

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD CHARLES, a/k/a DONALD CHILDS,

Defendant-Appellant.

UNPUBLISHED

February 3, 2005

No. 252031

Wayne Circuit Court

LC No. 03-008352-01

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault with intent to commit murder, MCL 750.83; felonious assault, MCL 750.82; possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. He was sentenced to concurrent terms of 23 years and 9 months to 50 years in prison for the assault with intent to commit murder conviction, 1 to 4 years for the felonious assault conviction, and 1 to 5 years for the felon in possession conviction, to run consecutive to a 5 year term for the felony-firearm conviction. We affirm.

I. Underlying Facts

Defendant's convictions arise from his shooting of the victim outside the victim's home on the afternoon of June 21, 2003. The victim and defendant attended the same church. The victim was the church treasurer, and chairman of the board of trustees. Defendant worked as the pastor's bodyguard, and also worked at a carwash owned by the church. In March or April 2003, the victim discovered financial misconduct by the pastor, including use of church funds to gamble. In May 2003, a civil lawsuit was filed against the pastor. On the morning of June 21, 2003, the victim and the pastor attended a trustee board meeting, during which the board took the church's credit card and vehicle from the pastor. The meeting ended at 1:00 p.m. The victim testified that the pastor was "really upset."

At approximately 2:00 p.m., the victim returned home and was sitting on his front porch talking on his cell phone when he saw defendant walking down the street, toward his house. The victim wondered why defendant was "in his neighborhood." When defendant reached the end of the victim's driveway, he "reached behind his back[,] pulled out an automatic pistol," pointed it at the victim, and fired several bullets at the victim while running toward him. The victim was shot in his finger and thigh before escaping into his garage. The victim, who has one prosthetic eye, testified that he was absolutely certain that defendant was the shooter, and that he saw his

face “real good.” The victim explained, “I know him. I have seen him before and anybody walk that close upon me, ain’t no way for me not to know who they are if I know them at all.” The victim testified that, when he came outside after the shooting, a few of his neighbors, including Cleophus Pye, were outside.

Pye, who lived near the victim, testified that he saw defendant running from the crime scene. He indicated that, after he heard gunshots, his neighbor pointed in the general direction of the victim’s house. Pye then saw defendant, who walked between him and a neighbor, stepped into the street, “stopped, turned to [Pye] and made a motion to his waist[band]” before leaving.

II. Prosecutorial Misconduct

Defendant first argues that the prosecutor engaged in misconduct by withholding evidence in violation of the rule set out in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and by vouching for the credibility of the victim. We disagree.

Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied his right to a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor’s conduct below, we review his unpreserved claims for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000) abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Schutte*, *supra* at 721.

Defendant claims that the prosecutor violated *Brady*, *supra*, by withholding the information that Pye could identify him. Defendant contends that, in a statement made to the police in September 2003, Pye did not indicate that he could identify defendant as the man he saw leaving the scene, but, rather, indicated that he could only identify the perpetrator’s clothing. When the parties appeared in court for trial on October 2, 2003, the trial court granted defense counsel’s motion to adjourn. According to Pye, while sitting in the courtroom on that day, he told the prosecutor that defendant was the man he saw running from the scene. On October 7, 2003, defense counsel interviewed Pye, but Pye did not tell her that he could identify defendant. Pye indicated that, when giving his initial statement to the police, he was not asked if he could identify defendant, but was only asked to describe him. Pye denied that he indicated that he could only identify the perpetrator’s clothing.

“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), citing *Brady*, *supra*. “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.” *Lester*, *supra* at 281-282.

Defendant has not established a *Brady* violation. Initially, we note that defendant does not claim that he was unaware that Pye was going to be called as a witness, and acknowledges

that defense counsel had an opportunity to interview Pye before he testified. Further, Pye identified defendant as the man he saw leaving the crime scene, and indicated that, as defendant was fleeing, he made a seemingly threatening gesture toward him. Therefore, the allegedly withheld evidence was not favorable to defendant. Moreover, although defendant speculates and makes general observations concerning how the receipt of such information may have affected his defense strategy and the outcome of the case, he makes no specific claims regarding the *actual* effect. Defendant has not demonstrated plain error affecting his substantial rights; therefore, he is not entitled to relief on this unpreserved issue.

We also reject defendant's claim that he is entitled to a new trial because the prosecutor vouched for the victim during rebuttal when he stated, "[the victim] could see, he knows what he saw." While "[a] prosecutor is prohibited from vouching for a witness' credibility or suggesting that the government has some special knowledge that a witness will testify truthfully," *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), "[o]therwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Schutte, supra* at 721. Viewed in context, the challenged remarks were plainly focused on refuting defense counsel's suggestion made during closing argument that, because the victim does not have good vision, he did not have the ability to identify defendant from a distance of twenty-five feet. Before making the challenged remarks, the prosecutor told the jury to rely on their memory of the victim's testimony and to recall that the victim's vision was sufficient to drive an automobile, and was likewise adequate to identify defendant. Further, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* Additionally, to the extent that any of the challenged remarks could be viewed as improper, the trial court's instructions that the jurors were the sole judges of the witnesses' credibility and that the lawyers' comments were not evidence was sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Defendant has failed to demonstrate plain error affecting his substantial rights; therefore, he is not entitled to relief on this unpreserved issue.

III. Juror Misconduct

Next, defendant argues that the trial court's refusal to remove a juror who knew witness Pye denied him of his due process right to a fair and impartial trial. We disagree. A trial court's decision whether to remove a juror is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Id.*

On the second day of trial, after two witnesses had testified and Pye was called to testify, a juror advised the trial court that he knew Pye. The trial court questioned Pye outside the presence of the jury, and Pye stated that he knew the juror "from somewhere," and that the juror looked familiar. The juror stated that he and Pye were not friends and did not socialize, but that they attended the same Alcoholics Anonymous meetings. The juror did not know Pye's last name. In response to the trial court's inquiries, the juror stated that he had not formed any opinion concerning Pye's truthfulness, could assess his credibility, could render a verdict based solely on the evidence, and would not consider any outside matters when deliberating. After the juror stated that he could be fair and impartial, the trial court denied defendant's request to remove the juror.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20. *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). However, “due process does not require a new trial every time a juror has been placed in a potentially compromising situation.” *People v Grove*, 455 Mich 439, 472; 566 NW2d 547 (1997), quoting *Smith v Phillips*, 455 US 209, 217; 102 S Ct 940; 71 L Ed 2d 78 (1982). “[I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it.” *Grove, supra* at 472, quoting *Smith, supra* at 217.

Here, the juror and Pye were mere acquaintances. The juror assured the trial court that he could be impartial and deliberate based on the evidence, and that the fact that he knew the witness would not affect his decision. Therefore, defendant received the due process to which he was entitled, i.e., a jury capable and willing to decide the case solely on the evidence before it. *Grove, supra* at 472. Moreover, defendant is entitled to a fair trial, not a perfect one. *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). We are not convinced that the nature of the juror’s relationship with Pye denied defendant a fair and impartial jury, and the trial court did not abuse its discretion in refusing to excuse the juror.

IV. Effective Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to call an eyewitness identification expert, and for failing to object to the prosecutor’s alleged misconduct discussed in part II. We disagree. Because defendant failed to move for a new trial or for a *Ginther*¹ hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). “In order to overcome this presumption, defendant must first 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.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* at 663-664. “The defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy,” and “this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant argues that defense counsel was ineffective for failing to call an identification expert to attack the victim’s and Pye’s identification of him, because identity was a critical issue at trial. Initially, we note that defense counsel’s determination whether to present an expert witness “is presumed to be a strategic one for which this Court will not substitute its judgment.” *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

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

Here, the victim testified that he knew defendant before the crime, and was positive that defendant was the perpetrator. Regarding his poor vision in one eye, the victim testified that he had been driving effectively since he developed the problem with his eye in 1975. Further, the incident occurred during the day and, at one point, defendant was only 10 to 12 feet from the victim. Regarding Pye's identification, defendant walked directly past him, stopped, turned toward him, and made a gesture before leaving. Thus, Pye had an adequate opportunity to view defendant in the daylight.

A review of the record reveals that rather than call an eyewitness expert to testify, defense counsel attempted to undermine the credibility of the victim's and Pye's identification of defendant by attacking them on cross-examination and during closing argument. Specifically, defense counsel questioned the victim at length regarding his identification, including his lack of vision in one eye, and the traumatic and transitory conditions under which he saw the perpetrator. She also questioned Pye regarding his failure to initially indicate that he could identify defendant. Defense counsel also presented the testimony of a police officer who confirmed that Pye stated that he could only identify the perpetrator's clothing. During closing argument, defense counsel again addressed the weaknesses in the victim's identification, and reiterated the discrepancy in Pye's delayed identification of defendant.

We find that defense counsel acted reasonably when she cross-examined the victim and Pye regarding the circumstances surrounding their identification of defendant. Further, defendant has not overcome the strong presumption that counsel employed a sound trial strategy to forego "perhaps lengthy expert testimony that [the jury] may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

We also reject defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct. In light of our determination in part II that defendant's allegations of prosecutorial misconduct lack merit, defense counsel's failure to object did not deprive him of the effective assistance of counsel. *Matuszak*, *supra* at 58.

Defendant has not overcome the presumption that he received the effective assistance of counsel; therefore, he is not entitled to relief on this basis.

V. Cumulative Error Theory

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

We affirm.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra