STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 4, 2009
v	No. 283490 Macomb Circuit Court
TERRY GERARD BOOKER, Defendant-Appellant.	LC No. 2006-005007-FH

Before: Saad, C.J., and Sawyer and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2), as an alternative to assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1). Defendant was sentenced as a fourth offense habitual offender, MCL 769.12, to 30 to 180 months' imprisonment. Defendant appeals by leave granted and we affirm.

Defendant first argues that the following acts committed by the prosecutor deprived him of his constitutional right to a fair trial and his right to a present defense: (1) the prosecutor improperly threatened a res gestae witness; (2) the prosecutor introduced inadmissible hearsay statements for the sole purpose of convicting defendant; and (3) the prosecutor improperly shifted to defendant the burden of proving his innocence. We disagree with each claim. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant's claim that the prosecutor intimated a res gestae witness is based on the following colloquy:

> *Defendant*: I was just informed of a witness of mine would be available, but they are scared to come to court because the police threatened him to come if he came and testify for me, that they was going to arrest him.
>
> So I mean, I am really feeling pressured here. And I got to know that you can call him. I got a note saying you can call him and he will show up. If you show up in court, we are going to arrest you. It is a lot of stuff going on that you don't know about, Your Honor.

Court: You want to respond.

Prosecutor: You want me to respond.

Court: Yes.

Prosecutor: The individual I believe, and defense counsel has concurred with this, I believe that the Defendant is speaking of the other individual that he entered the store with. That individual was involved in an incident with a police officer. Resisting, obstructing charges will be filed against that witness. What is his name.

Defense Counsel: James Tony

Court: Is it Mr. Tony.

Defense Counsel: Yes, James Tony, Junior.

Prosecutor: Mr. Tony was involved in an incident that day involving resisting obstructing Officer Scott. Therefore, he will be arrested. He fled the scene. Police gave chase but were not able to locate him. So they have been looking for him and they will make an arrest. So—

Court: Nothing I can do about that.

Prosecutor: The best he can do is turn himself in. I mean, he would be arrested but nothing is preventing him from testifying in this matter, if he turns himself in.

Defendant argues that this colloquy demonstrates that had it not been for the prosecutor's threat of arrest, Tony would have testified. For that reason, defendant argues the prosecutor improperly intimidated his witness and deprived him of a fair trial.

The Sixth Amendment to the United States Constitution guarantees criminal defendants a right to compulsory process. US Const, Am VI. This right is essential to due process. *Chambers v Mississippi*, 410 US 284, 294; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Attempts by the prosecution, if successful, to intimidate a witness into not testifying can constitute denial of a defendant's due process rights. *People v Stac*y, 193 Mich App 19, 25; 484 NW2d 675 (1992), citing *People v Pena*, 383 Mich 402; 175 NW2d 767 (1970). Threats made by police officers are attributable to the prosecution. *Id.*

Cases where courts have found that the prosecutor improperly intimidated a witness typically involve situations where the prosecutor threatened to bring criminal charges against the witness or in some way punish the witness for testifying. See, e.g., *Pena*, *supra* at 406 (holding that the prosecutor improperly intimidated defense witnesses where he sent them letters that said he would prosecute them for perjury if they testified untruthfully for the defendant); *People v Callington*, 123 Mich App 301, 306-307; 333 NW2d 260 (1983) (holding that the prosecutor improperly intimidated a witness where he stated his intent to possibly charge the witness with a

new offense or institute a probation violation proceeding that could lead to life imprisonment if the witness testified). Assuming that Tony was afraid to come to court for fear of being arrested, the question is whether the possibility of arrest was communicated to him by someone, who that someone was, and whether it was done for the purpose of keeping Tony from testifying. Defendant argues that Tony was told directly by police officers solely for the purposes of keeping Tony from testifying at trial. This would mean that the police knew who and where Tony was, that they knew he was a possible witness, and that they communicated with him but did not arrest him. The only proof of that in the record is defendant's self-serving assertion, which was made before defendant was even placed under oath. There is no evidence from Tony to that effect in the record below, and defendant has provided no such evidence on appeal. In sum, defendant has failed to meet his burden to establish a miscarriage of justice stemming from the prosecutor's actions. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

Defendant also argues that he was deprived of a fair trial when the prosecutor was allowed to introduce a hearsay statement allegedly made by Tony that implied defendant was guilty of the charged offense. Defendant fails to cite to the record where the alleged improper testimony was elicited and admitted at trial, which is grounds alone to deny defendant's request for relief on this issue. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121 (2007) ("A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim."). Looking to the testimonial record, it appears to us that defendant's argument is predicated on testimony provided by a friend of the victim that when Tony returned to the gas station after the assault, he said that "he was not involved in any of this."

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees criminal defendants a right to confront witnesses who testify against them. US Const, Am VI. Interpreting the meaning and scope of the Confrontation Clause, the United States Supreme Court has held that testimonial hearsay from a declarant who does not appear for cross-examination at trial is not admissible against a criminal defendant to prove the truth of the matter asserted, unless the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Although the Court declined to provide an exhaustive list of what it considered testimonial hearsay, it clearly regarded out-of-court statements that were made for the purpose of use at a later trial as falling within this category. *Id*. at 51-52.

Contrary to defendant's argument, it is not plain that this statement constituted testimonial hearsay within the meaning of *Crawford*. It is questionable that the statement implicates defendant in any wrongdoing. Further, it is clear from the record that Tony's statement was not offered to establish the proof of his assertion, i.e., that Tony was not involved in the assault. For that reason, defendant's reliance on *Lily v Virginia*, 527 US 116, 139-140; 119 S Ct 1887; 144 L Ed 2d 117 (1999), and *Bruton v United States*, 391 US 123, 125; 88 S Ct 1620; 20 L Ed 2d 476 (1968), is misplaced.

To the extent that defendant is arguing that the statement was inadmissible hearsay under the Michigan Rules of Evidence independent of his Confrontation Clause rights, we see no plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Pursuant to MRE 801(d), statements not offered for the truth of the matter asserted are

not hearsay. As noted above, it is apparent from the context in which it was provided that Tony's statement was not offered for the truth of the matter asserted.

Defendant also claims error in the following remarks made by the prosecutor during closing argument:

> We heard Defendant denying everything and the Defendant making or putting forth this story that he was going to use the bathroom.
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> And he told you that he used the bathroom on a daily base [sic]. He wanted you to believe that, but it is kind of funny that the Defendant who had every resource. He could have called whoever [sic] he wanted to the stand. If he decides to put up a defense he could have called whoever he wanted. He decides to call this one individual who he says is his girlfriend. The defense attorney has the power of subpoena power to contact and to get anybody into court to defend the Defendant. Where is this Rochelle girl that is supposed to let the Defendant use the bathroom or the other two employees that supposedly let the Defendant use the bathroom?
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> Where is the Defendant's friend? Why didn't he come and testify? Why didn't they come and testify? You can infer from that the Defendant had something to hide.

Defendant also objects to the following statements made during the prosecutor's rebuttal argument:

> Rochelle is important because the Defendant is trying to tell you he used that bathroom in the past. He has gone back there and it is okay. So if that is the truth, if that indeed is the truth, then why isn't Rochelle in here? Why are the other two telling you that: Oh, yes, he's in there all the time. He uses the bathroom. Why aren't they here. And the Defendant's friend who is in there, the one to one, the comment: I wouldn't go back there, and then ran from the police.
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> * * *
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> So yes, those people are relevant. And the Defendant doesn't have to put on the defense, but he did. If you could put on a defense and say those things, you better have the people to back you up and he didn't.

Defendant argues that in making these statements, the prosecutor improperly shifted the burden of proof. Criminal defendants are innocent until proven guilty, and it is the prosecution's burden to prove the defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 US 358, 361, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). A prosecutor violates a criminal defendant's presumption of innocence when it suggests in closing argument that the defendant has the burden to prove his or her innocence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003).

Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Brown, supra* at 135-

136. Our Supreme Court held in *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995), that where a criminal defendant's theory at trial makes an issue legally relevant, the prosecutor is not prohibited from commenting on the credibility of that theory. This includes a prosecutor's ability to comment on the defendant's failure to call corroborating witnesses. *Id.* at 115-116. Here, defendant's theory at trial was that he went to the gas station to use the bathroom as he had done on many occasions in the past, and that the victim followed him into the bathroom, which made him angry, and that a verbal and physical altercation may have occurred. As part of his theory, defendant also argued that he had permission from Rochelle, the station manager, and other employees to use the bathroom. It is not entirely clear from the record whether Tony could verify this defense or not, but it seems from the prosecutor's argument that he assumed Tony might have been able to do so. Thus, in context, the prosecutor was not arguing that defendant had the burden to prove his innocence, but that defendant failed to produce witnesses to corroborate his theory of defense, which is not improper. *Id.* at 117.

Moreover, the trial court instructed the jury that a person accused of a crime is presumed innocent and that it is the prosecution's burden to prove guilt beyond a reasonable doubt and that the attorneys' statements are not evidence. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the trial court deprived him of his statutory right to a polygraph examination when it denied his request for a second examination. We review de novo whether a defendant's statutory right to a polygraph examination was violated. *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003). Resolution of this argument involves interpretation of the meaning of MCL 776.21(5), which provides as follows: "A defendant who allegedly has committed a crime under [MCL 750.520b to 750.520e and MCL 750.520g] shall be given a polygraph examination or lie detector test if the defendant requests it." "The purpose of affording individuals accused of criminal sexual conduct a right to a polygraph exam is to provide a means by which accused individuals can demonstrate their innocence, thereby obviating the necessity of a trial." *People v Phillips*, 251 Mich App 100, 107; 649 NW2d 407 (2002).

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature. *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). Once the intent of the Legislature is ascertained, that intent must be upheld. *People v Russo*, 439 Mich 584, 595; 487 NW2d 698 (1992). The Legislature is presumed to intend the plain meaning of the words expressed. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001).

Here, a plain reading of the statute reflects that the Legislature intended that criminal defendants be afforded a single polygraph test upon request. This is evident from the Legislature's use of the indefinite article "a", which is "[u]sed before nouns and noun phrases that denote a single but unspecified person or thing." *The American Heritage Dictionary of the English Language* (1996). While it is true that a singular term may be extended to include its plural meaning, MCL 8.3b; *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003), such a construction should not be imposed if it would be inconsistent with the Legislature's intent, *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 267; 667 NW2d 97 (2003). The statute could be read as indicating that *every time* "a" request is made, "a polygraph" examination should be given. This would be consistent with the use of the indefinite article, i.e.,

a single request does not lead to multiple examinations, but each request results in an examination. But we believe that the clear thrust of the statute is to provide a single opportunity to receive a single test, not that the opportunity exists ad infinitum. Defendant does not dispute that a polygraph examination was scheduled, that he showed up for the examination, and that an examination was conducted. That is all that the statute requires. Moreover, a reasonable conclusion from the evidence is that the problems with the polygraph examination were created by defendant when he ignored directions not to breathe deeply and not make body movements. In sum, the trial court did not violate defendant's statutory right to a polygraph examination when it denied his request for a second examination.

Lastly, defendant argues that he was deprived of his right to compulsory process when the trial court denied his request to compel certain testimony at his preliminary examination. "There is no federal constitutional right to a preliminary examination or hearing—the procedure is one left to the Legislature to provide or not." *People v Johnson*, 427 Mich 98, 103; 398 NW2d 219 (1986), citing *Gerstein v Pugh*, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975). In Michigan, criminal defendants are entitled to a preliminary examination prior to trial. MCL 766.1. The purpose of a preliminary examination is to determine if probable cause exists to believe that a crime was committed and that defendant is responsible. *Johnson, supra* at 104. However, a preliminary examination is not a criminal prosecution because it is not an inquiry into the defendant's guilt or innocence. *People v Kinsman*, 16 Mich App 611, 613; 168 NW2d 422 (1969). Nonetheless, pursuant to court rule, a defendant may subpoena witnesses to testify at a preliminary examination. MCR 6.110(C).

Defendant argues that the trial court deprived him of his constitutional right to confront and cross-examine witnesses against him and his ability to effectively impeach testimony given when it denied his request to compel the witness to testify at his preliminary examination. Defendant's claim is without merit. As is evident from the record, defendant never requested that the trial court compel the testimony at his preliminary examination. Indeed, after the court decided that probable cause existed to bind over defendant, defense counsel noted that he had decided not to call the witness even though defendant had been insistent. "I did not believe, and I still don't believe, that it was beneficial to my client to have him testify today," counsel stated.

Defendant also argues that when counsel failed to call the witness at his request, counsel was not providing the level of representation constitutionally required. The United States and Michigan Constitutions guarantee every criminal defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right guarantees counsel's assistance will be effective. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To prevail on an ineffective assistance of counsel claim a defendant must show that counsel's performance fell below that of a reasonable competent attorney and that but for counsel's deficient performance there is a reasonable probability the outcome of the trial would have been different. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000), citing *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). A reviewing court must give deference to counsel's chosen trial strategy and should not substitute its judgment for that of a defendant's counsel on hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

It is not plain that defense counsel's decision not to call the witness at the preliminary examination was objectively unreasonable. A review of the witness's testimony at trial reflects

that defense counsel's initial assessment of the benefit of the testimony to defendant's case was correct. Accordingly, the decision not to call Vernier was sound strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). It is also pure speculation that somehow the witness would have created an opening for effective impeachment at trial if he had been called at the preliminary examination.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Stephen L. Borrello