

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

HENRY LEE SLAUGHTER, JR.,

Defendant-Appellant.

UNPUBLISHED
December 9, 2010

No. 293068
Wayne Circuit Court
LC No. 09-003975-FC

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, two counts of felonious assault, MCL 750.82,¹ and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 19 months to 10 years for the assault with intent to do great bodily harm conviction, and six months to four years for each felonious assault conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arose from an altercation following a traffic accident. Complainant Marcus Leroy and the two passengers in his vehicle all claimed that the driver of a blue Durango—defendant—pursued their vehicle after the altercation and fired four shots at them. Defendant did not dispute that he fired his weapon, but claimed that he only fired it into the air in self-defense when Leroy backed his vehicle toward him after the altercation.

I. WAIVER OF THE RIGHT TO REMAIN SILENT

Defendant first argues that the trial court erred when it failed to inform him of his right to remain silent before he testified at his bond-revocation hearing. We disagree. Defendant did not preserve this issue by raising it in the trial court. Accordingly, our review is limited to

¹ Defendant was charged with three counts of assault with intent to commit murder, MCL 750.83, along with three counts of assault with intent to do great bodily harm less than murder and three counts of felonious assault. The prosecutor was advancing three different possible outcomes for each of the three victims.

ascertaining whether plain error occurred that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Both the United States Constitution and the Michigan Constitution guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17; *People v Bassage*, 274 Mich App 321, 324; 733 NW2d 398 (2007). However, a “defendant waives his privilege against self-incrimination when he takes the stand and testifies.” *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). “In all cases where a personal privilege exists for a witness to testify or not, if such witness does testify without objection he will be deemed to have done so voluntarily.” *People v Smith*, 257 Mich 319, 322; 241 NW 186 (1932) (internal citation and quotation marks omitted). The record discloses that defendant voluntarily testified on his own behalf at the bond hearing after conferring with counsel. Defendant does not maintain that he was in any manner compelled to take the stand, and he never attempted to invoke his right to remain silent during his testimony. Further, a trial court is not required to advise a defendant who decides to testify of his right not to testify; such a strategic decision is best left to the defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). Accordingly, the trial court was not required to inform defendant, who was represented by counsel, that he did not have to testify.

Although defendant also argues that the prosecutor exceeded the scope of permissible cross-examination at the bond hearing, his briefing of this issue is inadequate, see *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998), and the trial court sustained defense counsel's objection to questions relating to the charged offenses. There is no basis for reversal.

II. PROSECUTOR'S CONDUCT

Defendant next argues that the prosecutor's conduct denied him a fair trial. Again, we disagree.

Defendant objected when the prosecutor asked Leshonda Chandler, a passenger in Leroy's vehicle, why she did not want to look over at the defense table at trial. Therefore, that issue is preserved. However, defendant failed to object to the remaining claims of misconduct on the grounds asserted on appeal. Therefore, those claims are not preserved. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). This Court reviews preserved claims of prosecutorial misconduct case-by-case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). Defendant's unpreserved claims of misconduct are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764. This Court will not reverse if the alleged prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction upon request. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant argues that the prosecutor insinuated that defendant was dangerous when he asked Leroy on redirect examination whether Leroy had earlier asked if defendant would be in the courtroom during Leroy's testimony. A finding of prosecutorial misconduct cannot be based on a prosecutor's good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). There is no indication that the prosecutor's questioning of Leroy was

made in bad faith. Leroy's credibility was a matter of concern to both parties, given (1) his trial testimony that he could not positively identify defendant despite having previously identified him at both a lineup and the preliminary examination and that he did not recall portions of his police statement, and (2) his claim that he could hardly see on the night of the incident because he was not wearing his glasses, which he acknowledged he had not mentioned before trial. In addition, Leroy had explicitly stated that he did not want to testify and that it was not his choice to involve the police. Viewed in context, the challenged questions related to Leroy's decision to testify and were relevant in light of Leroy's inconsistent testimony and sudden inability to positively identify defendant. Therefore, the questions were not clearly improper.

Defendant further argues that the prosecutor continued to insinuate that he was dangerous when she similarly asked Chandler on direct examination if there was a reason she did not want to look at the defense table. Following a sidebar conference in response to defense counsel's objection, the prosecutor pursued a different line of questions. Although defense counsel objected, no record was made and defendant did not request any action by the trial court. The purpose of requiring a timely objection is to give the trial court an opportunity to correct the error, *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), and any prejudicial effect of the prosecutor's question here could have been cured by a timely instruction, *Watson*, 245 Mich App at 586. Regardless, Chandler did not provide a response and the prosecutor did not discuss the matter further. Thus, there is no basis for finding that the prosecutor's question denied defendant a fair trial. Further, in its final instructions, the trial court instructed the jury that the lawyers' questions and comments were not evidence, that the case should be decided on the basis of the evidence, and that it was to follow the court's instructions. These instructions were sufficient to dispel any possible prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant next argues that during the prosecutor's redirect examination of Chandler, the prosecutor improperly insinuated that defense counsel "did something wrong by cross-examining" her. The record discloses that the prosecutor asked Chandler how defense counsel's questions made her feel. Chandler responded that she had already answered the same questions several times and she felt that defense counsel was trying to make it seem that she was lying. A prosecutor may not personally attack defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). The jury's focus must remain on the evidence and not be shifted to the attorneys' personalities. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996). Viewed in context, the prosecutor's questioning did not imply that defense counsel acted improperly. Rather, the prosecutor was attempting to elicit an explanation for why Chandler may have appeared uneasy, uncertain, and reluctant to testify. A witness's demeanor while testifying is an appropriate subject for questioning because it can provide clues to the factfinder regarding whether the witness is telling the truth. See *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998). The prosecutor's questions were not improper.

Defendant also argues that the prosecutor improperly vouched for Delores McGuire, a passenger in Leroy's vehicle, through the following questioning:

Q. You talked to me before, correct?

A. Yes.

Q. Did I tell you it's important to tell the truth?

A. Yes.

Q. You're telling the truth today?

A. Yes.

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, the prosecutor did not suggest that she had special knowledge that McGuire was credible. Further, the prosecutor's questioning was responsive to defense counsel's cross-examination. Defense counsel had asked McGuire on cross-examination if she had talked to the prosecutor and to the police before trial. Thus, it was not improper for the prosecutor to clarify the scope of that conversation on redirect examination, to refute any suggestion that McGuire had altered her version of the events after talking with the prosecutor. Given the responsive nature of the prosecutor's questions and the trial court's instructions that the jurors are the sole judges of witness credibility, there was no plain error requiring reversal. See *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant further argues that the prosecutor continued to impermissibly vouch for her witnesses when she questioned the officer in charge about the decision not to perform forensic testing in this case. We again disagree. The questions were focused on allowing the officer to explain why the police did not impound Leroy's vehicle to perform forensic testing to determine the actual source of the holes in the vehicle. The officer conceded that he could not tell what type of gun caused the holes in the vehicle simply from looking at them. Because the propriety of the police investigation was challenged in this case, it was not improper to question the officer in charge about the police investigative procedures in the case.

Defendant also claims that when questioning the officer in charge, the prosecutor improperly insinuated that defendant had "fraudulently and criminally" obtained his CCW (carrying a concealed weapon) permit. A prosecutor may not indiscriminately introduce prior bad acts of a defendant. See MRE 404(b)(1). Here, defendant has failed to demonstrate that the prosecutor's question regarding his residence constituted a plain error affecting his substantial rights. Officers testified at trial that they determined that defendant had a valid CCW permit and that he was carrying the firearm lawfully. Further, in discussing the CCW permit during his own testimony, defendant explained that he had a Macomb County address on his CCW permit because he had temporarily lived there. Although defendant argues that an insinuation was made that he did not lawfully obtain his CCW permit and additionally argues that his vehicle registration and driving record were referred to improperly, there was no direct or circumstantial evidence that he criminally obtained the permit or that his vehicle registration or driving record were amiss. Further, as previously indicated, the trial court instructed the jury that the lawyers' questions were not evidence, and the jury is presumed to follow those instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant claims that the prosecutor improperly asked him to comment on the credibility of other witnesses, including Leroy and the officer who took defendant's statement. It is improper for the prosecutor to ask a witness to comment on the credibility of another witness

because credibility is a determination for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, to the extent that the prosecutor's questions were improper, defendant has not demonstrated that his substantial rights were affected. *Carines*, 460 Mich at 752-753, 763-764. In *Buckey*, 424 Mich at 17, the Michigan Supreme Court noted that this type of error was harmless where the defendant "dealt rather well with the questions," and it was not clear how the questioning harmed the defendant. Here, nothing in the record suggests that defendant suffered any harm. Defendant advanced his claim that the interviewing officer gave him the opportunity to cross out items "in a particular spot," but that he was not given the opportunity to add additional information as claimed by the officer. Regarding a discrepancy concerning his residence, defendant was given an opportunity to explain that he lived in Gladwin for a total of four years. In addition, defendant and the prosecution witnesses gave conflicting testimony, and the jury was aware that the witnesses disagreed on the crucial matters at issue. Further, a timely objection "could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction." *Id.* at 18 (internal citation and quotation marks omitted). Moreover, even though defendant did not object, the trial court instructed the jury that it was to assess and determine the credibility of the witnesses. Consequently, reversal is not warranted on the basis of this issue.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel was ineffective for failing to object to the various unpreserved claims of prosecutorial misconduct discussed in section II. We disagree. Because defendant did not raise this issue in the trial court and no evidentiary hearing was conducted, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceedings would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Most of the prosecutor's questions were not clearly improper. To the extent any were improper, they did not affect the outcome of the case, and the trial court's jury instructions were sufficient to dispel any possible prejudice. Defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceedings would have been different. *Frazier*, 478 Mich at 243. Accordingly, defendant cannot establish a valid claim of ineffective assistance of counsel.

IV. JURY INSTRUCTIONS

Defendant lastly argues that the trial court erred by denying his requests to instruct the jury on the misdemeanor offenses of intentionally aiming a firearm without malice, CJI2d 11.23,

discharge of a firearm while intentionally aimed without malice, CJI2d 11.24, and reckless or wanton use of a firearm, CJI2d 11.26, as lesser offenses. We disagree.

MCL 768.32 only permits instruction on necessarily included lesser offenses, not cognate offenses. *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010); see also *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2002). A necessarily included offense is one that has elements completely subsumed in the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *Wilder*, 485 Mich at 41; *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003). “In other words, if a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater.” *Id.* Conversely, a cognate offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *Wilder*, 485 Mich at 41; *Cornell*, 466 Mich 345.

Defendant was charged with assault with intent to commit murder, assault with intent to do great bodily harm less than murder, and felonious assault. The trial court was not permitted to also instruct the jury on the requested misdemeanor offenses because they are not necessarily included lesser offenses of the charged offenses. A person can commit the charged offenses without the use of a firearm. In contrast, the offenses of intentionally pointing a *firearm* without malice, discharge of a *firearm* while intentionally aimed without malice, and reckless or wanton use of a *firearm* all require the use of a firearm. They are cognate offenses. Therefore, the trial court’s failure to instruct the jury on those offenses was not error.

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter