STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ELLIS DERRICK,

Defendant-Appellant.

UNPUBLISHED
May 24, 2002

No. 229916
Oakland Circuit Court
LC No. 00-170907-FC

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant was convicted of armed robbery, MCL 750.529, and accessory after the fact, MCL 750.505, following a jury trial. At sentencing, the court vacated the accessory after the fact conviction and sentenced defendant as a second habitual offender, MCL 769.10, to a term of 4-1/2 to 20 years' imprisonment for the armed robbery conviction. Defendant now appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by allowing testimony from two police officers regarding statements made to them by the complainant and codefendant Fellows, both of whom testified against defendant at trial. Defendant argues that the testimony should have been excluded under MRE 403, because it was cumulative to the complainant's and Fellows' trial testimony. We disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Even if relevant, evidence may be excluded under MRE 403 if its probative value is substantially outweighed by the danger of unfair prejudice or amounts to the needless presentation of cumulative evidence. *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000). "Unfair prejudice" does not simply mean "damaging." *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212; 539 NW2d 504 (1995). Rather, unfair prejudice exists when there is a tendency that the marginally probative evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.* at 75-76. The prejudicial effect of evidence is best determined by the trial court's contemporaneous assessment of the presentation, credibility and effect of the testimony. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995).

Defendant first challenges the testimony of a police officer, who stated that the complainant told him that defendant's car was parked two spaces from hers at the time of the robbery. This was consistent with the complainant's earlier trial testimony; however, on cross examination, defense counsel questioned the accuracy of this information in light of a police report written by the officer which indicated that the cars were farther apart. This evidence was relevant for purposes of evaluating defendant's vantage point at the time of the robbery and assessing the credibility of the defense theory that defendant had no prior knowledge of the robbery and was not aware of its commission before the women returned to his car. Moreover, the trial court did not abuse its discretion by refusing to exclude the evidence as unnecessarily cumulative under MRE 403.

Defendant also complains that the testimony of another officer, who testified that Fellows made certain statements regarding the motive for the robbery and defendant's involvement in planning it, should have been excluded because it was cumulative to Fellows' earlier trial testimony. However, in his cross-examination, defense counsel questioned Fellows about whether she was promised anything in return for her testimony and also inquired whether Fellows' testimony was influenced by a possible motive to fabricate or bias against defendant due to her dislike of codefendant Jones or defendant. Against this backdrop, the trial court did not abuse its discretion in allowing the challenged testimony.

II

Defendant next argues that the trial court erred in allowing the prosecutor to impeach him with evidence of his prior conviction for retail fraud. The trial court did not engage in an on-the-record analysis of the probative value of the evidence and any prejudicial effect, contrary to MRE 609(b). However, this error was harmless because it is apparent that the prior conviction was admissible under MRE 609(a)(2). The crime contains an element of theft and, therefore, is an indicator that defendant is of dishonest character and may not testify truthfully. *People v Cross*, 202 Mich App 138, 147; 508 NW2d 144 (1993). Also, it was committed in January 1999. The recent age of the conviction enhances its probative value. *Id.* at 146-147; see also *People v Minor (On Remand)*, 170 Mich App 731, 736; 429 NW2d 229 (1988). The prejudicial effect of the evidence is minimized by the fact that retail fraud and armed robbery are not substantially similar offenses. See *People v Allen*, 429 Mich 558, 606; 420 NW2d 499 (1988). Also, admission of the evidence did not cause defendant not to testify. Thus, the prior conviction was admissible under MRE 609(a)(2); therefore, appellate relief is not warranted. Moreover, based on the evidence presented, we do not believe that a reasonable juror would have voted to acquit defendant even had the impeachment evidence been suppressed; therefore, assuming error, it was harmless. *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988).

III

Defendant next argues that the trial court improperly allowed rebuttal testimony that could have been presented during the prosecutor's case-in-chief. Because defendant did not object to the scope of the rebuttal testimony, this issue is not preserved.[1] *People v Stimage*, 202

[1] Defendant's objection to a specific question on grounds of relevancy was insufficient to preserve this issue. An objection based on one ground at trial is insufficient to preserve an (continued…)

Mich App 28, 30; 507 NW2d 778 (1993). In order to avoid forfeiture of this unpreserved issue, defendant must demonstrate a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Contrary to what defendant argues, the test of whether rebuttal evidence is properly admitted is not whether the evidence could have been offered in the prosecutor's case-in-chief, but whether it is responsive to evidence introduced or a theory developed by defendant. *People v Figgures*, 451 Mich 390, 399; 547 Mich 673 (1996). In this case, the challenged testimony was responsive to issues injected by defendant. Plain error has not been shown.

Defendant also argues that rebuttal testimony regarding Jones' prior statements to the police violated his right of confrontation. Defendant relies on *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999), *Bruton v US*, 391 US 123; 88 S Ct 1620; 20 L Ed 476 (1968), and *People v Banks*, 438 Mich 408; 475 NW2d 769 (1991), in support of his position. However, those cases all involve the admission of statements by a *non-testifying* codefendant. Defendant provides no support for his position that the prior statement of a testifying codefendant cannot be used as impeachment evidence to contradict their in-court testimony, nor does he explain how he was prejudiced considering that Jones had previously testified on his behalf and, had there been an objection, could have been recalled if necessary. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant has failed to demonstrate that a plain error affected his substantial rights.

IV

Defendant also argues that his right to due process was violated when the prosecutor resorted to a community protection argument in his closing statement. Because defendant did not object to the remark in question, this issue is not preserved. *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000). Because any prejudice caused by the remark could have been cured by a cautionary instruction upon timely objection, we find that defendant has failed to avoid forfeiture of this unpreserved claim. *Schutte*, *supra*; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Moreover, defendant has failed to demonstrate that a plain error affected his substantial rights.

V

Defendant finally argues that the prosecutor failed to use due diligence in obtaining the presence of a missing witness. We disagree with defendant that the police were required to exercise due diligence in locating and producing this non-endorsed witness. Due diligence is no longer the standard. MCL 767.40a; *People v Burwick*, 450 Mich 281, 288-289, 537 NW2d 813 (1995); *People v Long*, 246 Mich App 582, 586; 633 NW2d 843 (2001). Rather, the prosecutor was only required to provide reasonable assistance in locating the witness. MCL 767.40a(5);

(…continued)

appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778, (1993).

Burwick, *supra* at 288-289; *Long*, *supra* at 586. Here, the trial court did not err in finding that reasonable efforts were made to assist in locating the witness. Thus, the missing witness instruction, CJI 2d. 5.12, was not warranted.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly