STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2004
v	No. 247313 Oakland Circuit Court
PHILLIP ANTHONY BROWN, Defendant-Appellant.	LC No. 2002-184580-FC

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and felonious assault, MCL 750.82. He was sentenced to life imprisonment for the first-degree murder conviction and twenty-three to forty-eight months' imprisonment for the felonious assault conviction. He appeals as of right. We affirm.

Defendant was convicted of murdering Randy Pardy by shooting him with an arrow and stabbing him twice with a knife at an apartment defendant shared with Brian Weigold. Defendant was also convicted of feloniously assaulting Weigold when he swung the knife at Weigold during this incident. Defendant did not deny killing Pardy, but claimed he did so in self-defense.

On appeal, defendant argues that the trial court erred in excluding evidence of a pending criminal sexual conduct (CSC) case against Weigold, the prosecution's key witness at trial. Defendant argues that he was denied his constitutional right to confront Weigold for purposes of testing his credibility. We disagree.

In an offer of proof outside the presence of the jury, Weigold testified that he had been charged with three counts of CSC involving minors, and had been released on bond. The case was investigated by the Michigan State Police and there were no discussions about his cooperation in this case benefiting the CSC case. Also, Weigold did not know what the sentencing guidelines would be if convicted of the charged CSC offenses. Weigold did not believe that his cooperation in the instant case would benefit his CSC case.

We hold that defendant failed to preserve his claim that he had a constitutional right to cross-examine Weigold about his pending CSC case, inasmuch as defendant did not object to the evidence on this specific ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478

(1996). Hence, we limit our review of this latter issue to whether defendant has established a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). The right to cross-examine witnesses is not without limits. *People v Hackett*, 421 Mich 338, 347; 365 NW2d 120 (1984). A violation of the right of confrontation will be found when a trial court places limits on cross-examination that preclude a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility might be inferred. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996); *People v Mumford*, 183 Mich App 149, 153; 455 NW2d 51 (1990). But the right of confrontation does not include the right to cross-examine a witness on irrelevant issues and may bow to other legitimate interests of the trial process and society. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). "'[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Id.*, quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

Although a witness' bias may be induced, consciously or unconsciously, by the witness' self-interest in a case, we are not persuaded that the trial court here erred in excluding defendant's proffered evidence on the ground that defendant offered only speculation to support his position that the pending CSC case was probative of Weigold's credibility. *People v Layher*, 464 Mich 756, 763; 631 NW2d 281 (2001). The threshold foundation for admitting such evidence is logical relevance. MRE 401; *Layher*, *supra* at 761. Because there was no evidence to support an inference that Weigold might color his testimony against defendant because of some expectation, consciously or unconsciously, that it would benefit him in the unrelated CSC case, there was an inadequate foundation for defendant to question Weigold about his CSC case in front of the jury.

Because defendant has not shown that he was denied a reasonable opportunity to test Weigold's credibilty with relevant evidence, we find no plain constitutional error. Defendant's reliance on *United States v Landerman*, 109 F3d 1053 (CA 5, 1997), modified on other grounds 116 F3d 119 (CA 5, 1997), is misplaced because, unlike in *Landerman*, the evidence concerning Weigold's pending CSC case did not support an inference that Weigold had an incentive, consciously or unconsciously, to slant his testimony in this case.

Defendant next argues that the trial court erred by permitting Detective Sergeant Gary Miller (Sergeant Miller) to testify as an expert witness. We disagree. Because defendant does not address his argument that the prosecutor committed a discovery violation regarding his witness list, we decline to address that argument. "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 with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, we note that the discovery order did not require that the prosecutor disclose which witnesses would testify as an expert. It only required disclosure of any report produced by or for an expert witness who the prosecutor intended to call. There is no indication that Sergeant Miller prepared a report concerning the subject matter of his testimony and a trial court may not compel a party to create an expert witness report. *People v Phillips*, 468 Mich 583, 590; 663 NW2d 463 (2003).

We also find that the trial court did not abuse its discretion in determining that Sergeant Miller was qualified through his training and experience as a hunter to provide expert testimony about bows and arrows. MRE 702; *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996). The fact that other bow hunters "on the street" might have the same knowledge as Sergeant Miller is not the relevant inquiry. Rather, the relevant inquiry was whether Sergeant Miller possessed specialized knowledge that would assist the trier of fact in understanding the evidence or determining a fact in issue. *Id.* at 667-668.

Here, while certain aspects of Sergeant Miller's testimony could be considered to be within the knowledge of a layperson, the principal matter that prompted the trial court to require that Sergeant Miller be qualified as an expert was the prosecutor's inquiry into whether Sergeant Miller could estimate the poundage of defendant's bow. An earlier witness, Robert Charlton, a crime laboratory specialist with the Oakland County Sheriff's Department, had already identified defendant's bow as a compound bow and indicated, without objection, that a compound bow takes quite a bit of pressure to operate. Nonetheless, the trial court did not abuse its discretion in finding that the testimony of Sergeant Miller, as an expert in the area of bows and arrows, would be helpful in the case at bar. We find no basis for disturbing the court's decision to allow Sergeant Miler to provide testimony with respect to how defendant's bow, arrows, and related appliances are used. *Peebles, supra*.

Defendant next argues that the trial court erred by precluding him from calling an unendorsed witness to impeach Weigold's testimony. Defendant claims that the trial court's ruling deprived him of his due process right to present a defense. But because defendant has insufficiently briefed the basis of the trial court's ruling, namely, defendant's failure to comply with a pretrial discovery order, we could decline to address this issue. *Kelly, supra.* Nevertheless, we find it was within the trial court's discretion to deny defendant's tardy motion to have the unendorsed witness testify. MCR 6.201(J); *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). After reviewing the record, we find no basis for disturbing the trial court's decision.

Having considered defendant's newly raised claim that he was deprived of his constitutional right to present a defense, in light of the trial court's ruling that defendant's tardy offer of the unendorsed witness violated the pretrial discovery order, we find no plain constitutional error. *Carines, supra* at 763. A defendant's due process right to present a defense is not absolute. *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). "It is well settled that the right to assert a defense may permissibly be limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294; 613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

Next, defendant argues that he was denied due process and a fair trial as a result of the prosecutor's misconduct. We disagree. Although we generally review claims of prosecutorial misconduct de novo, *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003), defendant's claims that were not preserved with an appropriate objection at trial are reviewed for plain error affecting defendant's substantial rights. *Carines, supra*. We examine the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *Abraham, supra* at 272-273.

We reject defendant's claim that the prosecutor improperly expressed a personal opinion with respect to his guilt. Examined in context, the prosecutor's challenged opening statement about this case being very simple suggested that the jury would hear strong evidence about defendant's guilt. Also, the prosecutor's remarks in closing argument about defendant being afforded his right to a trial did not suggest that the jury suspend its power of judgment in favor of a prosecutorial belief in defendant's guilt. Rather, the prosecutor suggested that the jury find defendant guilty based on the strength of the evidence. A prosecutor is free to present and argue the evidence and all inferences arising from it as they relate to the prosecutor's theory of the case. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). We conclude that the prosecutor's remarks were not improper.

Also, we find no basis for relief based on defendant's challenge to the prosecutor's rebuttal remarks about law enforcement officers and the prosecutor's office doing all that could be done. The record supports the prosecution's position on appeal that the remarks were responsive to defense counsel's closing argument. In particular, defense counsel suggested that everyone involved in the investigation was result-driven to obtain a conviction when he commented in closing argument, "You know you've got to know how the system works. Somebody's murdered, the cops say murder. Somebody's killed, who did it, they go get the guy. Now their job, the prosecutor's, everybody, is let's get a conviction." Examined in the context of these remarks, the prosecutor's challenged rebuttal remarks did not plainly suggest that the jury convict defendant based on the prosecutor's personal belief, but rather once again asked the jury to decide the case based on the evidence.

Furthermore, even if the prosecutor's remarks could be considered plain error, improper prosecutorial remarks which respond to issues raised by defense counsel do not necessarily require reversal. *People v Jones,* 468 Mich 345, 353; 662 NW2d 376 (2003). The invitation, defense counsel's conduct, and the proportionality of the response must be examined to determine if the error affected the fairness of the trial. *Id*. at 353-354. Considered in light of defense counsel's statement in his closing argument, we cannot say that defendant was prejudiced by the prosecutor's comments. The prosecutor merely responded that the governmental units involved in the case did their jobs and that it was now the jury's job to decide the outcome of defendant's case.

Defendant next argues that the prosecutor committed misconduct in his rebuttal argument by twice shifting the burden of proof. Having examined the prosecutor's challenged remarks in context, we find no plain error warranting relief. The prosecutor's argument regarding actions that defense counsel could have taken before trial were a fair response to defense counsel's closing argument that Weigold's testimony about defendant wearing a trigger release was a "bombshell." *Jones, supra* at 352 n 6. Although a prosecutor's remarks that tend to shift the burden of proof to a defendant are improper, once a defendant presents evidence or a theory, the prosecutor may comment on the weakness of the defendant's evidence or theory. *People v Fields,* 450 Mich 94, 115; 538 NW2d 356 (1995).

Similarly, the prosecutor's rebuttal argument about the absence of defense proofs that Pardy was a violent person were not plainly improper in light of the defense theory that Pardy was the aggressor and the prosecutor's acknowledgement in his rebuttal remarks that the burden was on the prosecution to disprove self-defense. *Id.* at 115-116. "[W]hen a controversy arises regarding whether the deceased was the aggressor, a jury's persuasion may be affected by the

character of the deceased because it will shed light on the probabilities of the deceased's actions." *People v Harris*, 458 Mich 310, 315-316; 583 NW2d 680 (1998).

Defendant also argues that the prosecutor made improper appeals to the jury's sympathy during his closing and rebuttal arguments. The challenged remarks include one instance in which defense counsel objected on the ground that the remarks constituted an appeal to sympathy and the trial court sustained the objection. Although defense counsel did not request a curative instruction, the trial court later instructed the jurors that "you may not let sympathy or prejudice influence your decision." And jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under these circumstances, we do not find the challenged remarks so inflammatory as to cause prejudice. Hence, while the record supports defendant's claim that the prosecutor made some remarks that may be characterized as an appeal to the jury's sympathy, reversal on this ground is not warranted. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001).

Defendant further argues that the prosecutor committed misconduct by misstating the law regarding self-defense when cross-examining him, and later in his rebuttal closing argument. Because defendant did not object to the prosecutor's cross-examination on the ground that the prosecutor misstated the law, we review this claim for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 309; ___ NW2d ___ (2004); *Carines, supra* at 763. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial. However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (citations omitted).

The record does not plainly indicate that the prosecutor expressly misstated the law during his cross-examination of defendant. To the extent the prosecutor's questions could be viewed as misleading with respect to the legal standard for self-defense, reversal is not warranted because defendant has not shown any error with respect to the trial court's jury instructions regarding self-defense, and the court's instructions were sufficient to dispel any prejudice. Similarly, any misleading effect of the prosecutor's challenged remarks during rebuttal argument, which were objected to by defense counsel at trial on the ground that they were misleading, was dispelled by the court's jury instructions. Hence, reversal on this ground is not warranted. *Grayer, supra.*

Also, defendant argues that the cumulative effect of the prosecutor's misconduct at trial requires reversal. We disagree. Any errors demonstrated by defendant do not require reversal. Accordingly, defendant was not denied a fair trial. *People v Bahoda*, 448 Mich 261, 282 n 64; 531 NW2d 659 (1995).[1]

[1] Although defendant also lists a number of instances in which the trial court sustained defense objections at trial as support for his conclusion that reversal is required, defendant's cursory treatment of the sustained objections is insufficient to invoke appellate review. *Kelly, supra* at 640-641. Furthermore, the purpose of an objection is to give a trial court an opportunity to correct an error. *Jones, supra* at 355. And defendant has not established any basis for relief
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Defendant's remaining two issues afford no basis for relief. Because defendant denied, on cross-examination by the prosecutor, making a statement to Sergeant Miller about acting out in a violent manner, and because the prosecutor did not offer extrinsic evidence of the statement, we find it unnecessary to address defendant's claim that the trial court erred in permitting testimony about the statement. The jury was instructed that the lawyer's questions to the witnesses were not evidence. "It is well established that jurors are presumed to follow their instructions." *Graves, supra*. Also, defendant waived any challenge to the trial court's answer to the jury's question about fingerprint evidence by stipulating to the answer. The waiver extinguished any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Defendant's alternative claim of ineffective assistance of counsel is not properly before us because it is not set forth in the statement of the questions presented. MCR 7.212(C)(5); *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). In any event, limiting our review to the record, we find that defendant has not established any entitlement to relief based on ineffective assistance of counsel. *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003).

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

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beyond the actions taken by the trial court.