STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2012
v	No. 300708 Branch Circuit Court
DEVIN ALLEN-KURTIS MAGGART, Defendant-Appellant.	LC No. 09-099298-FH

Before: HOEKSTRA, P.J., and K.F. KELLY and BECKERING, JJ.

PER CURIAM.

Defendant, Devin Allen-Kurtis Maggart, appeals as of right from his jury trial convictions for arson of real property, MCL 750.73, and placing explosives near property, MCL 750.207(1)(b). Defendant was sentenced as an habitual offender, MCL 769.10, to 47 to 180 months' imprisonment for the arson of real property conviction and 120 to 360 months' imprisonment for the placing of explosives near property conviction. We affirm.

I. BASIC FACTS

This case stems from the arson of a portable classroom building in Quincy, Michigan. The building was a freestanding structure near the Jennings Elementary School. The fire investigator concluded that the fire was intentionally set, by means of an incendiary device. He could not confirm a Molotov cocktail[1] was used, but could not rule it out. Defendant confessed to the crime in a conversation with fellow inmate, Joshua Swick. Swick wore a recording device during this conversation and an audio recording of defendant's conversation with Swick was played for the jury. Defendant also confessed to starting the fire to a number of other people. Defendant told his friend Brittney M. Ernsberger that he started the fire with "Jason." Defendant told Ernsberger he ignited gas and threw it at the building. Defendant also told his friend Lacie

[1] The expert explained that a Molotov cocktail is "just a bottle with some type of ignitable liquid, commonly gas, you know, inside it. You know some type of wick, whether it be, you know, a rag or a tissue or anything. Oftentimes people will saturate that cloth or whatever they're using for a wick, make a nice tight [fit] around the neck, so that the vapors aren't coming out of the bottle and ignite the wick and throw it."

Elizabeth Hantz that he burned the building down with some friends. Defendant also confessed the crime to Shane Alan Reade. When Reade told defendant he heard someone named "Michael" had started the fire, defendant corrected him and told Reade that he "approached the building with a gas can in one hand and numerous bottles in the other" and said he broke a window, stole a computer or two, and began pouring gasoline into the bottles and "then created the [M]olotov cocktails, and then that's when he decided to throw them." Defendant told Reade he acted alone.

A number of defendant's family members testified regarding defendant's claimed alibi that he was at his grandfather's house on the night of the fire. Defendant's grandparents testified that they did not believe defendant left the house at all that night. Kirstyn Nicole Luft, a girl defendant met on the internet who lived in Boise, Idaho, testified she spoke to defendant on the telephone late on the night of July 31, 2007, and believed she heard defendant's grandparents in the background.

II. RIGHT TO CONFRONTATION

Defendant first argues that his right to confront witnesses against him was violated when the trial court admitted the recording of defendant's confession to Swick, who was unavailable as a witness at defendant's trial. We disagree. "In general, we review for an abuse of discretion a circuit court's decision concerning the admission of evidence. However, we review de novo the circuit court's ultimate decision on a motion to suppress evidence, as well as all preliminary questions of law. Similarly, whether the admission of evidence would violate a defendant's constitutional right of confrontation is a question of law that we review de novo." *People v Dinardo*, 290 Mich App 280, 287; 801 NW2d 73 (2010) (citation omitted).

Both the United States Constitution and the Michigan Constitution provide that a criminal defendant has a right to "to be confronted with the witnesses against him." US Const, Am VI; Const 1963, art 1, § 20. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). In *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004), this Court made it clear that the Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." See *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004). The Confrontation Clause is only concerned with "a specific type of out-of-court statement, i.e., the statements of 'witnesses,' those people who bear testimony against a defendant." *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011). "[T]he Confrontation Clause applies only to statements used as substantive evidence." *Id*. "Statements are testimonial where the 'primary purpose' of the statements or the questioning that elicits them 'is to establish or prove past events potentially relevant to later criminal prosecution.'" *People v Lewis (On Remand)*, 287 Mich App 356, 360; 788 NW2d 461 (2010), quoting *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Nontestimonial statements "do not implicate the Confrontation Clause." *People v Taylor*, 482 Mich 368, 374; 759 NW2d 361 (2008).

There is no indication that Swick's statements were testimonial or used for the truth of the matter asserted. During the prosecutor's closing argument, he stated:

> Swick (phonectic), during the recording says that makes you an accomplice. And do you remember his [defendant's] response to that? I was kind of shocked by that when I listened to this record for the first time. No, that makes me guilty as f***. He knew exactly what happened that night because he did it.

Swick's recorded statements were not evidence and were not used for the truth of the matter asserted; rather, Swick's statements only provided meaning to defendant's responses. Therefore, the Confrontation Clause was not implicated. Defendant's argument on appeal focuses on the harms resulting from not being able to confront one's accusers, but fails to explain how questions by Swick, not used as evidence against defendant, implicate the Confrontation Clause. Defendant's argument would appear to be that *any* statements of *any* kind introduced into evidence implicate the Confrontation Clause, but this is not the case.

III. EVIDENCE OF THREATS MADE TO WITNESSES

Defendant next argues that the prosecutor committed misconduct by asking witnesses if they were threatened by defendant or were fearful of testifying against him and that his trial counsel was ineffective in failing to object to the allegedly improper questions. Defendant failed to preserve this issue by making a specific objection on the ground of prosecutorial misconduct and requesting a curative instruction. *People v Unger*, 278 Mich App 210, 235-236; 749 NW2d 272 (2008). We generally review claims of prosecutorial misconduct de novo to "determine whether defendant was denied a fair and impartial trial." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Unpreserved instances of prosecutorial misconduct, however, are reviewed for plain error. *Unger*, 278 Mich App at 235. To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. The burden is on defendant to demonstrate prejudice. *Id.* Error requiring reversal cannot be found where a curative instruction would have "alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Because no *Ginther*[2] hearing was held, "review of the defendant's claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To prove ineffective assistance of counsel defendant must demonstrate: (1) his counsel's performance fell below an objective standard of reasonableness; (2) it is reasonably probable that the result of the proceeding would have been different but for counsel's alleged error; and (3) the result was fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

A prosecuting attorney may not "create the illusion by innuendo that witnesses are being intimidated by the defense," and thus may not ask witnesses if they are afraid of the defendant absent a properly laid foundation. *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985).

Defendant argues the prosecutor committed misconduct in eliciting the following testimony from one of the witnesses, Cody Benedict:

> *Q.* Mr. Benedict, are you a little nervous or scared to be here testifying today?
>
> *A.* I'm just nervous. I've had a last rough [sic] couple weeks, sir.
>
> *Q.* Okay. And were you waiting out in the hall to come in to testify?
>
> *A.* I was waiting out in the hall, yes, sir, because I had to be here.
>
> *Q.* Okay. Did you want to be here?
>
> *A.* Not really, no, sir.
>
> *Q.* Did you tell – you know Ms. Mack (phonetic) here?
>
> *A.* Yes.
>
> *Q.* Did you tell her right before you came in that Maggart has a hit or hits out on you, and you were scared to testify?
>
> MR. STEWART: Judge, I'm going to object to that. That's-
>
> THE COURT: Don't answer that question.
>
> MR. STEWART: It's not-
>
> MR. WEBB: It goes to credibility and his – and that he's been threatened. I don't know why that's not relevant.
>
> THE COURT: You may answer the question.
>
> THE WITNESS: I heard that he had a hit out on me. I don't know if it's true. I didn't do nothing wrong. Alls [sic] I know is I just want peace. I mean, I have nothing to do with it. I mean, but, yes, I did hear he had a hit out on me, and I'm not -- I wasn't scared to come here. I was just, you know – I had a stressful few weeks, sir.

The prosecutor asked Benedict these questions in response to Benedict's evasive and hesitant answers to the prosecutor's questions. While Benedict initially told police that defendant told Benedict that he committed the crime, at trial Benedict testified that he could no longer recall

what actually happened. Benedict was no longer sure whether defendant told him of his involvement or whether it was just "the word on the street." *People v Kelly*, 231 Mich App 627; 588 NW2d 480 (1998), had a similar fact pattern:

> Next, defendant challenges as misconduct questions posed to a prosecution witness who testified that he was approached by two men offering to sell him some items allegedly taken from the victim's home. When asked if he saw either of the two men in court, the witness responded, "No. I don't know." The prosecutor asked the witness if he was afraid to come to court, and the witness testified that he was "a little bit afraid." On two other occasions, the prosecutor asked the witness if he was afraid of identifying either of the two persons that he had encountered. When this question was posed for the third time, the court sustained defendant's objection that the question had been asked and answered. Defendant now argues that the prosecutor attempted to prejudice defendant by unfairly insinuating that he was either dangerous or had threatened a witness.
>
> Evidence of a defendant's threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt. *People v. Sholl*, 453 Mich. 730, 740, 556 N.W.2d 851 (1996). In this case, no direct evidence was offered or admitted. However, in view of the witness' statement that he was a little afraid to come to court, we believe it was appropriate for the prosecutor to question the witness in this matter in an attempt to elicit testimony that might explain his inability to identify defendant. [*Kelly*, 231 Mich App at 640-641.]

Benedict's trial testimony was in direct contrast to his previous statements to police as well as his preliminary examination testimony. Just as in *Kelly*, the prosecutor was properly afforded an opportunity to explain to the jury why Benedict's testimony was inconsistent. Because the issue of whether Benedict felt threatened by defendant touched upon Benedict's credibility, we conclude that the prosecutor's questions were relevant and proper. Additionally, Benedict admitted defendant never personally threatened him.

Defendant also challenges testimony given by Shane Reade. However, it is important to note that Reade's comments were in response to *defense counsel's* questioning. Defense counsel was impeaching Reade with his preliminary examination testimony:

> *Q.* [by defense counsel]: Question at number 11 – line 11 on page 54, "And you didn't tell – you don't recall telling Detective Karbon that Mr. Maggart told you he was the one who burned down the ISS building in Quincy a little over a year ago?" And you answer was, "No." Are --
>
> *A.* I felt threatened. I felt very threatened.
>
> ***
>
> *Q.* And, Mr. Reade, you have never been threatened by my client, Devin Maggart, have you?
>
> *A.* Not yet.

Q. Not yet. Is that a no, sir?

A. No, sir.

During redirect examination, the prosecutor asked:

> *Q.* When you came to testify at this earlier hearing back in September of last year, how were you feeling then?
>
> *A.* When I first entered the courtroom, I felt threatened. I felt like if I was going to speak of what I spoke of, what I wrote on my statement, I felt like I was going to get out of jail, and I was going to get beat up by Mr. Maggart.
>
> *Q.* Okay. On page 62, Mr. Stewart asked you about – when you first started out testifying, he asked you, "So all the times that you were up on the witness stand telling Mr. Webb it didn't happen, didn't remember, those weren't truthful, were they?" And do you recall answering, "I – I feel threatened"?
>
> *A.* Yes, sir.
>
> *Q.* Okay. And, again, Mr. Stewart asked, "Oh, so you weren't truthful to Mr. Webb, the deputy prosecutor here, were you?" And your answer was, "No, sir." And then Mr. Steward asked you, "Okay. So you lied?" And your answer, "I felt threatened, sir." Do you recall that testimony?
>
> *A.* Yes.
>
> *Q.* And then when I had a chance to ask you questions again, which would start on page 64, I asked you, "Do you recall me asking you – you said you felt threatened?" And your answer, "Yes, sir"?
>
> *A.* Yes.
>
> *Q.* And then my next question, "When I asked you questions initially?" And your answer, "Yes, sir." Do you recall that?
>
> *A.* Yes.
>
> *Q.* And then you were asked, "Did someone – somebody threaten you?" And your answer, "No, sir. I just feel threaten [sic]. I mean, I'm incarcerated with him, and, you know, I don't know – I just don't want to get hurt in jail." Do you recall that?
>
> *A.* Yes.

As with Benedict's testimony, Reade's testimony provides an explanation for his inconsistency. We do not perceive any error, especially in light of the fact that defense counsel was the one who first elicited the testimony.

Even if Benedict's or Reade's testimony regarding defendant's alleged threats was improper, defendant cannot demonstrate he was prejudiced. The evidence that Benedict and Reade were afraid to testify was minimally relevant and the other evidence against defendant was strong, specifically his confession to committing the crime to numerous individuals and the admission of his taped confession. *Carines*, 460 Mich at 763. Additionally, error requiring reversal cannot be found where a curative instruction would have "alleviated any prejudicial effect." *Callon*, 256 Mich App at 329-330. There is nothing to indicate the prejudice, if any, from the questions by the prosecutor and the respective answers, could not have been cured with a proper instruction.

IV. REFERENCE TO DEFENDANT'S PRIOR CONVICTION

Defendant next argues the prosecutor committed misconduct by improperly referencing a prior conviction previously ruled inadmissible. We agree, but find that defendant was not denied a fair and impartial trial. C*ox*, 268 Mich App at 450-451.

Before defendant's trial began, the trial court ruled that defendant's prior conviction for breaking and entering of a motor vehicle could not be used as evidence. Despite this ruling, the prosecutor asked defendant's aunt, "Okay, What about an attempted breaking and entering [of] a vehicle?" Immediately following this question, before the witness could answer, the following exchange occurred:

> MR. STEWART [defense counsel]: I'm going to object. That is really--
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> THE COURT: Don't answer that.
>
> MR. STEWART: --within [sic] going past the scope of what--
>
> THE COURT: It's definitely past the scope, but how is that relevant?
>
> MR. WEBB [the prosecutor]: Well, she's talked about his character, and I'm just following up on that.
>
> THE COURT: And she said his character was bad and a liar and a theft [sic]. I believe I paraphrased that correctly.
>
> MR. WEBB: Okay. I have no more questions, Judge.

The witness did not answer the question and the conviction was not mentioned again.

Defendant's theory of defense was that he was a braggart and a liar and that he had been lying when he confessed to multiple individuals. Defense counsel questioned his aunt regarding defendant's reputation as a liar. In context, any prejudice was minimal because the prior conviction (breaking and entering a vehicle) was not similar to the charges for which defendant was on trial (arson and placing explosives near a building), and was consistent with defendant's argument that he was a liar and a thief and that he lied about starting the fire. Additionally, the jury was instructed by the trial court that "[t]he lawyers' questions to witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses'

answers." "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235 (citation omitted). The jury instructions cured any prejudice.

We decline to address defendant's argument that the prosecutor improperly shifted the burden of proof because it was not raised in the statement of questions presented. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009); see also *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

V. PRESENTENCE INVESTIGATION REPORT (PSIR)

Finally, defendant argues the trial court abused its discretion by failing to hold a separate hearing on or exclude information in defendant's PSIR. We disagree. A trial "court's response to a claim of inaccuracies in defendant's PSIR" is reviewed for an abuse of discretion. *People v Spanke*, 254 Mich App 642, 648; 658 NW2d 504 (2003).

At sentencing, defendant challenged a statement in his PSIR that he had threatened the prosecutor. In response, the prosecutor advised the court that he listened to the recording of the threat. While a sentencing court must respond to challenges to the accuracy of information in a PSIR, it also "has wide latitude in responding to these challenges." *Spanke*, 254 Mich App at 648. "The court may determine the accuracy of the information, accept the defendant's version, or simply disregard the challenged information." *Id*. "[O]nce a defendant has *effectively* challenged an adverse factual assertion contained in the presentence report or any other controverted issues of fact relevant to the sentencing decision, the prosecution must prove by a preponderance of the evidence that the facts are as asserted." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993) (emphasis added). In order for the burden to shift to the prosecution to support a factual statement in a PSIR, the defendant must first effectively challenge the information. See *People v Lucey*, 287 Mich App 267, 276; 787 NW2d 133 (2010). We find that defendant failed to effectively challenge the PSIR because he denied threatening the prosecutor, but made no effort to have the recording played or provided to the trial court to support his own claim. Defendant's challenge was not effective and the trial court did not abuse its discretion by declining to change the PSIR.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering