

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JONATHON ARTURO CLARK,

Defendant-Appellant.

UNPUBLISHED

January 15, 2008

No. 272988

Wayne Circuit Court

LC No. 06-001737-01

Before: Talbot, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was acquitted of assault with intent to rob while armed, MCL 750.89, carjacking, MCL 750.529a, felon in possession of a firearm, MCL 750.224f, and felonious assault, MCL 750.82(1). Defendant was sentenced to 18 to 30 years' imprisonment for the assault with intent to murder conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. We affirm.

I Basic Facts and Proceedings

This case arises from the attempted robbery and shooting of Antonio Revis. As Revis was leaving a Detroit bar early one morning, a man approached him, demanded his Cartier eyeglasses, and fired several gunshots. Revis began to run and threw off his glasses. He was shot twice, once in the leg and once in the buttock. He ran until he reached a nearby police car. The officers in the car put a description of the incident and the suspect over the radio. A man who was sitting in his car in a nearby parking lot testified at trial that defendant approached, demanded that the man give him the vehicle, and tried to push him out of the driver's seat. Just then, two police officers, who also identified defendant at trial, approached and defendant ran. One of the officers pursued defendant and arrested him.

II Effective Assistance of Counsel

Defendant argues on appeal that he was denied effective assistance of counsel because trial counsel failed to use a receipt for the Cartier glasses given to him by defendant as evidence, obtain the results of a gunshot residue test before trial, and raise any defense theory. We disagree.

A. Standard of Review

In order to preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or a *Ginther*¹ hearing before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Where the defendant fails to preserve the issue, appellate review is “limited to mistakes apparent on the record.” *Id.* Defendant did not move for a new trial before the trial court, and although he did move for a *Ginther* hearing, he subsequently withdrew the motion. Thus, our review of his ineffective assistance claim is limited to mistakes apparent on the record.

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional 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). In general, this Court reviews a trial court’s findings of fact for clear error. *Id.* As noted, *supra*, however, defendant failed to move for a *Ginther* hearing below, so review is limited to the trial record. This Court reviews questions of constitutional law de novo. *Id.*

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). In order to overcome the presumption, the defendant must show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Id.* The defendant must show that counsel’s performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficiency was so prejudicial that he was deprived of a fair trial in that there is a reasonable probability that, but for counsel’s unprofessional errors, the trial outcome would have been different. *LeBlanc, supra* at 582-583; *McGhee, supra* at 625. The defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy which we will not second-guess with the benefit of hindsight.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

1. Failure to Present Evidence

B. Analysis

With respect to defendant’s argument that counsel was ineffective for failing to present evidence of defendant’s ownership of Cartier eyeglasses, defense counsel indicated at the time trial was to begin on July 31, 2006, that he was not ready to proceed. He stated:

[T]here was a particular piece of evidence in this case that the family of the defendant—well, not his family—apparently his girlfriend was in possession of, which was a receipt for a pair of glasses. I have actually seen this receipt. I asked

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

them to preserve it, keep it; and apparently some person described as his girlfriend has taken his original receipt and thrown it away. As I spoke to the family this morning, one of his relatives went out to a mall. They are trying to get a duplicate copy of this receipt, and based on what they're indicating to me, the people are en route. That I did not anticipate.

The court then addressed other matters, including defendant's waiver of a jury, and which police officers the parties intended to call, then the trial began without objection from defense counsel. At the end of the first day of trial, the court asked defense counsel about the evidence:

THE COURT: Well, you had indicated earlier that you were waiting for something, little piece of evidence or something of that nature.

MR. BARNETT: Yes, sir. I have it, and I'm in contemplation as to how I'm going to proceed. At this moment, I have no witnesses.

The prosecution introduced Revis' Cartier glasses into evidence at trial. Defense counsel never introduced the receipt or any other evidence of defendant's ownership of designer glasses.

Defendant cannot overcome the presumption that counsel's decision not to introduce the receipt or other evidence that defendant owned designer glasses was a matter of trial strategy. Even if the trier of fact believed that defendant owned similar or the same glasses before or at the time of shooting, defendant has failed to articulate how this evidence supports the conclusion that defendant had no motive to commit the crimes charged. Rather, the trier of fact may have concluded that it was more than coincidental that defendant, who was arrested near the scene of an attempted robbery of a pair of \$1,550 Cartier eyeglasses, happened to have owned and worn identical eyeglasses.

2. Gunshot Residue

Defendant also claims counsel was ineffective for failing to obtain the results of the gunshot residue test performed on samples taken from defendant's hands after he was arrested. However, the test results indicated that gunshot residue was detected on all three of the samples taken from defendant. Thus, we readily conclude that defendant has failed to show that obtaining or introducing the results of gunshot residue tests at trial would have affected the outcome of trial in defendant's favor.

Defendant argues that had he been aware of the positive results, he may have negotiated and accepted a plea agreement with a less extensive prison sentence. This argument has no merit. Even if defendant had been inclined to accept a plea agreement, it is highly doubtful the prosecution would have offered defendant a sentence agreement with a relatively light sentence, particularly after being made aware of the positive test results. In any event, speculation about plea negotiations that might have taken place had the evidence looked different before trial is not enough to establish prejudice.

3. Failure to Present a Defense Theory

Defendant next argues that defense counsel was ineffective for relying on the weaknesses of the prosecution's case and failing to raise a defense theory. For this proposition, defendant cites *US ex rel Cosey v Wolff*, 727 F2d 656 (CA 7, 1984), overruled on other grounds *US v Payne*, 741 F2d 887 (CA 7, 1984), and *Harris v Reed*, 894 F2d 871 (CA 7, 1990), both of which held that defense counsel was ineffective for failing to present defense witnesses. Each case is factually distinct from the instant case. In *Cosey*, defense counsel failed to investigate or interview any of the five witnesses proffered by the defendant. *Cosey, supra* at 658. In *Harris*, defense counsel told the jury during opening statements that they would hear evidence that someone other than the defendant shot the victim. After the close of the prosecution's case, however, defense counsel believed that the prosecution's case against the defendant was weak and decided not to call two unbiased witnesses who had separately identified the uncharged suspect as the man, or one of the men, they saw fleeing the scene. *Harris, supra* at 872-874, 878. Here, defendant has not alleged a particular defense theory that counsel ought to have raised, nor does he claim that defense counsel failed to call specific witnesses whose testimony would have been favorable to the defense. Moreover, defense counsel did call two witnesses, both police officers, whom he questioned about defendant's statements in the police car after he was arrested and at the hospital. Defendant has failed to overcome the presumption of effective assistance, and, given the vagueness of this argument, has not demonstrated that, even if counsel's performance was deficient, the errors were prejudicial.

III Prosecutorial Misconduct

Defendant also filed a standard 4 brief in which he raises additional arguments. First, he argues that the prosecutor committed misconduct by failing to disclose exculpatory evidence, improperly stating his personal opinion that defendant was guilty, and accusing defendant of threatening Revis to prevent him from testifying unfavorably to defendant. We disagree.

A. Standard of Review

In order to preserve the issue of prosecutorial misconduct, a defendant must raise a timely and specific objection. *People v Barber (Appeal After New Trial)*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Because defendant failed to object during trial, this issue is unpreserved. We review unpreserved allegations of prosecutorial misconduct for plain error. *Matuszak, supra* at 48. To avoid forfeiture under the plain error rule, defendant must show that an error occurred, the error was plain (clear and obvious), and the error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant bears the burden of showing actual prejudice, *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006), and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence, *Carines, supra* at 763-764.

B. Analysis

Defendant first alleges that the prosecutor committed misconduct by "attempt[ing] to mislead the witness Mr. Antonio Revis as well as the officers, and Judge by directing them toward an emotional response and away from consideration of his weak case." He also claims that the prosecutor attempted to "prejudice" the police witnesses and the judge against defendant "by injecting the element of fear into the trial." Defendant does not provide examples, and it is

not clear what he is arguing or whether this is intended as a distinct argument. “An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *Matuszak, supra* at 59 (change in *Matuszak*; citations and quotation omitted). “Such cursory treatment constitutes abandonment of the issue.” *Id.*

Second, defendant alleges that the prosecutor failed to disclose exculpatory evidence, the results of the gunshot residue test, in violation of *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1973). “A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant’s guilt.” *Cox, supra* at 448, citing *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994), citing *Brady, supra* at 87. “In order to establish a *Brady* violation, a defendant must prove: (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.*, citing *People v Lester*, 232 Mich App 262, 281; 591 NW 2d 267 (1998).

Defendant has failed to establish a *Brady* violation. First, he has failed to prove that the results of the gunshot residue were favorable to the defense. According to a document attached to defendant’s brief on appeal, the results of the test were positive, and defendant does not argue in his standard 4 brief that these purported results are inauthentic or inaccurate. Second, there is no indication that the prosecutor suppressed this evidence or that defendant could not have obtained it with reasonable diligence. At the end of the first day of trial, the court asked the parties if there was a stipulation to the results of the test. The prosecutor said he had not seen the results of the test and was trying to find out if it had been completed. Defense counsel said he would not stipulate to anything he had not seen. Thus, defendant was aware of the possibility that the test had been completed, and presumably could have obtained the results had he insisted on obtaining them before proceeding with trial. Also, the prosecutor would have had no reason to suppress the results, which amounted to further evidence that defendant shot Revis. Even if it would otherwise have been misconduct for the prosecutor to have had this evidence in his possession and not revealed it to the defense, defendant cannot establish a *Brady* violation in this case because he has not proven that the results were favorable to him.

Defendant also argues that the prosecutor improperly stated his personal belief that defendant was guilty. However, defendant cites the following comment, made by the prosecution during closing argument:

[Defendant] is on the scene shortly after a shooting, very close in time period, as the police officers are, in fact, looking for the person that was doing the shooting. They see [defendant] attempting to take someone’s car. Could we make an argument that it’s for the purpose of escaping or getting away from the scene of the shooting that he had just been involved in? One could make that argument. But I think the thing that’s most compelling is after [defendant] is taken into custody he is self-identifying. He, in fact, himself admits to the shooting, and it is not a custodial interrogation.

While a prosecutor may not express personal opinions about a defendant's guilt, *Matuszak, supra* at 56, a prosecutor "has a wide latitude in arguing the facts and reasonable inferences," and is "free to argue all reasonable inferences from [the evidence] as they relate to his or her theory of the case." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). In the instance cited by defendant, the prosecutor was simply arguing that the trier of fact could infer that defendant was the person who shot Revis from his presence in the area and his attempt to take someone's car. The prosecutor did not inject his personal belief that defendant was guilty. This was a proper closing argument.

Finally, defendant argues that the prosecutor improperly accused defendant of threatening Revis "to prevent unfavorable testimony." However, he cites a portion of the transcript in which defense counsel, not the prosecutor, was questioning a police witness. Because this argument is apparently the result of confusion on the part of defendant, we do not address it.

IV Additional Claims of Ineffective Assistance of Counsel

The second argument defendant raises in his standard 4 brief is that his trial counsel was ineffective for failing to obtain the data underlying the gunshot residue test, challenge the reliability of the test results, consult with an expert about the results of the gunshot residue test, or object to the instances of alleged prosecutorial misconduct already discussed. We disagree.

Defendant's arguments relating to the gunshot residue tests are based on a misunderstanding of what happened at trial. In his standard 4 brief, defendant states, "[a]t trial in the instant case, the prosecution offered opinion evidence from it's [sic] expert[] on the results of [the] gunshot residue test." However, the prosecution did not call any expert witness, and the results of the gunshot residue test were not admitted at trial. Nor were any witnesses questioned about those results. The results of this test were unknown to the court, the defense, and apparently also the prosecutor, until after trial.

Likewise, we find no merit in defendant's claims of prosecutorial misconduct. As already discussed, none of the instances cited by defendant amounted to error, so there was no ground for objection. Defense counsel was not required to raise a futile objection. *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007).

V Sufficiency of the Evidence

The third argument defendant raises in his standard 4 brief is that there was insufficient evidence to support his conviction of assault with intent to murder. We disagree.

A. Standard of Review

This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial. *People v Lanzo Construction Co*, 272 Mich App 470, 473; 726 NW2d 746 (2006). "In reviewing a challenge to the sufficiency of the evidence, this Court analyzes the evidence presented in the light most favorable to the prosecution to determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

B. Analysis

“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, 147-148; 703 NW2d 230 (2005) (citations and quotations omitted); MCL 750.83. Identity is an element of any criminal prosecution. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). “Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (citation and quotation omitted).

Defendant contests the sufficiency of the evidence identifying him as the person who shot Revis. However, the circumstantial evidence in the form of witness testimony was sufficient to identify defendant as the perpetrator of the shooting. At trial, a police officer testified that at approximately 1:45 or 2:00 a.m. on January 22, 2006, she and her partner responded to a police dispatch to the scene of a shooting at the Zoo Bar on Congress and Brush in Detroit. As they were looking between cars in the parking lot across from the Zoo Bar, the police officer heard a male voice behind her. When she turned around, she saw defendant, who met the description they had been given over the radio, trying to push his way into the driver’s seat of an occupied white vehicle. Defendant ran when he saw the police officers. The other police officer testified that he chased defendant on foot, and arrested him a few minutes later. The driver of the white vehicle also testified that he went to the Zoo Bar, but stayed in the parking lot. Around 1:40 or 1:45 a.m., he heard gunshots and saw people running. Then a man with blood on his face, who the driver identified at trial as defendant, approached and demanded the vehicle. The driver testified that when a police officer approached carrying a gun, and defendant ran away. A third police officer who took defendant to the hospital after his arrest, testified that he was instructed to do so because defendant had “scratches” on his face. He also said there was blood on defendant’s face.

In addition, one of the officers who took defendant to the hospital after he was arrested testified that, while they were in the police car, defendant said that Revis owed him \$10,000, and that he had “dealt with” Revis. Another police officer testified that, when Revis was brought into the hospital, defendant said that he had shot Revis, again said that Revis owed him \$10,000, and said Revis had better repay him before he died. Two other police officers who were also at the hospital testified that they heard defendant make similar statements.

Although the police officers' testimony about the description of the suspect contained slight inconsistencies,² there was sufficient evidence for a rational trier of fact to conclude that defendant was the person who fired the gun at Revis.

Affirmed.

/s/ Michael J. Talbot

/s/ Brian K. Zahra

/s/ Patrick M. Meter

² For instance, an officer who heard gunshots and came in contact with Revis shortly after he was shot, testified that he announced over the police radio that the suspect was a black male with a light complexion, approximately six feet tall, wearing a white leather coat. However, the police officer who testified that she saw defendant standing in a parking lot shortly after the shooting said that the description she heard over the radio was of a black male wearing a tan shirt, blue jeans, and no coat.