

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG MELVIN JACKSON,

Defendant-Appellant.

UNPUBLISHED

January 24, 2013

No. 304163

Wayne Circuit Court

LC No. 10-010029-FC

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Craig Melvin Jackson appeals as of right his jury trial conviction of second-degree murder,¹ felon in possession of a firearm (“felon in possession”),² and possession of a firearm during the commission of a felony (“felony-firearm”).³ The trial court sentenced Jackson to 420 to 840 months’ imprisonment for the second-degree murder conviction, 40 to 60 months’ imprisonment for the felon in possession conviction, and two years’ imprisonment for the felony-firearm conviction. We affirm.

On appeal, Jackson argues that defense counsel was ineffective for various reasons.⁴ We disagree and additionally find that remand for a *Ginther*⁵ hearing is unnecessary. Ineffective

¹ MCL 750.317.

² MCL 750.224f.

³ MCL 750.227b.

⁴ Jackson raised claims of ineffective assistance based on defense counsel’s failure to: raise Jackson’s alibi defense; call witnesses that would purportedly provide evidence of forced entry at the scene of the crime, that Jackson voluntarily went to police after the incident, and from individuals who were purportedly at the scene of the crime after the shooting but before police arrived; and object to the prosecutor’s vouching, in a supplemental brief filed pursuant to Michigan Supreme Court Administrative Order 2004-6, Standard 4.

⁵ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

assistance of counsel claims are mixed questions of law and fact.⁶ “A trial court’s findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.”⁷ Because these claims are unpreserved, our “review is limited to mistakes apparent on the record.”⁸

“To prove a claim of ineffective assistance of counsel, a defendant must establish [(1)] that counsel’s performance fell below objective standards of reasonableness, and [(2)] that but for counsel’s error, there is a reasonable probability that the result of the proceedings would have been different.”⁹ “Effective assistance of counsel is presumed, and [Jackson] bears a heavy burden to prove otherwise.”¹⁰

Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. We will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel’s competence.¹¹

Furthermore, “[t]his Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired.”¹²

Jackson claims that defense counsel failed to properly question a potentially biased juror during jury selection. We find that defense counsel’s behavior did not fall below an objective standard of reasonableness. Initially, the juror advised the trial court that despite having been robbed in the past, she believed that she could be fair and impartial. The juror failed to indicate, like some of the other potential jurors, that she would convict Jackson before the prosecution presented any evidence. Although the juror later advised the prosecution that “after being robbed at gun point” she was not sure if she could make a fair decision, the juror confirmed her understanding that Jackson was not the individual who robbed her. Additionally, defense counsel appropriately questioned the potential jurors as a group regarding whether they understood that Jackson was presumed innocent until proven guilty, and that the prosecution had the burden to prove Jackson guilty beyond a reasonable doubt. All jurors questioned confirmed their understanding of the above concepts, and the juror at issue did not agree with defense

⁶ *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

⁷ *Id.* (citation and quotations omitted).

⁸ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

⁹ *Swain*, 288 Mich App at 643.

¹⁰ *Id.*

¹¹ *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

¹² *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

counsel's statement that she felt that "more likely than not" Jackson must be guilty. Accordingly, reversal is not warranted.¹³

Jackson also asserts that inadmissible opinion testimony from a lay witness was not objected to and was impermissibly elicited by defense counsel.

Under MRE 701, a witness who is not testifying as an expert may only testify in the form of opinions or inferences that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."¹⁴

Witness David Scott testified that Jackson appeared to be guilty because he avoided contact with his friends and failed to act upset by the victim's death. Scott indicated that he believed that Jackson was running away from the situation. Scott's testimony regarding Jackson's behavior after the victim was killed was rationally based on his perceptions of Jackson, thus it was proper. To the extent that Scott testified that Jackson's behavior made Scott believe that Jackson was guilty, the jury was properly instructed regarding the prosecution's burden of proof to convict Jackson.¹⁵ As such, any error by defense counsel in failing to object to or for eliciting such testimony does not warrant relief.¹⁶

Jackson's contention that defense counsel provided ineffective assistance by failing to call several witnesses at trial also must fail. "[T]he failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy."¹⁷

Jackson asserts that individuals who went to the scene of the crime after the shooting allegedly moved the body, and removed guns and drugs from the home before the police arrived. Jackson, however, has presented no evidence regarding the purported content of the alleged witnesses' testimony. As such, Jackson has not established that the individuals' testimony would be contrary to witness Lewis Berry's testimony placing Jackson at the scene of the crime immediately after the shooting.

Additionally, Jackson claims that police officers should have been called as witnesses to allegedly testify that it was observed that the home where the shooting occurred was ransacked and there was evidence of forced entry, which presumably supports defense counsel's theory that someone else shot the victim. Contrary testimony was elicited that evidence of forced entry was

¹³ *Swain*, 288 Mich App at 643.

¹⁴ *People v Yost*, 278 Mich App 341, 358; 749 NW2d 753 (2008), quoting MRE 701 (quotations omitted).

¹⁵ *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

¹⁶ *Swain*, 288 Mich App at 643.

¹⁷ *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009).

not observed. Additionally, the officers' purported testimony would not have contradicted Berry's testimony that Jackson was observed at the scene of the crime immediately after the shooting. As such, Jackson has failed to demonstrate that it is reasonably probable that had the individuals testified, the result of the proceedings would have been different.¹⁸

Jackson further argues that trial counsel was ineffective for failing to call as witnesses individuals who allegedly would have testified that Jackson voluntarily went to the police after the shooting. Because five months passed between the shooting and the time that Jackson went to the police, Jackson has failed to rebut the presumption that defense counsel's failure to call the witnesses was sound trial strategy.¹⁹

Jackson's argument that defense counsel's assistance was ineffective when he failed to present Jackson's alibi also lacks merit. "Decisions regarding what evidence to present . . . [is] presumed to be [a] matter[] of trial strategy."²⁰ Assuming *arguendo* that Jackson's cellular telephone records and the testimony of the storeowner would have placed Jackson outside of the liquor store at 7:06 p.m., the record demonstrates that the liquor store, the gas station, and the home where the incident occurred were all within a short walking distance of each other. As such, Jackson's alleged alibi places him in the area of the shooting close in time to the shooting. Therefore, Jackson has failed to rebut the presumption that defense counsel's decision not to present such evidence constituted sound trial strategy.

Jackson's final ineffective assistance argument is that defense counsel impermissibly failed to object to the prosecutor vouching for the truthfulness of a witness. Jackson uses the same facts to support one of his contentions of prosecutorial misconduct, both of which will be addressed here. "A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness."²¹ A prosecutor may, however, argue from the facts in evidence that a witness is worthy or not of belief.²² Here, the prosecution did not imply that it had some special knowledge of Berry's truthfulness. Rather, the prosecution used the facts in evidence to substantiate its claim that Berry testified truthfully and thus did not commit misconduct. Because defense counsel is not required to raise a futile objection, counsel's assistance was effective.²³

¹⁸ *Swain*, 288 Mich App at 643.

¹⁹ *Seals*, 285 Mich App at 21.

²⁰ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²¹ *Seals*, 285 Mich App at 22.

²² *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

²³ *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Jackson next argues that the trial court abused its discretion when it allowed the prosecution to endorse a witness on the second day of trial. We disagree. This Court reviews a trial court’s decision to permit the late endorsement of a witness for an abuse of discretion.²⁴

Michigan law requires the prosecution to attach a witness list to the information and to include in it the names of known witnesses who might be called at trial and all res gestae witnesses known to the prosecution or to investigating law enforcement officers. The prosecution may add a person to, or delete a person from, that witness list at any time “upon leave of the court and for good cause shown or by stipulation”²⁵

The prosecution did not violate the relevant statute²⁶ by failing to include witness Phillip Stewart on the witness list as the advance notice required is of “witnesses known to the prosecution.”²⁷ The record demonstrates that the prosecution did not know that Stewart had relevant information about the shooting until defense counsel mentioned a man named “Phil” in his opening statement. After defense counsel mentioned Stewart’s name in his opening statement, Stewart then volunteered to testify. Defense counsel had the opportunity to interview Stewart before he testified. Therefore, the trial court granted leave to amend the witness list after good cause was shown and thus, there was no abuse of discretion.²⁸

Jackson next argues in his supplemental brief that the prosecution committed multiple acts of misconduct. We disagree. This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting Jackson’s substantial rights.²⁹

“[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.”³⁰ A prosecutor compromises a defendant’s right to a fair trial when she “interjects issues broader than the defendant’s guilt or innocence.”³¹ This Court must read the prosecutor’s statements as a whole, and evaluate the statements in light of the evidence presented at trial and Jackson’s arguments.³²

²⁴ *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

²⁵ *People v Steele*, 283 Mich App 472, 483; 769 NW2d 256 (2009) (citation, quotations and emphasis omitted).

²⁶ MCL 767.40a(1), (3), (4).

²⁷ *Steele*, 283 Mich App at 483.

²⁸ *Burwick*, 450 Mich at 291.

²⁹ *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

³⁰ *Dobek*, 274 Mich App at 63.

³¹ *Id.*

³² *Brown*, 279 Mich App at 135-136.

We find Jackson's assertion that the prosecution allowed Berry to testify falsely unpersuasive.

[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. If a conviction is obtained through the knowing use of perjured testimony, it "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of jury."³³

A "prosecutor may not knowingly use false testimony to obtain a conviction" and "has a duty to correct false evidence."³⁴ This includes the duty to correct perjured testimony that relates to a witness's credibility.³⁵

The police report that Jackson references indicates that it is "unknown" if Berry was "being truthfull [sic] or may be confused about some of the details." The fact that the police report called into question Berry's honesty and mental capacity does not establish that his testimony at trial was false or that the prosecutor had knowledge of actual false testimony. The police report is only the officer's impression at the time the statement was made. Additionally, Berry's testimony that he saw and spoke to Jackson at the gas station is corroborated by the gas station security video taken shortly after the shooting.

Moreover, the prosecutor's knowledge of Jackson's potential alibi does not prove that the prosecutor had knowledge of any potential false testimony. Jackson claims that the prosecutor should have known that Berry was testifying falsely because of Jackson's cellular telephone records and because the store owner provided him with an alibi. As explained above, Jackson's alibi actually places him in the area of the shooting around the time of the shooting and supports Berry's version of events. Furthermore, the statements that Jackson claims prove that the prosecutor and police coached Berry about what to say on the witness stand, when taken in context, establish that the police and the prosecutor were merely asking Berry to repeat his version of events.

Jackson also contends that the prosecution committed misconduct when it commented on his decision not to testify and shifted the burden of proof to him.

[A] prosecutor may not comment on a defendant's failure to testify. Such remarks "are prohibited because they ask the jury to draw the inference that the defendant is guilty or hiding something merely because he has not taken the stand." However, "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the

³³ *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009) (citations and quotations omitted).

³⁴ *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998).

³⁵ *Id.*

evidence and all reasonable inferences from the evidence as it relates to their theory of the case.”³⁶

The prosecution explained that it could not tell the jury Jackson’s motive because no one can see inside another person’s mind. Therefore, the prosecution’s comments were not regarding Jackson’s failure to testify, but rather, were comments about his motive and intent. As such, the prosecutor’s comments were proper. Even if the prosecutor made improper comments, the trial court instructed the jury that the attorneys’ statements were not evidence and that the burden of proof was on the prosecution, and juries are presumed to follow their instructions.³⁷ Accordingly, Jackson was not denied a fair and impartial trial.

Next, Jackson argues in his supplemental brief that there was insufficient evidence to prove that he shot the victim. We disagree. Specifically, Jackson argues that the physical evidence shows that the victim was shot from the front of the house and testimony established that Jackson was at the back of the house after the gunshots were fired. Challenges to the sufficiency of the evidence are reviewed de novo.³⁸

To determine sufficiency of the evidence, “this Court reviews the evidence in the light most favorable to the prosecution” to “determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt.”³⁹ “Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime.”⁴⁰ “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.”⁴¹ Identity of the assailant is an element of every offense.⁴²

Jackson is not excluded from being the shooter simply because Berry testified that he saw Jackson toward the back of the house without a gun in his hand after the gunfire. Before Berry fell asleep on the afternoon of the shooting, he was in the home with Jackson and the victim. Berry observed that Jackson had a gun in his waistband. When he woke up after hearing a gunshot, Berry observed Jackson coming from the back of the house. Contrary to Jackson’s assertion, the physical evidence of the location of the shooter was inconclusive. One of the police officers who was at the scene testified that he observed spent shell casings in the living room. The evidence technician testified that two spent shell casings were in the dining room.

³⁶ *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010) (citations and quotations omitted).

³⁷ *Mahone*, 294 Mich App at 212.

³⁸ *Ericksen*, 288 Mich App at 195.

³⁹ *People v Railer*, 288 Mich App 213, 216-217; 792 NW2d 776 (2010).

⁴⁰ *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010).

⁴¹ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

⁴² *Yost*, 278 Mich App at 356.

The medical examiner testified that the victim's wounds were consistent with the victim facing the shooter during the first shot, and the shooter being to the victim's left at the time of the second shot. The medical examiner, however, would not testify definitively regarding the exact positioning of the shooter and the victim.

Additionally, even if the shooter was toward the front of the house, it was reasonable for the jury to infer that Jackson had enough time to move to the back of the house after firing the second gunshot, before Berry, who is narcoleptic, woke up. The record demonstrates that Berry's narcolepsy makes him very difficult to wake. Berry testified that it took him approximately two or three seconds to come to full consciousness after hearing what the jury could reasonably infer to be the second of the two gunshots. Therefore, a rational jury could find that Jackson was the shooter beyond a reasonable doubt.⁴³

Finally, Jackson's supplemental brief asserts that he was denied a fair trial when the trial court refused to dismiss a biased juror. We disagree. This unpreserved issue is reviewed for plain error affecting Jackson's substantial rights.⁴⁴

A "criminal defendant has a constitutional right to be tried by an impartial jury."⁴⁵ "[J]urors are 'presumed to be . . . impartial, until the contrary is shown.' The burden is on [Jackson] to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt."⁴⁶

We find that Jackson has failed to show that the juror's impartiality was in reasonable doubt based on the same facts that supported this Court's conclusion that defense counsel was not ineffective for failing to further question the same juror.

Affirmed.

/s/ Michael J. Talbot

/s/ Kathleen Jansen

/s/ Patrick M. Meter

⁴³ *Railer*, 288 Mich App at 216-217.

⁴⁴ *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008).

⁴⁵ *Id.* at 547, citing US Const, Am VI; Const 1963, art 1, § 20.

⁴⁶ *Miller*, 482 Mich at 550 (citations and quotations omitted).