

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE MCKAY,

Defendant-Appellant.

UNPUBLISHED

February 15, 2005

No. 251889

Wayne Circuit Court

LC No. 03-008753-01

Before: Wilder, P.J., and Sawyer and White, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of two years' imprisonment for the felony-firearm conviction and life imprisonment for the murder conviction. He appeals as of right. We affirm.

Defendant argues that the trial court abused its discretion in denying his motion for an adjournment in order to retain new counsel. We disagree.

A trial court's denial of a motion for a continuance to retain new counsel is reviewed for an abuse of discretion. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). An abuse of discretion involves more than a difference of judicial opinion; it occurs only when the result is so violative of fact and logic that it evidences not the exercise of will, but perversity of will; not the exercise of judgment, but the defiance of judgment; not the exercise of reason, but rather the exercise of passion or bias. *Id.*

Although the Sixth Amendment guarantees a defendant the right to retain counsel of his choice, that right is not absolute. *Akins, supra* at 557. In determining whether defendant's right to choose his own attorney has been violated, this Court must balance that right against the public's interest in the prompt and efficient administration of justice. *Id.* This Court should consider (1) whether defendant is asserting a constitutional right, (2) whether defendant had a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether defendant was negligent in asserting the right, (4) whether defendant had requested previous adjournments or was merely attempting to delay the trial, and (5) whether defendant was prejudiced. *Id.*

Although defendant was asserting the constitutional right to be represented by counsel of his choice, he did not appear to have a legitimate reason for wanting to replace his appointed attorney, and he was negligent in waiting until the day of trial to raise the issue. Although defendant questioned his attorney's preparation, counsel advised the court that he had met with defendant on several occasions, had examined the discovery package, and read and reviewed the witness statements with defendant, and was prepared to proceed with trial. The case was straightforward, involving only one defendant and a few eyewitnesses. The trial court did not abuse its discretion in denying defendant's motion for an adjournment.

Additionally, defendant has not demonstrated any resulting prejudice. The evidence against defendant was clear and overwhelming. Witnesses saw defendant with a gun, heard him threaten to kill someone, saw him point a gun at the victim's head, heard gunshots, and saw defendant run away, holding a handgun, saying that he had just killed someone. Defendant does not indicate how defense counsel's preparation was deficient, what a new attorney could have done differently, or what evidence a new attorney could have presented that might have made a difference in the outcome. Therefore, the trial court's denial of defendant's motion for an adjournment does not warrant a new trial.

Defendant next argues that the prosecutor committed misconduct during closing argument. We disagree.

Claims of prosecutorial misconduct are reviewed case by case, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and ns 5-7; 531 NW2d 659 (1995). Here, however, defendant failed to object to the alleged misconduct. Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is not warranted if a curative instruction could have eliminated any possible prejudice. *Noble, supra* at 660.

As argued by defendant, "[a] prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Similarly, a "prosecutor may not place the prestige of his office behind the assertion that the defendant is guilty," *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988), and may not denigrate defense counsel, *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). It is also improper for the prosecutor to inject issues broader than the defendant's guilt or innocence. See *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

In the present case, the prosecutor's closing remarks were not improper. Rather, the prosecutor argued that the evidence was very strong and that it showed that defendant was guilty of the charged offenses beyond a reasonable doubt. The prosecutor's remarks were made in reference to the evidence and, therefore, were not improper. See *Swartz, supra* at 371; see also *Howard, supra* at 548. Thus, there was no plain error.

Lastly defendant argues that defense counsel was ineffective by failing to adequately prepare for trial and by failing to object to the prosecutor's closing argument. We disagree.

Because defendant did not raise this issue in a motion for a *Ginther*¹ hearing or a new trial, our review of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he or she was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id.* at 312, 314. To establish prejudice, defendant must show that the error might have made a difference in the outcome of the trial. *Id.* at 312, 314.

“Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy.” *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Although lack of adequate trial preparation can constitute ineffective assistance of counsel, see *People v Dixon*, 263 Mich App 393, 396-397; 688 NW2d 308 (2004), here it is not apparent from the record that trial counsel was not prepared. On the contrary, at the hearing on defendant's request for an adjournment to obtain new counsel, trial counsel informed the court that he had met with defendant on several occasions, had examined the discovery package, and read and reviewed the witness statements with defendant, and was prepared to proceed with trial. Further, defendant does not indicate what witnesses or evidence counsel neglected to present that might have made a difference to the outcome. For these reasons, it is not apparent that counsel's trial preparation was deficient.

Additionally, as previously discussed, there is no merit to defendant's claim of prosecutorial misconduct. Therefore, counsel was not ineffective for failing to object to the prosecutor's closing argument. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Affirmed.

/s/ Kurtis T. Wilder
/s/ David H. Sawyer
/s/ Helene N. White

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