STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 19, 2012
v	No. 299872 Wayne Circuit Court
DERRIC LEE GREEN, Defendant-Appellant.	LC No. 09-021437-FC

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for assault with intent to great bodily harm, MCL 750.84, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 3 to 10 years in prison for the assault conviction, 12 to 20 years in prison for the carjacking conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. BASIC FACTS

This case arises out of a carjacking and shooting in the parking lot of a gas station in the city of Detroit in the early morning hours of August 2, 2009. The victim, Darine Jefferson, is a sergeant in the Detroit Police Department; he was off-duty at the time of the carjacking.

Rachel Davis lives in the neighborhood of the gas station where the carjacking occurred. She walked to the gas station around 2:00 a.m. to buy a drink. She saw two men at the entrance to the parking lot of the gas station. She recognized one of them as defendant and observed that he was wearing black pants and a white t-shirt, and he was carrying a long gun. She recognized defendant from the neighborhood. While she was in the store she saw both men run up to a parked car in the gas station parking lot. Defendant was still carrying the gun. She then heard two gunshots but did not see who shot the gun. She saw defendant pull a man out of the car, get in the car and drive away.

Jefferson came into the gas station with two gunshot wounds and Davis called 911 on her cell phone. Davis left and went home before the police and paramedics arrived. She testified that she was afraid to talk to the police. Eventually, she gave the police a statement and identified defendant in a photographic lineup. She also identified defendant in the surveillance video from the gas station.

Jefferson testified that he was sitting in his car when he heard someone say, "[g]ive it up." When he looked up he saw someone in all dark clothing. He was then shot in the right leg and hand. He did not see who shot him.

The prosecutor called defendant's acquaintance, Robert Johnson, to testify. After Johnson denied implicating defendant to the police, the prosecutor requested and received permission to treat Johnson as a hostile witness. Johnson testified that he was with defendant the night of the carjacking and drove defendant to the gas station to buy chips. After they left the gas station, he let defendant out down the street from the station where a group of people had congregated. Johnson acknowledged that he made a statement to the police but indicated that he had no memory of the answers he provided to the police. He continued to acknowledge, however, that the statement was his.

Detroit Police Officer Scott Shea testified that he took Johnson's statement and read portions of the statement into the record. In the statement, Johnson indicated that as he and defendant left the gas station, defendant looked at the victim and stated, "that n***** is asleep." Johnson responded, "I got nothing to do with it . . . I [don't] know why you're telling me that." Defendant requested to be let out of the car moments later. Johnson stated that he heard "one or two" gunshots that night. Johnson also stated that when he talked to defendant the day after the carjacking, defendant told him he "f***ed up" and "shot somebody."

On cross-examination Johnson testified that Shea told him the police knew defendant was the perpetrator of the carjacking and that they could charge Johnson with aiding and abetting defendant. Johnson testified that, as a result, he told "the police what [he] believed they wanted to hear." He testified that he never saw defendant with a gun. He further testified that he saw a group of 10 to 12 individuals "hanging out" down the street from the gas station. Shea acknowledged on cross-examination that he told Johnson they had a case against defendant. Defense counsel asked Shea, "[D]id you tell him that . . . you were going to charge [Johnson] as an aider and abettor unless he accused [defendant] of this offense?" Shea responded, "Those exact words, no." Shea acknowledged that he wrote the statement that Johnson signed.

Defendant offered several stipulations in lieu of presenting any witnesses. The parties stipulated that no fingerprint or DNA evidence linked to defendant was found inside Jefferson's car. They further stipulated that no usable fingerprints were found on the shotgun shells retrieved by the police. Finally, the parties stipulated that defendant voluntarily presented himself to the police to be arrested in this case.

The jury found defendant guilty of assault with intent to do great bodily harm, carjacking, felonious assault, and felony-firearm. At sentencing, the trial court dismissed the felonious assault conviction because "[i]t was stemming out of the same set of circumstances" as the assault with intent to commit great bodily harm conviction. Defendant was sentenced as outlined above and now appeals as of right.

II. AUDIO RECORDING OF DEFENDANT'S JAILHOUSE CALL

Defendant first argues that the trial court erred when it admitted an audio recording of a phone call made by defendant while incarcerated. We disagree. This Court reviews a trial

court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A court abuses its discretion when it selects a course outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Nevertheless, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999); MCL 769.26; MCR 2.613(A); MRE 103.

The prosecutor sought to play a recording of defendant in a phone conversation with an unidentified person while he was in jail before trial. Defendant objected and argued that the recording was privileged because it referenced a discussion of plea negotiations. The trial court ruled that it was not privileged because it was not a conversation between defendant and his defense counsel and did not reference any privileged communication. Defendant also argued, briefly, that the recording was unduly prejudicial. The trial court rejected this argument as well. The court permitted the prosecutor to play an excerpt of one phone call:

> Uh, s***, hopefully, I get some more money probably Monday or Tuesday, or something, and see what they're talking about my court date. S***, I don't know, I guess. I'm alright. I'm just gonna sit in here and see what they're talking about. You feel me? See if I can get some of this s*** dropped, you know what I'm saying? My lawyer came to talk to me today. But I ain't tripping, you know what I'm saying? I can't be mad at nobody but myself, you feel me?

Defendant argues that the recording was not relevant to the prosecutor's case and only served to prejudice the jury against him. The prosecutor argued at trial that the recording was relevant because it was evidence of defendant's consciousness of guilt.

MRE 402 requires that evidence be relevant to an issue or fact of consequence at trial. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In the context of "other acts" evidence under MRE 404(b), we have held that, even if the evidence satisfies the relevance requirement, a determination must be made whether the danger of undue prejudice substantially outweighs the probative value of the evidence in view of the availability of other means of proof and other facts. *Id.* at 75; see also MRE 403.

Defendant argues that his statement is ambiguous with respect to consciousness of guilt. However, this argument goes only to the weight of the evidence, not to whether it is relevant. *People v Ivers*, 459 Mich 320, 329-330; 587 NW2d 10 (1998). In the recording, defendant is discussing the fact that he is in jail facing criminal charges. His statement, even without further context, certainly has some tendency to make it more probable that defendant has a guilty conscience, regardless of other possible, speculative, explanations. MRE 401; *Ivers*, 459 Mich at 329. We find that the recording was relevant.

Defendant argues that the danger of undue prejudice outweighs the recording's probative value. "Unfair prejudice exists [where] a probability exists that evidence which is minimally

damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect." *People v Murphy*, 282 Mich App 571, 583; 766 NW2d 303 (2009) (internal quotations omitted).

Defendant first argues that the recording signals to the jury that defendant was incarcerated, which reflects poorly on him. It is highly unlikely that jurors would be surprised to discover that defendant was incarcerated after his arrest for carjacking and shooting a police officer. Defendant has not offered any more specific reason to believe that the jury would be unduly influenced by this fact.

Defendant next argues that the jury would be unduly influenced by defendant's use of coarse language. Similarly, there is no reason to believe that the jurors would consider defendant's private use of a common vulgarity out of proportion as it pertains to defendant's guilt. We find no reason to conclude that these "minimally damaging" facts created any danger of undue prejudice for defendant.

Defendant also argues that the use of the recording violated MRE 410(4). MRE 410(4) prohibits admission of "[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." The rule is inapplicable to the recording because there were no statements in the recording "made in the course of plea discussions" or even "with an attorney." Therefore, defendant's argument is without merit.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed multiple instances of misconduct at trial, depriving him of his right to a fair trial. We disagree. In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). This issue is unpreserved because defendant did not raise any objections of this nature at trial. Unpreserved issues are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, "[this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant first argues that the prosecutor's opening remarks were improper. He argues that the prosecutor improperly limited the scope of the jury's deliberations and improperly vouched for his witnesses' testimony. The prosecutor stated that the jury would not need to decide whether a carjacking had taken place; rather, the only issue was *who* committed the carjacking. Further, the prosecutor explained what he believed his witnesses' testimony would demonstrate at trial. Contrary to defendant's contention, both instances constitute the essence of an opening statement. "Opening statement is the appropriate time to state the facts that will be proved at trial." *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010).

Defendant next argues that the prosecutor vouched for his own evidence and witness testimony at several points in his closing argument. While "a prosecutor may not vouch for the credibility of his or her witnesses," a prosecutor may properly comment on his witnesses'

credibility so long as the argument is confined to the evidence and reasonable inferences arising therefrom. *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010). "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness's truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The danger is that the jury will be persuaded by the implication that the prosecutor has knowledge the jury does not and decide the case on this basis rather than on the evidence presented. *Id.*; *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004).

In the first instance, the prosecutor argued to the jury that Rachel Davis, an eyewitness who identified defendant, had no particular reason to lie in her trial testimony. He argued that she would have no motivation to lie about defendant when doing so might put herself in harm's way. This argument was a direct reference to Davis's testimony that she knew defendant from her neighborhood and was afraid to first talk to police and also to testify at trial. Thus, the prosecutor's argument was made directly from the evidence adduced at trial and was not improper. The prosecutor also stated, "[s]he stayed true to her recollection as she remembers it." The prosecutor was attempting to argue that there was no indication from Davis's testimony that she was attempting to conform her testimony to the other evidence in the case. Rather, she testified as she remembered despite come discrepancies from other evidence. This again constitutes an argument made directly from evidence adduced at trial.

One of the prosecutor's witnesses, Robert Johnson, testified differently from a signed police statement previously given. The prosecutor argued that Johnson's police statement was more credible than his testimony at trial. Defendant argued that the prosecutor was vouching for the truth of the statement. We find no evidence that the prosecutor's argument demonstrated any special knowledge of the truthfulness of the police statement; rather, he argued that the statement from immediately after the incident speaks for itself.

Finally, defendant argues that the prosecutor bolstered the testimony of the police witnesses when he countered the notion that defendant was targeted for investigation for improper reasons. We conclude that the prosecutor was again arguing from the evidence adduced at trial. The police witnesses detailed their investigation, including talking to Davis who identified defendant as the perpetrator. At no point was any evidence introduced suggesting that the police were targeting defendant.

Defendant also argues that the prosecutor improperly "gave his interpretation of the law of aiding and abetting" when he stated, "[s]o, aiding and abetting is going to be told to you, instructed to you, so that you understand that the fact that he was only helping, if you want to put it in those terms, it doesn't minimize it. He's still guilty of carjacking." The prosecutor also gave a lengthier description of how aiding and abetting would apply to the facts of this case. Defendant does not explain how these statements are improper. Nor does defendant argue that the prosecutor misstated the law. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) (uncorrected, erroneous statement of the law may prejudice defendant).

Finally, defendant argues that the prosecutor appealed to the jurors' sense of civic duty when he argued that "this [case] is about accountability." The prosecutor concluded, "All I'm asking you to do is hold him accountable." "A prosecutor may not make a civic duty argument

that appeals to the fears and prejudices of the jurors because this injects issues broader than the guilt or innocence of the accused into the trial." *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). The prosecutor was arguing that defendant should be held accountable for committing the crimes he was charged with and did not "inject" an issue broader than defendant's guilt or innocence.

IV. PUBLIC TRIAL

Defendant next argues that the trial court denied him his constitutional right to a public trial when it closed and locked the courtroom doors for the duration of opening statements. Defendant has waived his right to a public trial by failing to raise an objection at trial. *People v Orlewicz*, ___ Mich App ___; ___ NW2d ___ (Docket No. 285672, issued June 14, 2011) (slip op at 8-9). In any event, the trial court did not exclude anyone from the courtroom; rather, the doors were locked during opening statements in order to avoid distractions based on the configuration of the courtroom. We find defendant's argument meritless.

V. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of the alleged errors denied him a fair trial. While the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, it follows that absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). Having determined no errors occurred, we find defendant's argument to be without merit.

Affirmed.

/s/ Kathleen Jansen
/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly