STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2006
v	No. 244024 Wayne Circuit Court
HAROLD STEVEN VARNER, Defendant-Appellant.	LC No. 02-000893-01

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. We affirm.

Defendant first argues that the trial court erred in failing to sever the joint trial with co-defendant. We disagree. The decision to sever a joint trial is generally reviewed for an abuse of discretion. See *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). "The general rule is that a defendant does not have a right to a separate trial." *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). However, "[o]n a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." MCR 6.121(C). The defendant must provide the court with a supporting affidavit or make an offer of proof that "clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice." *Hana*, *supra* at 346. However, defendant failed to move for severance; therefore, he must demonstrate plain error affecting his substantial rights to avoid forfeiture of this unpreserved nonconstitutional issue. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

Defendant argues that a separate trial was mandated in this case because the evidence used to explain the shooting and co-defendant's actions was combined to convict him for co-defendant's actions, even though he was not present at the shooting and was not the shooter. However, "[i]nconsistency of defenses is not enough to mandate severance; rather, the defense must be 'mutually exclusive' or 'irreconcilable.'" *Hana*, *supra* at 349. Here, both defendants pursued the same theory that the prosecution presented insufficient evidence upon which to convict them, in the form of incredible witnesses.

Defendant has failed to demonstrate error where he can point to nothing that would have necessitated severance. Moreover, even if defendant had established plain error, he has failed to demonstrate that it affected the outcome of the lower court proceedings. *Carines, supra* at 763. Defendant has not met his burden of showing prejudice by being tried with co-defendant because all of the evidence admitted at trial would have been admitted against defendant had he been tried alone. See *Hana, supra* at 346 n 7. Defendant has forfeited this unpreserved issue.

Defendant next argues that the trial court abused its discretion in allowing evidence concerning a firebombing and the murder of Alvin Knight under MRE 404(b). We review for an abuse of discretion a trial court's decision to admit evidence. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). An abuse of discretion occurs 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. *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004). Whether evidence is admissible under a particular rule of evidence is a question of law that we review de novo. *Moorer*, *supra* at 67. Because defendant failed to object to the admission of the evidence concerning the firebombing, he must demonstrate plain error affecting his substantial rights to avoid forfeiture of the issue. *Carines*, *supra* at 763-764.

MRE 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible, the prosecutor must offer the other acts evidence for a proper purpose under MRE 404(b). *People v Vandervliet*, 444 Mich 52, 55; 508 NW2d 114 (1993). Second, the evidence must be relevant under MRE 401 and 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). Third, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *Id*. at 55-56. Finally, the trial court may, upon request, provide a limiting instruction to the jury under MRE 105. *Id*. at 56.

Here, the prosecution introduced evidence that a house on Cooley Street that the victim's girlfriend recently purchased from defendant had been firebombed. Defendant argues that this evidence was inadmissible under MRE 404(b) because it was not offered for a proper purpose, was irrelevant, and was highly prejudicial.

The evidence concerning the firebombing was offered for a proper purpose, i.e., it was offered to suggest that defendant and the victim had a dispute regarding the Cooley Street house, thus establishing the motive for defendant's arranging the murder at issue here. The evidence was relevant, i.e., it made the fact that defendant orchestrated the victim's murder more probable than it would have been without the evidence. Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Defendant has failed to demonstrate error where the evidence concerning the firebombing was properly admissible under MRE 404(b). Moreover, even if defendant had established plain error, he failed to demonstrate that it affected the outcome of the lower court proceedings. *Carines, supra* at 763. Defendant has forfeited this unpreserved issue.

At trial, Sergeant Kenneth Gardner testified that after advising defendant of his rights and proceeding to question him concerning this case, defendant instead wanted to discuss the Knight murder. Specifically, defendant indicated that the person responsible for Knight's murder was not in jail, that he had hired Knight's murderer, and that he knew the location of the murder weapon. Defendant told Gardner that in exchange for a written statement, he wanted to be "cut some slack" and given a nine-month sentence for the victim's murder in this case. Thus, defendant essentially admitted his complicity in the victim's murder by vying for a reduced sentence in this case in exchange for identifying the person he hired to murder Knight as well as the location of the murder weapon. [Since this trial, defendant pleaded guilty to the Knight murder.]

Contrary to defendant's assertions, the evidence concerning the Knight murder was not offered as prior acts evidence under MRE 404(b). Rather, the evidence was introduced to show the voluntariness of defendant's statement. This was necessary inasmuch as "[p]roof of confession is never admissible unless shown to have been made voluntarily, and the burden of proof is on the people to show that it was." *People v Zeigler*, 358 Mich 355, 364; 100 NW2d 456 (1960). Further, one of defendant's theories of this case was that someone else murdered the victim and the police were attempting to charge him with this offense because they were unsuccessful in charging him with arranging the Knight murder. Gardner's testimony rebutted this theory by providing evidence that defendant admitted his involvement in this murder and tried to get a deal by providing information concerning the Knight murder. The trial court did not abuse its discretion in allowing Gardner's testimony and defendant is not entitled to relief on this issue.

Defendant next argues that the prosecutor committed misconduct by referring to inadmissible other acts evidence, by misleading the jury regarding a leniency agreement fellow inmate Vaudia Higginbotham received in exchange for his testimony against defendant in this case, by eliciting testimony that Higginbotham received a plea agreement in his own murder case in exchange for testifying against his co-defendant, by improperly vouching for the credibility of prosecution witnesses, and by eliciting testimony regarding a polygraph test taken by Amanda Coddington, an employee of defendant whose statements were introduced at trial. We disagree. We review de novo preserved claims of prosecutorial misconduct to determine if the defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). However, defendant failed to object to the prosecutor's statements; therefore, we review his claims for plain error that affected his substantial rights. *Id*. at 453-454.

Defendant first argues that the prosecutor engaged in misconduct by eliciting testimony concerning the firebombing of the Cooley Street house as well as information concerning the Knight murder. However, as noted above, that evidence was properly admissible and claims of prosecutorial misconduct cannot be predicated on the elicitation of admissible evidence. See *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999); *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989).

Defendant next argues that the prosecutor engaged in misconduct by misleading the jury regarding the existence of an "agreement of leniency" for Higginbotham in exchange for his testimony implicating defendant. However, the record reveals that while Higginbotham admitted that he hoped he would receive favorable treatment in exchange for his testimony, he received nothing in exchange for it. Defendant points to no evidence that such an agreement existed, and

he may not leave it to this Court to search for a factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Defendant next argues that the prosecutor engaged in misconduct by improperly vouching for the credibility of Higginbotham, Coddington, and Gardner. However, the prosecutor did not improperly vouch for the credibility of her witnesses by implying that she had some special knowledge of their truthfulness, and "a prosecutor may comment on [her] own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Thomas*, *supra* at 455.

Defendant also argues that the prosecutor engaged in misconduct by eliciting testimony from Higginbotham that he received a plea agreement for testifying against his co-defendant in his own murder case. While the prosecutor elicited testimony to that effect, Higginbotham also admitted that while he hoped to get some additional benefit in exchange for his testimony against defendant in this case, he was promised nothing and received nothing in exchange. Further, even if Higginbotham had received a better deal in exchange for his testimony in this case, the mere disclosure of a plea agreement with a prosecution witness, including a provision for truthful testimony and sanctions for untruthful testimony, does not constitute improper vouching by the prosecutor, provided there is no suggestion of special knowledge of truthfulness not available to the jury. *People v Bahoda*, 448 Mich 261, 276-277; 531 NW2d 659 (1995); *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988).

Finally, defendant argues that the prosecutor engaged in misconduct by eliciting testimony that Coddington submitted to a polygraph test. However, the record reveals that it was co-defendant's counsel who elicited inadvertent testimony from a police officer that Coddington may have taken a polygraph test in between giving her first and second statements, and the prosecutor subsequently made a single passing reference to the polygraph in rebuttal closing argument. Applying the doctrine of invited response to the facts of this case, the prosecutor's reference to the polygraph does not necessitate reversal of defendant's conviction because it was made in response to testimony elicited by co-defendant's counsel and defendant has failed to demonstrate that the prosecutor's passing comment affected the outcome of the trial. *People v Jones*, 468 Mich 345, 353-357, 359-360; 662 NW2d 376 (2003). Defendant has failed to establish plain error affecting his substantial rights. Accordingly, he has forfeited this unpreserved issue.

Defendant next argues that he was denied the effective assistance of counsel when trial counsel failed to object to various instances of prosecutorial misconduct and failed to call defendant's fellow inmates as witnesses to refute Higginbotham's testimony. We disagree. To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient, and that there is a reasonable probability that but for the deficient performance, the result of the trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

Defendant first argues that his counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct. However, as noted above, the prosecutor did not engage in misconduct, and counsel is not ineffective for failing to make a futile objection. *Thomas*, *supra* at 457.

Defendant next argues that his counsel was ineffective for failing to call his fellow inmates as witnesses to refute Higginbotham's testimony. Defendant supports his claim with the affidavits of a number of inmates attesting that defendant never discussed the case with Higginbotham and that Higginbotham's testimony was fabricated in an attempt to broker a reduced sentence in his own murder case. However, while defendant indicated at the *Ginther*[1] hearing that he provided the trial court with such affidavits, they were not attached to defendant's motion for a *Ginther* hearing or new trial, and were not admitted as evidence at the hearing. Accordingly, we need not review those materials in addressing defendant's claim, because "affidavits, filed for the first time in the appellate brief, may not serve to enlarge the record on appeal." *Wiley*, *supra* at 346; *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999).

Even if we were to consider the affidavits supplied by defendant, only one inmate provides evidence to suggest that, at the time of trial, defense counsel knew of these witnesses or what they would say. The affidavit states that defendant asked his fellow inmates to testify for him at trial that he never talked to Higginbotham; that the inmates told defendant to call them to testify; that after trial, defendant told the inmates that the reason they were not called to testify was that his attorney said they were not needed as witnesses; and that defendant said he should never have listened to his attorney. Additionally, defendant's own affidavit attests that trial counsel told him that "it would make [him] look desperate if [he] got these guys to testify," and defendant's wife's affidavit attests that trial counsel told her that they "did not need [defendant's fellow inmates] to testify."

At the *Ginther* hearing, defense counsel questioned trial counsel about various claimed errors, but at no point was there questioning directed to the issue of defense counsel's failure to call defendant's fellow inmates to testify. Indeed, trial defense counsel was asked whether he was aware of certain alibi witnesses that defendant was interested in presenting at trial, but was not questioned concerning whether defendant apprised him of the names of inmates to call as witnesses to refute Higginbotham's testimony. Defense counsel's failure to explore at the *Ginther* hearing trial counsel's failure to call defendant's fellow inmates as witnesses strongly suggests that trial counsel's conduct was the product of trial strategy. See *Carter*, *supra* at 219 n 14.

Also at the *Ginther* hearing, defendant testified that on the day Higginbotham testified at trial, he told defense counsel to "go get all those guys off of the ward in the county jail" to testify that he would not have discussed his case with Higginbotham. The trial court then referred to its apparent trial decision[2] that defendant could not call his fellow inmates as witnesses, seemingly indicating that trial counsel could not be deemed ineffective for failing to have defendant's fellow inmates testify at trial where it was the trial court's decision to not allow the inmates to testify.

---

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

[2] Nothing could be found in the lower court record to support this assertion, leading to the reasonable inference that any such discussion must have occurred off the record.

Q. [The Court]: I didn't prevent you from bringing those people, *other than the jailers*, and they couldn't testify to an alibi.

A. [Defense Counsel]: No. But they could testify that to the—impeach the credibility of Mr. Higginbotham because they had information that would dispute everything he said in terms of his conversations—alleged conversations with [defendant] regarding this so-called liaison between Ms. Coddington and Officer Bruce.

Q. That's what the court did. Talk to me about what you claim [trial counsel] did.

The trial court then, in seeming contradiction to its previous statement, took issue with defendant's failure to specifically identify the inmates who would testify in his favor until after trial, commenting that information obtained after trial was irrelevant in evaluating defendant's ineffective assistance of counsel claim. Defense counsel refuted this assertion with defendant's testimony that he provided trial counsel with information about witnesses who could be called to impeach Higginbotham's testimony.

Even assuming defendant provided trial counsel information concerning witnesses to call to impeach Higginbotham's testimony, defendant has failed to overcome the strong presumption that trial counsel's decision not to call defendant's fellow inmates to testify constituted sound trial strategy, and we will not substitute our judgment for that of counsel regarding matters of trial strategy. *Matuszak*, *supra* at 58. Moreover, especially in light of the testimony from Coddington and Gardner concerning defendant's admitted involvement in the murder, defendant has failed to show that but for counsel's decision not to call his fellow inmates to refute Higginbotham's testimony concerning defendant's admissions, the result of the proceeding would have been different. Accordingly, defendant is not entitled to relief on this issue.

We affirm.

/s/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra