

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND HALL,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2007

No. 263860

Wayne Circuit Court

LC No. 04-001159-01

Before: Fort Hood, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of assault with intent to murder, MCL 750.83, and use of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 19 to 40 years' imprisonment for each assault with intent to murder conviction and two years' imprisonment for his felony-firearm conviction. Because the trial court's admission of relevant but inadmissible motive testimony constituted harmless error, the prosecutor made no improper statement in closing argument, and defendant was not denied the effective assistance of counsel, we affirm.

Defendant's conviction arises out of a shooting incident that occurred on November 10, 2003. On that date, Janay Barrow was standing with her boyfriend, Ricardo Dunson, outside Dunson's home when defendant fired four to five shots from the alley behind the house, one of which struck Barrow in the upper back. According to the evidence at trial, defendant may have been seeking revenge against Dunson for allegedly jumping defendant's friends or cousins.

On appeal, defendant first argues that the evidence regarding motive in this case constituted hearsay and that the trial court abused its discretion in admitting it. A trial court's evidentiary ruling is reviewed for abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). However, evidentiary decisions frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes the admission of the evidence, which we review de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

All relevant evidence is admissible unless otherwise provided in the rules of evidence, United States or Michigan Constitutions. MRE 402. Under MRE 802, hearsay is inadmissible as substantive evidence absent an exception. *People v Dhue*, 444 Mich 151, 159; 506 NW2d 505 (1993). Hearsay is defined as an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993).

Defendant claims that Dunson's testimony that one of defendant's friends told him defendant thought Dunson had jumped one of his friends or cousin constituted inadmissible hearsay. Although a statement that is offered to show its effect on the listener is not hearsay, *People v Moorner*, 262 Mich App 64, 71; 683 NW2d 736 (2004), here, it is clear that the statement of defendant's friend to Dunson was not offered to show its effect on Dunson, but rather, to show that defendant had a motive. In other words, the prosecution was not merely attempting to show that the statement led Dunson to believe that defendant had a motive, rather, the prosecution offered the statement to show how Dunson's belief (i.e., that defendant actually had a motive) was true. This is evidenced by the prosecutor's closing argument during which he explained that defendant's motive for the shooting was a fight between Dunson and defendant's friend. Therefore, this statement was hearsay, and should not have been admitted.

Notwithstanding the above, "[a]n erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony." *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Here, Janay Barrow testified that she believed defendant had shot her because of a problem between defendant and Dunson. Thus, the jury was already aware of defendant's possible motive for shooting Barrow before learning of the statement at issue. Moreover, defendant has failed to show that this error resulted in a miscarriage of justice or was outcome determinative in light of Barrow's statements to her sister and police that defendant had shot her. See MCL 769.26; *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) ("In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative.")

Defendant also claims that the evidence of his motive was also inadmissible because it was only remotely connected to him. Because defendant failed to object on this basis below, we review for plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); MRE 103(a)(1).

At the outset, we note that defendant bases this argument, in large part, on *People v Wells*, 102 Mich App 122, 128-129; 302 NW2d 196 (1980) and *People v Horne*, unpublished opinion per curiam of the Court of Appeals, issued March 23, 2001 (Docket No. 221050).<sup>1</sup> In *Wells*, this Court held that evidence of the defendant's motive was improper because the relationship of the evidence to the defendants was too attenuated to be relevant. *Wells, supra* at 129. In contrast, here, evidence that defendant had a problem with Dunson would make it more likely that defendant had a motive to shoot Barrow. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998) (evidence is relevant if it tends to make a fact of consequence more or less probable than it would be without the evidence). Therefore, defendant's argument fails.

Defendant next argues that the prosecution made an improper statement during closing argument. We disagree.

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<sup>1</sup> We note that this opinion is not binding on this Court under the doctrine of stare decisis. See MCR 7.215(C)(1).

We review claims of prosecutorial misconduct by examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, where, as here, the issue of prosecutorial misconduct is unpreserved, we review the issue for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *Carines, supra* at 750. Defendant must show that there was plain error that affected his substantial rights, i.e., that the error was outcome determinative. *Carines, supra* at 763. To warrant reversal, the error must result in the conviction of an innocent defendant or must seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.* If a curative instruction could have alleviated any prejudicial effect, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context, on a case-by-case basis. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The propriety of these remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 95 (2002). A prosecutor is free to argue "the evidence and all inferences relating to his theory of the case" and respond to defense counsel's theory of the case. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Defendant claims that the following statement was an improper expression of the prosecutor's personal belief of defendant's guilt: "I tell you right now I don't believe that [defendant] wanted to kill [Barrow], but he wanted to kill [Dunson]." However, this statement was not improper because it was clearly related to the evidence and the prosecutor's theory of the case. Specifically, the prosecutor began his closing argument by reminding the jury that it had heard evidence of a fight between defendant and Dunson. This statement was directly supported by Barrow's testimony that problems existed between Dunson and defendant. Thus, it was reasonable for the prosecution to argue the inference that defendant intended to kill Dunson rather than Barrow in anticipation of the trial court's instruction regarding transferred intent. Indeed, the issue of transferred intent was the crux of the prosecutor's theory of the case – a theory that the prosecutor presented during his opening statement. Further, a prosecutor's argument is not rendered improper simply by the use of the words "I believe" rather than "the evidence shows." *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). This statement, then, was not improper and did not deny defendant a fair trial. *Watson, supra* at 586.

However, even if this statement were improper, defendant has failed to show prejudice. *Carines, supra* at 763. On the contrary, Barrow indicated repeatedly after she was shot that defendant was the culprit. Further, Dunson indicated that he saw defendant in the alley behind where he and Barrow were standing after Barrow was shot. Moreover, any error was cured by the trial court's instruction that the attorney's arguments were not evidence. *Ackerman, supra* at 448-449. Therefore, defendant's claim fails.

Defendant next argues that he was denied the effective assistance of counsel. We disagree.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). The United States and

Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “To establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Id.*

Defendant claims that defense counsel’s failure to object to the prosecutor’s statement during closing denied him the effective assistance of counsel. As noted above, however, the prosecutor’s remarks were not improper. Given that “[d]efense counsel is not required to make a meritless motion or a futile objection,” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003), the failure to object or to request a curative instruction was not objectively unreasonable or outcome determinative. Defendant was thus not denied the effective assistance of counsel based upon a failure to object to the prosecutor’s remark during closing argument.

Defendant’s second ineffective assistance of counsel claim pertains to defense counsel’s failure to call or investigate alibi witnesses. Because the trial court denied defendant’s motion for a *Ginther* hearing,<sup>2</sup> this Court limits its review to mistakes apparent on the existing record. *Rodriguez, supra* at 38.

It is presumed that defense counsel’s decisions regarding what evidence to present or whether to call and question witnesses constitute trial strategy, which this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Moreover, “the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.” *Id.* “A defense is substantial if it might have made a difference in the outcome of the trial.” *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac’d in part on other grds 453 Mich 902 (1996).

Here, the record is devoid of any evidence concerning any alibi witnesses or even the extent of defense counsel’s investigation of the alibi witnesses. In fact, defendant’s first reference to this issue did not occur until his motion to remand in this Court. Indeed, the trial court pointed out that defendant even failed to raise this issue at sentencing.

We note that defendant submitted affidavits of his proposed alibi witnesses with his motion to remand in this Court. Regarding these affidavits, the trial court explained during the *Ginther* motion hearing that it appeared the witnesses “miraculously” recalled the events in question even though the police reports indicated these witnesses claimed no knowledge of these events at the time they originally occurred. In light of this, it appears the decision not to call these witnesses was a matter of trial strategy, which was not objectively unreasonable. *Dixon, supra* at 398; *Effinger, supra* at 69.

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<sup>2</sup> See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Moreover, defendant has failed to show that any alibi witnesses would have made a difference in the outcome of the trial in light of Barrow's and Dunson's testimony. *Hyland, supra* at 710. Thus, defendant has failed to show that defense counsel's actions were objectively unreasonable or establish outcome determinative error. *Effinger, supra* at 69.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Deborah A. Servitto