STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERMAN ANTHONY AUSTIN,

Defendant-Appellant.

UNPUBLISHED
December 15, 2005

No. 256612
Wayne Circuit Court
LC No. 04-000765-01

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred by recognizing a Fifth Amendment privilege against self-incrimination for a defense witness. A trial court's determination that a witness's testimony may be self-incriminating is reviewed for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996).

Under the Fifth Amendment, an individual may decline to testify at any criminal proceeding where the answers may incriminate him in a future criminal proceeding. *People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000). If a potential defense witness has a Fifth Amendment privilege against incriminating himself, that privilege overrides a defendant's right to compel testimony. However, this privilege against self-incrimination may only be asserted where the trial court determines that there is a reasonable basis for a witness to fear incrimination. *People v Dyer*, 425 Mich 572, 578; 390 NW2d 645 (1986). "[A] trial court may compel a witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness." *Id*. at 579. Thus, the trial court decides whether a witness' silence is justified based on the facts in evidence. See *People v Joseph*, 384 Mich 24, 29-30; 179 NW2d 383 (1970).

In this case, the witness, "DeShazo," was an inmate facing trial on a homicide charge. One of DeShazo's codefendants had already been convicted, largely through the testimony of a jailhouse witness. DeShazo was expected to testify that he saw inmate Derrick Green, a prosecution witness, in defendant's cell going through defendant's discovery materials while

defendant was not present. The prosecutor indicated that if this testimony were brought up, he would question DeShazo about how jailhouse witnesses would be called in his trial and had been called in his codefendant's trial because the questioning would be relevant to defendant's motive to lie. The prosecutor indicated that he intended to ask DeShazo about how his codefendant presented witnesses at his trial to show that the jailhouse witness stole discovery materials to fabricate his testimony and to show that defendant wished to use a similar tactic to discredit Green's testimony. Defense counsel stated that if the prosecutor asked any questions about DeShazo's pending trial, he would advise DeShazo to invoke his Fifth Amendment right against self-incrimination. The trial court conducted the proper inquiry and determined that testimony about the case pending against him would be potentially incriminating to DeShazo and that DeShazo would invoke his constitutional privilege. The trial court did not abuse its discretion by refusing to allow defendant to call DeShazo to the stand. *Dyer, supra* at 578.

Further, the trial court did not have to allow defense counsel to call DeShazo and have DeShazo invoke his Fifth Amendment privilege on a question-by-question basis. A lawyer may not knowingly call a witness when he is aware that the witness will claim a valid privilege not to testify. *Dyer, supra* at 576. Because DeShazo would have a valid right to invoke his Fifth Amendment privilege on relevant questions that the prosecutor would ask, the trial court did not abuse its discretion by refusing to allow DeShazo to testify.

Defendant next argues that the trial court erred by improperly admitting the victim's dying declarations because defendant did not have the right to confront the witness. The dying declarations at issue involve the victim's statement given at the hospital and the audiotape of the victim's 911 call. Defendant must preserve the issue of the admission of evidence with a timely objection. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). The party opposing the admission of evidence must object at trial on the same ground that the party asserts on appeal. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Defense counsel failed to object to the introduction of the victim's statement given at the hospital. Because defendant failed to object to the admission of the victim's statement at the hospital, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Defense counsel stated that he had no objections to the playing of the 911 tape. This action by defense counsel resulted in a waiver, rather than forfeiture, and thus, the waiver extinguished any error. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Defendant does not dispute that the statements are dying declarations[1] but, rather, contends that the dying declarations are inadmissible under *Crawford v Washington*, 541 US 36,

[1] Our dissenting colleague would conclude that the statements were not dying declarations, even though defendant does not dispute that the statements were dying declarations. She concludes that there is no evidence that Bowen was aware he was dying when he made the statements, primarily because "he requested something to eat while waiting for the ambulance to arrive." However, the record reveals that immediately after Bowen was shot he called his cousin's name and told her that he could not talk and that his leg was going numb. Bowen had two quarter size holes in his upper left chest area and was bleeding from the mouth. He could not respond at first

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53; 124 S Ct 1354; 158 L Ed 2d 777 (2004). In *Crawford*, the Court found that testimonial statements of a witness who does not appear at trial are barred unless the witness is unavailable to testify and defendant had a prior opportunity for cross-examination. *Crawford, supra* at 53. The Supreme Court held off on a definitive ruling on dying declarations, but indicated that a strong historical basis exists for including dying declarations as an anomaly:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v United States*, 156 US 237, 243-244; 39 L Ed 409; 15 S Ct 337 (1895); *King v Reason*, 16 How St Tr 1, 24-38 (K B 1722); 1 D. Jardine, Criminal Trials 435 (1832); Cooley, Constitutional Limitations, at 318; 1 G. Gilbert, Evidence 211 (C. Lofft ed. 1791); see also F. Heller, The Sixth Amendment 105 (1951) (asserting that this was the only recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock, supra*, at 501-504, 168 Eng. Rep., at 353-354; *Reason, supra*, at 24-38; Peake, Evidence, at 64; cf. *Radbourne, supra*, at 460-462, 168 Eng. Rep., at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*. [*Crawford, supra* at 56, n 6.]

Because the rules of evidence allow the admission of dying declarations, see MRE 804(b)(2), and because the United States Supreme Court has not ruled on the issue and has indicated that there are historical reasons for making an exception to the rule in *Crawford* for dying declarations, we conclude that the trial court did not abuse its discretion by admitting the victim's dying declarations.

Defendant next argues that he was denied his right to a fair trial by prosecutorial misconduct. To preserve the issue for appellate review, defendant must timely and specifically object to the prosecutor's improper conduct. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Defendant properly preserved some of the issues for appeal by objecting to the prosecutor's remarks during closing argument. Defendant failed to preserve other claims for review on appeal because he failed to object to the prosecutor's statements in the trial court.

Issues of prosecutorial misconduct are reviewed de novo. To determine if prosecutorial misconduct occurred, the test is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The Court must examine the pertinent portion of the lower court record and evaluate the prosecutor's comments in context to

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to questions asked of him due to blood in the throat. Bowen did, in fact, die upon his arrival at the hospital. These facts are sufficient to support a finding that defendant was conscious of his impending death and, presumably, this is the reason that trial defense counsel did not object to the admission of the statements and the reason that appellate defense counsel does not dispute that the statements were dying declarations.

determine whether it was more probable than not that a miscarriage of justice occurred. *Carines, supra* at 774.

Appellate review of unpreserved claims of prosecutorial misconduct is for plain error affecting substantial rights. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceeding independent of the defendant's innocence. Thus, if a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant argues that the prosecutor improperly asked defendant to comment on whether Agent Yott lied about a fistfight defendant had with the victim. Defense counsel immediately objected and the trial court sustained the objection. Although a prosecutor may not ask a defendant to comment on the credibility of a prosecution witness' testimony, *Ackerman, supra* at 448, defendant was not prejudiced by the prosecutor's comments. The trial court instructed the jury that stricken testimony and excluded evidence were not to be considered in deciding the case. The trial court sustained the objection to the testimony, and the jury is presumed to have followed the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecutor improperly argued with defendant and accused him of not having the records to prove what he was saying. Defense counsel objected to the prosecutor's questioning and the trial court sustained the objection and instructed the jury that the burden was not on defendant to prove anything. Because the trial court instructed the jury that defendant did not have to prove anything and that the prosecution had the burden of proof, and the jury is presumed to have followed the trial court's instructions, defendant was not prejudiced by the question. *Graves, supra* at 486. Further, although defendant does not have the burden to produce evidence, the prosecutor is allowed to comment on defendant's failure to present evidence corroborating his testimony. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995).

Defendant next argues that the prosecutor improperly questioned him about discovery materials. The prosecutor asked defendant if he had seen all the discovery materials and defendant responded that he had seen everything except what the prosecutor gave to the defense attorney at the last minute. The prosecutor asked if that discovery consisted of two pages, and defendant indicated that it did not. Defense counsel then stated that it was "more like four hundred pages." The trial court told the jury to disregard the conversation and stated that defense counsel was misleading the jury. After more testimony the prosecutor stated that defendant was misleading the jury regarding the discovery and the trial court told the prosecutor that was an improper argument because there was no issue in the case regarding the scope of discovery. The prosecutor's comments did not prejudice defendant. The comments were intended to question defendant regarding his opportunity to conform his testimony to the testimony of the other witnesses and to the discovery materials. The prosecutor is allowed to cross-examine defendant regarding his opportunity and motive to fabricate his testimony. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). Further, the trial court again took the proper action to defuse any possible prejudice.

Defendant next argues that the prosecutor improperly asked defendant if he had heard particular testimony by the other witnesses. A prosecutor is allowed to ask a defendant if he disagrees with prior testimony, and thus, there was no prosecutorial misconduct by the prosecutor asking these questions. *Buckley, supra* at 17.

Defendant argues that the prosecutor engaged in misconduct when defendant stated that he was trying to help and the prosecutor responded by saying, "I doubt that." The prosecutor's offhand remark, after which he returned promptly to questioning defendant, even if improper did not rise to the level of misconduct that would prejudice defendant and deny him a fair trial. Because defendant failed to object, and because a curative instruction could have alleviated any prejudicial effect, we do not find reversible error. *Ackerman, supra* at 448-449.

Defendant argues that during closing argument the prosecutor called defendant a liar and stated that defense counsel was cowardly. The prosecutor stated that defendant's testimony showed that he was a liar. The prosecutor also stated that there was no credible evidence to support defense counsel's argument that Officer Khary Mason was lying and that defense counsel making such an argument was cowardly. A prosecutor has "great latitude" in making his arguments and statements at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may draw inferences from the evidence, but may not argue facts not in evidence or mischaracterize the evidence. *Id.; People v Goodin*, 257 Mich App 425, 432-433; 668 NW2d 392 (2003); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Although the prosecutor has a duty to ensure that the defendant receives a fair trial, he also has a duty to advocate the conviction of the guilty. "Prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). A prosecutor's remarks must be read in context. *Bahoda, supra* at 267. In this case, the statement regarding defendant and defense counsel referenced the evidence and drew inferences from the testimony presented. The prosecutor specifically mentioned the evidence that led him to draw such conclusions, and thus made proper arguments.

Defendant next argues that he received ineffective assistance of counsel because counsel failed to object to the admission of the dying declarations under *Crawford, supra*, and failed to object to the prosecutor's comments during cross-examination and during closing argument. Defendant has not preserved the issue of effective assistance of counsel for review. Defendant did not move for a new trial and his motion to remand for an evidentiary hearing was denied by this Court, and therefore, this Court's review is limited to the mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance failed to meet an objective standard of reasonableness and that the deficient performance so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc, supra* at 578.

Defendant claims that counsel was ineffective for not objecting to the admission of the 911 tape and the victim's statement to police because the statements were inadmissible under *Crawford, supra,* 541 US 53. But we have already concluded that the statements were properly admitted and, therefore, this argument is without merit.

Defendant also claims that counsel was ineffective for not objecting to the prosecutor's comments during cross-examination and closing argument. The unobjected to incidents include questions concerning whether defendant heard and agreed with prior testimony and the prosecutor's augments that defendant was a liar. As indicated, *supra*, these questions were not improper and, therefore, an objection to the questions would have been futile. Additionally, defense counsel did not object to the prosecutor's comment that he doubted that defendant was trying to help. As indicated *supra*, this comment was not so prejudicial that it affected the outcome of the trial and, therefore, defendant was not denied the effective assistance of counsel by defense counsel's failure to object. *Pickens, supra* at 302-303.

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald