STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2009
v	No. 281148 Kalamazoo Circuit Court
DEALTO VERNON MATTHEWS, Defendant-Appellant.	LC No. 07-000739-FH

Before: Saad, C.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant appeals his convictions for third-degree fleeing or eluding a police officer, MCL 257.602a(3); failure to report an accident resulting in damage to fixtures, MCL 257.621(a); and driving with a suspended license, MCL 257.904(1). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 35 to 180 months' imprisonment for the third-degree fleeing and eluding a police officer conviction, to be served consecutively to his parole violation. The court also sentenced defendant to concurrent terms of 90 days each for his other convictions, and gave him credit for 90 days served. For the reasons set forth below, we affirm.

I. Prosecutorial Misconduct

Defendant contends that several of the prosecutor's arguments constituted misconduct. Because defendant failed to object at trial on grounds that the prosecutor argued facts not in evidence and vouched for the credibility of Lieutenant Victor Ledbetter, we review these unpreserved claims for outcome-determinative plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is ultimately warranted only if defendant was convicted although innocent, or the fairness, integrity, or public reputation of the proceedings was seriously impacted. *Callon, supra* at 329. If a timely objection and curative instruction would have rectified any prejudicial effect of an improper statement, we are precluded from finding error requiring reversal. *Id.* at 329-330.

We hold that the prosecutor did not argue facts that were not admitted into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Though defendant complains that the prosecutor's argument invited the jury to speculate that the vehicle defendant drove was loaned to him as part of a drug deal, the prosecutor's argument was supported by Lieutenant Ledbetter's trial testimony. Lieutenant Ledbetter testified that the vehicle defendant drove and

crashed was registered to Thomas and Linda White, and he believed the vehicle was returned to them after the incident. Ledbetter explained that he was patrolling that area of Kalamazoo because there were many reports of drug dealing there, it was common for someone to loan a drug dealer his vehicle in exchange for drugs, and the woman who exited the vehicle after the crash informed Ledbetter that she was in the vehicle to obtain crack cocaine.

The prosecutor's arguments regarding the Whites were supported by the evidence and reasonable inferences drawn from the evidence. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). Further, the prosecutor's rebuttal arguments appropriately responded to defense counsel's argument that the Whites were responsible for the charged offenses, not defendant. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). In addition, the trial court instructed the jury that the lawyers' arguments were not evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant has failed to prove the existence of a plain error that affected his substantial rights. *Callon, supra* at 329-330.

Defendant also claims that the prosecutor improperly vouched for Lieutenant Ledbetter's credibility. The prosecutor may not vouch for the credibility of a witness by asserting that he possesses special knowledge that the jury does not have; however, the prosecutor is free to argue that a witness is worthy or unworthy of belief based on the evidence. *Bahoda, supra* at 276. Further, "[t]he prosecutor may not attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty, but he may argue that the evidence shows that the defendant is guilty." *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Viewing the prosecutor's arguments in context, we find no plain error requiring reversal. The prosecutor permissibly argued that Lieutenant Ledbetter's testimony was more credible than defendant's based on the record evidence, i.e., that Lieutenant Ledbetter had no motivation to lie and had no bias against defendant, he had an excellent memory and ability to recall people's faces and names accurately and this ability was relied upon by other law enforcement personnel, he had extensive experience as a police officer with a great deal of knowledge about crime in that area, and patrolled that neighborhood despite the fact that, as a supervising lieutenant, he was not required to do so. The prosecutor did not assert that he possessed special knowledge that Lieutenant Ledbetter was testifying truthfully, *Bahoda, supra* at 276, nor did the prosecutor impermissibly invoke the prestige of law enforcement to argue that defendant was guilty, Cowell, *supra* at 628. Rather, he argued that Lieutenant Ledbetter was credible based on the evidence adduced at trial. Additionally, the trial court instructed the jury that a police officer's testimony "is to be judged by the same standards you use to evaluate the testimony of any other witness," and the jury is presumed to follow instructions. *Graves, supra* at 486.

Defendant further complains that the prosecutor's argument shifted the burden of proof. A defendant is entitled to the presumption of innocence until he is proven guilty, and the prosecutor may not advance an argument that burdens defendant with proving his innocence. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). "Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Because defendant raised this objection at trial, we review this issue de novo. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

We hold that the prosecutor's argument did not shift the burden of proof. Defendant argued at trial that the lack of evidence regarding the Whites amounted to reasonable doubt, and that the Whites actually drove the vehicle that night. The prosecutor responded by reminding the jury that the prosecution always has the burden of proof, and then arguing that focusing on the Whites was a distracting and speculative effort, and defendant could have subpoenaed the Whites. We find, on the record before us, the prosecutor advanced a fair argument in response to defendant's arguments, and clarified that the prosecutor, not defendant, carried the burden of proof. *Fields, supra* at 115. Further, the trial court instructed the jury that defendant was presumed innocent and was not required to prove his innocence, and that the prosecutor "must prove each element of the crime beyond a reasonable doubt." Defendant has failed to establish that the prosecutor's argument amounted to plain error that affected his substantial rights, where, as here, the prosecutor's argument was responsive to defendant's theory at trial and the trial court instructed the jury on the burden of proof. *Callon, supra* at 329-330; *Graves, supra* at 486.

Defendant also argues that his trial counsel rendered ineffective assistance by failing to object to the allegedly improper prosecutorial arguments challenged above. However, because the prosecutor's remarks were proper, defense counsel's performance was not defective. Defense counsel is not required to raise meritless objections. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

II. Sentence Credit

Defendant claims that he was entitled to credit against his sentence for his third-degree fleeing or eluding a police officer conviction for the time he was incarcerated awaiting trial and sentencing in the instant case. Defendant did not object to the trial court's determination that he was not entitled to credit for any time served because he was on parole when he committed the offense; therefore, this issue is unpreserved and we review it for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

> When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. MCL 791.238(2). A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. *People v Stewart*, 203 Mich App 432, 433; 513 NW2d 147 (1994); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. MCL 768.7a(2). [*People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004).]

Because "bond is neither set nor denied when a defendant is held in jail on a parole detainer[,]" MCL 769.11b does not apply to parole detainees. *Id.* at 707-708. When a parole violator remains incarcerated, "[s]uch a period of incarceration thus constitutes part of the original sentence and in that sense is credited against it." *People v Filipi*, 278 Mich App 635, 641-642; 754 NW2d 660 (2008); MCL 791.238(1). Additionally, "MCL 791.238(2) specifically dictates that a parole violator 'is liable, when arrested, to serve out the unexpired portion of his

or her maximum imprisonment. And any remaining portion of the original sentence must be served before a sentence for a second offense may begin." *Id.* At 642. Therefore, the time is not credited to the new sentence even though the parole violator has served the minimum of the prior sentence. *Id.* "[I]f a defendant is not required to serve additional time on the previous sentence because of the parole violation, then the time served is essentially forfeited." *Id.*

We hold that defendant is not entitled to credit against his current sentence because he remained incarcerated on his parole violation, not because he could not post bond. *Seiders, supra* at 707-708. He committed the instant offense after he absconded from parole. Therefore, MCL 769.11b was inapplicable to defendant's situation because he was a parole detainee, and the time served therefore constituted part of the unexpired prior sentence. *Seiders, supra* at 705; *Filip, supra* at 641-642. Although defendant disagrees with this Court's previous holdings and interpretation of these sentencing statutes, this Court is obligated to follow its ruling in *Seiders*. MCR 7.215(C)(2) and (J)(1). Further, defendant's citation to unpublished opinions of this Court and dissenting opinions in cases from the Michigan Supreme Court is unavailing because they are not binding authority. *Rohde v Ann Arbor Pub Schools*, 265 Mich App 702, 707; 698 NW2d 402 (2005); MCR 7.215(C)(1).

Finally, defendant argues that failure to provide him sentencing credit for the new sentence constitutes a double jeopardy and equal protection violation. We review this unpreserved claim for plain error. *Carines, supra* at 763-764. The Double Jeopardy Clause " 'protects against multiple punishments for the same offense.' " *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008), quoting *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004); US Const, Am V; Const 1963, art 1, § 15. However, double jeopardy protections do "not limit the Legislature's ability to define criminal offenses and establish punishments . . . ." *People v Ford*, 262 Mich App 443, 448; 687 NW2d 119 (2004).

We further hold that defendant's double jeopardy rights were not violated. He did not receive multiple punishments for the same offense. Any time spent incarcerated as a parole detainee that is not credited to a defendant does not implicate the new sentence, but the sentence for the paroled offense, the maximum which he had not served. *Seiders, supra* at 704-706. This Court has previously held that the Legislature did not intend to grant credit toward a new sentence of a defendant parole detainee. *Id.*; MCL 791.238. See *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003) (double jeopardy protects a defendant from being subjected to more punishment than intended by the Legislature). Therefore, defendant was not subjected to more punishment for the instant offense than the Legislature intended.

Moreover, this case is distinguishable from *North Carolina v Pearce*, 395 US 711, 718-719; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled in part on other gds *Alabama v Smith*, 490 US 794; 109 S Ct 2201; 104 L Ed 2d 865 (1989), cited by defendant, where the defendant was reconvicted and resentenced for the same offense and he was not given credit for time spent incarcerated during the pendency of the appeal. Here, defendant was not resentenced and any credit for time served would apply to defendant's paroled sentence, the maximum which he had not served, and not the sentence for the current offense. *Seiders, supra* at 705. The present case is also unlike *People v Resler*, 210 Mich App 24, 25-27; 532 NW2d 907 (1995), which involved revoking a defendant's good-time credit when such action was not provided for by the Legislature.

We also conclude that no equal protection violation occurred. US Const, Am XIV, § 1; Const 1963, art 1, § 2. In *People v Stewart*, 203 Mich App 432, 433-434; 513 NW2d 147 (1994), this Court ruled that MCL 791.238 does not violate equal protection, due process, or double jeopardy protections because it precludes a defendant "parolee from receiving credit for time served [towards the new offense] while being held on a parole detainer." In *People v Watts*, 186 Mich App 686, 687-692; 464 NW2d 715 (1991), cited by defendant, the Court did not find an equal protection violation in refusing to grant credit against the defendant's new sentence and denying jurisdiction to grant any credit against his paroled offense, and there is no indication that an equal protection issue was before the *Watts* Court. Moreover, this Court and the trial court lack jurisdiction to alter defendant's prior judgment of sentence because the paroled case is not before us. *Watts, supra* at 687 n 1. We decline to grant defendant's request for a remand to determine the status of his paroled sentence.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra