STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DAROLD BENTLEY,

Defendant-Appellant.

UNPUBLISHED
October 11, 2007

No. 272551
Macomb Circuit Court
LC No. 2005-004409-FH

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unarmed robbery, MCL 750.530, conspiracy to commit unarmed robbery, MCL 750.157a and 750.530, unauthorized driving away of an automobile (UDAA), MCL 750.413, and conspiracy to commit UDAA, MCL 750.157a and 750.413. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 172 to 360 months' imprisonment for the unarmed robbery conviction and accompanying conspiracy conviction and to 58 to 120 months' imprisonment for the UDAA conviction and accompanying conspiracy conviction. We affirm.

Defendant first argues that the prosecution engaged in misconduct by eliciting evidence regarding, and commenting on, defendant's drug use and his "pimping" of a female codefendant,[1] by appealing to the jury's sympathy for the codefendant, by failing to produce an endorsed *res gestae* witness, and by eliciting evidence regarding statements made by the *res gestae* witness to police in violation of defendant's constitutional right of confrontation. Because trial counsel failed to raise objections on these matters, defendant also argues that he was denied the effective assistance of counsel.

We review de novo claims of prosecutorial misconduct to determine, on a case by case basis, whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Unpreserved allegations of error will not be reversed unless a defendant demonstrates

[1] The female codefendant entered a guilty plea and testified against defendant; she was not a codefendant at trial, but we shall refer to her as codefendant for purposes of this opinion.

plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Some of defendant's arguments allege prosecutorial misconduct in regard to eliciting evidence, and this Court has stated that "[t]he prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Ackerman, supra* at 448.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to defendant's argument concerning the evidence and prosecutorial comments relative to his drug use and prostitution, he places reliance on MRE 404(b), MRE 403, and due process. We find no misconduct and, because there was no misconduct, counsel was not ineffective for failing to raise futile motions. *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998).

This case was ensconced in drugs and prostitution. The desire to obtain money to make drug purchases or to obtain drugs directly was the motive for commission of the crime, and the entire criminal transaction itself involved the procuring of drugs, the use of drugs, the exchange of drugs for gasoline purchased by defendant with the victim's stolen credit card, and it involved an act of prostitution between the codefendant and the victim, which act was part of the plan or conspiracy engaged in by defendant.

In *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996), our Supreme Court, after acknowledging MRE 404(b), stated, "Nevertheless, it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place." Quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), the *Sholl* Court expressed:

> "It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect

> from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the 'compete story' ordinarily supports the admission of such evidence." [*Sholl, supra* at 742 (citations omitted).]

Evidence of and references to defendant's drug use and pimping, as well as codefendant's drug use and prostitution, were necessary to give the jury an intelligible presentation of the full context in which the criminal activity took place, or, in other words, to give the jury the complete story. The charges included claims of a conspiracy; therefore, the nature of the relationship between defendant and codefendant, which was one mired in drugs and prostitution, was a vital component in prosecuting the case. The crimes charged did not arise in isolation or in a vacuum but flowed from defendant's and codefendant's relationship that was predicated on drugs and prostitution. Without explanation of this relationship, which affected issues of credibility and motivation, as well as providing the groundwork for conspiracy, the jury would be denied context and the full story.

The challenged evidence and remarks served a proper purpose under *Sholl*, *Delgado*, and MRE 404(b), and not a character to conduct or propensity theory, the evidence and comments were relevant under MRE 401 and 402, and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. See *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993). Moreover, due process, which, at its core, requires fundamental fairness, was not offended by the admission of the challenged evidence and the prosecutor's comments. See *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993). Accordingly, defendant received a fair and impartial trial, there was no prosecutorial misconduct, and counsel was not ineffective for failing to make frivolous objections.

Next, defendant asserts that the prosecution repeatedly appealed to the jury's sympathy for the codefendant in an attempt to have the jury overlook deficiencies in the prosecution's case. The prosecution may use emotional language during closing argument, *Ackerman, supra* at 454, but the prosecution may not appeal to the jury for sympathy, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The prosecutor is free and has wide latitude to argue the evidence and all reasonable inferences arising from the evidence, and he or she need not confine argument to the blandest possible terms. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Defendant's argument arises from evidence and remarks concerning codefendant's life as a drug addict and prostitute and defendant's treatment of her as her pimp. As reflected in our discussion above, this evidence was proper as it presented the full story to the jury and gave context to the criminal transaction. The prosecutor was merely commenting on the evidence and was not precluded from using emotional language. While the jurors may have felt sympathy for the codefendant, any sympathy would have been derived simply from the unfortunate facts of her life and not by any intentional and concerted effort by the prosecutor to evoke sympathy in an attempt to deflect the jury from the facts of the case. Accordingly, defendant received a fair and impartial trial, there was no prosecutorial misconduct, and counsel was not ineffective for failing to make futile objections.

Next, defendant characterizes the prosecution's failure to produce an endorsed *res gestae* witness at trial as prosecutorial misconduct. MCL 767.40a(3) provides that within 30 days of

trial, the prosecutor "shall send to the defendant . . . a list of the witnesses the prosecuting attorney intends to produce at trial." The witness at issue here was so endorsed. MCL 767.40a(4) provides that the prosecutor "may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation." The prosecutor indicated that the witness, supposedly a homeless drug addict, could not be located. The record reflects that defense counsel did not object to the trial continuing, did not request an adjournment, did not demand a due diligence hearing, and that counsel had no problem with the case proceeding. Given that the expected testimony from the witness would be extremely damaging to defendant, counsel's actions are understandable. On the existing record, we cannot conclude that the prosecution engaged in misconduct, nor that counsel was ineffective. Even if error, misconduct, and deficient performance existed, there was no prejudice to defendant under the plain-error test, *Carines, supra* at 763, or under the principles governing ineffective assistance claims, *Carbin, supra* at 599-600.

Defendant also contends that admission of a statement made by the missing witness through the testimony of the police violated his right of confrontation. Assuming a Confrontation Clause violation under *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and deficient performance by counsel for failing to object to the testimony, the admission of the brief statement, which did not identify defendant by name, was not prejudicial, considering its nature and the overwhelming evidence of guilt as supplied by the testimony of the victim and codefendant, as well as the testimony by police regarding incriminating statements made by defendant himself after his arrest.

Defendant next raises claims of ineffective assistance of counsel outside the context of related prosecutorial misconduct allegations. Defendant complains that counsel failed to request a missing witness instruction, failed to present an expert on identification, and failed to request a cautionary instruction on the grave dangers of misidentification.

With respect to the missing witness instruction, CJI2d 5.12, it may be appropriate to give such an instruction when the prosecution fails to produce a listed witness at trial and fails to seek leave from the trial court to excuse the witness for good cause. *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003); *People v Cook*, 266 Mich App 290, 293 n 4; 702 NW2d 613 (2005). The instruction allows the jury to infer that the witness's testimony would have been unfavorable to the prosecution. *Perez, supra* at 420; CJI2d 5.12. Here, it is reasonable to conclude that counsel did not push the issue of the missing witness because the witness would likely have provided testimony damaging to defendant. And had counsel initially objected to the prosecution's failure to produce the witness and indicated that a missing witness instruction would be sought, it is conceivable that the prosecution might have made a further, potentially successful, effort to locate the witness.[2] Defendant has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy.

[2] We find it unlikely that the court would have given this instruction if requested after proofs were presented, considering that counsel did not raise any issues or objections, understandably, when the matter first arose, thereby lulling the prosecutor into believing that any further attempts to locate the witness were unnecessary. Moreover, it appears that good cause existed for not

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Next, with respect to presenting an expert on identification, to obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. *People v Tanner*, 469 Mich 437, 443; 671 NW2d 728 (2003). Our Supreme Court opined that "[i]t is not enough for the defendant to show a mere possibility of assistance from the requested expert." *Id.* There must be a showing that an expert would likely benefit the defense. *Id.*

We rather doubt that the trial court would have allowed the appointment of an expert on identification in this case, where there were other methods to challenge the victim's identification of defendant, and where the codefendant, who personally knew defendant, implicated him, as did defendant's own statements to police. This was not a case where the entire prosecution rested solely on an eyewitness identification of a defendant by an unfamiliar witness. Defense counsel need not make a frivolous motion. *Fike, supra* at 182-183.

With respect to a request for a cautionary instruction on the "grave dangers" of misidentification. This Court has stated that Michigan law "does not require any special jury instruction regarding the manner in which a jury should treat eyewitness identification testimony." *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). The panel indicated that CJI2d 3.2 on reasonable doubt, which was given here, is an adequate instruction to cover the concerns raised. *Id.* We note that CJI2d 3.6 on witness credibility, which was also given here, addresses factors for the jury to consider when determining whether to believe a witness, e.g., "Was the witness able to see or hear clearly? How long was the witness watching or listening? Was anything else going on that might have distracted the witness?" CJI2d 3.6(3)(a).[3] Accordingly, defense counsel was not ineffective for failing to make a meritless request for an instruction on misidentification. Moreover, no prejudice was incurred.

Defendant finally asserts that the cumulative effect of the alleged errors requires a new trial. In light of our conclusions regarding the alleged errors as discussed above, there is no basis to reverse on a "cumulative effect" argument. See *Ackerman, supra* at 454.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette

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producing the witness.

[3] CJI2d 7.8 speaks more directly to the issue of factors to consider in determining the reliability of an identification; however, counsel may not have requested this instruction because, on examination of the factors, it may have benefited the prosecution more than defendant, given the nature of the evidence.