STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2007
v	No. 271803 Oakland Circuit Court
MICHAEL ALAN MCCLUSKEY, Defendant-Appellant.	LC No. 2006-207551-FC

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant Michael Alan McCluskey appeals as of right his jury trial convictions for one count of armed robbery, MCL 750.529; one count of first-degree home invasion, MCL 750.110a; one count of possession of a firearm by a felon, MCL 750.224f; one count of possession of a weapon directing electrical current, impulse, wave, or beam (taser); MCL 750.224a; and one count of possessing a firearm during the commission of a felony, MCL 750.227(b). Defendant was sentenced as an habitual offender, third offense, to 25 to 50 years' imprisonment for armed robbery, 25 to 40 years' imprisonment for first-degree home invasion, five to eight years' imprisonment for possession of a taser, five to eight years' imprisonment for being a felon in possession of a firearm, and a five-year sentence for his second offense of possessing a firearm during the commission of a felony. The last sentence is to be served consecutively to the other sentences, which are concurrent to one another. We affirm.

Defendant first argues on appeal that the evidence produced at trial was insufficient to establish his identity as a participant in the armed robbery at issue. We review de novo claims of insufficient evidence**.** *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In so doing, we view the evidence in a light most favorable to the prosecution in order to determine whether a rational trier of fact could have found the elements of the charged offenses beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The identity of the defendant is an essential element of all crimes. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). The evidence produced at trial showed that defendant matched eyewitness descriptions of codefendant Fields's cohort on the night of the crimes. Defendant, who was 26 years of age in 2004, had brown eyes and hair, was five feet, 11 inches tall, and weighed 160 pounds. One of the victims, Peter Talia, testified that the person identified as the "second intruder" (codefendant Fields was identified as the "first intruder"), was six feet tall, weighed between 150 and 160 pounds, and was between 20 and 25 years of age.

Eyewitness Jonathon Tanas, who observed a man running down the street shortly after the robbery, described the man as a young Caucasian male, who weighed roughly 152 to 157 pounds and "fairly average height," with light brown hair, brown eyes, and a light mustache. Subsequently, during a photographic identification, Tanas identified defendant without hesitation as the man he observed running down the street shortly after the robbery. Further, codefendant Fields acknowledged that he was acquainted with defendant for roughly 2-1/2 years before the time of trial. On the record, there was sufficient evidence that defendant was the person identified as the "second intruder" during the armed robbery. Circumstantial evidence and reasonable inferences arising from the evidence can constitute sufficient proof of the identity of a perpetrator, *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996), and positive identification by a witness is often sufficient to support a conviction for a crime, *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Defendant next argues that the prosecutor committed misconduct by eliciting testimony from Detective Jason Weimer that defendant refused to come to the police station after he was requested to do so. Defendant argues that the testimony constituted an impermissible reference to defendant's pre-arrest silence. Defendant alternatively argues that his trial counsel was ineffective for failing to object to the contested testimony. At trial, defendant did not object to the challenged evidence based on defendant's right to remain silent. To preserve an issue for appellate review, a party must object below and specify the same ground for objection that it argues on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Because defendant failed to preserve the issue, we review for plain error affecting defendant's substantial rights. *People v McNally*, 470 Mich 1, 6; 679 NW2d 301 (2004), *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001). To avoid forfeiture of issue on appeal under the plain error rule, three requirements must be met: (1) error must have occurred; (2) the error was plain, that is, clear or obvious; (3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The trial court did not conduct a *Ginther*[1] hearing, so review of defendant's ineffective assistance of counsel claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Concerning defendant's claim that the prosecution infringed his constitutional right to remain silent, we begin with the text of the constitutional provisions at issue. The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]" US Const, Am V. The Michigan Constitution provides similarly. Const 1963, art 1, § 17; *People v Schollaert*, 194 Mich App 158, 160; 486 NW2d 312 (1992). However, as stated in *Schollaert*, where a defendant's silence or nonresponsive conduct did not occur during a custodial interrogation situation, nor was it in reliance on the *Miranda*[2] warnings, the "silence . . . was not a constitutionally protected silence." *Id.* at 166-167. Because defendant's objections pertain to the introduction of actions that occurred before his arrest, and not in reliance on *Miranda* warnings, his objection is an evidentiary objection, not a constitutional objection. *People v Alexander*, 188 Mich App 96, 104; 469 NW2d 10 (1991).

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[1] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant argues that his pre-arrest silence was inadmissible because such evidence can only be used for impeachment, and he did not testify at trial. Defendant is correct that evidence of a defendant's silence in the face of accusations cannot be admitted as substantive evidence to support the assertion that defendant tacitly admitted the truth of an allegation or made an admission. *People v Greenwood,* 209 Mich App 470, 472-473; 531 NW2d 771 (1995). In *Greenwood,* the prosecutor introduced evidence that the defendant declined an invitation from the police to "offer an explanation" as substantive evidence of defendant's guilt. *Id.* We reversed the defendant's convictions after finding that the prosecutor's conduct resulted in plain error, because there was no evidence that defendant "adopted the truth" of the police officer's accusation against him, and because the jury's decision "hinged on the credibility of the defendant." *Id.* at 473.

However, here detective Weimer's testimony is distinguishable from the evidence presented in *Greenwood*. Here, the prosecutor introduced the challenged evidence when providing background about defendant's flight from the jurisdiction. It is clear from the context of the prosecutor's closing argument that he did not introduce the evidence to show that defendant tacitly adopted any accusation. Rather, the evidence was introduced to show that defendant fled the state of Michigan. As evidence of flight, the challenged testimony was relevant and admissible as substantive evidence of guilt. *People v Cutchall,* 200 Mich App 396, 399; 504 NW2d 666 (1993). Thus, the trial court did not abuse its discretion in admitting Detective Weimer's testimony, and the prosecutor did not commit misconduct by seeking to admit it, or by commenting on it. Prosecutors are given wide latitude in their closing arguments to argue all reasonable inferences that arise from the evidence. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). Additionally, the performance of defendant's trial counsel did not fall below an objective standard of reasonableness where he refrained from objecting to the prosecutor's closing argument. Trial counsel is not required to make a futile objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the trial court abused its discretion in allowing the prosecutor to admit evidence of a letter written by codefendant Fields to his sister. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court's decision on a close evidentiary question ordinarily will not be considered an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Generally, evidence of a prior inconsistent statement of a witness is admissible to impeach the witness, even if the statement may tend to directly inculpate the defendant. *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). Prior statements of a witness, however, may not be used for impeachment when the substance of the statement being offered is relevant to the central issue of the case, and there is no other testimony from the witness for which his credibility was relevant. *Id.* at 683. In addition, prior statements of a witness cannot be used as substantive evidence of the truth of the matter asserted. *People v Kohler,* 113 Mich App 594, 599; 318 NW2d 481 (1981). Defendant argues that the prosecutor impermissibly used codefendant Fields's letter as impeachment, because codefendant Fields did not provide any substance evidence unrelated to the letter, and because codefendant Fields did not testify to anything that the letter would contradict. We disagree. Fields provided two areas of substantive

testimony unrelated to his letter: he testified that he knew defendant for 2-1/2 years before the trial, and he testified about the details of the planned armed robbery for which defendant was convicted.

Moreover, the prosecutor provided the proper foundation from which to impeach codefendant Fields. MRE 613 governs the use of inconsistent out-of-court statements for impeachment purposes. MRE 613(b) provides that extrinsic evidence of a prior inconsistent statement, such as the letter written by codefendant Fields to his sister "Missy," is not admissible unless the witness is afforded an opportunity to explain or deny the statement. Defendant specifically argues that defendant did not provide any testimony that was necessary for the prosecutor to impeach. However, during codefendant Fields' direct examination, the following exchange occurred:

> *Q.* Who was the other person who was with you inside the house committed [sic] the robbery?
>
> *A.* Who was it?
>
> *Q.* Yes
>
> *A.* "Flacko."
>
> *Q.* "Flacko?" Is that how you know the person?
>
> *A.* Yeah.

Contrary to codefendant Fields' testimony, the substance of the letter he wrote to his sister "Missy" indicated that "Mike" or "Mikey" committed the robbery with him, not somebody named "Flacko." Thus, the trial court did not abuse its discretion by admitting evidence of codefendant Fields's prior inconsistent statement for impeachment.

Defendant next argues that, even if the evidence was properly admitted for impeachment, the prosecutor impermissibly used it during his closing argument as substantive evidence. Prior inconsistent statements are generally admissible only to challenge credibility and not as substantive evidence. *People v Jenkins*, 450 Mich 249, 260-262; 537 NW2d 828 (1995). However, it is not clear that the prosecutor was using the evidence to implicate defendant. Further, the trial court specifically instructed the jury that:

> If you believe that a witness previously made a statement inconsistent with his testimony at this trial, the only purpose for which the earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that [sic] the witness said earlier is true.
>
> * * *
>
> The letter itself is hearsay, not admissible and was not introduced into evidence. You may consider Terry Fields' testimony regarding the letter for the purpose of whether he is a truthful person.

Jurors are presumed to follow instructions. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). We find no error.

Defendant next argues that he was denied his sixth amendment right of confrontation when the trial court admitted hearsay evidence of an anonymous tip implicating defendant. We disagree. A defendant's claim that evidence violated his right to confront the witnesses against him is reviewed de novo on appeal, *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004), and we review a trial court's decision to admit evidence for an abuse of discretion. *Crawford, supra* at 383.

During the direct-examination of Detective Weimer, the following exchange occurred, without objection:

> *Q*. Now, at some point, did you receive an anonymous tip?
>
> *A*. Yes, I did.
>
> *Q*. Did that tip consider you - - lead you to consider [defendant] a suspect as the armed robber - - as a second armed robbery [sic]?
>
> *A*. Yes, it did.
>
> *Q*. Now, did that person who provided the tip also provide information about where the defendant could be located?
>
> *A*. Yes, they [sic] did.

The confrontation clause provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. The Michigan Constitution also guarantees the same right. Const 1963, art 1, § 20. To preserve this right, testimonial hearsay is inadmissible against a criminal defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington*, 541 US 36, 42, 58, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

We find that the confrontation clause is not implicated by the testimony quoted above. The quoted testimony merely asked the officer whether he received an informant's tip, what he did in response to the tip (arrest defendant), and how he knew where to find defendant. The alleged hearsay testimony was not presented for the truth of the matter asserted (where, in fact, defendant was to be found), but for its effect on the officer (how it led him to be able to find and arrest defendant). The confrontation clause is only implicated by substantive use of hearsay (use of an out-of-court statement for the truth of the matter asserted). *Crawford, supra* at 36. Thus, defendant's right to confront the witnesses against him was not infringed.

Next, defendant argues that the trial court abused its discretion by allowing the prosecutor to introduce evidence that he absconded, and by instructing the jury about that defendant's flight. We disagree.

Evidence of flight is admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). While evidence of flight alone is not sufficient to sustain a conviction, such evidence is probative because it may indicate consciousness of guilt. *Id*. The term "flight" has been applied to behavior such as: (1) fleeing the scene of the crime, (2) leaving the jurisdiction, (3) running from the police, and (4) resisting arrest. *People v Hall*, 174 Mich App 686, 691 436 NW2d 446 (1989). Here, the prosecutor presented evidence that defendant fled from the jurisdiction out of a consciousness of guilt. The evidence showed that defendant engaged in a telephone conversation, with Detective Weimer, where defendant asked the Detective whether there was a warrant out for his arrest. Detective Weimer replied that he "would like [defendant] to come down to the station." After this conversation, defendant left Michigan. Defendant was found in another state, and did not return to Michigan voluntarily. Defendant argues that his travel to another jurisdiction could have occurred for innocent reasons. "It is true that flight from the scene of a tragedy may be as consistent with innocence as with guilt; but it is always for the jury to say whether it is under such circumstances as to evidence guilt." *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993). As such, it was not improper for the prosecutor to seek admission of the evidence, which could support a finding of guilt. A claim of prosecutorial misconduct cannot be based on the prosecutor's presentation of admissible evidence. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). As mentioned above, defendant's departure from the jurisdiction, under circumstances where he was aware that the police wanted to contact him, was evidence of flight. Therefore, the trial court did not err by instructing the jury on flight. *People v Parks*, 57 Mich App 738, 743; 226 NW2d 710 (1975).

Defendant next argues that prosecutorial misconduct deprived him of his due process right to a fair trial. We disagree. To the extent defendant preserved this issue, this Court reviews claims of prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor's remarks in context to determine whether defendant received a fair and impartial trial. *Bahoda, supra* at 276. However, where the alleged misconduct was not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain error. *Watson, supra* at 586. No error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *Id*.; *Ackerman, supra* at 448-449. We have reviewed defendant's claims and find no misconduct requiring reversal.

First, the prosecutor's references to codefendant Fields's letter and testimony were made to impeach Fields's credibility, and specifically the credibility of his assertion that defendant did not participate in the armed robbery. The other challenged references did not constitute hearsay. Second, defendant argues that the prosecutor improperly bolstered Tanas's credibility. A prosecutor is not allowed to vouch for the credibility of a witness by asserting special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276. But a prosecutor is allowed to comment on his own witnesses' credibility during closing argument, especially in cases where the jury's verdict will likely depend on which witnesses the jury believes. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The inference that Tanas lacked motivation to testify dishonestly was supported by the evidence adduced at trial. A prosecutor is allowed to argue the evidence and all reasonable inferences arising from it, as they pertain to the prosecutor's theory of the case. *Knapp, supra* at 382.

Third, defendant argues that the prosecutor improperly argued facts not in evidence, when he implied that one of the victims was concerned that defendant would retaliate against

him for testifying. The argument was speculative. However, we find that the trial court cured any alleged error when it instructed the jury:

> When you decide the case and decide on your verdict, you may only consider the evidence that has been properly admitted in this case. Therefore, it's important for you to understand what is evidence and what is not evidence.
>
> * * *
>
> May things are not evidence, and you must be careful not to consider them as such. . . . The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories. The lawyers' questions to the witnesses are also not evidence. You should consider these questions as they give meaning to the witness's answers.

Jurors are presumed to follow instructions, and instructions are presumed to cure most errors. *Graves, supra* at 486; *Bauder, supra* at 190. In sum, defendant was not denied his due process right to a fair trial by substantial prosecutorial misconduct.

Defendant next argues that the trial court abused its discretion by issuing the "undisputed accomplice" instruction. We disagree. This Court reviews a trial court's decision to issue a cautionary accomplice instruction for abuse of discretion. *People v Young*, 472 Mich 130; 693 NW2d 801 (2005). It was undisputed at trial that codefendant Fields participated in the armed robbery with at least two other people, and was therefore somebody's accomplice. A trial court should give the undisputed accomplice instruction when the witness has admitted his guilt or has been convicted of the crime, or where the evidence clearly indicates his complicity. *People v Jensen*, 162 Mich App 171, 187-190; 412 NW2d 681 (1987). Fields admitted to committing the crimes for which defendant was charged. Further, a trial court does not infringe on a defendant's right to present a defense by issuing a cautionary instruction regarding accomplice testimony where the testimony supports defendant. See *People v Heikkinen*, 250 Mich App 322, 337; 646 NW2d 190 (2002).

Defendant finally argues that the trial court clearly erred by scoring 15 points to offense variable (OV) 8, MCL 777.38. We disagree. Because defendant failed to object to the scoring of OV 8, we review for plain error. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). The trial court's factual findings associated with its sentencing determination are reviewed for clear error. MCR 2.613(C). This Court upholds the trial court's scoring of the sentencing guidelines if there is any evidence in the record to support it. *Babcock, supra* at 264-265.

MCL 777.38 provides that a trial court should score 15 points to a defendant where a "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." Here, Talia testified that the armed robbers forced him to leave the area behind his friend's house and travel to the basement of the house, where Talia was threatened by the robbers with weapons, away from public view. This Court has previously upheld a score of 15 points for OV 8 where a defendant moved a victim from a public place to a private place. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering