STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 3, 2012
v	No. 302027 Livingston Circuit Court
COTY LEE MCCAULEY, Defendant-Appellant.	LC Nos. 10-018990-FH; 10-018991-FH

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

In lower court docket no. 10-018990-FH, defendant appeals as of right from his conviction by a jury of eight counts of possessing a firearm during the commission of a felony, MCL 750.227b; five counts of assault with a dangerous weapon, MCL 750.82; and four counts of unlawful imprisonment, MCL 750.349b. In lower court docket no. 10-018991-FH, defendant appeals as of right from his conviction by the same jury of assault with a dangerous weapon. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent terms of four to six years' imprisonment for the felonious assault convictions in lower court docket no. 10-018990-FH, 121 months to 22-1/2 years' imprisonment for the unlawful imprisonment convictions, and two to six years' imprisonment for the felonious assault conviction in lower court no. 10-018991-FH, all of which are to be served consecutively to the concurrent sentences of two years' imprisonment for the felony-firearm convictions. We affirm.

In lower court docket no. 10-018991-FH, defendant was convicted for assaulting Brandon Decare with a steak knife in Andy Auxier's trailer in Howell. In the trailer, defendant also punched Ken Goble in the head.[1] In lower court docket no. 10-018990-FH, defendant was convicted of assaulting Brooke MacDonald with a piece of glass and of assaulting MacDonald, Auxier, Seth Brunner, and Kashmere Bice with a handgun in his Brighton duplex, where he also unlawfully imprisoned them. Contrary to the testimony of MacDonald and Brunner, Auxier and Bice testified that nothing happened inside defendant's duplex.

[1] Goble did not want charges issued against defendant.

On appeal, defendant argues both through his counsel and in his standard 4 supplemental brief that the trial court erred in denying his motion for a mistrial based on the fact that the jury was tainted. We disagree. We review a trial court's decision regarding a motion for a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*. "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. (quotation marks and citation omitted).

After voir dire was completed and the selected jurors were sent home, the trial court received a telephone call from the husband of Juror 66, who expressed concern that Juror 66 had disclosed his name and place of work. The trial court questioned Juror 66 the following morning. Juror 66 admitted that she told "a few" jurors that she regretted telling the trial court where her husband worked and that she had safety concerns. After dismissing Juror 66, the trial court individually questioned the remaining jurors.

Juror 70 stated that in a conversation among three or four jurors, including herself and Juror 51, Juror 66 stated that she regretted informing the trial court where her husband worked and that she was concerned for her safety. Juror 70 stated that Juror 66's concerns about safety did not cause her any concern about serving on the jury. She believed that she could be fair and impartial. Juror 51 stated that he had no conversation with Juror 66 or Juror 70 about defendant's case. He did not recall a juror discussing her husband, nor did he recall a juror being fearful. Juror 66 did not even sit near him in the jury room. The remaining 11 jurors denied having any conversations with Juror 66 about defendant's case.

A defendant is entitled to a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Jackson*, 292 Mich App 583, 592; 808 NW2d 541 (2011). An impartial jury is "a jury with an impartial frame of mind at the beginning of the trial and one that bases its verdict only on legal and competent evidence produced, during the trial, connecting the defendant with the commission of the crime charged." *People v Kamischke*, 3 Mich App 236, 241; 142 NW2d 21 (1966) (emphasis deleted). Jurors are presumed to be impartial unless the contrary is shown. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). Here, where only Juror 70 recalled having a conversation with Juror 66, and she believed that she could be a fair and impartial juror, there is nothing to suggest that any juror could not base his or her decision on the evidence produced at trial. Accordingly, there was no irregularity in the proceedings that was prejudicial to defendant's rights and impaired his ability to get a fair trial. *Schaw*, 288 Mich App at 236. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant next argues, again through counsel and in his standard 4 brief, that the prosecutor injected into trial the possible penalties for the charged crimes when she asked Bice whether Bice believed that defendant's act of punching Goble was less serious than the crimes with which defendant was charged. Because defendant did not object on grounds of prosecutorial misconduct below, his claim of prosecutorial misconduct is unpreserved. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("[a]n objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground"). We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

A prosecutor may not comment on a defendant's possible punishment. *People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973); *People v Secorski*, 37 Mich App 486, 489; 195 NW2d 8 (1972). However, a prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Ackerman*, 257 Mich App at 448. Nothing in the record indicates that the prosecutor asked Bice any questions in bad faith. Moreover, when the prosecutor elicited the testimony from Bice that she believed that defendant's act of punching Goble was not as serious as the charges defendant was facing, the prosecutor did not confirm whether Bice's belief was correct. The prosecutor also did not inform the jury of the prison terms defendant, if convicted, would receive. Under these circumstances, the prosecutor neither commented on nor elicited testimony about defendant's possible punishment.

In addition, even if defendant's claim is viewed as one of evidentiary error and not prosecutorial misconduct, the trial court did not abuse its discretion in allowing the prosecutor to ask Bice the question. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008) (evidentiary issues are reviewed for an abuse of discretion). Relevant evidence is "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. Essentially, evidence is relevant "if it is helpful in throwing light on any material point." See *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Whether a witness is testifying truthfully and accurately is itself relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). Bice's belief threw light on a possible motivation for Bice to admit that defendant punched Goble but to deny that anything happened in defendant's duplex. In addition, the probative value of Bice's belief was not substantially outweighed by the danger of unfair prejudice. MRE 403. As already stated, the prosecutor did not confirm Bice's belief, nor did she indicate what defendant's prison sentences would be if he were to be convicted. Under these circumstances, it was not inequitable to use Bice's belief to evaluate her credibility, nor was there a danger that the jury would give Bice's belief undue or preemptive weight. *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (discussing determinations under MRE 403).

Defendant also argues through counsel that the admission of hearsay deprived him of a fair trial. We disagree. "'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). "A 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." MRE 801(a). Hearsay is not admissible except as provided by the rules of evidence. MRE 802.

First, defendant claims that the jury heard inadmissible hearsay when MacDonald testified that her doctor told her she was suffering from post-traumatic stress disorder (PTSD). We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

We agree that the doctor's out-of-court statement was inadmissible hearsay. However, its admission did not affect defendant's substantial rights, i.e., it did not affect the outcome of his trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The prosecutor did not question MacDonald about PTSD, including its causes, nor did the prosecutor argue that MacDonald's testimony was credible because MacDonald had been diagnosed with PTSD.

Further, much evidence was presented that Bice and Auxier were not credible witnesses. For example, Bice denied that she and defendant had ever discussed the case, aside from when defendant asked her to get Auxier to talk to defense counsel, until she was shown the postcards that defendant had written her from jail. In the postcards, defendant asked Bice to talk with Goble and summarized the testimony that he needed from Bice and Auxier. Given the evidence of defendant's guilt and the credibility problems that plagued Bice and Auxier, we cannot conclude that MacDonald's brief and unemphasized testimony that her doctor said she had PTSD affected the outcome of defendant's trial. Accordingly, there was no plain error affecting defendant's substantial rights.

Second, defendant asserts that the trial court erred in allowing MacDonald to testify that, when in defendant's duplex, Bice told her that defendant was getting a gun. Defendant also claims that the trial court erred in allowing MacDonald to testify that, when she and Auxier were driving away from defendant's duplex, Auxier told her not to tell anyone what had happened. We review for an abuse of discretion the trial court's decision that Bice's and Auxier's statements were admissible as excited utterances. See *Unger*, 278 Mich App at 216.

Under MRE 803(2), "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" are not excluded by the hearsay rule. The trial court's decision that Bice's statement that defendant was getting a gun was an excited utterance did not fall outside the range of principled outcomes. *Schaw*, 288 Mich App at 236. The statement was made while Bice was under the stress of excitement of being unlawfully imprisoned by defendant and her demeanor (she appeared to have been crying) indicates that she did not have an emotional state that permitted fabrication. See *People v Edwards*, 206 Mich App 694, 697; 522 NW2d 727 (1994), and *People v Carson*, 87 Mich App 163, 167; 274 NW2d 3 (1978). We need not decide whether Auxier's instruction to MacDonald not to say anything was an excited utterance because it was not hearsay. Commands, which are incapable of being true or false, are not hearsay. *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204-205; 579 NW2d 82 (1998), mod on other grounds 458 Mich 862 (1998). Accordingly, the trial court did not abuse its discretion in admitting Auxier's command.

Third, defendant claims that MacDonald's testimony about telephone calls she received from Theresa Grace, who was defendant's girlfriend; Cassie, who was a person that did not testify at trial; and Bice included hearsay. We disagree. Defendant did not assert any *hearsay* objection when MacDonald testified about the telephone calls or conversations except when MacDonald testified that Bice said she wanted to leave Howell. The issue is therefore unpreserved except with regard to Bice's statement about leaving.

MacDonald testified that she had heard that Grace wanted to speak with her. However, MacDonald never actually testified about any statement that Grace made to her. In fact, it cannot be concluded from MacDonald's testimony that MacDonald even spoke to Grace. Accordingly, no out-of-court statements by Grace were improperly admitted into evidence and no plain error is apparent. *Coy*, 258 Mich App at 12.

MacDonald also testified that she received a telephone call from Cassie in which Cassie asked her whether she had talked to the police. Questions, like commands, are incapable of

being true or false. See *Jones (On Rehearing After Remand)*, 228 Mich App at 204-205 (discussing commands). Therefore, Cassie's question to MacDonald was not hearsay. See *id*.; see also *United States v Thomas*, 451 F3d 543, 548 (CA 8, 2006) ("[q]uestions and commands generally are not intended as assertions, and therefore cannot constitute hearsay"). Again, no plain error is apparent. *Coy*, 258 Mich App at 12.

Defendant also refers to conversations that MacDonald had with Bice. Regarding the first conversation, MacDonald testified that Bice said that she wanted to leave Howell. After defendant's objection, the prosecutor stated that she was not offering Bice's statement for the truth of the matter asserted but, rather, to show its effect on MacDonald's state of mind. The trial court accepted this purpose and allowed MacDonald to testify about the conversation. Out-of-court statements that are not offered for the truth of their contents are not hearsay. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). On appeal, defendant makes no argument that, contrary to the prosecutor's assertion below, Bice's statement that she wanted to leave Howell was actually used for the truth of the matter asserted. Accordingly, defendant has abandoned the issue, *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998), and we have no basis from which to conclude that Bice's statement was not hearsay. Regarding the second conversation, MacDonald testified that Bice asked her if she was going to plead the Fifth Amendment at trial. However, because questions are incapable of being true or false, Bice's question to MacDonald was not hearsay, *Jones (On Rehearing After Remand)*, 228 Mich App at 204-205; *Thomas*, 451 F3d at 548, and, once again, no plain error is apparent, *Coy*, 258 Mich App at 12.

Defendant also argues that defense counsel was ineffective for failing to object to the hearsay that was not objected to below. Defendant has abandoned this issue by way of his inadequate briefing. *Kelly*, 231 Mich App at 640-641. Moreover, even if we assumed that counsel's performance in failing to make objections fell below an objective standard of reasonableness, defendant has not established that, but for counsel's deficient performance, there is a reasonable probability that the result of his trial would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). Defendant was not denied the effective assistance of counsel.

Defendant next argues that Officer Michael Arntz gave improper opinion testimony when he testified that it was his opinion that statements in the postcards that defendant sent to Bice meant that Bice should lie to newspapers about what had happened. Defendant, however, did not include this issue in the statement of his questions presented for appeal. In addition, defendant provides no argument supported by legal authority regarding why Arntz's testimony was improper. Accordingly, defendant has abandoned the issue. See *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009), and *Kelly*, 231 Mich App at 640-641. We decline to address the issue.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter