STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2004
v TIM LANDERS, Defendant-Appellant.	No. 235918 Wayne Circuit Court LC No. 99-009785-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TIM LANDERS, Defendant-Appellant.	No. 235919 Wayne Circuit Court LC No. 99-009784-01

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted, in two separate cases, of a total of two counts of first-degree murder, MCL 750.316, two counts of conspiracy to commit murder, MCL 750.157a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] Defendant was tried jointly with codefendant Christine Jackson, before a single jury. Defendant was sentenced to concurrent terms of life imprisonment for each of the murder and conspiracy convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. Defendant's convictions arise from the shooting deaths of Mary Ann Simmons and Kevin Garland. We affirm.

[1] Defendant was also convicted of a second count of felony-firearm, but the court vacated that conviction at sentencing.

On appeal, defendant first argues that the trial court erroneously denied his mid-trial motion for a separate trial. We disagree.

Ronney Johnson testified that he became frightened for his safety and the safety of his family when he learned, after his arrest, that Angela Wallace, a California attorney, had contacted his mother in California and told her that he was in "big trouble."[2] At trial, Wallace testified that she did not know codefendant Jackson before Wallace attempted to arrange for representation for Johnson after his arrest in October 1998. According to Wallace, she was contacted by one of Johnson's family members to represent Johnson on a gun charge in Detroit. Wallace claimed that she did not meet Jackson until March 1999 when she represented her for an extradition. Wallace testified that both Johnson and Jackson were from California, and that their families called her as a result of referrals. Wallace further testified that Jackson never asked her to represent Johnson. The prosecutor subsequently contacted a California district attorney and learned that Wallace had testified in an unrelated federal case that she represented Jackson in March 1998. The prosecutor contacted Wallace, who agreed to return to Michigan to explain the inconsistency, but Wallace subsequently disappeared and could not be located. The trial court allowed the transcript of the earlier federal proceeding to be admitted for impeachment purposes. Defendant moved for a separate trial, arguing that the evidence was unduly prejudicial as to him. The trial court denied the motion, but instructed the jury that the evidence was only to be considered against codefendant Jackson.

We review a trial court's ruling on a motion to sever for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). "Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes 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. The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Hana, supra* at 346-347. Defendant argues that severance was required because the impeachment evidence concerning the relationship between Wallace and codefendant Jackson was prejudicial to his case. But as our Supreme Court stated in *Hana*, *supra* at 349, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial," does not suffice to establish the requisite prejudice to require severance. The tension between the defenses in this case was not "so great that a jury would have to believe one defendant at the expense of the other." *Id.*

Further, the jury was instructed that the impeachment evidence was not to be considered against defendant. The trial court's limiting instruction was given as follows:

> First of all, this testimony can only be considered in judging the credibility of the witness Angela Wallace. It cannot be used for any other purpose, that it, it

[2] Johnson, from Los Angeles, California, testified, for the prosecution, that he witnessed defendant shoot Kevin Garland. Johnson also testified that defendant requested that he "take care of" Simmons, and that when he declined defendant made "that same request" to Kevin Wills. According to Johnson, Wills left and when he returned he indicated that he had "handled" it and Jackson confirmed that she saw Wills "take care of the business."

> cannot be used as proof of any of the facts stated in that transcript. Again, it can only be used to judge the credibility of the witness Angela Wallace and for no other purpose.
>
> In addition, this evidence comes in only with respect to the Defendant, Christine Jackson. It only can be considered in terms of her case in judging the credibility of Angela Wallace. It cannot be used for any other purpose. Again, I'll repeat, it cannot be used as facts of any of the statements that are contained within the transcript.

The jury is presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The evidence that Wallace knew Jackson in March 1998, before Johnson was arrested, was damaging because it impeached Wallace's credibility and, by inference, called into question her other testimony, particularly her claim that she did not contact Johnson's family or arrange his representation in October 1998 at Jackson's request. And, in light of the conspiracy charges in this case and the prosecution's theory that defendant and codefendant Jackson acted together, the evidence was somewhat prejudicial. But considering the nature of the impeachment evidence, that the request for severance was made in mid-trial, and the limiting instruction given by the trial court, we conclude that the court did not abuse its discretion in denying defendant's request for a separate trial.[3]

Defendant next argues that he was denied a fair trial because of misconduct by the prosecutor. Prosecutorial misconduct issues are generally reviewed case by case, and this Court considers the alleged misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000); *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Here, however, defendant failed to object to several of the matters that he now claims were improper. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *Schutte, supra* at 720, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

First, defendant argues that the prosecutor improperly suppressed the impeachment evidence of attorney Wallace's prior testimony. We disagree. A prosecutor may not *knowingly* use false testimony to obtain a conviction. *Banks v Dretke*, ___ US ___; 124 S Ct 1256, 1274;

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[3] We note that defendant submitted supplemental authority contending that the recent United States Supreme Court decision, *Crawford v Washington*, 541 US __; 124 S Ct 1354, 1364; 158 L Ed 2d 177 (2004), supports that the admission of Wallace's testimony from a prior federal proceeding denied defendant the right to confront his accuser because her grand jury statements were testimonial in nature and she was unavailable for cross examination regarding these statements. However, we find that this contention is meritless because Wallace's testimony from the prior federal proceeding was not presented against defendant. In fact, the jury was specifically instructed that Wallace's prior testimony from the federal proceeding was not to be used against defendant, but only against codefendant Jackson. Accordingly, defendant was not denied his Sixth Amendment guarantee, "to be confronted with the witnesses *against him*." (Emphasis added.)

157 L Ed 2d 1166 (2004); *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998) (emphasis added). There is no indication in the record that the prosecutor was aware of Wallace's earlier contradictory federal testimony before Wallace testified at defendant's trial. Upon inquiry by the trial court, the prosecutor stated that it was only after Wallace had testified that he decided to contact a district attorney in California to inquire whether the district attorney had any information to connect Wallace to Jackson before the dates in question. It was at that time that the prosecutor first learned of Wallace's earlier testimony in the federal case. There is nothing in the record to suggest that the prosecutor knew beforehand that Wallace would give inconsistent testimony at defendant's trial, that the prosecutor was aware of Wallace's earlier contradictory testimony at the time Wallace testified, or that the prosecutor deliberately withheld any evidence. Therefore, we find no merit to this claim.

Defendant additionally argues that a new trial is required because the prosecutor improperly denigrated defense counsel during closing rebuttal argument, improperly appealed to the jury's sympathy, and argued facts not in evidence. We disagree.

A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor is free to base an argument on the inferences created by a defendant's theory, *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), and is not required to use the "blandest possible terms" to state his inferences and conclusions, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Rather, the prosecutor may use strong and emotional language in making his argument so long as the evidence supports it. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

Although defendant complains that the prosecutor improperly appealed to the jury's sympathy, the trial court found that the challenged remarks did not amount to an improper appeal for sympathy. A fair reading of the prosecutor's remarks supports that the prosecutor was arguing that the jury should consider all the evidence in this case. See *People v Thomas*, ___ Mich App ___; ___ NW2d ___ (Docket No. 243817, issued February 3, 2004) slip op p 2. Further, the trial court instructed the jury that sympathy must not play any part in their decision. This instruction was sufficient to cure any perceived prejudice.

Defendant did not object to the remaining challenged remarks, thus, precluding appellate relief absent plain error affecting defendant's substantial rights. *Carines*, *supra*.

We reject defendant's claim that a new trial is required because the prosecutor improperly denigrated defense counsel. For the most part, the challenged remarks were responsive to defense counsel's arguments. Even improper remarks do not require reversal when they are of a responsive nature. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Viewed in this context, the prosecutor's remarks did not constitute plain error. Further, any prejudice that did arise could have been cured by a cautionary instruction upon timely objection. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte*, *supra* at 722. Defendant has presented no outcome determinative plain error with regard to the prosecution denigrating defense counsel.

We also reject defendant's claim that the prosecutor improperly argued facts not in evidence. The prosecutor is allowed to draw inferences from the testimony. *People v Buckey*,

424 Mich 1, 14-15; 378 NW2d 432 (1985). The challenged remarks were supported by the evidence and reasonable inferences arising therefrom. Therefore, no plain error exists affecting defendant's substantial rights.

Next, defendant argues that the trial court improperly limited his cross-examination of Johnson. We disagree. The Confrontation Clause does not give a defendant an unlimited right to cross-examine on any subject. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). While a defendant is entitled to "a reasonable opportunity to test the truth of a witness' testimony," the trial judge "retain[s] wide latitude . . . to impose reasonable limits" on cross examination. *Id.* Whether a trial court has properly limited cross-examination is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

Here, the trial court intervened when defense counsel referred to the same impeachment evidence repetitively during his lengthy cross-examination of Johnson. The trial court also limited cross-examination on collateral matters, such as the karat-weight of Johnson's gold necklace, and properly excluded extrinsic evidence of an auto loan agreement for the purpose of attacking Johnson's credibility, a use specifically prohibited by MRE 608(b). Contrary to what defendant suggests, the trial court permitted inquiry into relevant matters affecting Johnson's credibility, allowing defense counsel to elicit testimony that Johnson repeatedly lied, sold drugs, and spent time in prison, and that he earned enough money to support his family, purchase luxury items, and drive a BMW, even though he did not report any income. Insofar that the trial court limited inquiry into certain matters, it did not abuse its discretion.

Lastly, we note that defendant submitted supplemental authority with a cursory argument that pursuant to the recent United States Supreme Court decision in *Crawford v Washington*, 541 US __; 124 S Ct 1354, 1364; 158 L Ed 2d 177 (2004), the trial court improperly, and in violation of the Confrontation Clause, permitted Kelvin Garland, Kevin Garland's brother, to testify about what Kevin Garland had told him over the phone[4] and what Simmons had told him about buying cocaine.[5] Apparently, defendant's contention is that he was denied his right to confront Kevin Garland and Simmons regarding the statements against him because they are deceased. Initially, we note that even if *Crawford, supra*, is applicable to defendant we find no plain or outcome determinative error, with regard to this unpreserved issue, because Kelvin Garland's testimony regarding statements from Kevin Garland and Simmons did not change the outcome of defendant's trial. See *People v Geno*, __ Mich App __; __ NW2d __ (Docket No. 241768, issued April 27, 2004), slip op p 4.

Nonetheless, we find that the statements made by Kevin Garland and Simmons to Kelvin Garland were not "testimonial," in nature and, thus, are not barred by the Confrontation Clause. See *Crawford, supra* at 541 US at __; 124 S Ct at 1364, 1374. The statements defendant

[4] Kelvin Garland testified that Kevin Garland told him about an "incident between Mike [McConico (who testified that he paid an individual to have defendant shot)] and [defendant]" on the telephone.

[5] Kelvin Garland testified that Simmons told him that her and Kevin Garland had bought "at least 25 keys" from California, and she helped distribute them.

contends were improperly admitted, were not testimonial in nature as a government official did not elicit them, the statements were not any type of "*ex parte* in-court testimony or its functional equivalent," and the statements were not given with an eye toward trial.[6] See *Crawford, supra*, 541 US at __; 124 S Ct at 1364; see also *Geno, supra*. The Court in *Crawford* 541 US at __; 124 S Ct at 1374, provided that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." Therefore, we conclude that the testimony regarding the statements of Kevin Garland and Simmons is not improper pursuant to *Crawford*. We further conclude that defendant has established[7] no plain error that was outcome determinative with regard to this Confrontation Clause issue. See *Geno, supra*.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot

[6] We note that the Court in *Crawford* did not define "testimonial" instead left it "for another day." *Id*. at 1374. But the Court in *Crawford* noted that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id*. The statements at issue in the present case are not akin to any of those type statements listed as testimonial in *Crawford*.

[7] We note that defendant's only claim in his supplemental brief is that the admission of the testimony is improper pursuant to *Crawford, supra*.