substantial defense because the statement provided no clear alibi for defendant when considering it in conjunction with the evidence presented at trial, including defendant's testimony. Duckett's statements in the report were not totally consistent with defendant's testimony, and this may have been the reason defense counsel did not call her as a witness. Moreover, there is no error apparent from the record with respect to defense counsel's failure to call Duckett. Defendant has not overcome the presumption that defense counsel's decision not to call the witnesses was a matter of strategy. This Court will not second-guess counsel in matters of trial strategy. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. *Id.*

Next, defendant argues that the district court abused its discretion by allowing Channon Brower to testify at the preliminary examination in violation of a sequestration order. We disagree.

The decision to sequester witnesses and the penalties for a violation of a sequestration order are matters within the trial court's discretion. *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987). A sequestration order serves to prevent witnesses from coloring their testimony in relation to the testimony of other witnesses. *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). To obtain appellate relief for a sequestration order violation, a defendant must demonstrate prejudice. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

Defendant advances a conclusory argument that the failure to sequester Brower violated his constitutional due process right to a fair trial. It is undisputed that Brower was present while some witnesses were testifying during preliminary examination in violation of the trial court's sequestration order. Defendant claims that he was prejudiced by Brower's presence because she was able to shade her testimony according to the testimony of other witnesses. However, Brower's most significant and damaging testimony was that she heard the click when defendant was holding a shotgun. No other witness testified in this regard, thus, this testimony was not colored in relation to the testimony of the other witnesses. Defendant has not demonstrated that he was prejudiced by the sequestration order violation.

Defendant also argues that reversal is required because he was denied his right to confrontation when the trial court allowed Brower's preliminary examination testimony to be read into the record. We disagree.

Defendant contends that his Sixth Amendment right to confront the witnesses against him was violated when the trial court permitted Brower's preliminary examination testimony to be read into the record after the prosecutor was unable to procure her presence at trial. We review a trial court's decision to admit evidence for an abuse of discretion and underlying questions of law de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

A defendant has the right to be confronted with the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v Washington*, 541 US 36, 43; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A witness is a person who offers testimony against the accused in the form of a formal statement to government officers. *Crawford, supra* at 52. The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Id.* at 54. Here, Brower's preliminary examination testimony was clearly testimonial,⁴ and, as a result, it could only be properly admitted against defendant if Brower was both unavailable and defendant had the prior opportunity to cross-examine her.

A witness is considered unavailable if he or she is "absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance ... by process or

⁴ See *Crawford, supra* (noting that ex parte testimony at a preliminary hearing is always testimonial).

other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). "The test for whether a witness is 'unavailable' as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). The good-faith effort standard is identical to the due diligence standard. See *id.* at 682-683 n 11. The prosecution's efforts to obtain Brower complied with the diligent good-faith effort requirement necessary to establish that she was available. Here, the prosecution had a duty to exercise due diligence in obtaining Brower's presence. The record indicates that approximately two weeks prior to trial, Deputy Cavanaugh, in order to serve the subpoena on Brower, visited the apartment that was her residence at the time of the incident, but she had moved without leaving a forwarding address. Deputy Cavanaugh talked to other witnesses, her friends, and found out she had moved to Howell, Michigan, at which time he did a LEIN check. The LEIN check revealed an address in Vanderbilt, Michigan. Deputy Cavanaugh went the address, and it no longer existed because it was a trailer that had moved. Sergeant Glenn Crane spoke with a postmaster who gave a post office box, but had no physical address. Deputy Cavanaugh then conducted further computer searches through ASIX, a reporting system, to see if any police contact had been made with her. Sergeant Crane obtained an address and phone number for Brower's father in Hillman, Michigan, and called and left a message for him, which was not returned. Deputy Cavanaugh explained that all possibilities were exhausted and that they went beyond steps they normally take. The prosecution's efforts to obtain Brower complied with the due diligence requirement, thus, the trial court did not abuse its discretion.

Having determined that Brower was properly considered unavailable, we must now determine whether defendant had a prior opportunity to cross-examine her. *Crawford, supra* at 54. The preliminary examination testimony of a witness is admissible at trial where the witness is unavailable and the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony through cross-examination. *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998). Whether a defendant had a similar motive to develop the testimony through cross-examination depends on the similarity of the issues for which the testimony was presented at each proceeding. *People v Vera*, 153 Mich App 411, 415; 395 NW2d 339 (1986).

Brower's preliminary examination testimony was originally elicited by the prosecution to establish defendant's guilt and was introduced in the actual trial for the same purpose. Likewise, defendant's trial counsel cross-examined Brower at the preliminary examination in an effort to prove that defendant did not commit the crimes for which he was charged. As such, defendant had an opportunity to cross-examine Brower and the motive in doing so was the same. Because Brower was unavailable, as required by the Confrontation Clause, and defendant had the prior opportunity to develop her testimony through cross-examination, Brower's preliminary examination testimony was properly admissible. Consequently, this issue is without merit.

Next, defendant contends that reversal is required because he was denied a fair trial when the prosecution failed to call *res gestae* witnesses. We disagree.

Defendant did not raise this issue below, and, thus, it has not been preserved for appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Dixon*, 217 Mich App 400, 409; 552 NW2d 663 (1996). Therefore, review is precluded unless defendant establishes plain error that affected his substantial rights. *Carines, supra* at 763-764.

Under the current res gestae witness statute, MCL 767.40a, "the prosecutor's duty to produce res gestae witnesses has been replaced with an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request." *People v Burwick*, 450 Mich 281, 289; 537 NW2d 813 (1995). MCL 767.40a requires the prosecutor to disclose the names of res gestae witnesses. The statute deals only with the disclosure of witnesses' names. Defendant does not specifically name who was not called, but seemingly is referring to Duckett. However, Duckett was listed as a witness by the prosecution. As such, the prosecution did not commit plain error and, therefore, did not violate defendant's due process rights.

Lastly, defendant also raises various other issues throughout his supplemental brief that are not in his statement of questions presented. The appellant must identify the issues in his brief in the statement of questions presented. MCR 7.212(C)(5). Ordinarily, no point will be considered which is not set forth in the statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Nonetheless, defendant has failed to show that he was deprived a substantial defense with regard to any of these issues.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly