

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN RODNEY FRITZ,

Defendant-Appellant.

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UNPUBLISHED

August 19, 2008

No. 276686

Wayne Circuit Court

LC No. 06-011191-01

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced to consecutive prison terms of 18 to 30 years for the assault conviction and two years for the felony-firearm conviction. He appeals as of right. We affirm.

I. Prosecutorial Misconduct

Defendant first argues that misconduct by the prosecutor deprived him of a fair trial. We disagree.

Because defendant either failed to object to the challenged conduct at trial or objected on a different basis than he asserts on appeal, this issue has not been properly preserved for appellate review. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Therefore, our review is limited to plain error affecting his substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Where a defendant fails to object to the prosecutor's conduct, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *Avant, supra* at 512. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *Noble, supra* at 660. The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995).

Defendant first argues that the prosecutor committed misconduct during her cross-examination of defendant when she referred to an alleged conspiracy between defendant and codefendant DeLorean Love to commit a robbery, and by mentioning Love's guilty plea to

robbery.<sup>1</sup> Regarding the reference to a planned robbery, the victim's girlfriend had previously testified, without objection, that she saw defendant with the same gun earlier in the day and that defendant and Love told her that they were going to rob someone. Thus, there was an evidentiary foundation for the prosecutor's question, and the question did not deprive defendant of a fair trial.

We agree with defendant, however, that it was improper for the prosecutor to mention Love's guilty plea to robbery. The plea was not a fact in evidence and was not relevant to whether defendant committed the charged offense. It also was not relevant for defendant's impeachment because the fact that Love pleaded guilty to robbery did not tend to prove that defendant was involved in planning the robbery. However, this isolated remark did not deprive defendant of a fair trial, considering that defendant was not charged with or implicated in the robbery. Further, four witnesses identified defendant as the person who shot the victim during an altercation that was not associated with the later robbery, and DeAngelo Washington, the one who was robbed, testified that he did not think the same person who shot the victim had robbed him. The trial court instructed the jury to decide the case based on the evidence admitted at trial, and that the attorneys' statements, arguments, and questions were not evidence. Jurors are presumed to follow the trial court's instructions unless the contrary is clearly shown, which defendant has not attempted to do here. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

Defendant additionally argues that the prosecutor committed misconduct during her rebuttal argument by placing the prestige of her office behind Washington's identification of defendant. Indeed, it is improper for a prosecutor to use the prestige of her office to place her personal opinion before the jury. *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004). However, the prosecutor's comments were responsive to defense counsel's argument that the police had arrested the wrong person, and were supported by the testimony at trial. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). Contrary to defendant's assertion, Washington testified that he had identified defendant as the shooter at defendant's preliminary examination. Thus, there was no plain error.

Defendant also contends, in his supplemental brief filed in propria persona, that the prosecutor improperly expressed her personal belief in defendant's guilt during both opening statement and closing argument. We disagree. Viewed in context, the prosecutor's opening remarks were based on what she believed the evidence would show, and her closing remarks were based on what she believed the evidence had established. Accordingly, they were not improper. See *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

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<sup>1</sup> To the extent that defendant argues that this evidence was improperly admitted, his argument is misplaced. Defense counsel objected to the prosecutor's question, and the trial court ruled that the evidence was inadmissible because it was more prejudicial than probative.

## II. Request for a Mistrial

Defendant argues that the trial court erred in denying his untimely motion for a mistrial. We disagree. We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Lett*, 466 Mich 206, 218; 644 NW2d 743 (2002). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Defendant did not request a mistrial during the prosecutor's cross-examination of defendant, when the prosecutor referred to the alleged plan to commit a robbery and Love's guilty plea. Thus, it would have been improper for the trial court to grant a mistrial at that point absent manifest necessity. *People v Echavarría*, 233 Mich App 356, 363; 592 NW2d 737 (1999). There is no specific test for what constitutes manifest necessity, but it generally exists when there are "sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997), quoting *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). As discussed previously, the prosecutor's comments during defendant's cross-examination did not deprive defendant of a fair trial. Therefore, a mistrial was not warranted.

Although defendant additionally asserts that the prosecutor repeated her improper comments during closing argument, he has not identified the comments that he believes were improper or supported his argument with appropriate citations to the record. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Thus, this issue may be deemed abandoned. See *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). In any event, we have reviewed the prosecutor's closing and rebuttal arguments and have not found any reference to the alleged conspiracy, robbery, or Love's guilty plea. The prosecutor did acknowledge during her rebuttal argument that Washington was not entirely forthcoming with the police on the night of the shooting because he was upset that his brother had been shot, and because "[h]e got robbed trying to take this [sic] brother to the hospital." However, this was a proper comment on the credibility of Washington's testimony concerning the charged offense. The comment did not warrant an objection, let alone the declaration of a mistrial.

For these reasons, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

## III. Effective Assistance of Counsel

Defendant claims that defense counsel was ineffective for failing to timely move for a mistrial, and for failing to object to the prosecutor's rebuttal argument. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and

constitutional law.” *Matuszak, supra* at 48, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to raise this issue in a motion for a new trial or request for a *Ginther*<sup>2</sup> hearing, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorner, supra* at 75-76.

As previously discussed, before the prosecutor’s cross-examination of defendant, the victim’s girlfriend had already testified without objection that she saw defendant with the same gun earlier in the day and that defendant and Love told her that they were going to rob someone. Therefore, the prosecutor’s comment was cumulative of this earlier testimony and did not deprive defendant of a fair trial. While it was improper for the prosecutor to mention Love’s guilty plea to robbery, defense counsel successfully foreclosed questioning on the subject by objecting at trial. Although counsel did not immediately move for a mistrial, as we discussed *supra*, a mistrial would not have been warranted. Therefore, counsel was not ineffective for failing to request a mistrial.<sup>3</sup> See *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Additionally, because defendant has failed to demonstrate any error in the prosecutor’s closing and rebuttal arguments, defense counsel was not ineffective for failing to object to those arguments at trial because any objection would have been futile. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

#### IV. Sufficiency of the Evidence

In his supplemental brief filed in propria persona, defendant argues that the evidence was insufficient to support his convictions. We disagree.

When the sufficiency of the evidence is challenged, we review the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006). Issues of witness credibility are for the jury, *People v Lemmon*,

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<sup>2</sup> *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

<sup>3</sup> Defendant does not argue that counsel was ineffective in failing to request a cautionary instruction. In any event, whether to request a cautionary instruction is a matter of trial strategy. *People v Gonzalez*, 468 Mich 636, 645; 664 NW2d 159 (2003).

456 Mich 625, 642; 576 NW2d 129 (1998), and the jury may draw reasonable inferences from the evidence, *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

“The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.” *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (internal quotations marks and citation omitted). Felony-firearm consists of two essential elements: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b(1); *Avant, supra* at 505.

We find no merit to defendant’s argument that there was no evidence that he was the shooter, or that he knowingly possessed a firearm. Four witnesses testified that they saw defendant shoot the victim in the head with a handgun. This evidence was sufficient to enable the jury to identify defendant as the shooter beyond a reasonable doubt, and to conclude that he knowingly possessed a firearm. Additionally, evidence that defendant shot the victim in the head was sufficient to enable the jury to infer that defendant acted with the intent to kill. See *People v Unger*, 278 Mich App 210, 223; \_\_\_ NW2d \_\_\_, (2008) (“minimal circumstantial evidence is sufficient to establish a defendant’s intent to kill”). Although defendant asserts that the victim’s medical records were not introduced into evidence, the victim’s medical condition and the care he received were not elements of either crime. Therefore, the evidence was sufficient to support defendant’s convictions, and reversal is not warranted on this ground.

#### V. Sentencing

Lastly, defendant argues in his supplemental brief filed in propria persona that the trial court erred in scoring his offense variables because it relied on facts that had not been found by a jury beyond a reasonable doubt, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). As defendant concedes, however, our Supreme Court has squarely rejected this argument. *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006). Defendant requests that this Court hold this case in abeyance pending the United States Supreme Court’s decision whether to grant certiorari in *McCuller*. However, there is no indication that this case presents an issue similar to that in *McCuller*, which involved a defendant who was entitled to an intermediate sanction as opposed to a prison sentence, and the Court recently denied certiorari. *McCuller v Michigan*, \_\_\_ US \_\_\_; \_\_\_ S Ct \_\_\_; \_\_\_ L Ed 2d \_\_\_ (2008), 2008 WL 1699516 (April 14, 2008). Therefore, defendant’s argument is without merit.

Affirmed.

/s/ Deborah A. Servitto  
/s/ Mark J. Cavanagh  
/s/ Kirsten Frank Kelly