STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 19, 2016
v	No. 326458 Oakland Circuit Court
ERIC LAMONT WASHINGTON, Defendant-Appellant.	LC No. 2013-247603-FH

Before: SAAD, P.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals from his jury trial convictions of felon in possession of a firearm ("felon in possession"), MCL 750.224f(5), possession of a firearm during the commission of a felony ("felony firearm"), second offense, MCL 750.227b(1), and a misdemeanor conviction of reckless use of firearms, MCL 752.863a. Defendant was sentenced to serve one to five years for the felon-in-possession conviction, five years for the felony-firearm conviction, and ninety days for the reckless use of a firearm misdemeanor conviction. For the reasons provided below, we affirm.

Defendant's convictions arise from a shooting that occurred at the Newman Apartments in Pontiac, Michigan. At trial, the key prosecution witness was Briana Mabin. She testified with "a hundred percent" certainty that defendant was the one who was in the middle of the street, shooting a gun in the direction of her apartment. In addition to her in-court identification, the prosecutor also presented to the jury the fact that Mabin previously identified defendant in a photographic lineup and in a 911 call that she placed at the time of the shooting.[1]

At trial, defendant presented the alibi witness of Yolanda Woods. Woods testified that defendant was with her, inside her mother's apartment at the time of the shooting. She testified that after the shooting, defendant was "all frantic," and had to be calmed down. Woods claimed that after calming down, defendant "ran out [of] the house . . . to go look for one of his brothers, and a couple of his friends."

[1] The 911 call was admitted into evidence through a stipulation of the parties.

The prosecution called Detective Joseph Marougi as a rebuttal witness. During rebuttal, Detective Marougi testified that he and his partner interviewed defendant a couple days after the shooting. After being given his *Miranda*[2] rights, defendant agreed to speak with the detectives. At that point, he was asked what happened at the apartment complex, and defendant responded by telling the detectives that he "had no idea" what they were talking about and that he wanted to end the interview. The interview was then concluded.

The jury thereafter found defendant guilty of all three counts of which he was charged.

I. DEFENDANT'S POST-*MIRANDA* SILENCE

On appeal, defendant argues that his constitutional rights were violated when (1) the prosecutor elicited testimony from Detective Marougi on rebuttal that defendant exercised of his right to remain silent and (2) the prosecutor used defendant's silence against him when referring to it during closing argument.

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Here, defendant has conceded that he has not preserved this error for appellate review because he did not object to the testimony or closing argument. Therefore, our review of this unpreserved constitutional issue is for plain error affecting defendant's substantial rights. *People v Kowalski*, 489 Mich 488, 505-506; 803 NW2d 200 (2011). In order to avoid forfeiture under a plain-error analysis, defendant must establish (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights, i.e., that the error was outcome determinative. *Id.*; *People v Scott*, 275 Mich App 521, 524; 739 NW2d 702 (2007). Thus, in this context, defendant is entitled to relief on his claim of prosecutorial misconduct only if a curative instruction would not have alleviated any prejudicial effect from the comment. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Specifically, defendant complains of the following responses elicited by the prosecutor during the rebuttal testimony of Detective Marougi:

> *Q*. And after you read [defendant] his [*Miranda*] rights, did he agree to talk to you?
>
> * * *
>
> *A*. He said he'd speak to us.
>
> *Q*. All right, and did—what—
>
> *A*. I asked him—

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Q. Go ahead.

A. —what happened at the Newman's. He said he had no idea what I'm talkin' about, and he wanted to end the interview, so at that time we ended the interview.

Q. So he . . . told you he had no idea what you were talking about. Did you tell him anything about the shooting?

A. No, he ended the interview so he didn't want to talk to us no more, so we got up and we left.

Q. All right. I'm talkin' prior to, when you're—when you're meetin' with him, did you say, okay, we're here investigating a shooting at the apartment complex?

A. We don't do that until after we read the rights, and then tell—and then read it to 'em.

Q. Right, did you . . . in fact ask him that? After you read him his rights and he agreed to talk, did you say, hey, we're lookin' to find out what happened at the Newman?

