

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCUS ANTHONY WINDLESS,

Defendant-Appellant.

UNPUBLISHED

March 26, 2009

No. 281995

Wayne Circuit Court

LC No. 07-005895-FC

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of armed robbery, MCL 750.529, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 14 to 21 years in prison for the armed robbery and carjacking convictions and two years in prison for the felony-firearm conviction. For the reasons set forth below, we affirm.

I. Jury Instructions

Defendant argues that the trial court committed plain error and denied defendant his right to present a defense by failing to give a cautionary instruction regarding the unreliability of accomplice testimony. See CJI2d 5.6. An affirmative statement by defense counsel that there are no objections to the jury instructions constitutes express approval of the instructions. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defense counsel expressly approved the jury instructions with the affirmative statement that she had no objection to them after they were given. Therefore, defendant has waived this issue on appeal. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant also complains that he was denied the effective assistance of counsel when his attorney failed to request the instruction on accomplice testimony. Defendant argues that an instruction was crucial to his theory that Cortland Brown falsely accused defendant of committing the crimes. Moreover, defendant argues that because Brown's testimony was

favorable to the prosecution, there is a reasonable probability that, if the court had given the instruction, the outcome of the trial would have been different.¹

“Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise.” *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). “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.” *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “Defendant must overcome the strong presumption that counsel’s performance was sound trial strategy.” *Dixon, supra* at 396.

Defense counsel repeatedly emphasized Brown’s potential credibility problems to the jury during cross-examination and closing argument. In her cross-examination of Brown, defense counsel highlighted inconsistencies between Brown’s trial testimony and what he initially told the police and questioned him about the plea bargain he received in exchange for his testimony. Defense counsel stressed these issues in her closing argument and suggested that Brown was untrustworthy. The trial court also instructed the jury that it could consider Brown’s plea bargain and past criminal conviction when determining his credibility and assigning weight to his testimony. Because the issues of Brown’s credibility were plainly presented to the jury, there is no reasonable probability that the outcome of the proceedings would have been different if the trial court gave an accomplice credibility instruction. *People v Reed*, 453 Mich 685, 692-693; 556 NW2d 858 (1996). Therefore, defendant was not denied the effective assistance of counsel. *Scott, supra* at 526.

II. Disclosure of Mask

Defendant asserts that he was denied his right to discovery when his attorney did not receive Officer Rogers’s preliminary complaint record (PCR) until the day of trial and learned that the prosecutor intended to introduce into evidence a mask found in the officer’s patrol car. Defendant contends that if the mask had been tested and the results did not link the mask to him, it could have been used as impeachment evidence against Officer Rogers.²

¹ Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. “A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* Because there was no hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court’s review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

² A trial court’s decision to admit evidence is reviewed for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). “An abuse of discretion occurs when the court
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A defendant has no constitutional right to discovery in criminal cases. *People v Elston*, 462 Mich 751, 758; 614 NW2d 595 (2000). All discoverable materials, except exculpatory material, must be requested. MCR 6.201; *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). Under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), “[a] criminal defendant has a due process right of access to certain information possessed by the prosecution.” *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). “This due process requirement of disclosure applies to evidence that might lead a jury to entertain a reasonable doubt about a defendant’s guilt.” *Id.* at 281. “Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence ‘may make the difference between conviction and acquittal.’” *Id.* (citation omitted).

“In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *Id.* at 281-282. “The failure to disclose impeachment evidence does not require automatic reversal even where . . . the prosecution’s case depends largely on the credibility of a particular witness.” *Id.* at 282. Rather, “[t]he court must still find the evidence material,” meaning there is reasonable probability that if the evidence was disclosed it might have affected the outcome. *Id.*

“In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness’ credibility would have undermined a critical element of the prosecution’s case.” *Id.* at 282-283. “In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable.” *Id.* at 283.

Here, even assuming that after lab testing the evidence would have been favorable to defendant, defendant could have obtained the mask well before trial with reasonable diligence. Officer Rogers was on the witness list for months before trial, yet defense counsel did not seek to obtain his PCR. The PCR referred to the mask, and defendant could have obtained it for testing. Further, while defense counsel only learned about the mask on the day of trial, nothing in the record suggests that the prosecution actively suppressed this evidence. Moreover, the evidence was not material because it would not have affected the outcome. While a test of the mask that favored defendant would have assisted defendant in attempting to impeach the testimony of Officer Rogers, the officer’s testimony was not the primary link between defendant and the crimes. Rather, Brown testified extensively about defendant’s involvement and defendant’s own statements to police implicated him in the crimes.

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chooses an outcome that falls outside the range of reasonable and principled outcomes.” *People v Unger (On Remand)*, 278 Mich App 210, 217; 749 NW2d 272 (2008). Constitutional claims of due process violations are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Defendant also claims that he did not receive the effective assistance of counsel because his trial counsel's lack of knowledge about the mask rendered her unprepared for trial. When claiming ineffective assistance of counsel based on an alleged lack of preparation, a defendant must show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Defendant cannot show prejudice here because the mask was merely one item of evidence that may have linked defendant to the crimes. Again, Brown's direct testimony detailed defendant's involvement and defendant's own statements to police indicated that he was involved in stealing the cars.

For the same reasons, we reject defendant's further argument that the prosecution's failure to disclose the existence of the mask constituted prosecutorial misconduct and a denial of due process.³ As discussed, any alleged failure of the prosecution did not actually prejudice defendant. Moreover, defense counsel was able to fully cross-examine Officer Rogers about the circumstances under which he discovered the mask. Therefore, any alleged misconduct did not result in plain error.

Affirmed.

/s/ Henry William Saad

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

³ This Court reviews a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, because the issue is unpreserved, this Court reviews for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Allegations of prosecutorial misconduct are examined on a case-by-case basis, viewing the prosecution's statements in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Generally, prosecutors have great latitude in their arguments and conduct during trial. *Unger, supra* at 236. "To avoid forfeiture under the plain error rule, a defendant must show actual prejudice." *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).