STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 313754 Wayne Circuit Court
TENKAMENIN LAVONTA RICE, Defendant-Appellant.	LC No. 12-005940-FC

Before: O`CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of three counts of assault with intent to murder, MCL 750.83, four counts of felonious assault, MCL 750.82(1), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 25 to 40 years' imprisonment for each of the assault with intent to murder convictions, one to four years' imprisonment for each of the felonious assault convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case arises from two separate incidents that occurred in Detroit on May 20, 2012. Defendant's convictions of felonious assault stem from allegations that he used a gun to threaten Lakeith Alexander, Darrell Webb, Shaquille Sherman, and Darius Townsend in the parking lot of J & S Party Store at about 10:30 a.m. Defendant's convictions of assault with intent to murder arise from allegations that less than 30 minutes after the altercation at the party store, he fired several rounds at Alexander, Webb, and Townsend while they were sitting in a burgundy Grand Prix parked on Grandville Street.

First, defendant argues that certain statements the prosecutor made during her closing argument were not supported by the evidence and therefore constituted misconduct. We disagree.

"In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defense counsel did not object during the prosecutor's closing argument to the comments at issue; therefore, this issue is unpreserved.

This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Meissner*, 294 Mich App 438, 455; 812 NW2d 37 (2011). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In addition, reversal is not required when a curative instruction could have alleviated any prejudicial effect. *Id*. at 329-330.

Claims of prosecutorial misconduct are reviewed case by case to determine whether the remarks in context denied the defendant a fair and impartial trial. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Prosecutors are accorded great latitude with regard to their arguments and conduct at trial. *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010). While prosecutors may argue the facts in evidence and reasonable inferences arising from the evidence, they may not argue facts that are not before the jury. *Meissner*, 294 Mich App at 456-457. It is also improper for a prosecutor to vouch for the credibility of a witness by implying some special knowledge concerning the witness' truthfulness. *Id.* at 456.

Defendant asserts that the prosecutor argued facts that were not supported by the evidence twice during her closing argument. First, the prosecutor argued:

> And I told you in opening statement that there will be witnesses that [sic] will not want to testify. I indicated that this was a gang situation, that this was a retaliation issue that's going on here.

The prosecutor then addressed the inconsistencies between some witnesses' trial testimony and the previous statements they gave to police:

> Now of course, a month later, individuals are back on the street. Back living whatever life they were living previously.
>
> There are other influences that come into play. Maybe threats, maybe payoffs, maybe just honor among thieves; whatever the issue is.

The prosecutor's statements that this case involved retaliation and "a gang situation" were not improper because they were supported by evidence and reasonable inferences arising from the evidence. See *Meissner*, 294 Mich App at 456. In his statement to Sergeant Eby, defendant said that Marcus Cole's funeral was the day before the altercation at the party store. After the funeral, three cars with RTM members drove by defendant and others and yelled "f*** Squid [Cole], RTM." The altercation at the party store started when Shaniqua Short said "f*** RTM" because she believed members of RTM killed Cole, who was her cousin. There was evidence that Cole was a member of a different gang. In response to Short, Townsend said, "I'm RTM, what up b****?" and got out of the Grand Prix. Defendant admitted that he intervened. With a gun in his hand he told Townsend and the other occupants of the Grand Prix to leave.

Only 10 to 30 minutes later, someone shot at the same Grand Prix at least 10 times. Townsend, Alexander, and Webb, were hit. They were all present at the party store. Alexander said that defendant was the shooter. Cole, who was allegedly killed by members of RTM, was a cousin of defendant's girlfriend. When police officers arrived at the scene of the shooting, there

was a group of young men surrounding the Grand Prix. Many of these young men were known gang members or had tattoos indicating that they were members of RTM or another gang, the Red Wings. Given this evidence, the prosecutor was within her discretion to argue that this case involved retaliation and was gang related. See *Mann*, 288 Mich App at 120. Because her argument was supported by the evidence and inferences that could be drawn from the evidence, there was no reason for the jury to believe that the prosecutor was relating her personal opinion on the basis of special knowledge. See *Meissner*, 294 Mich App at 456.

It was also not misconduct for the prosecutor to argue "[t]here are other influences that come into play. Maybe threats, maybe payoffs, maybe just honor among thieves; whatever the issue is." The prosecutor's remarks must be reviewed in context. *Bennett*, 290 Mich App at 475. In this case, there were several witnesses whose trial testimony conflicted with their statements to police or preliminary examination testimony. The prosecutor was suggesting why these witnesses may have changed their testimony. The prosecutor's statement itself indicates that she did not know why these witnesses' accounts changed, so there was no implication that the prosecutor had knowledge that the jury lacked. See *Meissner*, 294 Mich App at 456.

Moreover, reversal is not required because a curative instruction could have alleviated any prejudicial effect. *Callon*, 256 Mich App at 329-330. In fact, the trial court instructed the jurors that they should only consider the evidence when making their decision and that the evidence includes only the witness testimony and exhibits admitted into evidence. The court specifically said that the attorneys' arguments are not evidence. These instructions alleviated any prejudicial effect from of the prosecutor's remarks because jurors are presumed to follow their instructions, which are presumed to cure most errors. *Mann*, 288 Mich App at 122 n 23.

Finally, defendant's confrontation clause claim lacks merit. Defendant alleges that the prosecutor was essentially an unsworn witness because her arguments were not supported by the evidence. For the reasons discussed above, the prosecutor's arguments were supported by the evidence or reasonable inferences from the evidence. Her statements did not indicate that she had some special knowledge that the jury did not. Because prosecutors are afforded great latitude in their arguments and conduct at trial, we conclude that the prosecutor did nothing improper in making arguments that were supported by the evidence or suggesting reasons why some witnesses' stories changed. The prosecutor's conduct did not deny defendant a fair and impartial trial.

Second, defendant contends that his trial counsel was ineffective for failing to object to the prosecutor's statements discussed above. We disagree.

Because defendant did not move for a new trial or an evidentiary hearing in the trial court based on his ineffective assistance of counsel claim, he has not preserved this issue for appellate review. See *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Our review is therefore limited to mistakes apparent from the record. *Id*.

As discussed above, the prosecutor's statements were not improper because they were supported by the evidence. Defendant's ineffective assistance of counsel claim must fail because counsel is not ineffective for failing to offer meritless motions. *Id*. at 81.

Defendant also asserts that the trial court erred in concluding that the prosecutor exercised due diligence in attempting to procure Sherman's presence at trial. Defendant alleges that he was entitled to the "missing witness" jury instruction. We disagree.

"A party must object or request a given jury instruction to preserve the error for review." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defense counsel did not request the missing witness instruction at trial. When asked, defense counsel stated he had no problems with the instructions that the court planned to give. Because counsel expressly approved the jury instructions, defendant has waived this issue. See *People v Kowalski*, 489 Mich 488, 503-504; 803 NW2d 200 (2011). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver." *Id.* at 503. A party that waives rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for the waiver has extinguished any error. *Id.*

In his Standard 4 brief, defendant contends that his convictions should be reversed because the in-court identifications of him were tainted by unduly suggestive photographic lineups. We disagree.

"A motion to suppress evidence must be made prior to trial or, within the trial court's discretion, at trial." *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004). This issue is unpreserved because defendant did not move to suppress any of the testimony identifying him as the perpetrator of the charged offenses. This Court reviews unpreserved constitutional claims for plain error affecting substantial rights. *Heft*, 299 Mich App at 78-79. We will reverse only when the plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Meissner*, 294 Mich App at 455.

A photographic identification procedure or lineup violates due process when it is so improperly suggestive that it creates a substantial likelihood of misidentification. *People v McDade*, 301 Mich App 343, 357; 836 NW2d 266 (2013). Defendant argues that the physical differences between his photograph and the photographs of the other individuals in the lineup made the lineup unduly suggestive. This argument lacks merit. "Physical differences among the lineup participants do not necessarily render the procedure defective and are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants." *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Generally, physical differences will affect the weight of identification testimony, not its admissibility. *Id.*

Even if a pretrial identification procedure were suggestive, a witness's in-court identification of the defendant is admissible if there is an independent basis for it. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998). Whether a witness has a sufficiently independent basis to identify a defendant in court is a factual inquiry determined on the basis of the totality of the circumstances. *Id.* The following factors are relevant:

> (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed

> identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any . . . identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. [*People v Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

Generally, differences in physical appearance between a suspect and other lineup participants do not alone render an identification procedure impermissibly suggestive. *People v Kurylczyk*, 443 Mich 289, 312; 505 NW2d 528 (1993); *McDade*, 301 Mich App at 358-359. In *McDade*, 301 Mich App at 358-359, the defendant asserted that the photographic lineup was unduly suggestive because of differences in the participants' skin tones, head shape, and shoulders. The Court rejected the defendant's argument because to accept it "would make it nearly impossible for the police to compose a lineup, forcing authorities to search for 'twin-like' individuals to match against a defendant." *McDade*, 301 Mich App at 358. Defendant's argument in this case similarly lacks merit. The fact that some of the lineup participants looked younger, had narrower faces, had rounder eyes, or were wearing hooded sweatshirts does not render the witnesses' identifications of defendant unduly suggestive or improper.

Even if the photographic lineup was unduly suggestive, Alexander's in-court identification of defendant as the shooter is admissible because it was sufficiently support by an independent basis. See *Gray*, 457 Mich at 116; *Davis*, 241 Mich App at 702-703. Alexander had prior knowledge of defendant and had seen defendant at the party store only 10 to 30 minutes before the shooting. At the party store, defendant had a gun and was threatening Alexander and his friends and telling them to leave. Thus, Alexander was familiar with defendant's face; he had a particularly memorable encounter with him shortly before the shooting. Alexander identified defendant as the shooter only days after the shooting occurred. Alexander was in the hospital at the time and had not spoken with anyone else who was in the car with him when he was shot. He also said he had not received any text messages or phone calls. Moreover, he did not have a cell phone at the time. Thus, Alexander could not have been influenced by anyone else before he identified defendant in the photographic lineup. Alexander's pretrial identification of defendant and opportunity to see defendant in a particularly memorable situation provided a sufficiently independent basis for Alexander's in-court identification of defendant, making it admissible regardless of whether the photographic lineup was unduly suggestive. *Id.*

Defendant also argues in his standard 4 brief that the admission of the firearm seized during a warrantless search of Blakely Gordon's car denied him a fair trial. We disagree.

Defendant did not move to suppress evidence of the firearm or object to its admission. In fact, defendant said he had no objection to the court's admitting the firearm into evidence. Thus, this issue is unpreserved. See *Gentner*, 262 Mich App at 368. We review unpreserved claims for plain error affecting defendant's substantial rights. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011).

We find it difficult to analyze the legal basis for defendant's claim, which he does not support with citations to legal authority. See *People v Waclawski*, 286 Mich App 634, 679; 780 NW2d 321 (2009). "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

To the extent that defendant contends that the firearm was seized in an illegal search, we find this argument lacks merit: defendant does not have standing to contest the search. The constitutional right to be free from unreasonable searches and seizures is personal and may not be invoked by third parties. *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999). For an individual to have standing to object to a search or seizure he or she must have a subjective expectation of privacy that society is prepared to recognize as reasonable. *Id*. Some factors to consider when determining if an individual has a legitimate expectation of privacy are "ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case." *People v Powell*, 235 Mich App 557, 563; 599 NW2d 499 (1999).

The instant case involves the search of Gordon's car, in which defendant was a passenger when the car was stopped and subsequently searched. To assert a claim that his right to be free from unreasonable searches was violated, defendant must show that he had a reasonable expectation of privacy in Gordon's car. Defendant does not address this issue in his standard 4 brief. Defendant did not have ownership, possession, or control over Gordon's car when it was searched. There was no evidence that defendant had access to the car or previously used it. There was also no evidence that defendant had a subjective anticipation of privacy in the car. And, objectively, it would be unreasonable for defendant to have an expectation of privacy in someone else's car. Consequently, defendant did not have standing to challenge the search of Gordon's car in which the gun was recovered. *Zahn*, 234 Mich App at 446.

Finally, defendant asserts in his standard 4 brief that there was insufficient evidence to support his convictions because he "was never properly identified as the perpetrator." We disagree.

It is axiomatic that identity is an element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). When reviewing challenges to the sufficiency of the evidence, we view the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all essential elements of the crime to have been proved beyond a reasonable doubt. *Meissner*, 294 Mich App at 452. The elements of an offense may be established by circumstantial evidence and reasonable inferences from the evidence. *Bennett*, 290 Mich App at 472.

First, defendant admitted to his involvement in the party store incident, which supports his convictions for felonious assault. Alexander, Webb, Townsend, and Desaray Williams also testified that defendant had a gun, which he was holding when he told Alexander, Webb,

Townsend, and Sherman to leave. Thus, the evidence, including defendant's own testimony, supported his convictions of felonious assault.

Second, there was evidence that defendant shot at the Grand Prix on Grandville Street. Alexander identified defendant as the shooter. Webb denied that defendant was the shooter at trial, but he was impeached by the preliminary examination testimony he gave that defendant was the shooter. Alexander and Webb both identified defendant as the shooter in a photographic lineup. In addition, the gun used in the shooting was recovered from a car while defendant was an occupant. Viewing the evidence in the light most favorable to the prosecution, we find there was sufficient evidence to conclude that defendant shot at the Grand Prix and its occupants.

We affirm.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey