STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2004
v	No. 244937 Oakland Circuit Court
DWAYNE SCOTT BERRY, Defendant-Appellant.	LC No. 2002-182823-FC

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to fifty to seventy-five years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Underlying Facts

Defendant's convictions arise from the armed robbery of a married couple in their late sixties at their home, located in a secluded 2-½ acre wooded area. Defendant was present at the victim's home where he witnessed the transfer of $16,000 cash for the sale of a vintage vehicle. The victim sold the vehicle to defendant's acquaintance, Robert Hogg, and defendant witnessed the sale for "security reasons." After the transaction, the victim placed the cash in a bank envelope on a desk in his office. There was a bathroom adjacent to this office, and defendant repeatedly asked to use the bathroom during his visit. At approximately 8:30 p.m., Hogg and his party, including defendant, left the victim's residence.

Defendant returned to the victim's home shortly before 11:00 p.m. and represented that he had left some jewelry in the bathroom. Upon gaining access to the home, defendant pointed a small black handgun at the victim. The victim's wife heard the hostility in defendant's voice and saw the gun. She backed into an office closet and dialed 911, but defendant retrieved her from the closet and hung up the telephone. At 11:03 p.m., a police dispatcher heard a partial statement over the victim's phone line: "do this and you won't get hurt." Southfield police officers were dispatched to the victim's residence.

The victim rushed defendant and told his wife to run. Defendant yelled, and a second man, whom both the victim and his wife identified as codefendant Darry Dean Rabideau, ran into the garage. At the direction of defendant, Rabideau chased the victim's wife, but he could not locate her. Rabideau returned to the garage area where defendant had managed to subdue the victim with a metal object. Rabideau was instructed to guard the victim while defendant briefly went back into the home. The men then took defendant into the backyard and instructed him to call for his wife or he would be killed. The victim testified that when he moved his head, the gun discharged.

At 11:10 p.m., Southfield police officers arrived at the victim's house and announced their presence. Defendant immediately released the victim and fled. When the victim went into the house, he discovered that the $16,000 was missing. Although he did not see who took the money, he testified that it was there before defendant arrived.

After the incident, the police were unsuccessful in locating defendant for several months. In January 2002, six months after the armed robbery, Southfield police attempted to make a routine traffic stop, but the driver averted the police. Through information generated from the license plate number, the police learned that defendant was the driver of the car. Ultimately, police were able to establish surveillance of a residence and arrest defendant.

Defendant testified that the victim offered him $5,000 to stage a robbery to support an insurance claim. The victim allegedly told defendant to come back after dark, knock on the door, and pull a gun on him. Defendant enlisted Rabideau to drive, but only told him that the victim was paying him to scare his wife out of the house. Defendant denied taking the $16,000, hitting the victim with a metal object, or firing a gun at the victim's head. According to defendant, during the bogus robbery, he and the victim were wrestling around in the backyard "trying to make the robbery look good when the gun went off." Defendant admitted that, immediately after the incident, he fled the state, and also fled the Southfield police on January 21, because he knew that there was a warrant for his arrest.

II. Sufficiency of the Evidence

Defendant alleges that the evidence was insufficient to support his conviction for armed robbery and, therefore, he is entitled to a new trial. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). An object is in the

"presence or possession" of a person for purposes of a robbery analysis when it is so within the person's reach, inspection, observation or control that the person could, if not overcome by violence or fear of violence, retain possession of it. *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997); *People v Clark*, 113 Mich App 477, 480; 317 NW2d 664 (1982).

Here, the evidence, viewed in a light most favorable to the prosecution, was sufficient to enable a rational trier of fact to infer all the necessary elements of armed robbery. Defendant knew that the victim had recently received $16,000 in cash for the sale of a vehicle. Defendant returned to the home late at night with a gun. When Rabideau subdued the victim in the garage, defendant entered the home. When the victim returned to the home after defendant fled, the cash was missing. Based on the sequence of events that occurred, a reasonable jury could infer that defendant took the $16,000. The fact that no one saw defendant take the money is inconsequential. The circumstantial evidence was sufficient to allow the jury to infer that defendant took the money. *Truong, supra*. The jury rejected defendant's exculpatory explanation that he was paid to stage a bogus robbery. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). This Court will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *Wolfe, supra.* In sum, the evidence was sufficient to enable a rational jury to conclude beyond a reasonable doubt that defendant committed the crime of armed robbery.

III. Motion for Mistrial

Defendant also argues that the trial court abused its discretion by denying his motion for a mistrial, after a police detective testified regarding codefendant Rabideau's inculpatory statement in the presence of defendant's jury. We disagree. This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (citation omitted). With respect to the underlying evidentiary claim, because defendant failed to timely object, this Court reviews that unpreserved claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant is not entitled to relief on this basis, principally because he has failed to establish that he was prejudiced, i.e., that he was denied a fair and impartial trial. *Griffin, supra*. It is unclear what, if any, negative effect this testimony could have had on defendant's case. In the presence of defendant's jury, the detective did not delineate the substance of the statement of codefendant Rabideau. Rather, the detective merely stated that codefendant Rabideau "acknowledge[d] his presence there, his participation" before being cut off by the prosecutor. This testimony was not inherently contradictory to defendant's defense. It was undisputed that both men were at the home on the night in question. In context, the detective's reference to codefendant Rabideau's statement was isolated, fleeting, and was not emphasized to the jury. Furthermore, defendant declined the opportunity for a cautionary instruction on the matter. The denial of the motion for a mistrial was not an abuse of discretion. *Griffin, supra*.

IV. Evidence of Flight

Next, defendant claims that the trial court erred by allowing evidence concerning his flight from the police because it occurred months after the robbery and was irrelevant. We disagree. Because defendant did not object to the testimony below on the basis he now raises on appeal, see MRE 103(d), this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines, supra*.

"It is well established in Michigan law that evidence of flight is admissible" to support an inference of "consciousness of guilt." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Nonetheless, evidence of flight, alone, is insufficient to sustain a conviction. *Id.* The term "flight" has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *Id*. "The remoteness of the flight from the time of defendant's arrest [does] not affect the admissibility of the evidence, but [is] relevant only to the weight of the evidence." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001).

Here, because it is not clear or obvious that the challenged evidence could not have been received successfully and correctly, defendant has failed to demonstrate plain error. *Carines, supra*. Contrary to defendant's assertion, his actions of fleeing the police months after the robbery could properly be considered evidence of "flight." *Coleman, supra*. Additionally, at trial, witnesses identified defendant as the perpetrator and, thus, this was not a situation where the evidence of flight was the sole evidence of defendant's guilt. Furthermore, although defendant's flight from the police occurred months after the robbery and involved other criminal acts, the details of defendant's flight were nonetheless admissible as part of the "*res gestae* of the incident." See *Coleman, supra* at 5-6. We also note that the trial court instructed the jury on the proper use of this evidence. *People v Taylor*, 195 Mich App 57, 63-64; 489 NW2d 99 (1992). Accordingly, this issue does not support reversal.[1]

V. Denial of the Right of Cross-Examination

Defendant claims that, during trial, the court incorrectly limited his testimony regarding a conversation he had with a witness, thereby violating his constitutional right of confrontation.[2] We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

As an initial matter, we note that an offer of proof regarding the substance of the excluded testimony was not presented. MRE 103(a)(2); *People v Hampton*, 237 Mich App 143,

[1] Within this issue, defendant alleged that the detective's testimony, that he was armed with a handgun at the time of capture, was prejudicial. This testimony was not outcome determinative. *Carines, supra*. Moreover, defendant acknowledged in his own testimony that he had a handgun at the time of arrest. Also within the discussion of this issue, it was alleged that trial counsel was ineffective for failing to object to the evidence of flight. This contention is without merit. Evidence of flight was admissible, and counsel is not required to make a frivolous objection. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

[2] Defendant incorrectly postures this issue as one involving a limitation on the right to cross-examine witnesses.

154; 603 NW2d 270 (1999). Therefore, we cannot conclude whether the substance of the excluded testimony was admissible under the rules of evidence. Additionally, contrary to defendant's suggestion, a preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Here, despite the challenged evidentiary ruling, it is plainly apparent that defendant had the opportunity, and extensively discussed, the fact that Hogg told him that the victim was a wealthy man. In sum, defendant's testimony was sufficiently detailed and compelling as to render the initial limitation of his direct examination harmless. Accordingly, reversal is not warranted on this basis. *Lukity, supra*.

VI. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial by numerous instances of prosecutorial misconduct. We disagree. This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *Bahoda*, *supra* at 266-267, 282. When a defendant fails to object to the prosecutor's conduct, the issue is reviewed for plain error affecting the defendant's substantial rights. *Carines*, *supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A. Denigration of Defendant

Defendant argues that the prosecutor treated him with "derision" throughout his direct and cross-examination by laughing at his testimony, thereby indirectly remarking that defendant was not credible. Following defense counsel's direct-examination of defendant, outside the presence of the jury, it was alleged that the prosecutor was observed laughing by defense co-counsel. Defendant further alleged that the prosecutor apparently showed "some mirth" during her cross-examination because he asked her whether she thought the proceeding was funny.

A prosecutor may not express her personal opinion about the defendant's guilt, *Bahoda*, *supra* at 276-277; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), and "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda*, *supra* at 283. But even if we accept defendant's claim that the prosecutor laughed during his testimony,[3] although improper, it would not warrant reversal. Defense counsel did not timely object and failed to request a curative instruction, or otherwise request any other action by the trial court. Moreover, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility and that the lawyers' comments are not evidence. The court's instructions were sufficient to dispel any perceived prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

[3] It should be noted that the trial court reached a conclusion contrary to the allegations raised by defense counsel. The trial court did not observe any laughter by the prosecutor during the examination and noted that the microphones did not pick up any laughter. Although the proceedings were videotaped, a videotape of the alleged incident was not provided on appeal.

B. Improper Questioning of Defendant

Defendant also argues that the prosecutor "continued to treat [him] with derision and hostility" during cross-examination, noting that she "cut off his answers" "time and time again" and, at one point said, "maybe you didn't understand my question." Defendant did not object to the prosecutor's actions, and no clear or obvious error is apparent. *Carines, supra*.

Initially, we note that defendant fails to adequately argue how the prosecutor's conduct during his cross-examination amounted to impermissible cross-examination. Rather, he merely provides numerous page citations with the notation that the prosecutor "cut off" his answers. 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 Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted).

Moreover, viewed in context, the record does not demonstrate that the prosecutor engaged in inappropriate cross-examination. Rather, it appears that, in all cited instances, the prosecutor was directing defendant to answer the asked questions. We also note that defense counsel had an opportunity to question defendant during redirect examination, and could have given him the opportunity to complete any answer that was seemingly cut off. In sum, under the circumstances, we find no prosecutorial misconduct for which relief is warranted.

Defendant also claims that the prosecutor inappropriately made "editorializing remarks" during her questioning of him.[4] Although defense counsel objected, he failed to request a ruling from the trial court, a curative instruction, or any other action by the trial court. Furthermore, defendant has not shown how he was prejudiced by the prosecutor's remark. Again, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Watson, supra*. Moreover, the trial court's instructions that the lawyers' questions are not evidence, and that the case should be decided on the basis of the evidence were sufficient to dispel any perceived prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.[5]

VII. Cumulative Error Theory

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal

[4] The trial court did not respond to defense counsel's objection.

[5] Just before the challenged statement, defense counsel asserted that the questions posed by the prosecutor had been asked and answered. In response, the prosecutor indicated that she did not understand the answers given. Immediately thereafter, in answering a question, defendant said to the prosecutor "I think you're the one that's a little slow here." Thus, the comment "got that straight" may have merely been a statement of understanding of the answer given by defendant, not a comment on the testimony by defendant.

under the cumulative error theory is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).[6]

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

[6] We note that defendant recently raised four additional issues in a Standard 11 Brief, all of which lack merit. The evidence did not support the instructions requested by defendant. See *People v Reese*, 466 Mich 440, 447-448; 647 NW2d 498 (2002). There was no evidence that the prosecutor violated any discovery order in the case by failing to provide medical reports. Moreover, during trial, the victim testified that he received treatment at his home and refused to go to the hospital. Defendant's contention that the prosecutor allowed false testimony to stand is without merit. It was abundantly clear that the police searched for the weapon at the time of the offense and when defendant was apprehended, but the gun was never located. Lastly, the contention that trial counsel was ineffective for failing to call medical personnel that administered aid to the victim at the scene is without merit. The categorization of those witnesses as res gestae witnesses is erroneous. The nature of the injuries and any causation is not an element of the convicted offenses. Moreover, the testimony regarding the injuries was consistent. Both defendant and the victim testified that he sustained injuries as a result of the fall from the steps. However, the victim indicated that defendant's actions caused the fall whereas defendant characterized the fall as accidental. These issues do not warrant reversal of the convictions or a new trial.