A. Yeah, correct.

Q. All right, and, again, what did he say just so I'm clear.

A. He had no idea what we were talkin' about.

Defendant also argues that the prosecutor impermissibly discussed his silence during the following portion of the prosecutor's closing argument:

> [Y]ou had a chance to hear Ms. Woods testify. You also heard Detective Marougi. They went to interview [defendant], and ask him, okay, a few days later, what happened? "I have no idea what you're talking about" because he's involved. If he wasn't involved, he would have said, . . . "you know, I was there. There was a gun fight." He's denying and minimizing because he was involved. He . . . was culpable for this. So he didn't say, when they read the right, they said, do you wanna' talk to us. He didn't say, "no—no—no, I'm gonna' exercise my rights." He wanted to talk. That's his statement. That's his opportunity to—to discuss his alibi and saying, "whoa—whoa—whoa, I'm here with Ms. Woods smoking a blunt." He doesn't do that. He says, "I have no idea." And this is in the face of what she says. . . . So for him to say "I have no idea what . . . you're talkin' about," it's just a denial because he was involved, and he—he's guilty of that. [Quotation marks added for clarity.]

Defendant claims that these questions/answers and arguments were violative of his Fifth Amendment right to remain silent and require a new trial.[3] Regardless of the merits of defendant's claim that his right to remain silent was violated, we hold that he is not entitled to a new trial.

Indeed, we need not address whether Detective Marougi's testimony infringed on defendant's constitutional right to remain silent because, assuming arguendo that the testimony was impermissible, defendant cannot establish under the plain error doctrine how the error was outcome determinative. See *Scott*, 275 Mich App at 524. The salient point in defendant's statement to Detective Marougi was that he "had no idea" about what the detective was talking about. This stands in stark contrast to how defendant's alibi witness, Woods, described how defendant acted at the time of the shooting. Woods described defendant as extremely upset, "all frantic," and supposedly concerned about the well-being of his brother immediately after the shooting. Regardless of defendant's intent to immediately conclude the interview and remain silent thereafter, the jury would have had great difficulty reconciling these disparate statements. It would be highly improbable for one to forget such a harrowing experience if it happened the way Woods described. Furthermore, Mabin identified defendant several different times, including at the time of the shooting to the 911 operator. This is substantial evidence of defendant's guilt. In brief, the fact that defendant wanted to immediately conclude the interview without saying more to Detective Marougi had no discernable impact on the jury rendering its verdict. Accordingly, defendant is not entitled to relief on this issue.

Similarly, regarding defendant's claim that the prosecutor impermissibly referenced his right to silence, we hold that defendant has not established that he is entitled to any relief. To the extent that the prosecutor's comments merely highlight how defendant's claim that he "had no idea" about the shooting contradicted Woods's testimony, we find no error. However, to the extent that some of the prosecutor's comments could be construed as an insinuation that defendant was "silent" when he should have invoked his alibi, this would have ventured into impermissible commentary. See *People v Dixon*, 217 Mich App 400, 406; 552 NW2d 663 (1996). However, because the prejudice of any introduced error was slight and could have been alleviated with a curative instruction, defendant is not entitled to a new trial. See *Ackerman*, 257 Mich App at 449.

Accordingly, we conclude that neither Detective Marougi's testimony nor the prosecutor's closing argument supports defendant's claim for a new trial.

II. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecution committed misconduct during closing argument when it improperly vouched for Mabin's credibility and used facts not in evidence in an attempt to undermine defendant's alibi witness, Woods. We again disagree. Because

[3] To be clear, defendant's objection is to the testimony that describes his desire to conclude the interview. He has conceded on appeal that the introduction of his statement that he "had no idea" what the detectives were talking about was admissible.

defendant never raised these issues at the trial court, they are not preserved, and our review is for plain error affecting defendant's substantial rights. *Kowalski*, 489 Mich at 505-506. Once again, in this context, reversal is only required if a curative instruction would not have alleviated any prejudicial effect. *Ackerman*, 257 Mich App at 449.

"A prosecutor may not vouch for the credibility of a witness by implying that the prosecution has some special knowledge that the witness is testifying truthfully." *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). "A prosecutor may, however, argue from the facts and testimony that the witnesses are credible or worthy of belief." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Here, it is clear that the prosecutor was simply commenting on why Mabin should be believed, given the record evidence. The prosecutor argued that Mabin could be believed because of the consistency of her identification at the time of the 911 call, when shown the photo array, and at trial. All of these things were in evidence and heard by the jury. Accordingly, because the prosecutor did not imply any special knowledge of Mabin's credibility, we conclude that defendant failed to establish any error, let alone any plain error.

Defendant also argues that the prosecutor committed misconduct by arguing facts not in evidence when asserting that Woods's marijuana use may have caused her to be confused regarding the time and sequence of events. We again disagree. "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Here, a review of Woods's testimony establishes that the prosecutor challenged her memory given her admission that she was smoking marijuana at the time. While Woods denied that it had any effect on her memory, it is clear that the issue was one the prosecutor challenged during the trial. The fact that Woods's marijuana use was placed into evidence permitted the prosecutor to argue "any reasonable reference that may arise from the evidence." *Id.* Accordingly, we conclude that defendant failed to establish any error.

III. ADMISSION OF 911 CALL INTO EVIDENCE

Defendant argues that the 911 call placed by Mabin was improper hearsay testimony and should not have been admitted, as its admission resulted in Mabin's identification testimony being improperly buttressed, given that Mabin identified defendant on the call.

As a preliminary matter, we note that not only did defendant fail to object to the introduction of the 911 call, defendant affirmatively stipulated to its admission on the record. Based on this affirmative stipulation by defendant's counsel, we conclude that defendant has waived his right to have this issue reviewed by this Court. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver

has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citation omitted).[4]

IV. DEFENDANT'S PRESENTENCE REPORT

Defendant argues—without arguing that he is entitled to be resentenced—that three statements contained in his presentence report (PSIR) should be deleted because there is no evidence to support those statements. However, we again note that, as with the 911 call, defendant has waived any appellate review of this issue, as the record clearly establishes that defendant stated at the time of sentencing that he had reviewed the PSIR with defendant and defendant's family, and stated that "[e]verything is factually correct. No additions or corrections." As such, this issue has been waived as well. *Id.*

V. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant claims that because his attorney did not object to any of the alleged improper use of defendant's silence, the prosecutor's alleged improper vouching, and the alleged improper admission of the 911 identification, he received ineffective assistance of counsel. We disagree.

To establish that he received ineffective assistance, a defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant bears a heavy burden of showing that counsel's performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Regarding trial counsel's failure to object to the reference to defendant's silence during his interview with Detective Marougi, there is not a reasonable probability that but for the failure to object, the result of the trial would have been different. That is because an objection simply would have resulted in the jury being instructed that it is not to consider defendant's silence, and as explained previously, even if the jury did not consider defendant's silence, there was strong evidence to support his convictions in the form of eyewitness testimony and his claimed ignorance of the event to the investigating detective, which contradicted his alibi witness's testimony.

With respect to counsel's failure to object to the prosecutor's alleged improper vouching of witnesses and the admission of the 911 calls, as discussed in Parts II and III of this opinion, we have found no error with regard to these underlying claims. Therefore, defendant cannot establish that his counsel's decision to not make meritless objections or to enter into a valid

[4] In any event, the identification on the 911 call was not hearsay and admissible under MRE 801(d)(1)(C), which provides that an out-of-court statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving the person."

stipulation regarding admissible evidence amounted to ineffective assistance. See *Ericksen*, 288 Mich App at 201. Consequently, defendant has failed to meet the heavy burden that his counsel was ineffective, as defendant simply cannot establish that there was "a reasonable probability that . . . the result of the proceedings would have been different." *Frazier*, 478 Mich at 243.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Joel P. Hoekstra