

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENDELL DUPRESE ROBERTS,

Defendant-Appellant.

---

UNPUBLISHED  
September 14, 2006

No. 259083  
Wayne Circuit Court  
LC No. 04-006040-01

Before: Murray, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316(1)(a), two counts of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to a mandatory term of life imprisonment for the first-degree murder conviction and to two terms of 15 to 25 years' imprisonment for the assault with intent to murder convictions. Defendant was also sentenced to a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that he was denied the effective assistance of counsel. We disagree. With the exception of defense counsel's failure to object to the medical examiner's testimony, defendant properly preserved this issue by filing a post-conviction motion for a new trial and an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's factual findings for clear error, and its constitutional determinations de novo. *Id.*

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant must show "(1) that his trial counsel's performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). A defendant must also overcome the presumption

that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that defense counsel was ineffective for failing to object to the testimony of the medical examiner, Dr. Wayne Diaz, regarding whether the victim, Ray Redmond, suffered an “execution style” bullet wound. We disagree. Because this issue was not addressed at the *Ginther* hearing, it is not preserved and our review is limited to the lower court record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Expert testimony is admissible under MRE 702 if (1) the witness is qualified, (2) the testimony is relevant in that it assists the trier of fact to understand the evidence or determine a fact in issue, and (3) the testimony is derived from recognized scientific, technical, or other specialized knowledge. *People v Beckley*, 434 Mich 691, 710-719; 456 NW2d 391 (1990). In accord with the relevancy and reliability requirements, the expert’s testimony should be directly related to and within the scope of the witness’s expertise and should not include comment or opinion on the credibility of other witnesses. *People v Buckey*, 424 Mich 1, 16-17; 378 NW2d 432 (1985). Pursuant to MCL 52.202, medical examiners are required to investigate the cause and manner of death in all cases of persons whose death was unexpected or caused by violence. Additionally, medical examiners are under a duty to actually formulate an opinion as to the cause and manner of death in light of known facts and circumstances. MCL 52.205(3).

Here, a review of the record shows that Diaz was properly qualified to testify to the cause and manner of death, i.e., whether it was natural, accidental, self-inflicted, undetermined or homicide. Accordingly, his conclusion that Redmond’s death was a homicide and that the bullet wound could be the “last shot or execution style” was within the scope of his expertise. *Buckey, supra* at 16-17. Moreover, expert opinion that embraces an ultimate issue to be decided by the trier of fact is not objectionable. MRE 704. Because Diaz’s testimony was properly admissible, defense counsel was not ineffective for failing to object. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Furthermore, a review of the record shows that defense counsel properly cross-examined Diaz on his conclusion that the shooting was “execution style.” Indeed, Diaz testified that a bullet wound to the back of the head could be consistent with “a number of types of shooting that have nothing to do with an execution” and that Diaz could not tell what was in the mind of the shooter. Therefore, we conclude that defendant’s claim of ineffective assistance of counsel predicated on this issue must fail.

Defendant also contends that defense counsel was ineffective for failing to suppress Michael Runkel’s identification of defendant at the preliminary examination. We disagree.

The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). “The fact that the prior confrontation occurred during the preliminary examination, as opposed to a pretrial lineup or showup, does not necessarily mean that it cannot be considered unduly suggestive.” *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). “When examining the totality of the circumstances, relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of a prior description, the witness’ level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation.” *Id.* at 304-305.

Here, a review of the totality of the circumstances surrounding the identification of defendant at the preliminary examination shows that the procedure was not so impermissibly suggestive that it could have led to a substantial likelihood of misidentification. Thus, a motion to suppress Runkel's in-court identification of defendant would have been futile and, as defense counsel noted, nothing in the record would preclude Runkel from making an in-court identification of defendant. *Colon, supra* at 304. Defense counsel also noted that there was no independent basis to suppress Runkel's identification. Trial counsel is not ineffective for failing to make a futile motion or argument. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Further, defense counsel's testimony from the evidentiary hearing indicates that his strategy was to show Runkel's bias, impeach Runkel on the inconsistencies in his identification and argue to the jury that the prosecutor had not proved the elements of the charged offenses beyond a reasonable doubt based solely on Runkel's testimony. A review of the trial transcript shows that defense counsel effectively cross-examined Runkel, bringing out the fact that Runkel "expected" to see defendant at the preliminary examination. This Court will not "substitute[] its judgment for that of counsel regarding matters of trial strategy, nor make[] an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Based on the testimony at the *Ginther* hearing, we conclude that defendant was not denied his right to the effective assistance of counsel when defense counsel did not move to suppress Runkel's identification of defendant.

Defendant also argues that counsel was ineffective because defense counsel failed to produce the clothing that defendant was wearing at the time of his arrest. We disagree.

At the evidentiary hearing, defense counsel testified that he was aware of the existence of defendant's clothing. However, defense counsel testified that it was strategically better for defendant's case if the clothes were not admitted because of the conflicting descriptions by the other eyewitnesses regarding defendant's clothing. Defense counsel testified that his strategy was to cross-examine each witness regarding their inconsistent description of the clothing that defendant was wearing at the time of the shooting. Decisions regarding what evidence to present are presumed to be matters of trial strategy about which this Court will not substitute its judgment for that of trial counsel. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Accordingly, defendant has failed to overcome the presumption that defense counsel's actions were trial strategy. Thus, defendant's final claim of error alleging ineffective assistance of counsel must also fail.

Defendant next argues that the prosecutor's alleged misconduct denied him a fair trial. We disagree.

Because defendant failed to object below to the alleged instances of misconduct, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Issues of

prosecutorial misconduct are considered “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant’s arguments.” *Thomas, supra* at 454.

Defendant first argues that the prosecutor engaged in misconduct during closing argument when the prosecutor: (1) called defendant a “liar” and a “knucklehead”; (2) referred to defense counsel’s closing argument as “silly”; and (3) stated that defendant should not “cast stones.” We disagree.

A prosecutor may properly argue all reasonable inferences arising from the evidence consistent with his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor has “great latitude” in making his arguments and statements at trial. *Id.* A prosecutor may also argue from the facts that a witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). “[P]rosecutors may use ‘hard language’ when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms.” *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

In the present case, a review of the prosecutor’s statements during closing argument in context reveals that they were proper. The statements regarding defendant and defense counsel referenced the evidence and drew inferences from the testimony presented. A prosecutor may characterize the defendant as a “liar,” if the comment is based on the evidence produced at trial. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor specifically mentioned the evidence that led him to draw such conclusions, and thus made proper arguments. Additionally, the record shows that the prosecutor was responding to defendant’s version of events and pointing out the discrepancies in defendant’s testimony. “When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant’s theory or evidence.” *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). Although referring to defendant as a “knucklehead” was outside the preferred courtroom decorum expected of a prosecutor, in this context, it did not deny defendant a fair trial. Finally, the record reveals that the prosecutor was responding to defendant’s argument that the prosecutor had not met his burden of proof and that additional gunshot residue testing was required to prove the charged offenses. In light of defendant’s argument that the police had done insufficient testing, the prosecutor’s argument in response was proper. *Thomas, supra* at 454.

Moreover, any prejudice caused by the foregoing remarks could have been alleviated by a curative instruction given on a timely objection. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). “A miscarriage of justice will not be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Accordingly, we conclude that defendant’s argument is without merit.

Defendant next argues that the prosecutor engaged in misconduct by improperly vouching for the credibility of Runkel during closing argument. We disagree.

A prosecutor must argue the evidence and may not request that the jury find the defendant guilty based on the prosecutor’s special knowledge or the prestige of his office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Further, “[a] prosecutor may not vouch for witness credibility or suggest that the government has some special knowledge that a

witness will testify truthfully.” *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

Defendant contends that the following statement by the prosecutor was improper:

When I was in the first grade I remember a stranger who asked to give me a ride. To this day I can tell you what that person looks like, to this day, because a mind is not that fragile. The mind is a camera, and Mr. Runkel has a permanent snapshot of this individual Kendell Roberts and there’s no way around it.

In context, the prosecutor’s statement was not improper. The prosecutor’s case was largely dependent on the jury crediting Runkel’s identification of defendant. While the prosecutor’s argument referenced the prosecutor’s personal experience, viewed as a whole, the prosecutor was arguing to the jury that it was possible for Runkel to remember what defendant looked like on May 19, 2004. It is proper for a prosecutor to argue from the evidence that a witness is worthy or not worthy of belief. *Thomas, supra* at 455. Thus, we conclude that the prosecutor did not engage in misconduct by arguing credibility based on the facts, especially when Runkel’s and defendant’s testimony conflicted. Accordingly, defendant has failed to establish plain error.

Defendant finally argues that the cumulative effect of the prosecutor’s misconduct denied him a fair trial. “[T]he cumulative effect of several [actual] errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not.” *LeBlanc, supra* at 591. However, because defendant has failed to establish that the prosecutor engaged in misconduct, there can be no cumulative effect of errors warranting reversal.

Defendant next argues that the trial court erred in denying his motion for a mistrial following admission of a statement defendant made to Eugene Fitzhugh, an evidence technician with the Detroit Police Department, while Fitzhugh administered a gunshot residue test on defendant. Defendant contends that his statement indicating that he had not fired a gun on May 19, 2004, was made before he waived his constitutional rights. We disagree.

This Court reviews a trial court’s decision denying a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). The trial court has discretion whether to grant a mistrial. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). “A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant’s ability to get a fair trial.” *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Further, “not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial.” *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

Initially, we note that the record reflects that defendant’s statement to Fitzhugh occurred after defendant waived his constitutional rights and made an oral statement to Officer Derryck Thomas. Thus, defendant’s argument that the statement to Fitzhugh was made before he waived his rights lacks merit. Moreover, assuming that the admission of Fitzhugh’s testimony was improper, we conclude that the trial court did not abuse its discretion in denying defendant’s motion for a mistrial. Defendant has failed to show that Fitzhugh’s testimony was prejudicial. According to Fitzhugh’s testimony, defendant denied that he had fired a gun. At trial, defendant testified that he had fired a gun at 3:00 p.m. on May 19, 2004, and that he did not recall the

circumstances surrounding the gunshot residue test or if Fitzhugh had administered it at the hospital. In light of the results of the gunshot residue test indicating that defendant could have fired a gun at the time the shootings occurred and the fact that defendant did not deny that the test occurred, Fitzhugh's limited testimony indicating that defendant fired a gun did not have any substantial likelihood of appreciably prejudicing defendant. Therefore, the trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

Defendant finally argues that the trial court erred in admitting a photograph of Redmond and his son. Generally, to preserve an evidentiary issue for review, the party opposing the admission of the evidence must object at trial and specify the same ground for objection that the party asserts on appeal. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545-546; 520 NW2d 123 (1994). The lower court record shows that defendant initially objected to introduction of the photograph but later withdrew his objection. Because defendant waived his objection before the trial court, we are effectively precluded from reviewing the issue on appeal. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).

Affirmed.

/s/ Christopher M. Murray

/s/ Michael R. Smolenski

/s/ Deborah A. Servitto