STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2013
v	No. 299876 Wayne Circuit Court
DARRYL DOMINIC BULLARD, Defendant-Appellant.	LC No. 09-030600-FC

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

PER CURIAM.

A jury convicted defendant Darryl Dominic Bullard of second-degree murder, MCL 750.317,[1] felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, for the shooting death of Mario Baker. The prosecution presented significant evidence that defendant committed the charged offenses and defendant has presented no viable claim that his trial was so tainted or procedurally flawed that his convictions must be overturned. We therefore affirm.

Defendant's convictions arise from the October 29, 2006 shooting death of Mario Baker. Defendant was upset with Baker and Terrence Young for not assisting his friend, Tommie Brent, during a bar fight earlier in the evening. While Baker was inside his black Monte Carlo talking to a group of people who had gathered on Euclid Street in Detroit, defendant drove up next to Baker, got out of his vehicle, and repeatedly fired a handgun into Baker's car. Young was the passenger in Baker's vehicle at the time. He was able to escape on foot when the shooting started. Someone shot and killed Young later that night, but defendant was not charged with that offense. Baker received fatal gunshot wounds but did not die immediately. An unidentified person drove the Monte Carlo to an alley and left Baker there to die.

The prosecution's primary witness, Tony Perry, identified defendant as the person who shot Baker. Helen Taylor testified that she heard Perry tell others shortly after the shooting that defendant was the shooter. However, two defense witnesses identified Perry as the shooter.

[1] The jury acquitted defendant of the greater charge of first-degree premeditated murder, MCL 750.316(1)(a).

Defendant also produced two alibi witnesses who testified that defendant was with them at the time of the shooting.

I. WITNESS COERCION

Defendant contends that the prosecutor improperly coerced Taylor's testimony that she heard others discussing defendant's reasons for shooting Baker. Specifically, defendant asserts that the prosecutor coerced Taylor to testify in accordance with the prosecution theory by threatening Taylor at a prior investigative subpoena hearing that she could be charged with perjury if she testified falsely. Defendant also challenges defense counsel's failure to raise a contemporaneous objection on this ground at trial. Because defendant failed to object to Taylor's testimony at trial on this basis, his prosecutorial misconduct claim is unpreserved, *People v Nantelle*, 215 Mich App 77, 86; 544 NW2d 667 (1996), and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant did not raise his ineffective assistance claim until he requested that this Court remand for an evidentiary hearing. This Court denied his motion and our review is therefore limited to mistakes apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

At trial, the prosecutor used a transcript from the investigative subpoena proceeding to refresh Taylor's memory about what she had heard on the night of the shooting. Before reviewing the transcript, Taylor claimed that she only overheard that Baker had been shot. After her review, Taylor admitted that she had heard others, including Perry, discussing that defendant had shot Baker and talking about the type of car that defendant drove. Defendant now argues that the transcript of the investigative subpoena proceeding shows that Taylor was coerced into giving that testimony because she was threatened with perjury.

Initially, we disagree with the prosecutor's argument that defendant lacks standing to raise this issue because it only implicates Taylor's personal rights. Defendant is not attempting to assert Taylor's rights, but rather is arguing that the prosecutor's conduct toward Taylor affected defendant's own right to a fair trial because it resulted in the use of Taylor's coerced testimony to obtain a conviction. As defendant is arguing that prosecutorial misconduct related to the use of Taylor's testimony affected him personally, defendant has standing to pursue this issue. See *People v Yeoman*, 218 Mich App 406, 420; 554 NW2d 577 (1996) (to have standing, one must have a legally protected interest that differs from the interest of the citizenry at large and be in jeopardy of being adversely affected).

Nonetheless, the record does not support defendant's claim that the prosecutor coerced Taylor's testimony. At the investigative subpoena hearing, the prosecutor began Taylor's questioning by informing her that she had the right to an attorney and the right to invoke her Fifth Amendment privilege against self-incrimination. The prosecutor also confirmed Taylor's understanding that she was required to appear because of the subpoena and had a duty to "testify truthfully." The prosecutor continued:

> And you understand that this being testimony under oath, you are subject to the penalty of perjury if you do testify falsely, that charges could be brought against you on the basis of perjury by this office and we could prosecute those

charges, and for a homicide investigation, the penalty for perjury is the same as the underlying crime, which would be life. Do you understand that?

* * *

Okay. So it's very important that you tell us the truth about everything that you know, because, you know, we have information that even though you may not have been a direct eyewitness, you have some information about this homicide.

In *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003), this Court explained:

> The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial. The Michigan Supreme Court and this Court have strongly condemned prosecutorial intimidation of witnesses. Attempts by the prosecution to intimidate witnesses from testifying, if successful, amount to a denial of a defendant's constitutional right to due process of law. [Citations omitted.]

The record discloses that the prosecutor did not threaten Taylor with perjury if she failed to testify in a particular manner. The prosecutor merely informed Taylor, before she testified, regarding the consequences of testifying falsely and urged her to testify truthfully. The prosecutor's comments were informative, not coercive or threatening. Such conduct is insufficient to establish coercion. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999) (*Layher I*), aff'd 464 Mich 756 (2001).

Counsel was not ineffective for failing to object on this ground at trial. To establish ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant" that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant "must overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). As the prosecutor's comments at the investigative subpoena hearing were not coercive or threatening, any such objection would have been futile. Counsel could not be considered ineffective for failing to object. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

II. THREATS AGAINST WITNESSES

Defendant argues that defense counsel was ineffective for not objecting to testimony about threats against prosecution witnesses. Defendant primarily challenges Perry's testimony that he had been threatened by different people, including a person named Thomas, because he had spoken to the police. Defendant also challenges defense counsel's failure to object when the prosecutor elicited testimony from Detroit police sergeant Gerald Williams that another subpoenaed witness had attended court proceedings the week before but had disappeared by the

day of his scheduled testimony. Defendant contends that this testimony was inadmissible because there was no evidence linking him to the threats.

A defendant's threats against a witness may be relevant and admissible to show consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). They may also be relevant to explain why a witness was afraid to speak to law enforcement or to testify at trial. *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Here, Perry admitted that he did not immediately come forward to give a statement about the shooting he witnessed because he "was scared." Over time, Perry gave four separate statements to the police, each including more detailed information. Perry testified that other people from his neighborhood made him feel unsafe because he was cooperating with the police:

> *Q.* The other people that were with you, did anybody give you a hard time about coop—any of your friends, tell you hey, man, why you talking to the police?
>
> *A.* Yes.
>
> *Q.* Who were the people that said that to you?
>
> *A.* Majority, all of 'em.
>
> * * *
>
> *A.* I still get threats now, you know.
>
> *Q.* Okay. Who are you getting threats from?
>
> *A.* A lot of people. Like, him, right there. Black shirt.
>
> *Q.* Do you know who he is?
>
> *A.* Yeah, his name is Thomas.
>
> * * *
>
> *Q.* Do you know who, who is he affiliated with?
>
> *A.* "Boo-Boo" [defendant].
>
> * * *
>
> *Q.* What has he said to you?
>
> *A.* Just like, "kill yourself, you a rat." You showed up on the stand and testify [sic] on somebody you grew up with, you know, just [] threats, you know.
>
> * * *

Q. . . . Did you tell Sergeant Williams and others that you weren't gonna testify?

A. Yes, 'cause I was scared.

Any objection by defense counsel would have been futile as Perry's testimony was relevant and admissible. Perry testified that defendant was affiliated with Thomas, thereby establishing a connection between the threats and defendant. Furthermore, the threats, even if not directly connected to defendant, were independently admissible to explain why Perry was not fully cooperative with the police and were probative of the credibility of his testimony.

We also reject defendant's challenge to Sergeant Williams's testimony regarding potential threats against prosecution witnesses. On direct examination, Williams testified that Perry told him that he did not want to testify because "He was scared. He didn't want to be considered a snitch in the neighborhood[.]" On cross-examination by defense counsel, Williams testified that he last saw listed prosecution witness Willie Govan in court the week before. Apparently, Govan's version of events conflicted with Perry, but Williams had not confronted Govan about those differences. Williams testified that he did not do so because "Willie Govan refused to talk to me." The prosecutor recalled Williams to the stand as a rebuttal witness. At that time, the sergeant testified that Govan had appeared in court the week before pursuant to a subpoena. Williams testified that he saw Govan talking with some individuals "associated with the Defendant" in the elevator. The court had directed Govan to appear in court the following day, but he did not do so. Williams went to the home of Helen Taylor, Govan's girlfriend, that evening. Taylor told the sergeant that Govan had packed his belongings during the night while she slept and disappeared without a word.

Defense counsel's strategy was to argue that Govan was connected with Perry, the individual whom defendant blamed for Baker's murder. In closing argument, defense counsel suggested that Govan was the person who chased down Young and killed him in an alley after Baker's murder. Rather than trying to bury the fact of Govan's absence, counsel elicited testimony that Govan fled town so he could not be forced to testify. Counsel implied that Govan did not want to testify because he might incriminate himself. Based on this strategy, defense counsel had no reason to object to the prosecutor's line of questioning; any successful objection would limit defendant's ability to use the evidence to his advantage. Moreover, Sergeant Williams's testimony did not reveal any evidence of direct threats by defendant against Govan or indirect threats by his associates. Williams testified only that there appeared to be some communication to Govan by people associated with defendant before he disappeared. Counsel simply was not ineffective for failing to object.

III. EVIDENCE OF DEFENDANT'S PRIOR DRUG ACTIVITY

Defendant challenges defense counsel's failure to move for a mistrial after Sergeant Williams testified, on cross-examination by defense counsel, that defendant was previously arrested for a narcotics offense, and for then eliciting from a defense witness that defendant had been "picked up by the police for drug cases." Again, our review of this unpreserved challenge is limited to errors apparent from the record. *Matuszak*, 263 Mich App at 48.

On cross-examination of Sergeant Williams, defense counsel questioned when the officers actually arrested defendant. Williams indicated that defendant had been "arrested for this [case] in November or December" of 2009. Defense counsel continued, "And he wasn't arrested on this case or any other time; is that what you're saying?" Williams responded, "He was locked up for narcotics," but denied that defendant had previously been arrested in relation to Baker's shooting.

On direct examination of defense witness Cleotha Maddox, defendant's girlfriend, defense counsel asked her "did there come a point in time where [defendant] was arrested for the case he's in front of the court for now?" Maddox replied, "Yeah, he's been arrested a few times." When defense counsel tried to clarify, Maddox stated, "He been arrested for drugs." Maddox then indicated that defendant was arrested on drug charges in 2007 and that homicide detectives interviewed him at that time regarding the Baker/Young shootings.

As noted, the challenged testimony was elicited by defense counsel. "Decisions regarding what evidence to present and whether to call or question witnesses 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). A defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id*. Defendant has not overcome that presumption. Defense counsel likely elicited evidence of defendant's prior drug arrests to explain law enforcement's difficulty in tracking defendant down—suggesting that defendant did not evade capture to avoid the murder charge but to avoid further controlled-substance-related arrests.

Further, counsel had a reasonable basis to believe that defendant would not be unduly prejudiced by this information. The court had already notified the jury that defendant had at least one prior felony conviction based on defendant's stipulation to that element of the felon-in-possession charge. The trial court protected defendant's rights by instructing the jury that it could not consider the evidence of defendant's other criminal activity to conclude that defendant is a bad person likely to commit crimes.

In sum, because the record discloses that defense counsel elicited the challenged testimony as a matter of trial strategy and defendant was not prejudiced by the testimony, this ineffective assistance of counsel claim lacks merit.

IV. DEFENDANT'S STANDARD 4 BRIEF

Defendant raises several additional issues in a *pro se* supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which warrant relief.

A. INEFFECTIVE ASSISTANCE OF COUNSEL – ARREST WARRANT

Defendant argues that defense counsel was ineffective for not moving to suppress the arrest warrant on the ground that it was not supported by probable cause. Our review of this issue is limited to errors apparent from the record. *Matuszak*, 263 Mich App at 48.

Probable cause to issue an arrest warrant may be based on factual allegations showing the commission of an offense and "reasonable cause to believe that the individual accused in the

complaint committed that offense." *People v Hill*, 282 Mich App 538, 543-544; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009), quoting MCL 764.1a. The affidavit in support of defendant's arrest warrant indicated that Perry witnessed defendant shoot Baker. These allegations provided reasonable cause to believe that a shooting had occurred and defendant was responsible, thereby providing probable cause for defendant's arrest. Defendant blames defense counsel's inadequate pretrial investigation for counsel's decision not to move to quash the arrest warrant. In support of this argument, defendant cites only the conflicting witness accounts of the shooting. Such credibility questions are for the jury. They do not affect the validity of the arrest warrant. Thus, there is no merit to defendant's argument that defense counsel was ineffective in failing to move to quash the arrest warrant.

B. JUROR MISCONDUCT

Defendant argues that he is entitled to a new trial because the trial court failed to sufficiently investigate a juror's misconduct. Because defendant never objected to the trial court's handling of the situation or requested that the court conduct any further investigation, this issue is not preserved. Therefore, our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

During trial, Juror No. 9 informed the court that Juror No. 14 had approached and spoke to him about her impressions of the case. The trial court investigated the matter by individually questioning Juror No. 9 and Juror No. 14. Juror No. 9 revealed that Juror No. 14 had approached him in a parking lot and again when Juror No. 9 was returning from lunch. According to Juror No. 9, Juror No. 14 stated her belief that defendant was only a drug dealer and was innocent of the charged crimes. After Juror No. 14 admitted the contacts and discussions with Juror No. 9, the parties agreed that Juror No. 14 should be dismissed. The trial court therefore removed Juror No. 14 and she did not participate in deliberations. Defendant now argues that the trial court should have conducted further investigation to determine whether other jurors were improperly influenced by Juror No. 14's comments.

> The United States and Michigan Constitutions guarantee a criminal defendant a fair trial by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. The trial court must take appropriate steps to ensure that jurors will not be exposed to information or influences that could affect their ability to render an impartial verdict based on the evidence admitted in court. MCR 6.414(B). 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); see also [*People v Miller*, 482 Mich 540, 558-559; 759 NW2d 850 (2008).] [*People v Jackson*, 292 Mich App 583, 592-593; 808 NW2d 541 (2011).]

In this case, there is no indication that Juror No. 14 made improper comments to any other juror. The record indicates that Juror No. 14's improper conversations with Juror No. 9 occurred outside the jury room. Defendant speculates that other jurors may have been subject to Juror No. 14's comments, but Juror No. 14's answers to the court's questioning reveals nothing of the kind. As in *Jackson*, "The trial court's questioning of the dismissed juror did not reveal

any information or circumstances to suggest that the remaining jurors had been exposed to improper influences or that their ability to render a fair and impartial verdict had been compromised." *Id.* at 593. Absent any suggestion that other jurors were exposed to similar conversations, the trial court's decision to proceed without questioning the remaining jurors was not plain error.

Defendant's reliance on *United States v Humphrey*, 208 F3d 1190 (CA 10, 2000), is misplaced because that case is factually distinguishable. In *Humphrey*, there was evidence that a juror had extraneous personal knowledge of the defendant's family and may have shared that knowledge with other jurors. *Id.* at 1197-1198. The trial court questioned the jury foreperson, who did not recall the offending juror sharing any personal information with other jurors, but the court did not question other jurors or question the offending juror to determine whether he failed to disclose his knowledge of the defendant or any bias against the defendant during voir dire. *Id.* at 1198. Here, the trial court did not cut off further investigation of possible juror misconduct. The claim was made only by Juror No. 9 and concerned statements made to him alone. That juror did not indicate that he was aware of similar statements to other jurors. Further, unlike in *Humphrey*, the trial court questioned the offending juror, who was removed from the jury before deliberations. Accordingly, this case is distinguishable from *Humphrey*.

C. INEFFECTIVE ASSISTANCE OF COUNSEL – EVIDENCE TESTING

Defendant challenges defense counsel's failure to push to have Govan's car examined prior to trial. Testimony at trial indicated that Perry was with Govan at the time of the shooting. The defense theory was that Perry shot Baker. There was evidence that a bullet hole was discovered on the hood of Govan's car and that a red smear, possibly blood, was discovered inside the car. A sample of the smear was collected, but it was never tested to confirm whether it was blood or to determine who it may have belonged to. At trial, defense counsel extensively questioned the officer in charge of the investigation about the suspected blood found in Govan's car and whether it had been tested. During closing argument, defense counsel argued that it was an "outrage" that the police did not test the sample.

Defendant now argues that defense counsel was ineffective for not investigating the blood evidence from Govan's vehicle before trial. Counsel was aware of the evidence and knew that it had not been analyzed. Defendant argues that counsel should have requested that the sample be tested, but counsel's decision not to pursue testing was a strategic decision. Testing may have shown that the blood was not connected to either Baker's or Young's shooting, and risked eliminating Govan as a possible suspect or accomplice in the shooting. The absence of testing enabled defense counsel to attack the adequacy of the police investigation and to present different plausible explanations for the meaning and significance of the suspected blood evidence to aid in creating a reasonable doubt concerning defendant's guilt.

Defendant also argues that counsel was ineffective for not presenting evidence of gunshot residue tests. However, testimony was presented at trial that a gunshot residue test of Govan's car was negative, and that residue was detected on Baker's Monte Carlo. Defendant does not explain what additional evidence he believes should have been presented. Accordingly, there is no basis for concluding that defense counsel was ineffective in this regard.

D. WITNESS CROSS-EXAMINATION

Defendant argues that the trial court abused its discretion by permitting the prosecutor to elicit testimony from defense witness Demetrius Gipson that he was facing a pending charge of assault with intent to commit murder. We review the trial court's evidentiary decision for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001) (*Layher II*).

Defendant relies on *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973), to argue that evidence of pending criminal charges is not admissible for impeachment purposes. However, the rule in *Falkner* was limited by the Supreme Court's later decision in *Layher II*, 464 Mich at 758, in which the Court clarified that "a trial court may allow inquiry into prior arrests or charges for the purpose of establishing witness bias[.]" Consistent with the decision in *Layher II*, the trial court permitted the prosecutor to introduce the evidence of Gipson's pending criminal charge because it was relevant to show bias against the prosecution. The trial court did not abuse its discretion in allowing this evidence. See also *Estate of Barbara Johnson v Kowalski*, ___ Mich App ___; ___ NW2d ___ (Docket No. 297066, issued May 29, 2012), slip op at 9 (recognizing the broad range of evidence admissible on cross-examination to impeach a witness's credibility).

We also disagree with defendant's argument that it was improper to allow the prosecutor to question Gipson about his contact with defendant while both were in jail. That testimony was relevant to whether defendant had an opportunity to discuss Gipson's alibi testimony with him before trial. The witness's contact with defendant while incarcerated was highly probative of the witness's credibility.

E. NEWLY DISCOVERED EVIDENCE

Defendant lastly argues that he is entitled to a remand to allow him to move for a new trial based on newly discovered evidence, specifically testimony from Damon Gipson that he saw Perry shoot Baker.

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotation marks and citation omitted).]

Although defendant argues that Damon Gipson's testimony likely would have caused the jury to discount Perry's testimony, defendant presented two other witnesses at trial, Tiffany Gilmer and Demetrius Gipson, who identified Perry as the shooter. Damon's account is largely cumulative of that testimony, which obviously did not persuade the jury. Indeed, like Damon's account, Demetrius testified at trial that he was at his grandmother's house on Euclid Street when he heard arguing and saw Perry shoot Baker.

Further, although defendant asserts that he was unaware that Damon was a witness until he received a letter after trial, defendant has not provided any facts showing that he could not

have discovered Damon's identity as a witness with reasonable diligence, particularly when it appears that Damon is a relative of Demetrius Gipson. Thus, defendant is unable to satisfy the four-part test from *Cress* and, accordingly, he is not entitled to appellate relief with respect to this issue.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher