STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED December 28, 2010
v	No. 288975 Wayne Circuit Court
NIGEL KINTE WRIGHT, Defendant-Appellant.	LC No. 08-003633-FC

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree murder, MCL 750.316, and carrying a concealed weapon, MCL 750.227. The trial court sentenced him to serve life in prison for the first-degree murder conviction, and to serve two to five years in prison for the carrying a concealed weapon conviction. Because we conclude there were no errors warranting relief, we affirm.

I. BASIC FACTS

Defendant's convictions arise from the shooting of Travis Goodwin. On the morning of December 29, 2007, Alice Smiley, Goodwin's mother, awoke to the sound of gunshots outside her home. The next-door neighbor, Dwayne Currie, knocked on the door and told Smiley that Goodwin had been shot inside the van he had been driving. The van was parked across the street. Goodwin died at Henry Ford Hospital on January 10, 2008.

Currie testified that, at approximately 2:00 or 2:30 on the morning of December 29, 2007, he was playing video games with this six-year-old daughter. He saw Goodwin in a van that Currie believed belonged to Goodwin's mother. Goodwin was trying to find a place to park the van, and eventually parked in a driveway across the street. After approximately 20 minutes, he heard numerous gunshots close to the house. He and his daughter ducked and ran to the back of the house. Currie eventually returned to the front of the house and peeked out of the blinds.

He saw "some guys back up off the van." Defendant was in the driver's seat of a black Charger. A second person, Patrick Pickett, who was known as "Worm", was standing near the passenger side of the Charger. Worm had a shiny handgun in his hands and got into the passenger seat of the Charger. A third person, "Shondell," "Dalton," or "Black" held an assault rifle. Currie saw "Black" "[p]ointing at the back of the van." "Black" fired a round, then got into the rear driver's side of the Charger.

"Black" is about five feet, one inch tall. "Worm" is about five feet, five inches tall and weighs two or three hundred pounds. Currie had known both men all of his life. Both wore black clothing and ski masks, but Currie recognized "Black" by his movements and "Worm" by his size. Defendant did not wear a mask and had his hair in braids, which was the way he usually wore his hair. Currie had seen defendant in the Charger before and associated him with that car. After Currie saw "Black" and "Worm" get into the car, he ducked back down. When he looked again, the car was gone.

Defendant was convicted of first-degree murder under an aiding and abetting theory. Pickett and Dalton were initially charged in the same felony information as defendant, but the charges against them were dismissed at the close of the preliminary examination because the district court concluded that there was insufficient probable cause with respect to their identity.

II. HEARSAY STATEMENTS

Defendant first argues that the trial court erred in admitting out-of-court statements Goodwin allegedly made to his mother, Smiley, and Officer Alfred Thomas. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). This Court reviews de novo questions of law and it "is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id*. Where a trial court improperly admits evidence that does not rise to a constitutional error, the defendant bears the burden of showing that it is more probable than not that the outcome would have been different absent the error. *Id*. at 619.[1]

In this case, the prosecution called Goodwin's mother and officer Thomas to testify about statements that he had made prior to his death. Smiley testified that her son believed that he would be blamed for the arson of a nearby drug house:

> *Q*. And what happens, and when does that fire occur, and then when does your son say something to you?

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[1] Defendant contends that the improper admission of hearsay amounted to a constitutional error. He provides no analysis, however, to support his assertion that the trial court's error under the rules of evidence deprived him of due process. If every violation of the rules of evidence amounted to a denial of due process, there would be no non-constitutional evidentiary error. "Such cursory treatment constitutes abandonment of the issue." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

A. The fire occurred like early morning one day. I can't remember the exact date. But then that next following day when I saw my son and I asked him, did any—you know, was there a fire over there? What happened? Who house burned up? He explained to me that it was Patrick's house.[2] And then he informed me that, I know they gonna think I did it.

* * *

Q. After your son said that, that they're going to blame me for it, how long after that was your son shot?

A. Oh, maybe a couple of weeks later.

Officer Thomas testified that Goodwin told him that defendant had threatened him:

Q. Can you give me a sense of how soon before December 29th, '07 this conversation took place?

A. At least . . . three weeks to a month of patrolling the area of Mackinaw and Clarendon I encountered him, talked with him, and he expressed to me about some threats that he was receiving from three individuals in the neighborhood.

Q. And when you say—did he identify who those threats, or who that fear came from?

A. Yes.

* * *

Q. Who?

A. One was the gentleman that's sitting in front of defense counsel, Mr. Nigel Wright, Nigel Kinte Wright. Another gentleman's name was Damien Bell, a black male that lives in the area of Quincy, and another individual was Tommy Dickey, which is another black male that lives in that same area of Mackinaw.

Q. Who sought out who? Did you go up to . . . Goodwin and say, hey, is anybody threatening you, or did he initiate that conversation knowing you were the police?

A. In my course of patrol I observed him raise his hand up. I stopped and asked him what was going on with him; and he indicated he's not, you know, getting into anything; he's trying to start a family, and staying close to the home. And he

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[2] Smiley testified that Patrick's street name is "Worm."

says, it's those other guys that you need to look at that's in this neighborhood. I said, what other guys, and that's when he named the names.

Q. And did he—as part of that did he express fear from these people as to something happening to him?

A. Yes.

On cross-examination, Officer Thomas also testified that, in addition to the three names, Goodwin had given him some nicknames, including "Black," but not including "Worm." He also testified that Goodwin had told him that the named individuals were expanding their drug territory.

Defendant's trial counsel objected to the testimony, but the trial court determined that the statements were admissible. Although the trial court's reasoning is somewhat unclear, the court appears to have concluded that the statements were not hearsay and that they were admissible under *People v Fisher*, 449 Mich 441, 443-444; 537 NW2d 577 (1995). The court also stated that Goodwin's statement to Smiley was relevant to defendant's motive.

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is inadmissible except as provided in the rules of evidence. MRE 802. One such exception is for the declarant's then existing mental, emotional, or physical condition:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will. [MRE 803(3).]

The statements at issue were hearsay; they were clearly made by someone other than the declarant and were offered to prove the truth of the matter asserted. MRE 801(c). Further, the statements do not satisfy the exception stated under MRE 803(3). "A statement of the declarant's then existing state of mind" is admissible under MRE 803(3), "*but not including a statement of memory or belief to prove the fact remembered or believed . . .*" MRE 803(3) (emphasis added). As this Court explained in *People v Moorer*, 262 Mich App 64, 73; 683 NW2d 736 (2004), "the general use of statements of mind that are based on past events . . . violate the purpose of the rule."

The prosecutor introduced Goodwin's statement of belief that he would be blamed for the burning of the drug house to prove the fact believed. In other words, the statement was offered to show that Goodwin was in fact blamed for the burning of the drug house. Similarly, the prosecutor offered Goodwin's statement (of memory, since it happened in the past) that he had been threatened by defendant to prove that Goodwin had in fact been threatened by defendant. Here, the evidence was inadmissible even if Goodwin's state of mind was relevant because Goodwin's statements were offered to prove the truth of the matter asserted: that is, that Goodwin feared that he would be blamed for the burning of the house and that defendant had threatened him. See *People v Smelley*, 285 Mich App 314; 775 NW2d 350 (2009), vacated in

part on other grounds 485 Mich 1023 (2010). Therefore, the trial court abused its discretion in admitting this evidence.

Nonetheless, we conclude that the error does not require reversal because it does not appear more probable than not that the error affected the outcome of the trial. Defendant essentially argues that, given the questionable reliability of Currie's testimony, the admission of the hearsay testimony tipped the balance against defendant by permitting the jury to make the inference that there was a good reason for Goodwin to be frightened of defendant and for defendant to assist in his murder. However, after a careful review of the record, we do not agree that the inconsistencies in Currie's testimony were so consequential, or the inadmissible evidence so prejudicial, that one must conclude that more likely than not the jury's assessment of defendant's guilt or innocence turned on the inadmissible evidence. Currie's initial statement to police was understandably less comprehensive than his later detailed testimony about the incident. Indeed, the police officer who interviewed Currie after he was arrested on traffic tickets testified that he wanted to interview Currie because there were "holes" in Currie's earlier statement. The officer testified that, from the time the officer interviewed Currie and Currie identified the suspects, Currie had never named anyone other than defendant as the driver, "Black" as the person with the assault rifle, and "Worm" as the person with the shiny object getting into the passenger side of defendant's car. And, critically, even absent the inadmissible evidence, the jury would still have heard Currie's testimony that he burned the drug house knowing that defendant would blame Goodwin for burning the house. In addition, a firearms identification expert concluded based on the cartridge casings found at the scene that two guns were involved, and that one of the types of cartridges could have come from a semi-automatic assault rifle. This testimony was consistent with Currie's account of two shooters.

In addition, after defense counsel's cross-examination of Currie, in which defense counsel brought out some inconsistencies between Currie's various statements, the prosecutor forcefully highlighted defendant's involvement in the shooting:

> *Q.* Sir, were you asked these questions and did you give these answers at the preliminary examination on March 14th under oath, sir.
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> * * *
>
> "Question: Did . . . Nigel tell you that they were going to blame this on Travis; that he was going to tell Patrick that Travis did it?"
>
> Your answer under oath, "Yes."
>
> Was that you answer, sir?
>
> *A.* Yes.
>
> *Q.* So when counsel asked you about who set stuff in motion, who asked you to burn the house?
>
> *A.* Nigel.

Q. Who was going to blame Travis for it?

A. Nigel.

Q. Who was in the black Charger when Travis gets shot?

A. Nigel.

Q. And who's with Nigel?

A. Worm, and Black.

Q. And whose house—whose drug house got burned up?

A. Worm's

Q. And it got burned up because who wanted it burned up?

A. Nigel.

In light of the other evidence connecting defendant with the murder, we cannot conclude that it was more probable than not that the inadmissible evidence was outcome determinative.[3]

Defendant also claims that the prosecutor's references to Goodwin's out-of-court statements during closing arguments amounted to prosecutorial misconduct. However, even if the prosecutor's closing argument amounted to misconduct, we are not convinced that the error was outcome determinative, for the reasons already discussed. Therefore, this unpreserved claim of error does not warrant relief. See *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Defendant further argues that the admission of Goodwin's out-of-court statements to Officer Thomas violated his Sixth Amendment right of confrontation. In order to preserve such a claim of error, a defendant must raise a specific objection on that ground; an objection that the testimony is hearsay does not preserve a Confrontation Clause objection. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

In this case, defense counsel objected to the admission of Officer Thomas's testimony about Goodwin's statements, but not on Confrontation Clause grounds. Accordingly, this issue is unpreserved. We review unpreserved constitutional error for plain error affecting substantial

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[3] Defendant also argues as part of this issue that the trial court's failure to sua sponte provide a limiting instruction constituted plain error affecting his substantial rights. We decline to address this argument in detail because we agree with defendant that the evidence should not have been admitted at all. In any event, as discussed, defendant has not established that, even without a limiting instruction, the admission of this evidence was outcome determinative.

rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). A demonstration of plain error affecting substantial rights "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. at 763. For the reasons already noted, defendant has not established that the admission of these statements affected the outcome of his case.

III. ACCOMPLICE INSTRUCTION

Defendant next argues that the trial court erred in failing to give the jury a cautionary concerning accomplice witnesses. The trial court did not err in failing to give the jury instructions defendant now argues were required to protect his rights. Even when a defendant requests a cautionary instruction, a trial court is only required to give instructions that are supported by the evidence. *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998). Here, Currie never testified that he took part in Goodwin's murder. Thus, the instruction for an undisputed accomplice does not apply. See CJI2d 5.4. Further, there was no evidence that Currie actually took part in Goodwin's murder. See CJI2d 5.5. Defendant argues that Currie was "an accessory" or "played a major role" in "the precipitating event"—the burning of the drug house—but this is not the same as taking part in murder and carrying a concealed weapon, the crimes with which defendant was charged. The cautionary instruction provided under CJI2d 5.6 is to be given after CJI2d 5.4 or CJI2d 5.5, depending on the circumstances. If neither of those instructions is warranted, the instruction under CJI2d 5.6 is also not warranted. Under the circumstances, the trial court had no reason to instruct the jury under CJI2d 5.4, CJI2d 5.5, and CJI2d 5.6.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that he was denied his right to the effective assistance of trial counsel. Because there was no hearing before the trial court, this Court's review is limited to errors that are evident in the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court presumes the effective assistance of counsel and the defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). In order to warrant relief, the defendant must show that trial counsel's performance was deficient as measured against an objective standard of reasonableness under prevailing professional norms and that the deficiency was so prejudicial that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Id*.

Defendant argues that his trial counsel rendered ineffective assistance by failing to object to Officer Thomas's testimony about Goodwin's out-of-court statements on Confrontation Clause grounds, failing to request a limiting instruction or object to the absence of a limiting instruction concerning the testimony of both Officer Thomas and Smiley, and failing to object to the prosecutor's closing arguments or request a curative instruction. Even if defendant could overcome the presumption of effective assistance, he has not established that any deficiency was prejudicial. For the reasons already explained, defendant has not established that the erroneous admission of Goodwin's statements was outcome determinative.

In addition, defendant claims that trial counsel rendered ineffective assistance in failing to request a cautionary instruction on the unreliability of accomplice testimony. As explained, an accomplice cautionary instruction was not supported by the evidence. Counsel is not ineffective for failing to request an instruction that was not supported by the evidence. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").

V. STANDARD 4 BRIEF

Defendant has also filed a Standard 4 brief, see Michigan Supreme Court Administrative Order 2004-06, Standard 4, in which he raises several additional issues.

First, he argues that he was denied a fair trial by the prosecution's use of allegedly perjured testimony to obtain his convictions. In order to be preserved for appellate review, an issue must generally have been raised before and addressed by the trial court. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). Because there was no defense objection before the trial court to the prosecutor's use of allegedly false testimony to secure defendant's convictions, this issue is unpreserved. Unpreserved constitutional error is reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 764.

"[A] conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Michigan courts have also recognized that the prosecutor has a duty to correct false evidence. See *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001).

At trial, Currie admitted on cross-examination that he was not telling the whole truth at the preliminary examination when he replied "no" to the question whether Goodwin "had any beef with [defendant] before he got killed." He then replied "yes" when defense counsel asked, "You committed perjury, correct?" Even assuming this establishes perjury on this point, there is no indication that the prosecution "knowingly" offered perjured testimony at defendant's trial. Moreover, defendant does not even mention this admission in his Standard 4 brief. The instances of "perjury" he alleges in his brief are inconsistencies in Currie's testimony. Inconsistencies are not the same as perjury, and even if defendant could establish that Currie's testimony was perjured, he has not established that the prosecutor "knowingly" used perjured testimony to obtain his convictions. Defendant has not established that a violation of due process occurred in this case.

In a second set of issues in his Standard 4 brief, defendant alleges that references during trial to individuals who were allegedly involved in the shooting but who were not on trial (Pickett and Dalton) were improper. Defendant alleges error on the part of the trial court and misconduct on the part of the prosecutor in connection with these references. He also alleges that trial counsel rendered ineffective assistance by failing to challenge the prosecutor's "use" of this evidence or to move for a mistrial on that ground. We note that the jury was specifically instructed that other individuals to whom the jury had heard references were not on trial. We otherwise decline to address these issues because defendant fails to make any coherent legal argument to support his claims. "An appellant may not merely announce his position and leave

it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Matuszak*, 263 Mich App at 59 (citation and quotation marks omitted).

Defendant further argues in his Standard 4 brief that he was improperly charged as an aider and abetter under MCL 767.39, that the evidence only supported a charge of the common-law offense of accessory after the fact, and that this amounts to constitutional error. "[T]he decision whether to bring a charge and what charge to bring lies in the discretion of the prosecutor." *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). "[A]n accessory after the fact is 'one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment.'" *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999) (citation omitted). In contrast, the elements necessary to convict a defendant under an aiding and abetting theory are:

> (1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement. [*People v Plunkett*, 485 Mich 50, 61; 780 NW2d 280 (2010) (citations and quotation marks omitted).]

Defendant essentially argues that, because there was no direct evidence that he drove Pickett and Dalton to the scene of the crime, only that he drove them away from the scene, accessory after the fact was the more appropriate charge. Defendant fails to show that the prosecutor's decision to charge him with aiding and abetting, rather than accessory after the fact, amounted to an abuse of prosecutorial discretion. And contrary to defendant's argument, there was evidence to support a charge of aiding and abetting.

Currie testified at trial that, when he looked out the window the second time, he saw defendant in the driver's seat of a black Charger, he saw "Worm" standing near the passenger side of the Charger holding a shiny handgun, and "Worm" got into the Charger. Currie saw "Black" fire a round from an assault rifle at the back of the van occupied by Goodwin, then get into the driver's side of the Charger behind defendant. In addition, Currie testified that he burned down the drug house knowing that defendant would blame Goodwin for it. This evidence permitted the jury to infer that defendant assisted in the commission of the crime by driving "Worm" and "Black" to the scene of the crime, and that he had knowledge that the other men intended to murder Goodwin when he rendered this aid or encouragement. Also, the jury could infer that the guns would have been in the vehicle, and the assault rifle in particular would have been difficult for "Black" to conceal from defendant. Defendant has failed to establish any error or abuse of prosecutorial discretion in the prosecutor's decision to charge him with aiding and abetting, rather than accessory after the fact.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello