

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 24, 2012

v

JOSEPH ANTHONY SUTTON,
Defendant-Appellant.

No. 299262
Wayne Circuit Court
LC No. 09-003565-FC

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. The trial court sentenced defendant as a fourth-offense offender, MCL 769.12, to prison terms of 80 to 125 years for the second-degree murder conviction, two to five years for the felon in possession conviction, and to a mandatory two-year consecutive term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first contends that defense counsel was ineffective by failing to impeach witness Andre Christian with audio recordings from the Wayne County Jail that allegedly demonstrate Christian's bias against defendant. We disagree.

“In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary hearing.” *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Defendant did not file a motion for a new trial or for an evidentiary hearing in the trial court, and this Court denied defendant's motion to remand for an evidentiary hearing. Therefore, the issue is unpreserved. Thus, our review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

In order to establish a claim of ineffective assistance of counsel, a defendant must show that “(1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable.” *Seals*, 285 Mich App at 17. “Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy.”

People v Horn, 279 Mich App 31, 39; 755 NW2d 212 (2008). “Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy.” *Id.* at 37-38 n 2.

Because our review is limited to errors apparent on the record, we decline to consider the audio recordings submitted with defendant’s motion to remand. See *Horn*, 279 Mich App at 38 (declining to consider affidavits submitted with the defendant’s motion to remand). Consequently, defendant has failed to overcome the presumption of sound trial strategy. See *id.* at 37-38 n 2.

II

Defendant argues that the trial court erred by sua sponte instructing the jury on the offense of second-degree murder as a lesser included offense of first-degree murder. Any error regarding the jury instructions was waived. After the trial court instructed the jury, defense counsel expressed her satisfaction with the jury instructions. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009).

In the alternative, defendant argues that defense counsel was ineffective for failing to object to the court’s decision to instruct the jury on the offense of second-degree murder. Such an instruction is appropriate only if the lesser offense is necessarily included in the greater offense, meaning all the elements of the lesser offense are included in the greater offense and a rational view of the evidence would support such an instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).¹ “[A]n instruction on second-degree murder, as a necessarily included lesser included offense of first-degree murder, will be proper if . . . [an] element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder.” *Id.* at 357 n 13. The Court explained in *Cornell*:

[S]uch an instruction will be proper if the intent element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder. However, given that in many cases involving first-degree murder, the intent element is disputed, we suspect that more often than not, an instruction on second-degree murder will be proper. [*Id.* at 358 n 13.]

Therefore, an instruction on second-degree murder would be proper in this case if the intent element were disputed and the evidence would support a second-degree murder conviction.

The intent required for first-degree premeditated murder is the intent to kill with premeditation and deliberation. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). The intent required for “second-degree murder is malice, *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), which is defined as “the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *Id.* at 464.

¹ Some cases indicate that *Cornell* was overruled in part on other grounds by *People v Mendoza*, 486 Mich 527; 664 NW2d 685 (2003).

In this case, Charmaine Murphy testified that defendant told her that he went downstairs, asked someone named John for a gun, came back upstairs, and shot defendant in the back of the head. Defendant testified, however, that he told Murphy that Dixon was shot during an argument over a gun. Given the conflicting testimony, a factual dispute existed at trial over defendant's intent. A jury could have rationally concluded that defendant shot Dixon with the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm, but without premeditation. Because the intent element was disputed and the evidence would support a second-degree murder conviction, the instruction was proper. See *Cornell*, 466 Mich at 358 n 13. Thus, there is not a reasonable probability that, had defense counsel objected, the result would have been different.

III

Defendant contends that he was denied a fair trial by prosecutorial misconduct. Because defense counsel did not object to the allegedly improper conduct, we review this issue for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). This Court cannot find error requiring reversal where an instruction could have cured any prejudicial effect. *Callon*, 256 Mich App at 329-330.

When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Callon*, 256 Mich App at 330. Further, the propriety of a prosecutor's remarks will depend upon the particular facts of each case. In addition, a prosecutor's 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. Furthermore, otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense. Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence. [*Callon*, 256 Mich App at 330 (citations omitted).]

The alleged error in this case is the prosecutor's emphasis, during closing argument, on Lieutenant Morell's testimony that he believed Murphy told him the truth during her statement. This testimony was actually elicited by defense counsel during cross-examination when she asked Lieutenant Morell if he knew whether Murphy's statement was truthful and Lieutenant Morell replied, "I believe it to be." During closing argument, the prosecutor stated, in part:

[H]e took a statement from [Murphy]; he says, did you believe her, did you believe her; and Lieutenant Morell who's a 20 some year veteran of both Homicide and Police Department Violent Crimes, Lieutenant Morell says, I believed her; I thought she was telling the truth. That was his conclusion as he talked to Charmaine [sic] Murphy on that day. I submit to you ladies and gentlemen, that ultimately should be your conclusion. That Charmaine [sic] Murphy when she comes in here, despite her problems is in fact telling the truth when she says that [defendant] made those admissions to her.

Defendant argues that the prosecutor's statement led the jury to suspend its own powers of judgment because Lieutenant Morell "had already vetted her." In support of this argument,

defendant relies on *People v Smith*, 158 Mich App 220; 405 NW2d 156 (1987), and *People v Humphreys*, 24 Mich App 411; 180 NW2d 328 (1970).

In *Smith*, this Court stated that “[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness, since matters of credibility are to be determined by the trier of fact.” *Smith*, 158 Mich App at 230. In *Humphreys*, the Court similarly found that remarks that led the jury to suspend its own powers of judgment in deference to those of the police were highly prejudicial and improper. *Humphreys*, 24 Mich App at 418-419. This Court has found that a prosecutor’s remarks were not improper where they “did not urge the jury to improperly ‘suspend its own powers of critical analysis and judgment in deference to those of the police and prosecutor.’” *People v Whitfield*, 214 Mich App 348, 352-353; 543 NW2d 347 (1995), quoting *Humphreys*, 24 Mich App at 418.

In this case, while the prosecutor did not elicit the original improper statement made by Lieutenant Morell, the prosecutor made improper use of such testimony during his closing argument. Even if the prosecutor’s comments constituted plain error, however, the error did not affect defendant’s substantial rights because it did not affect the outcome of the lower court proceedings. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The prosecutor’s statement was based on Lieutenant Morell’s testimony that was already in the record. Moreover, the trial court instructed the jury that “[t]he lawyers [sic] statements and arguments are not evidence,” and that “[y]ou should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.” See *People v Unger (On Remand)*, 278 Mich App 210, 238, 240-241; 749 NW2d 272 (2008) (finding that the trial court gave similar instructions). The Court also instructed the jury that “[y]ou must think about all the evidence and all the testimony and then decide what each piece of evidence means and how important you think it is. This includes whether you believe what each of the witnesses said.”

Moreover, reversal is not warranted because an instruction could have cured any prejudicial effect. See *Callon*, 256 Mich App at 329-330. “Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions.” *Unger*, 278 Mich App at 235 (citations omitted). In *Humphreys*, this Court found that the prosecutor’s statement that, “if the defendant in the opinion of the police and my opinion were innocent of this charge, we would not be here right now,” could not have been cured with an instruction. *Humphreys*, 24 Mich App at 418-420. However, an instruction could have cured any prejudicial effect of the prosecutor’s comments in this case. The prosecutor emphasized what Lieutenant Morell had already testified to and a contemporaneous instruction that the jury must evaluate the credibility of witnesses itself could have cured any prejudice. In fact, as noted, the trial court did subsequently instruct the jury that it must consider all the evidence and decide whether it believed what the witnesses said. Thus, reversal is not warranted. See *Callon*, 256 Mich App at 329-330.

Defendant also contends that defense counsel was ineffective in failing to object to the prosecutor’s statements. Even assuming the statements were improper, trial counsel’s performance did not fall below an objective standard of reasonableness. See *Seals*, 285 Mich App at 17. “[T]here are times when it is better not to object and draw attention to an improper comment.” *Horn*, 279 Mich App at 40, quoting *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). “Furthermore, declining to raise objections, especially during closing

arguments, can often be consistent with sound trial strategy.” *Unger*, 278 Mich App at 242. In the present case, trial counsel could have decided it was better not to draw the jury’s attention to the fact that Lieutenant Morell made that statement. See *Horn*, 279 Mich App at 40 (“Counsel may have believed that it was better not to draw the jury’s attention to the fact that defendant never offered a statement to the investigating officers.”). Therefore, defendant has failed to overcome the presumption of sound trial strategy. See *id.* at 37-38 n 2.

IV

Defendant raises several unpreserved issues in his Standard 4 Brief. First, defendant suggests that the prosecutor refused to disclose information favorable to defendant in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), that the prosecutor knew Christian committed perjury and failed to disclose it to the court, and that the prosecutor’s statement that he discovered Christian through an overlap in the calls was not true. We disagree with each of these assertions.

“Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure.” *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). The elements necessary to prove a *Brady* violation are:

- (1) that the state possessed evidence favorable to the defendant;
- (2) that the defendant did not possess the evidence nor could the defendant have obtained it 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 177 (internal quotation marks omitted; citation omitted)].

Defendant argues that the prosecutor refused to disclose, until after trial began, the recordings of Christian’s phone conversations, which revealed that the prosecutor improperly obtained Christian as a witness, that Christian committed perjury, and Christian’s motive for testifying against defendant. Assuming the tapes were favorable to defendant, defendant has failed to establish the remaining elements of a *Brady* violation. See *Schumacher*, 276 Mich App at 177. Defendant admits that he was given the recordings at the start of trial. Thus, defendant has failed to show that he did not possess the recordings and that the prosecutor suppressed the evidence. See *id.* However, defendant claims that he received the recordings too late. Nonetheless, even if the recordings had been disclosed to defendant earlier, there is no reasonable probability that the outcome of the proceedings would have been different. See *id.* As determined above, defendant has failed to overcome the presumption that trial counsel’s decision not to introduce the recordings at trial was sound trial strategy. Therefore, defendant has failed to establish plain error affecting substantial rights. See *Carines*, 460 Mich at 763.

Moreover, “[t]he 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.” *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Rather, the court must find that the evidence is material. *Id.* Material means “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 281-282. “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 prosecutor's case." *Id.* at 282. "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.* Therefore, because Christian's testimony was corroborated by Murphy's testimony and the audio recordings merely furnished an additional basis on which to impeach Christian, whose credibility was already shown to be questionable based on his prior convictions for felonies involving dishonesty and his deal with the prosecution, a new trial is not required.

Defendant also suggests that the prosecutor knew that Christian committed perjury and failed to disclose it to the court. "Prosecutors . . . have a constitutional obligation to report to the defendant and to the trial court whenever government witnesses lie under oath." *Lester*, 232 Mich App at 276. Further, "the prosecutor may not knowingly use false testimony to obtain a conviction," and "a prosecutor has a duty to correct false evidence." *Id.* In *Lester*, the Court stated that "[a] new trial is required only if the false testimony could in any reasonable likelihood have affected the judgment of the jury." *Id.* at 280.

In the present case, defendant has failed to establish plain error affecting substantial rights. See *Carines*, 460 Mich at 763. The preliminary examination on February 17, 2010, from which defendant attaches portions in an exhibit to his Standard 4 Brief, does not appear to be part of this case. The transcript of the preliminary examination is not contained in the lower court file and is not listed on the register of actions. The preliminary examination in this case was held on February 11, 2009. The preliminary examination on February 17, 2010, may be part of an unrelated case involving defendant. Defendant even suggests this when he states in his Standard 4 Brief, "On February 17, 2010, a pre-examination was held in a case involving the same witness, Andre Christian." The transcript attached as another exhibit to his Standard 4 Brief similarly appears to not be part of this case, as it is a portion of a jury trial on October 19, 2010. Moreover, even if Christian testified falsely and the prosecutor was aware, because the testimony occurred in a different case, there is no reasonable likelihood that the false testimony affected the judgment of the jury. See *Lester*, 232 Mich App at 276. Thus, a new trial is not required.

Finally, defendant suggests that the prosecutor's statement that he discovered Christian through an overlap in the telephone calls was not true since there was no overlap. Defendant suggests that Christian was obtained as a witness improperly by lies by the police that defendant had threatened Christian and his family. During opening statement, the prosecutor said that defendant's calls were mixed up with Christian's calls because they both called the same number. During trial, the trial court ruled that it would not allow the prosecutor to elicit testimony from Officer Scott Shea that knowledge of Christian was obtained because both defendant and Christian called the same number. The court reviewed the phone numbers called by both defendant and Christian and determined there were no calls made to the same number. The court indicated that it instructed the prosecutor that it would have to call a witness to explain how the calls are logged and cross-referenced. The court also noted that defense counsel suggested that the prosecutor could simply ask Officer Shea if he became aware of Christian during the investigation and no objection would be made. The court stated that the prosecutor decided to secure the keeper of records. However, it does not appear that the prosecutor did so.

Even assuming, as the trial court found, that there were no calls to the same number, it is not clear that the prosecutor's statement was inaccurate or untruthful. It does not appear that the keeper of records was called to explain. However, the prosecutor's failure to call such a witness may further suggest that there was no overlap. Moreover, defendant has not established that what the police told Christian was false. Even if the prosecutor's statement was improper, defendant has failed to show that the error affected the outcome of the lower court proceedings. See *Carines*, 460 Mich at 763. The trial court instructed the jury that "[t]he lawyers statements and arguments are not evidence." Thus, if there was no evidence at trial that there was an overlap in the calls, the jury would not have considered the prosecutor's statement.

V

Defendant contends that trial counsel was ineffective in failing to present statements made by Murphy in a prior sworn statement that revealed that she learned information from third party sources. We disagree.

Where there has been no evidentiary hearing below, this Court's review is limited to errors apparent on the record. See *Seals*, 285 Mich App at 19-20. Therefore, similar to the audio recordings, we decline to consider the statement submitted with defendant's Standard 4 Brief because our review is limited to errors apparent on the record. See *Horn*, 279 Mich App at 38. Thus, defendant has failed to overcome the strong presumption of sound trial strategy. See *id.* at 37-38 n 2.

VI

Defendant next contends that defense counsel's failure to mark and present relevant excerpts of Murphy's mental health records as exhibits at trial constituted ineffective assistance of counsel. We disagree.

Defendant has failed to show that his trial counsel's performance fell below an objective standard of reasonableness. See *Seals*, 285 Mich App at 17. At trial, the parties stipulated to the admission of Murphy's medical records. During closing argument, trial counsel discussed the records. In addition, trial counsel elicited Murphy's mental health history during cross-examination. Murphy testified that she suffers from depression and panic disorder and has been diagnosed as bipolar and schizophrenic. She also suffers from paranoia and has memory problems. Murphy was receiving mental health treatment at the time she claimed to have a conversation with defendant. She was also on medication at the time. At some time during 2006 to 2008, there were gaps in Murphy's treatment when she used alcohol, marijuana, and cocaine. Her treatment at Northeast Guidance Center was terminated for non-compliance. Therefore, defendant has failed to overcome the strong presumption that trial counsel's decision not to excerpt portions of the records was sound trial strategy. See *Horn*, 279 Mich App at 37-38 n 2. Moreover, even if defendant showed that counsel's performance fell below an objective standard of reasonableness, given Murphy's testimony during cross-examination and the fact that the jury could have viewed the records, defendant has failed to show "a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *Seals*, 285 Mich App at 17.

VII

Finally, defendant contends that trial counsel's failure to object to statements made by the prosecutor during closing argument constituted ineffective assistance of counsel. We disagree.

With regard to the prosecutor's reference to the hangers, defendant has failed to establish a claim of ineffective assistance of counsel. Prosecutors "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. Two photographs of the hangers found at defendant's house were admitted into evidence. Therefore, any reference by the prosecutor to the hangers during closing argument was not improper. Accordingly, trial counsel's performance did not fall below an objective standard of reasonableness because any objection would have been futile. "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Moreover, trial counsel addressed the hangers in her own closing argument, stating:

What did they find? Hangers on the floor. Wow! That's really evidence of something, clothes hangers on the floor in the basement. Now I don't know about you, but you go to my house I've got bags of hangers and if you tip them over, they're going to be on the floor. Is that evidence of a crime? I submit to you, no.

Defense counsel further stated:

So then the prosecution said, oh because there was clothes hangers at [defendant's] house then that means he's the one that stole the clothes. Well maybe he bought some stolen clothes and maybe he just had some extra clothes hangers in his house but that doesn't connect the two up. You've gotta do more than that to connect the two up and they haven't done that.

With regard to the prosecutor's statement that Christian said that defendant shot the man over clothing, defendant correctly notes that Christian never mentioned clothing. Nonetheless, defendant has failed to overcome the strong presumption of sound trial strategy. See *Horn*, 279 Mich App at 37-38 n 2. This Court has stated that "declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy." *Unger*, 278 Mich App at 242. Instead of objecting, trial counsel addressed the issue during her own closing argument by stating, "Now he never mentioned anything about any clothes. Now use your collective memory, but he didn't say anything about any clothes." Given trial counsel's statement during closing, defendant has failed to show that "there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *Seals*, 285 Mich App at 17.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder