STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellee,

v

Supreme Court
No. ~~124012~~ 131942

CAPRESE GARDNER,

Defendant-Appellant.

Third Circuit Court No. 01-003494-01
Court of Appeals No. ~~238186~~ 267317

BRIEF IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL

131942 (26) for Spec Report

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QUESTIONS PRESENTED

I.A.

(Styled as Argument V in the defendant's brief).

A trial court may not grant relief from judgment unless the defendant demonstrates cause for failure to have presented his claims on direct appeal and actual prejudice. Here, the defendant claims that appellate counsel was ineffective for having "failed" to discover and argue issues he now presents. Since the defendant has not demonstrated cause and prejudice, was he entitled to relief from judgment?

The People answer: NO.
The defendant answers: YES.

I.

MCL 768.11 requires that to be considered an habitual offender third for the purpose of sentence enhancement, a person must have been convicted previously of any combination of two or more felonies. Here, the defendant had been convicted of felonious assault and felony firearm before being sentenced as a third-time habitual offender. Since the statute does not say what *People v Stoudemire* requires, that two convictions arising out of a single transaction be counted only as one, should this Court consider overruling *People v Stoudemire* and denying relief to the defendant?

The People answer: YES.
The defendant answers: NO.

II.

When counsel is present at a line-up, the defendant bears the burden of demonstrating that it was impermissibly suggestive. Here, counsel was present at the corporeal line-up and a photo of the it was used at trial. Since the defendant offers only vague suggestions that something might have been amiss, has he satisfied his burden of showing cause for counsels' failure to previously raise the issue and actual prejudice?

The People answer: NO.
The defendant answers: YES

III.

When a defendant claims he never made a statement, it is not necessary to hold a hearing to determine voluntariness. Here, the defendant claimed he did not make a statement to the arresting officer. Since the defendant has not established cause and prejudice, did the trial court correctly deny relief on the question of trial counsel's effectiveness in failing to request a *Walker* hearing?

The People answer: YES.
The defendant answers: NO.

IV.

A trial irregularity that is so prejudicial to a defendant that it causes an unfair trial warrants the grant of a mistrial. The prosecution witness made one minor passing reference to an habitual third charge. The defendant has not carried his burden of establishing cause and prejudice; did the trial court correctly find that the brief reference did not so infect the trial with unfairness as to mandate a mistrial?

The People answer: YES.
The defendant answers: NO.

V.

To merit a new trial based on a prosecutor's remarks during closing argument, a defendant must show that the remarks were so prejudicial that the defendant was denied a fair and impartial trial. Here, the prosecutor described the testimony of the alibi witness as "convenient" and she tracked the evidence in arguing the defense position was weak. Since the prosecutor's remarks were proper, was the defendant denied a fair and impartial trial?

The People answer: NO.
The defendant answers: YES.

STATEMENT OF FACTS

The defendant was convicted in 2001 of second degree murder, felon in possession of a firearm, and possession of a firearm in the commission of a felony for the killing of fifteen-year-old Dawan Bibbs. The Honorable Prentis Edwards presided over his jury trial.

The defendant appealed to the Court of Appeals for reversal of his convictions presenting the following argument.

> THE CIRCUIT JUDGE VIOLATED DEFENDANT CAPRESE GARDNER'S RIGHTS TO CONFRONTATION, TO PRESENT HIS DEFENSE, AND TO DUE PROCESS BY SUPPRESSING EVIDENCE RELATING TO BIAS AND MOTIVE AND TO THE DEFENNSE THEORY THAT THE KILLING WAS DRUG RELATED, THAT THE DECEASED AND JAMES WRIGHT, THE CHIEF WITNESS AGAINST DEFENDANT GARDNER, WERE INVOLVED IN SELLING DRUGS, AND THAT WRIGHT COMMITTED THE KILLING.

On April 15, 2003, the Court of Appeals issued an unpublished *per curiam* opinion affirming the defendant's convictions.

The defendant filed a motion for relief from judgment that the trial court denied without requesting a response from the prosecutor. The Court of Appeals denied the defendant's application for leave to appeal. And in response to the defendant's application, this Court has ordered the prosecutor to file a response.

Additional citations to the record will be offered in support of the following arguments.

ARGUMENT

I.A.

(Styled as Argument V in the defendant's brief).

A trial court may not grant relief from judgment unless the defendant demonstrates cause for failure to have presented his claims on direct appeal and actual prejudice. Here, the defendant claims that appellate counsel was ineffective for having "failed" to discover and argue issues he now presents. Since the defendant has not demonstrated cause and prejudice, he is not entitled to relief from judgment.

A jury convicted the defendant of second degree murder, felon in possession, and possession of a firearm in the commission of a felony. Now he requests relief from judgment. The defendant offers several legal grounds for relief. But prior to considering the validity of the defendant's legal arguments, this Court must determine whether the defendant has satisfied the two-pronged "cause and prejudice" requirement of MCR 6.508(D)(3)(a) and (b).[1] This court rule is patterned after the federal rules governing collateral review.

The cause and prejudice standard is the product of profound and repeated consideration by the United States Supreme Court of the values which must be reflected in our criminal justice system. In fashioning MCR 6.508 (D) (3)(a) and (b), the Michigan Supreme Court has expressed its agreement with those federal decisions which define the scope of the rule.[2] It is *Wainwright*

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[1] *People* v *Brown*,196 Mich App 153, 156 (1992).

[2] *People* v *Reed*, 449 Mich 375 (1995).

v *Sykes*,[3] and *United States* v *Frady*,[4] in conjunction with a growing body of federal habeas corpus law, which have given dimension to the cause and prejudice standard. These cases unequivocally support the rule that a collateral attack against a criminal conviction or sentence may not be treated as though it were a direct appeal. The *Frady* Court summarized, "We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." That hurdle is a showing of cause for failure to object at trial or on direct appeal as well as a showing of actual prejudice suffered as a result of the alleged error.

Also, in *Jones* v *Barnes*,[5] the United States Supreme Court indicated that appellate counsel has no constitutional duty to raise every non-frivolous issue on appeal if counsel, as a matter of professional judgment, decides not to raise such issues on appeal.[6] The Court reasoned that counsel must be allowed to exercise his or her reasonable professional judgment in selecting those issues most promising for review, and, in this respect, specifically stated that "[a] brief that raises every colorable issue runs the risk of burying good argument...."[7] "This process of

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[3] *Wainwright v Sykes*, 433 US 72, 97 SCT 2497, 53 LEd2d 594 (1977).

[4] *United States v Frady*, 456 US 152, 102 SCt 1584, 71 LEd2d 816 (1982).

[5] *Jones v Barnes,* 463 US 745, 103 SCt 3308, 77 LEd2d 987 (1983).

[6] 463 US at 751, 103 SCt at 3312.

[7] 463 US at 753, 103 SCt at 3313.

'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy."[8]

The defendant claims that appellate counsel was ineffective for failing to raise the issues he now raises. Appellate counsel could have raised many issues on appeal, but chose instead to raise one other than those the defendant now presses. That decision by the defendant's first appellate counsel is precisely what is meant as strategy and is not tantamount to "good cause" under MCR 6.508(D)(3)(a). Thus, the defendant has failed to establish "good cause" for not raising his new claims in his appeal of right in the Michigan Court of Appeals. Nor has he demonstrated "actual prejudice" as defined in MCR 6.508(D)(3)(b)(i) which requires a defendant to demonstrate that but for the alleged error he would have had a reasonably likely chance of acquittal.[9] As will be seen in the following arguments, none of the issues the defendant now presents warrant relief.

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[8] *Smith* v *Murray*, 477 US 527, 536, 106 SCt 2661, 2667, 91 LEd2d 434 (1986), quoting from *Jones v Barnes, supra.*

[9] Arguably the defendant has satisfied this standard with respect to Argument I., application of the habitual offender statute.

ARGUMENT

I.

MCL 768.11 requires that to be considered an habitual offender third for the purpose of sentence enhancement, a person must have been convicted previously of any combination of two or more felonies. Here, the defendant had been convicted of felonious assault and felony firearm before being sentenced as a third-timed habitual offender. Since the statute does not say what *People v Stoudemire* requires, that two convictions arising out of a single transaction be counted only as one, this Court should consider overruling *People v Stoudemire* and denying relief to the defendant.

Standard of Review

An appellate court reviews the grant or denial of a motion for relief from judgment for an abuse of discretion.[10] The interpretation of a statute is reviewed *de novo*.[11]

Argument

The defendant demands resentencing, arguing that the prosecutor erred in requesting he be sentenced as an habitual third offender because his previous two convictions had been one transaction and according to *People v Stoudemire*,[12] he could have been considered only a second-time habitual offender.

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[10] *People v Ulman,* 244 Mich App 500, 508 (2001).

[11] People v Stone, 463 Mich 558, 562 (2001).

[12] *People v Stoudemire*, 429 Mich 262 (1987).

The normal sentencing guidelines range computed for the defendant was 180 to 300 months.[13] The habitual third enhancement made the range 180 to 450 months; both defense counsel and the prosecutor acknowledged these numbers.[14] The trial court sentenced the defendant "within the guidelines" to twenty-five to fifty years imprisonment.[15] That sentence was within the normal guidelines range as well as the habitual-third range. One might argue as harmless error the one committed here in the computation of the habitual sentence guidelines since the sentence imposed falls within the normal, unenhanced guidelines range – a losing argument since this Court in *People v Francisco*[16] stated that resentencing is required when there has been an error in the sentence scoring even if the minimum sentence imposed falls within the corrected sentence guidelines range. So, under normal circumstances, resentencing would be required here to adjust the upper level of the guidelines to the habitual second enhancement range – 375 months rather than 450 months. But analysis of the law of habitual offender sentencing discloses a flaw that calls out for correction. If that were done, the defendant's sentence in this case would stand.

Michigan has had habitual offender statutes for a long time. It was well understood that the purpose of the law was to punish and protect: "The punishment in such cases is increased because of the apparent persistence in the commission of crime by the person convicted and his

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[13] Appendix A, sentencing information report.

[14] 8/30/01, 6, 11.

[15] 8/30/01, 12.

[16] *People v Francisco*, 474 Mich 82, 89-90 (2006).

indifference to the laws deemed necessary for the protection of the people and their property."[17] A subtle shift occurred when this Court discerned the "intent" of the Michigan Legislature by interpreting the words of a New York Senator.[18] In *People v Stoudemire*,[19] this Court held that habitual-offender status was defined as the number of "opportunities to reform" an offender had had. The result was that a defendant might be convicted any number of times, but as long as those convictions arose out of the same transaction they could count only as a single conviction for the purposes of the habitual offender statute. This Court later revisited *Stoudemire* and acknowledged that "...a more accurate interpretation of the statute precludes many of the statements made concerning the intent and purpose of the Legislature."[20] While eviscerating the rationale of *Stoudemire* by rejecting the assertion that the Legislature intended that a period of possible rehabilitation occur between each bundle of prior convictions before those offenses may be counted in the habitual offender formula, this Court left intact the same transaction test.[21] So, separate criminal events are counted separately even if the convictions occur on the same day.

The language of the statute is clear and unambiguous; it does not support the same-transaction analysis. The heading of MCL 769.11 describes a "person convicted of two or more felonies." The first sentence of Sec.11 begins: "If a person has been convicted of any

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[17] *People v Palm*, 245 Mich 396, 401 (1929) See also *People v Hendrick*, 398 Mich 410 (1976).

[18] *People v Stoudemire*, 429 Mich 262 (1987): discussion of Justice Levin's description of the role of N. Y. Senator Caleb Baumes in the enactment of the statute is left to another day.

[19] *Id.*

[20] *People v Preuss*, 436 Mich 714, 720 (1990).

[21] *Id.*

combination of 2 or more felonies or attempts to commit felonies...." The statute does not distinguish between two convictions that occur on the same day that arise out of the same transaction and two convictions that occur on the same day that arise from distinct circumstances. The defendant who robs two people by walking from one house to another and pleads guilty to both offenses on the same day may face habitual third enhancement of his sentence for a third conviction. But a defendant who robs two people in the same house and pleads guilty to those two crimes on the same day will not face an equivalent sentence enhancement upon conviction for a third offense. As the *Preuss* Court noted, the scheme is "flawed." This case presents the opportunity to overrule *People v Stoudemire* and give effect to the plain meaning of the statute.

ARGUMENT

II.

When counsel is present at a line-up, the defendant bears the burden of demonstrating that it was impermissibly suggestive. Here, counsel was present at corporeal the line-up and a photo of it was used at trial. Since the defendant offers only vague suggestions that something might have been amiss, he has not satisfied his burden of showing cause for counsels' failure to previously raise the issue and actual prejudice.

Standard of Review

The question of the propriety of the pre-trial identification procedure was not preserved at trial or raised on appeal. Review of the denial of the defendant's motion for relief from judgment is for an abuse of discretion.[22]

Argument

Dawan Bibbs, the defendant's victim, named the defendant as his shooter to three people before he died. James Wright, one of the three, is the only one who saw the defendant when he came to the door and asked for Bibbs. Wright picked the defendant out of a corporeal line-up. Now, the defendant makes vague allegations about the fact that the police had photos of the defendant; he is not specific about his claim except to say that the line-up was suggestive.

An unduly suggestive lineup violates a defendant's due process rights.[23] A lineup is unduly suggestive and violates due process if, under the totality of the circumstances, the

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[22] *People v Ulman,* 244 Mich App 500, 508 (2001).

[23] *People v Kurylczyk*, 443 Mich 289, 311-312 (1993).

procedure was so suggestive that it created a substantial likelihood of misidentification.[24] Although a photo of the line-up was used by the prosecutor during her direct examination of Wright, no question of a suggestive array was raised at trial, nor was the issue raised on direct appeal. Even now, the defendant is not specific about his claim. The defendant has not satisfied his burden of establishing error at trial and a basis for relief from judgment.

[24] *Id*, at 302-303.

ARGUMENT

III.

When a defendant claims he never made a statement, it is not necessary to hold a hearing to determine voluntariness. Here, the defendant claimed he did not make a statement to the arresting officer. Since the defendant has not established cause and prejudice, the trial court correctly denied relief on the question of trial counsel's effectiveness in failing to request a *Walker* hearing.

Standard of Review

An appellate court reviews the grant or denial of a motion for relief from judgment for an abuse of discretion.[25]

Argument

Mark Amos, a Detroit police officer, testified that he and his partner established surveillance of a cell-phone business because they had information that the defendant paid his bill at the beginning of the month in-person. When the defendant left the store, Amos arrested him. According to Amos, after placing the defendant in the scout car and advising him of the reason for his arrest and his constitutional rights, "He [defendant] stated he was there when the shit went down but he had left."[26] Because the defendant denied that he made the remark, no hearing was held to determine voluntariness.

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[25] *People v Ulman,* 244 Mich App 500, 508 (2001).

[26] 8/1/01, 176.

Now, the defendant claims ineffective assistance of counsel for failure to preserve the issue. In support of his argument, the defendant cites a plethora of cases dealing with voluntariness. The defendant seems to be saying that because the statement was not reduced to writing, trial counsel would have prevailed had he requested suppression of the statement. The defendant's claim is not really that the statement was not voluntarily given. Since the defendant is arguing he never made the statement, a *Walker*[27] hearing was unnecessary.[28] The trial court correctly denied relief from judgment on this issue.

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[27] *People v Walker*, 374 Mich 331 (1965).

[28] *People v Spivey*, 109 Mich App 36 (1981).

ARGUMENT

IV.

A trial irregularity that is so prejudicial to a defendant that it causes an unfair trial warrants the grant of a mistrial. The prosecution witness made one minor passing reference to an habitual third charge. The defendant has not carried his burden of establishing cause and prejudice; the trial court correctly found that the brief reference did not so infect the trial with unfairness as to mandate a mistrial.

Standard of Review

An appellate court review's a trial court's denial of a motion for mistrial for an abuse of discretion.[29]

Argument

Mark Amos, a Detroit police officer, testified to the circumstances of the defendant's arrest. The prosecutor asked Amos whether he told the defendant what he was being charged with. Amos responded that he showed the defendant the warrant that charged him with murder, felony firearm, flight to avoid prosecution, and habitual third.[30] Trial counsel requested a mistrial because of the reference to "habitual third;" the trial court denied the request. Now, the defendant claims the issue should have been raised on appeal and that it warrants the grant of relief from judgment. The claim is baseless.

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[29] *People v Dennis*, 464 Mich 567 (2001).

[30] 8/1/01, 167.

The power to declare a mistrial should be used "...with the greatest caution, only under urgent circumstances, and for very plain and obvious causes."[31] A mistrial should be granted only when the error complained of is so egregious that the prejudicial effect can be removed in no other way. A mere irregularity is not adequate reason for such a drastic response as mistrial. Unless the defendant can demonstrate that he suffered prejudice such that his trial amounted to a miscarriage of justice, a trial court's denial of a request for mistrial should not be reversed on appeal.[32]

The defendant complains that the trial court should have granted his motion for mistrial, made after Amos made reference to an habitual third "charge" thereby informing the jury that he had previously been convicted. The reference was passing and most likely not understood by the jury as indicative of the defendant's record. Not every mention of inappropriate subject matter warrants a mistrial, and this slip certainly did not.

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[31] *People* v *Siler*, 171 Mich App 246, 256 (1988); *People* v *Johnson*, 164 Mich App 634 (1987).

[32] *People* v *Heard*, 178 Mich App 692 (1989).

ARGUMENT

V.

To merit a new trial based on a prosecutor's remarks during closing argument, a defendant must show that the remarks were so prejudicial that the defendant was denied a fair and impartial trial. Here, the prosecutor described the testimony of the alibi witness as "convenient" and she tracked the evidence in arguing the defense position was weak. Since the prosecutor's remarks were proper, the defendant was not denied a fair and impartial trial.

Standard of Review

Generally, a claim of prosecutorial misconduct is a constitutional claim that this Court reviews *de novo*.[33] This Court evaluates the challenged conduct in context to determine if the defendant was denied a fair and impartial trial.[34]

Argument

The prosecutor provided the jury with a thorough analysis of the evidence that supported conviction of the defendant. She also said that the alibi testimony was "convenient." And it was. Kimberly Jones, the woman who gave the defendant an alibi, also had pressed charges against him for slashing her tires and breaking into her house as their relationship disintegrated. As that case progressed she spoke to the prosecutor several times after learning about the murder charge

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[33] *People v Pfaffle*, 246 Mich App 282, 288 (2001).

[34] *People v Aldrich*, 246 Mich App 101, 110 (2001).

against him. Even after talking to the prosecutor about the murder, Jones said nothing about the alibi. That is all the prosecutor said and it was consistent with Jones' testimony.

The prosecutor consistently pointed to the evidence for support of her argument that the defendant had lied. about the. It was the evidence – the identification testimony, circumstances of the killing, and the defendant's own statement upon arrest – that caused the jury to convict, not remarks made by the prosecutor. This Court has acknowledged that the "prosecutor is not required to state his argument in the blandest of terms."[35] Here, the prosecutor's responsive remarks were not manifestly prejudicial; they did not draw even one objection from trial counsel. The prosecutor's remark was an appropriate rebuttal response. The defendant's claim to the contrary is baseless.

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[35] *People v Marji*, 180 Mich App 525, 541 (1989).

RELIEF

The People request this Court to deny the defendant's application for leave to appeal.

Respectfully submitted,

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