STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK PRESTON HARDIMAN,

Defendant-Appellant.

UNPUBLISHED
April 17, 2003

No. 232355
Kent Circuit Court
LC No. 00-001139-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HEATH LAMONT NELSON, a/k/a TYGERR,

Defendant-Appellant.

No. 232356
Kent Circuit Court
LC No. 00-001140-FC

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendants Mark Hardiman and Heath Nelson were tried jointly, before separate juries, for the shooting death of Larry Taylor, Jr., which occurred on December 21, 1998. Defendant Hardiman was convicted of first-degree premeditated murder, MCR 750.316, conspiracy to commit first-degree premeditated murder, MCR 750.157a, kidnapping, MCL 750.439, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as a fourth-offense habitual offender, MCL 769.12, to life imprisonment without parole for the first-degree murder conviction, to be served (1) concurrently with two concurrent terms of life imprisonment for the kidnapping and conspiracy convictions, and (2) consecutively to a two-year prison term for the felony-firearm conviction. Defendant Nelson was convicted of second-degree murder, MCL 750.317, and kidnapping, MCL 750.349, for which the trial court sentenced him to two concurrent prison terms of forty to sixty years each. Both defendants appeal as of right. We affirm.

In Docket No. 232355, Hardiman asserts five allegations of error. He first argues that the trial court abused its discretion by admitting evidence that a firearm was confiscated from

Hardiman's automobile on a prior occasion. We review a trial court's decision to admit evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The list of proper purposes set forth in MRE 404(b) is not exclusive. *People v Ortiz*, 249 Mich App 297, 305; 642 NW2d 417 (2001). Further, MRE 404(b) is a rule of inclusion. *People v Pesquera*, 244 Mich App 305, 317; 625 NW2d 407 (2001). The admission of relevant, other-acts evidence violates MRE 404(b) if the evidence is offered solely to show the criminal propensity of an individual to establish that he acted in conformity with that propensity. *Ortiz, supra* at 304. In *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), the Court clarified the test to be used to determine the admissibility of other bad-acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

In this case, the prosecutor articulated a proper, noncharacter purpose under MRE 404(b), specifically, that the evidence of the prior weapon explained a unique, identifying characteristic with respect to the evidence in this case. Moreover, the evidence of the prior weapon was logically relevant. MRE 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, witness Elijah Allen saw only one gun at the shooting scene, but the evidence showed that the victim sustained wounds from three different types of ammunition. The fact that the gun confiscated from Hardiman in October 1998 was loaded with different types of ammunition was a unique characteristic that helped to explain the physical evidence in this case and supported the prosecutor's theory that Hardiman was involved in the victim's shooting.

We further find that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence.

> The trial court may exclude the admissible evidence of other acts "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. [*People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).]

The evidence at issue was not confusing or cumulative, it did not result in undue delay, and its probative value was high. We simply cannot conclude that the probative value of the evidence was substantially outweighed under the MRE 403 balancing test. Moreover, we note that the trial court gave a limiting instruction on the use of the evidence. Under the circumstances, we conclude that the trial court did not abuse its discretion in admitting the evidence.

Hardiman next argues that his counsel rendered ineffective assistance of counsel by failing to present Keith Hopskin's testimony after promising the jury, in his opening statement, that it would hear Hopskin's testimony and by failing to determine that Keith Hopskin would invoke the Fifth Amendment at trial. In order to establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). This Court presumes the effective assistance of counsel, and a defendant bears a heavy burden of proving otherwise. *People v Charles Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000).

During opening statement, Hardiman's counsel outlined what he anticipated the jury would hear from Hopskin. On the ninth day of trial, however, defense counsel learned that Hopskin planned to plead the Fifth Amendment. Hopskin presented himself to the trial court, outside the presence of the jury, and indicated that, while he previously agreed to testify, he had changed his mind. After reviewing the situation, the trial court agreed that Hopskin was entitled to exercise his Fifth Amendment rights. Hardiman cannot establish that counsel's conduct with respect to Hopskin was ineffective. Before counsel made his opening statement, he interviewed Hopskin, who agreed to testify. Counsel's plan to call Hopskin to testify was a matter of trial strategy. See *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy nor will it assess counsel's competence with the benefit of hindsight." *Id.* Further, once the trial court determined that Hopskin was unavailable,[1] counsel could not call Hopskin as a witness. Thus, Hardiman's argument that counsel was ineffective for failing to present Hopskin as a witness has no merit. While Hopskin's decision late in trial may have hurt the defense, counsel was not responsible for this event. Moreover, there is no evidence that counsel could have anticipated this event.

Hardiman next argues that the trial court failed to enforce its discovery order, thereby denying him a fair trial. We disagree because this argument is based on a misunderstanding of the record. Contrary to Hardiman's suggestion on appeal, Hardiman's counsel did not receive the challenged telephone records on or after October 26, 2000, the day Shavone Braylock testified. Rather, the record reflects that Hardiman's counsel admitted that he received the telephone records on October 23, 2000, the day the jury was selected. He was clearly in possession of those records before he made his opening statement and before any testimony was received. The missing records that were referenced when Braylock testified were those related to a conviction in 61st District Court. Thus, there is no merit to the issue as briefed by Hardiman on appeal.

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[1] Hardiman does not challenge the trial court's determination that Hopskin was entitled to plead the Fifth Amendment or that he was unavailable.

Hardiman additionally argues that his cross-examination of two prosecution witnesses was improperly limited by the trial court. "Whether a trial court has properly limited cross-examination is reviewed for an abuse of discretion." *People v Minor,* 213 Mich App 682, 684; 541 NW2d 576 (1995). "The right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject." *People v Adamski,* 198 Mich App 133, 138; 497 NW2d 546 (1993). The trial court has wide latitude to impose reasonable limits on cross-examination based on various concerns, including harassment, prejudice, confusion, or interrogation that is repetitive or marginally relevant. *Id.* "Cross-examination may be denied with respect to collateral matters bearing only on general credibility . . . as well as on irrelevant issues." *People v Canter,* 197 Mich App 550, 564; 496 NW2d 336 (1992).

Hardiman's argument that his cross-examination of Allen was improperly limited has no merit. The record does not indicate that Hardiman was precluded from examining Allen about his motives for testifying or about any deals that he may have tried to obtain in exchange for his testimony. The context makes clear that counsel was instead prohibited from exploring issues covered by the attorney-client privilege between Allen and his attorney, who represented him on another matter. Moreover, we note that Hardiman has not articulated how cross-examining Allen about conversations with his attorney would have revealed any relevant information. Our review of the record demonstrates that any information gained by such cross-examination would have been, at best, marginally relevant to Allen's credibility. We disagree with Hardiman's claim that the trial court improperly limited cross-examination.

Similarly, we find no improper limitation on Hardiman's cross-examination of Lashonda Taylor, the victim's sister. The trial court did not prohibit Hardiman from asking Lashonda whether the victim and Hardiman were roommates in 1994 or 1995. Instead, it indicated that if the question were asked, the door would be opened for the prosecutor to explore the context in which the men were roommates. Hardiman's counsel thereafter refrained from asking the question. The trial court's ruling was not an abuse of discretion.

Finally, Hardiman argues on appeal that he was denied a fair trial because of repeated instances of prosecutorial misconduct. We disagree.

Hardiman objected when the prosecutor began his rebuttal argument by referring to the victim's family. Hardiman argued that the prosecutor was appealing to the jurors' sympathy. The trial court sustained the objection. We disagree with Hardiman's claim that the prosecutor's comment immediately following the trial court's ruling constituted an improper plea for juror sympathy that requires reversal. While the comment appealed to the jurors' sympathy in an offhand manner, the argument was not a blatant appeal for sympathy. Further, the argument was not so inflammatory that it prejudiced Hardiman. Under the circumstances, any error could have been cured by a cautionary instruction. See *People v Mayhew,* 236 Mich App 112, 123; 600 NW2d 370 (1999). Hardiman has not demonstrated that the comment at issue constituted plain error requiring reversal. *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001); *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Hardiman next argues that the prosecutor improperly denigrated defense counsel and made an improper civic duty argument in his rebuttal remarks. Because Hardiman failed to object to the allegedly improper remarks, we review this issue for plain error. *Aldrich, supra* at

110. An improper civic duty argument injects into trial issues broader than the guilt or innocence of a defendant or encourages the jurors to suspend their powers of judgment. *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996). It appeals to the jurors' sense of civic duty to urge them to convict the defendant or improperly plays upon their general fears and prejudices. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Our review of the challenged remarks reveals that the prosecutor did not inject issues broader than the guilt or innocence of Hardiman and did not appeal to the fears or prejudices of the jury. Because the prosecutor did not make an improper civic duty argument, no plain error occurred.

We find, however, that certain of the prosecutor's comments did denigrate Hardiman's counsel in some respect. The comments at issue, referring to Hardiman's counsel as "having a little bit of carnival in him" and being "a little bit of slighted hand," among others, were not supported by the evidence or reasonable inferences drawn from the evidence. Nevertheless, we do not believe that the comments require reversal. Indeed, Hardiman has not demonstrated that the comments affected the outcome of the case. The jury was instructed that the attorneys' arguments were not evidence. Moreover, "a well-tried, vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged . . . ." *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). This unpreserved issue does not warrant reversal.

Finally, we disagree with Hardiman that the cumulative effect of the prosecutor's misconduct denied him a fair trial. The cumulative effect of several minor errors may warrant reversal in some cases even if the individual errors in the case would not warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). In order for reversal to be warranted on the basis of cumulative error, the errors at issue must be of consequence. *Id.* In this case, the instances of arguably questionable argument by the prosecutor were not errors of consequence, and reversal is unwarranted.

In Docket No. 232356, defendant Nelson argues that his trial attorney rendered ineffective assistance of counsel. Our review of this issue is limited to errors apparent on the record because no evidentiary hearing was held. *People v Walter Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Nelson first argues that the prosecutor improperly vouched for witness George Weaver's credibility and that counsel was ineffective for failing to object. We disagree. The introduction of testimony that a witness made an agreement that includes a promise of truthfulness is not erroneous unless "used by the prosecutor to suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Rodriguez*, 251 Mich App 10, 33; 650 NW2d 96 (2002). In *People v Turner*, 213 Mich App 558, 584-585; 540 NW2d 728 (1995), overruled in part on other grounds by *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001), this Court stated:

> Defendant Hall first argues that he was denied a fair trial because the prosecutor improperly bolstered Whitty's credibility by eliciting testimony regarding his promise to give truthful testimony as a term of his plea bargain. We disagree. As in *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995), the questioning did not convey a message to the jury that the prosecutor had some special knowledge or facts indicating the witness' truthfulness.

In *Bahoda, supra,* at 276, the Court stated:

> Generally, "[b]y calling a witness who testified pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness' veracity." *United States v Creamer,* 555 F2d 612, 617-618 (CA 7, 1977).

Here, the prosecutor's questioning did not convey to the jury that the prosecutor had special knowledge of Weaver's truthfulness. It revealed only that Weaver's deal included a promise of truthfulness. We therefore reject Nelson's claim that the prosecutor engaged in improper vouching. Because any objection on that basis would have failed, counsel was not ineffective for failing to object. See *People v Torres (On Remand),* 222 Mich App 411, 425; 564 NW2d 149 (1997).

We also disagree with Nelson's claim that counsel erred by failing to object to testimony that Nelson hung his head when asked about the crime. Witness Howard Mayfield testified that Nelson admitted shooting the victim but claimed it was an accident. Mayfield then asked Nelson why a second shot was fired. According to Mayfield, when he asked Nelson about the second shot, Nelson "just put his head down." Nelson argues that this testimony was improper because the prosecutor used it as a tacit admission of guilt, contrary to *People v Bigge,* 288 Mich 417; 285 NW 5 (1939).

In *Bigge,* the Court ruled that tacit admissions conveyed by silence may not be used as substantive evidence of a defendant's guilt. See *People v Hackett,* 460 Mich 202, 212; 596 NW2d 107 (1999). The application of the *Bigge* rule is "limited to tacit admissions, in the form of a defendant's failure to deny an accusation." *Id.* at 214-215. Silence that does not occur in the face of an accusation does not implicate the *Bigge* rule. *Id.* at 215. In *People v Schollaert,* 194 Mich App 158, 167; 486 NW2d 312 (1992), this Court stated:

> The rule in *Bigge* precludes the admission of evidence of a defendant's failure to say anything in the face of an accusation as an adoptive or tacit admission of the truthfulness of the accusation . . . In the present case, defendant's failure to question the presence of the deputies at his home at 3:30 a.m. was not allowed into evidence as a tacit admission of any accusation. Rather, defendant's demeanor was admitted as substantive evidence that was relevant to a determination of defendant's guilty knowledge. We find no error.

In this case, Nelson's conduct of hanging his head did not occur in the face of an accusation. Mayfield did not accuse Nelson of anything but simply made an inquiry about a second shot. Nelson's silence cannot be construed as tacitly adopting any statement or accusation. Further, the evidence of Nelson's conduct when asked about a second shot was relevant to impeach Nelson's claim to Mayfield that the shooting was accidental. Under the circumstances, the prosecutor did not improperly use Nelson's silence in the face of an accusation as substantive evidence against him. Thus, Nelson's counsel had no basis for objecting to the testimony. *Torres, supra* at 425.

Finally, we find no merit to Nelson's argument that his counsel rendered ineffective assistance by failing to impeach two prosecution witnesses with their prior convictions for providing false information to the police. Counsel's decision whether to impeach the witnesses with their prior convictions was a matter of trial strategy. See, generally, *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). This Court does not ordinarily second-guess counsel on matters of trial strategy. *Charles Williams, supra* at 331-332.

The record reveals that Nelson's counsel conducted a thorough and extensive cross-examinations of each of the witnesses at issue. Some of their testimony was helpful to Nelson's case, including testimony about Nelson's demeanor after the crime. Nelson's counsel may have strategically decided not to impeach the witnesses with general information that they were convicted of giving false information to the police. He also may have determined that cross-examination on specific discrepancies was more effective. We will not second-guess counsel's decision not to impeach the witnesses with their prior convictions for giving false testimony to the police. Moreover, we cannot conclude that the failure to impeach the witnesses with their prior convictions affected the outcome of the case. See *Stanaway, supra* at 687-688.

Affirmed.

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Pat M. Donofrio