STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 6, 2010
v MONTEL JOSEPH PETTIFORD, Defendant-Appellant.	No. 288551 Genesee Circuit Court LC No. 07-021145-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ROSALIND LAURICE BROWN, Defendant-Appellant.	No. 288552 Genesee Circuit Court LC No. 07-021158-FC

Before: JANSEN, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

At a joint jury trial, before separate juries, defendants Montel Pettiford and Rosalind Brown were each convicted of first-degree premeditated murder, MCL 750.316(1)(a). They were both sentenced to life in prison without parole. Defendant Pettiford appeals by right in Docket No. 288551, and defendant Brown appeals by right in Docket No. 288552. We affirm in both cases.

Defendants' convictions arise from the drowning death of defendant Brown's 11-year-old stepson in April 1985. Defendant Pettiford is defendant Brown's brother. The victim disappeared on April 12, 1985. His body was discovered in the Flint River on April 30, 1985. The victim's death was initially ruled an accidental drowning. Although a criminal investigation was opened, no charges were brought.

The investigation was re-opened in 2004 after additional information was received. At trial, defendant Pettiford's ex-wife, Cathy Pettiford, testified pursuant to a grant of immunity. Cathy testified that before the victim's disappearance, she observed defendants Pettiford and

Brown help the victim into her house. The victim was not able to walk on his own. Cathy saw defendant Pettiford give the victim a clear liquid from a brown bottle, and also saw him mix some of the same liquid into some eggs that defendant Pettiford instructed Cathy to feed to the victim. The victim complained that his stomach hurt. An hour or two later, Cathy observed defendants Pettiford and Brown leave the house while carrying the victim, who was unconscious. Defendants Pettiford and Brown later returned without the victim, and their shoes and pants were muddy and wet. According to Cathy, defendant Pettiford said that he had drowned the victim, and defendant Brown was crying.

Other witnesses testified that defendant Brown made statements to them admitting her involvement in the victim's death. Defendant Brown's husband, Jestine, testified that at some point after 2004, defendant Brown told him that she and defendant Pettiford took the victim to the river and defendant Pettiford threw him in the water while she stayed in the car. Another witness, Twila Miller Cochran, testified that defendant Brown told her in 1994 that she gave the victim some medication and could not wake him up.

A sample of the victim's blood obtained in 1985 revealed the presence of ethanol (grain alcohol), isopropanol (rubbing alcohol), and a trace amount of acetone. After the investigation was reopened, the victim's body was exhumed and a second autopsy was performed in 2005 by Dr. Ljubisa Dragovic. Tissue samples were not tested due to the level of decomposition and the use of embalming fluid. However, Dr. Dragovic testified that the presence of mud in the victim's lungs, but not his stomach, indicated that the victim was unconscious when he went into the water, which would have been consistent with the high ethanol level in his blood. Dr. Dragovic also testified that the alcohol levels in the victim's blood indicated that it was ingested before death, as opposed to produced by the body naturally after death due to decomposition. Dr. Joyce DeJong, a defense witness, agreed that drowning was the cause of death, but concluded that the manner was indeterminate. In her opinion, however, the alcohol levels were consistent with natural postmortem production, and she believed that no conclusions regarding consciousness could be drawn from the lack of fluid or mud in the victim's stomach. Dr. DeJong also believed that it would have been prudent to test the 2005 tissue samples for whatever additional information they could have yielded.

I. Docket No. 288551

Defendant Pettiford argues, through both appellate counsel and in a supplemental brief filed *in propria persona*, that reversal is required because the trial court's jury instructions misinformed the jury regarding the scope of Cathy Pettiford's immunity.

The record indicates that the parties and the trial court discussed the jury instructions at issue, after which defense counsel expressed satisfaction with the instructions. In addition, after the court instructed the jury, defense counsel indicated that he had no objection to the instructions as given. Therefore, any alleged instructional error was waived. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). Defendant Pettiford additionally argues, however, that defense counsel was ineffective for not objecting to the trial court's immunity instructions. Because defendant Pettiford did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

In this case, the trial court issued an order authorizing the prosecution to "enter into an agreement with CATHY MARIE PETTIFORD stating that she would not be prosecuted for the crime committed against [the victim] in exchange for truthful testimony." Consistent with this order, the trial court instructed the jury that "Cathy Pettiford has been promised that she will not be prosecuted for the crime the defendants are charged with committing." The court also gave a cautionary instruction regarding accomplice testimony in which it advised the jury that it could consider whether an accomplice's testimony was influenced by any promises when evaluating that witness's credibility, and that "the testimony showed that [Cathy] Pettiford was granted immunity from prosecution on a charge of murder." On appeal, defendant Pettiford argues that defense counsel should have objected to the trial court's instructions regarding the scope of Cathy Pettiford's immunity because they misinformed the jury that she received transactional immunity, rather than use immunity.

As explained in *People v Schmidt*, 183 Mich App 817, 826; 455 NW2d 430 (1990):

> Transactional immunity is a complete bar to prosecution for the offense to which the grant of immunity relates, while use immunity allows a witness to be prosecuted for the offense to which the compelled testimony relates, but only if the prosecution shows that the evidence used against that witness was derived from a legitimate source, wholly independent of the compelled testimony.

In this case, although Cathy Pettiford testified on cross-examination that she understood that she could not be prosecuted based on anything she said, there is no indication in the record that the actual scope of her immunity was ever formally raised as an issue before or during trial. However, the language of the trial court's immunity order is consistent with an authorization of transactional immunity—truthful testimony in exchange for not being prosecuted for a crime against the victim—and the trial court's jury instructions were consistent with the scope of immunity authorized by the trial court's order.

The basis for defendant Pettiford's argument on appeal—that the scope of Cathy Pettiford's immunity cannot be characterized as transactional immunity—is that Michigan statutes only recognize use immunity. See MCL 767.6; MCL 767.19b; MCL 780.701 *et seq*. Plaintiff agrees that Michigan statutes currently provide for only use immunity, but argues that this does not preclude a promise or agreement for transactional immunity, enforceable as a

contract.[1] As plaintiff recognizes, federal courts have long recognized that prosecutors have the authority to grant immunity under terms that differ from federal immunity statutes. See, e.g., *United States v Fitch*, 964 F2d 571 (CA 6, 1992); *United States v Turner*, 936 F2d 221 (CA 6, 1991). "Statutory immunity" pursuant to federal law, 18 USC 6002, equates to use immunity. *Turner*, 936 F2d at 223-224. However, a prosecutor can also informally grant "pocket immunity," bypassing statutory formalities. *Id*. at 223. Pocket immunity is enforceable according to contract principles, and the parties have those rights and remedies outlined in the immunity contract. *Fitch*, 964 F2d at 576.

The basis for recognizing transactional immunity agreements stems from the prosecutor's broad authority and discretion in deciding whether to plea bargain, whether to prosecute, and what charges to file. See *People v Jackson*, 192 Mich App 10, 15; 480 NW 283 (1991). In *People v McIntire*, 461 Mich 147, 154 n 7; 599 NW2d 102 (1999), our Supreme Court expressly recognized that a prosecutor has the authority "to add additional terms [to an immunity agreement] beyond that imposed by the statute." Therefore, we reject defendant Pettiford's argument that an agreement for transactional immunity is not enforceable as a matter of law. Further, because the trial court's jury instructions were consistent with its order authorizing the prosecution to enter into an agreement with Cathy Pettiford whereby "she would not be prosecuted for the crime committed against [the victim] in exchange for truthful testimony," they were not improper or misleading. Accordingly, defense counsel was not ineffective for failing to object to the court's instructions. *People v Clark*, 274 Mich App 248, 257-258; 732 NW2d 605 (2007).

Although defendant Pettiford lists an additional issue in the Statement of Questions Presented of his supplemental brief, he fails to address the merits of the issue in the body of his brief. Therefore, the issue has been abandoned. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

II. Docket No. 288552

A. Prosecutorial Misconduct

Defendant Brown argues through both appellate counsel and in a supplemental brief filed *in propria persona* that the prosecutor impermissibly shifted the burden of proof in his closing rebuttal argument. Because defendant Brown did not object to the prosecutor's remarks at trial, this issue is not preserved and our review is limited to ascertaining whether a plain error affected her substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Error requiring reversal will not be found where a curative instruction could have alleviated any prejudicial effect, given that jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[1] The current immunity statutes provided for transactional immunity before they were amended in 1999 by 249 PA 1999 and 250 PA 1999. See *People v McIntire*, 461 Mich 147, 154; 599 NW2d 102 (1999).

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). 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*, 279 Mich App at 135.

During his rebuttal argument, the prosecutor explained why tissue samples taken from the victim's body were not tested. He further stated:

> Now, here's the kicker to this. If there's someone that disagreed with that, and Dr. DeJong apparently does, Dr. DeJong could have looked at the samples. I mean why are we playing this game? If you believe that you could have done something, then, Doctor, you test it. Don't turn around and tell me I'm wrong for not testing them and you don't even look at them. You test them. You look at them. You explain your results. Don't come into this Courtroom, and sit in that chair, and say I didn't look at anything, but yet you're wrong. That right there should tell you that that's just not correct. If you really believe that the tests could have been done and would have caused valid results, then you test them. You look at them.

A prosecutor may not suggest in closing argument that a defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Here, viewed in context, it is apparent that the primary purpose of the prosecutor's argument was to respond to Dr. DeJong's criticism of Dr. Dragovic for not testing tissue samples obtained during the second autopsy. Because Dr. DeJong had advanced the theory that testing of the tissue samples could have yielded useful information, the prosecutor was entitled to comment on her failure to test the samples herself to challenge the credibility of her opinion. Such an argument does not impermissibly shift the burden of proof. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995) (noting that once a defendant advances an alternate theory, comment on the weaknesses of that theory does not shift the burden of proof). Thus, there was no plain error.

Furthermore, shortly after the prosecutor's argument, the trial court gave a cautionary instruction in which it advised the jury that it was to consider the prosecutor's argument only as it related to the witness's credibility, and not as suggesting that defendant had a burden to prove or disprove the case, and that the burden always remains with the prosecution. To the extent that the prosecutor's remarks could have been taken as improperly suggesting that defendant Brown had a burden to test the samples, the trial court's cautionary instruction was sufficient to cure any prejudice and to protect defendant Brown's substantial rights. *Unger*, 278 Mich App at 235.

In her supplemental brief filed *in propria persona*, defendant Brown asserts that the prosecutor engaged in additional misconduct that resulted in a miscarriage of justice. For most of her claims, however, apart from specifying different types of improper conduct generally, she fails to identify specific remarks or conduct that she believes were improper. Because her

assertions of error are not adequately briefed, we consider them abandoned. See *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

B. Right to Present a Defense

Defendant Brown next argues, through both appellate counsel and in her supplemental brief, that the trial court violated her constitutional right to present a defense when it prohibited her from introducing hearsay evidence from a police report that a group of young boys had identified the victim and another boy walking down the street on the date the victim disappeared. At trial, defendant Brown sought to introduce the evidence under the hearsay catchall exception, MRE 803(24). The trial court determined that the evidence was not admissible under that rule because it lacked circumstantial guarantees of trustworthiness. Although defendant Brown now argues that the exclusion of this evidence violated her constitutional right to present a defense, she did not raise this constitutional claim in the trial court. Therefore, the constitutional claim is unpreserved, *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005), and our review is limited to plain error affecting defendant Brown's substantial rights, *People v Shafier*, 483 Mich 205, 211; 768 NW2d 305 (2009).

A criminal defendant's constitutional right to present evidence in her defense is not absolute. *Unger*, 278 Mich App at 250; see also *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998). States have the power to establish criminal trial rules and procedures, including broad latitude to establish rules excluding evidence. *Unger*, 278 Mich App at 250; see also *Scheffer*, 523 US at 308, and *Chambers v Mississippi*, 410 US 284, 302-303; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Such rules do not abridge a defendant's right to present a defense if they are not arbitrary or disproportionate to the purposes they are designed to serve. *Unger*, 278 Mich App at 250.

MRE 803(24) allows the admissibility of otherwise inadmissible hearsay evidence that has adequate circumstantial guarantees of trustworthiness if it is offered as evidence of a material fact, it is more probative on the point for which it is offered than any other evidence, and its admission will serve the general purposes of the rules of evidence and the interests of justice. By seeking to limit the admission of otherwise inadmissible evidence to reliable evidence of a material fact that will serve the interests of justice, the rule is neither arbitrary nor disproportionate to the purpose it was designed to serve. Accordingly, in light of the trial court's determination that the proffered evidence did not qualify for admission under MRE 803(24), the trial court's exclusion of the evidence did not violate defendant's constitutional right to present a defense.

Furthermore, the purpose of the proffered hearsay evidence was to show that the victim was with someone else when defendant Brown left her house on the day the victim disappeared. At trial, defendant Brown's 1985 police statement was introduced, in which she stated that when she left her house, the victim was standing across the street with a boy on a bicycle. The victim's mother testified that defendant Brown told her substantially the same thing. Defendant Brown's daughter testified that after defendant Brown left the house, she saw the victim walk toward a park with another boy. In addition, a police officer testified that he located a group of

young people who allegedly saw the victim and another boy walking down the street.[2] Thus, the proffered hearsay evidence would have been largely cumulative, and defendant Brown's right to present a defense was not violated by the trial court's refusal to admit it.

C. Confrontation Clause

Defendant Brown lastly argues, through both appellate counsel and in her supplemental brief, that her Sixth Amendment right of confrontation was violated when Cathy Pettiford testified that defendant Pettiford had told her that "he drowned [the victim]." Because there was no objection to this testimony at trial, we review this issue for plain error affecting defendant Brown's substantial rights. *Shafier*, 483 Mich at 211.

The Confrontation Clause provides that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *People v Taylor*, 482 Mich 368; 374; 759 NW2d 361 (2008), quoting US Const, Am VI. However, only out-of-court statements that are testimonial implicate the Confrontation Clause. *Crawford v Washington*, 541 US 36, 50-52, 61, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *Taylor*, 482 Mich at 374, 377. Statements are testimonial when they are made under circumstances that would lead an objective declarant reasonably to believe that the statement would be available for use in a later trial or criminal prosecution. *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006); *Taylor*, 482 Mich at 377-378.

In this case, defendant Pettiford made the statement to Cathy, his wife at the time, in their home after he returned without the victim. There is no indication that he had reason to believe when he made the statement that it would be available for use at a later trial, particularly after having earlier threatened Cathy not to say anything about a liquid he poured into the victim's drink and making her feed the victim eggs that were mixed with the same liquid. Indeed, Cathy did not cooperate with the police in 1985, and did not speak to them for nearly 20 years. Because defendant Pettiford's statement was made in an informal setting in the presence of only his wife and defendant Brown, it was not testimonial. See *Taylor*, 482 Mich at 378, 380 (holding that statements made informally to an acquaintance were nontestimonial). Therefore, defendant Brown cannot establish a Confrontation Clause violation in this regard.

Defendant Brown also asserts in her supplemental brief that by allowing Cathy Pettiford to testify about her immunity agreement, the trial court denied her of the "right to be tried solely on the evidence against her." Defendant Brown does not further explain the basis for her argument. Nevertheless, we note that it is well established that matters affecting a witness's credibility, including evidence of any inducements or consideration given for a witness's testimony, are a proper subject of examination. See *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod 450 Mich 1212 (1995); *People v Dowdy*, 211 Mich App 562, 570-571; 536 NW2d 794 (1995). Thus, we perceive no error with respect to this issue.[3]

[2] The trial court's ruling only prevented the officer from testifying whether one of the youths positively identified the victim as one of the two boys walking down the street.

[3] Defendant Brown's supplemental brief contains several additional pages, beginning with a page
(continued…)

III. Conclusion

Having found no errors requiring reversal, we affirm in both Docket No. 288551 and Docket No. 288552.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly

(…continued)

entitled, "For future use or can it be used now?" These pages are not part of any issue on appeal and the matters mentioned therein are not listed in the Statement of Questions Presented. Further, the pages consist of only general statements, and do not contain any substantive arguments. Accordingly, they fail to properly present an issue for this Court's review. MCR 7.212(C)(5); MCR 7.212(C)(7); *Matuszak*, 263 Mich App at 59.