STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 29, 2012
v TRENTON RASHAAN PALMER, Defendant-Appellant.	No. 302265 Jackson Circuit Court LC No. 10-005836-FH

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

Defendant was convicted by a jury of intimidating witnesses, MCL 750.122(3); possession of a firearm by a felon, MCL 750.224f; carrying a concealed weapon, MCL 750.227; and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant appeals as of right. We affirm.

I. FACTS

The events underlying this case stem in part from a separate murder case. On April 6, 2010, Romeo Gibson was shot and killed in Jackson, Michigan. Christopher Hurst was charged with the murder of Gibson. Cherell Faulkner's sons, Damarrius Nathan and Tyrick Faulkner, were cousins, or like cousins, to Gibson. Hurst's preliminary examination was held May 27, 2010. Ms. Faulkner and her sons attended Hurst's preliminary examination. Outside the courthouse, after the preliminary examination, there was a verbal altercation between Nathan and others present that lasted less than a minute. Ms. Faulkner testified that defendant arrived shortly thereafter in a car with Davon Gallegos. Gallegos got out of the car immediately, and he and Ms. Faulkner exchanged words. Defendant parked the car and then he also got out of the car. The exchange between Gallegos and Ms. Faulkner escalated and Gallegos called her sons snitches and said he would kill them. Ms. Faulkner testified that defendant also called her sons snitches before police from the courthouse broke up the altercation.

A few hours later, Ms. Faulkner and Nathan spotted defendant in a car outside of a party store. Nathan, who was once friends with defendant, went to talk with defendant. Ms. Faulkner could hear the conversation and testified that defendant told Nathan that Nathan was a snitch and that defendant was going to kill Nathan. Ms. Faulkner then approached defendant alone and asked defendant if he was serious. She testified, "and he said, 'Yes, I'm serious' and he told me he was gonna blast my son and that he was a snitch." Ms. Faulkner testified that as defendant

said this, he was holding a gun in his lap up to just above his waist. Ms. Faulkner had seen real firearms before, and identified the gun as an automatic. She testified that there was nothing orange coming out of the barrel and it looked like a real pistol. Ms. Faulkner encouraged her son to leave Jackson after this exchange. The prosecution was unable to serve Nathan and he did not appear at trial.

II. ANALYSIS

On appeal, defendant argues there was prosecutorial misconduct. These claims were not preserved and are reviewed for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). 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). To affect substantial rights, the error generally has to affect the outcome of the lower proceedings. *Id.* Prosecutorial misconduct claims are reviewed "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citations omitted). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (citation omitted).

Defendant claims the prosecutor improperly injected evidence into the proceedings twice. The first instance was when the prosecutor questioned Ms. Faulkner:

> *Q.* Okay. Why did he [Nathan] leave Jackson? Without telling us what he said. Why did you want him to leave Jackson?
>
> *A.* He was shot at.
>
> *Q.* And at that point in time based on everything that happened on the 27th, you were concerned for your son's physical safety?
>
> *A.* Yes, I was.

Preceding these questions, the prosecutor asked questions designed to show that Nathan left Jackson because of the events of May 27, 2010, including the altercation at the courthouse and the alleged threat made outside the party store, and that Ms. Faulkner took the threat seriously. This testimony about why Nathan left Jackson was relevant to establishing whether defendant was guilty of intimidating witnesses. MCL 750.122(3) provides that a person shall not, by threat or intimidation, "discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness . . . ." The prosecutor's challenged questions were designed to establish that defendant's threats or intimidation discouraged Nathan from testifying. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (citation omitted). The record does not indicate the prosecutor knew Ms. Faulkner would answer his question by stating Nathan had been "shot at" or that his questions were anything other than "good-faith efforts to admit evidence" that would help establish that defendant was guilty of witness intimidation. *Id.*

Although the prosecutor's question was proper, it elicited a prejudicial answer because there was no other evidence that anyone had shot at Nathan. However, this was the only reference to Nathan being shot at and the testimony was not specific or clear that defendant was involved. The prosecutor promptly turned the questioning away from the statement. Isolated comments that are not blatant are not prosecutorial misconduct. *Watson*, 245 Mich App at 591. Even if this was an instance of prosecutorial misconduct, an instruction for the jury to disregard the statement would have cured the prejudice and there is no error requiring reversal. *Schutte*, 240 Mich App at 721. Moreover, the evidence against defendant was substantial. It included that he called Nathan and Tyrick Faulkner snitches; he told Nathan he was a snitch and indicated he was going to kill Nathan; and defendant told Ms. Faulkner, while holding a gun, that Nathan was a snitch and defendant was going to "blast" him. In light of this evidence, defendant has not shown that the alleged error affected the outcome of the trial. *Carines*, 460 Mich at 763.

Defendant also argues there was prosecutorial misconduct when the prosecutor elicited testimony from Ms. Faulkner that she did not want to come to court and that her son Tyrick did not want to testify in the Hurst trial. Defendant argues this improperly injected evidence that the witnesses were fearful of retaliation. As to a prosecution's inquiry into whether a witness is afraid of the defendant, "[a]bsent any foundation in this regard, either through direct examination or during proper voir dire, the prosecution cannot be permitted to create the illusion by innuendo that witnesses are being intimidated by the defense." *People v Walker*, 150 Mich App 597, 603; 389 NW2d 704 (1985) (citation omitted). In this case, there was a foundation for the prosecutor's questions because there had already been testimony that defendant called Ms. Faulkner's sons snitches; threatened to kill Nathan; and told Ms. Faulkner, while holding a gun, that Nathan was a snitch and defendant would "blast" him. This testimony provided a foundation for the prosecutor's questions concerning Ms. Faulkner and Tyrick wanting to testify. Because this foundation existed, the prosecutor did not "create the illusion by innuendo that witnesses are being intimidated by the defense." *Id.*

The record does not support that the prosecutor's questions were anything other than good faith efforts to elicit testimony to support the elements of witness intimidation. Thus, prosecutorial misconduct cannot be predicated on those questions. *Noble*, 238 Mich App at 660.

Next, defendant argues that the prosecutor made improper appeals for sympathy for Ms. Faulkner and her sons. "A prosecutor may not appeal to the jury to sympathize with the victim." *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008) (citation omitted). The prosecutor asked questions about difficulties between Ms. Faulkner and her sons regarding how to handle the threats. Ms. Faulkner answered that she and her sons were not getting along and they disagreed about how to handle the situation. In answering the prosecutor's questions, Ms. Faulkner referenced people close to her getting killed. In the instant case, the prosecutor's questions themselves did not rise to the level of an improper attempt to elicit testimony that would appeal to the jurors' sympathy. However, Ms. Faulkner's answer was more akin to an improper appeal to sympathy because it referenced other people close to her being killed. However, we find that this testimony was relevant to Ms. Faulkner's credibility. And, even if it improperly appealed to the jury to sympathize with Ms. Faulkner and her sons, the trial court instructed the jury that it "must not let sympathy or prejudice influence [its] decision;" this instruction cured any prejudice. *Watson*, 245 Mich App at 592; *Schutte*, 240 Mich App at 721.

Defendant has not demonstrated the existence of plain error requiring reversal related to this claim. *Callon*, 256 Mich App at 329.

Defendant also argues there was prosecutorial misconduct when the prosecutor vouched for Ms. Faulkner's credibility in closing arguments when he argued:

> It takes courage and guts to come to court and to look another person in the eye and say this is what happened and that's the person who did it. Some folks have more of that than others.
>
> Why is Ms. Faulkner coming forward? What is her motivation? What is her reason? Mrs. Faulkner's momma grizzly trying to protect her cubs. She's gonna step up and do what it takes to protect her kids. Her kids may not think they need protection, they're, they're - - Damarrius is twenty and Tyrick is sixteen and fully grown physically. But the [sic] don't have mom's life's experience as to what can happen in the real world. And mom told you some of the things that she's seen and that have happened and she wants to make sure those things don't happen to her sons.
>
> She's the only witness that has told you what happened, what was, what was heard involving the threats and the use of a gun. You as the jury are the ultimate determine, determiner, you make the ultimate decision on who you believe, what you believe. That decision is final with you.

"It is impermissible for the prosecutor to vouch for the credibility of his witnesses." *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983) (citations omitted). "A prosecutor may argue the credibility of the witnesses and the guilt of the defendant, but may not support the argument with the authority or prestige of the prosecutor's office or the prosecutor's personal knowledge." *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987) (citation omitted). In the instant case, the prosecutor did not vouch for Ms. Faulkner's credibility. He offered an explanation for why Ms. Faulkner was testifying, but he did not argue that she should be believed or that he believed her. In fact, the prosecutor stated that the jurors should decide who and what to believe. Moreover, the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence." This instruction would have cured any prejudice from the alleged misconduct. *Schutte*, 240 Mich App at 721. Defendant has not demonstrated that there was plain error requiring reversal. *Callon*, 256 Mich App at 329; *Carines*, 460 Mich at 763.

In concluding there was no prosecutorial misconduct, we reject defendant's cursory argument that the cumulative misconduct requires reversal. Defendant has not shown that the cumulative effect of any errors denied him a fair trial. *People v McLaughlin,* 258 Mich App 635, 649; 672 NW2d 860 (2003).

Second, defendant argues he was denied a fair trial when the trial court found the prosecution made good faith and duly diligent efforts to serve Nathan, who was not served and did not appear, and when the trial court denied defendant's request for the "missing witness" instruction. This issue was preserved because it was "raised, addressed, and decided by the

lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007) (citation omitted). This Court reviews the trial court's determination of due diligence and whether the missing witness instruction should be given for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 389; 677 NW2d 76 (2004) (citations omitted). Police are required to do everything reasonable, but not everything possible, to serve a witness. *Id.* at 391. When the prosecution does not provide reasonable assistance to serve witnesses, the defendant should receive a special jury instruction, CJI2d 5.12, which permits the jury to infer that a missing witness's testimony would have been unfavorable to the prosecution. *Id.* at 388-389, 391 (citation omitted).

In this case, Detective Brett Stiles testified that efforts to serve Nathan started three weeks before trial. An officer went to Nathan's father's house on "several different occasions" and frequently enough that Nathan's father "was actually upset." The officer checked an "in house computer" for other addresses and confirmed Nathan's address with the post office. The officer contacted Ms. Faulkner, who indicated Nathan was living with his father. The officer checked if Nathan was in jail or on probation and posted the subpoenas on a department information board that all officers read. The trial court did not abuse its discretion when it found the prosecution made good faith and due diligent efforts to serve Nathan. The prosecution did everything reasonable and is not required to do everything possible. *Eccles*, 260 Mich App at 391. The trial court did not abuse its discretion when it denied defendant's request for the missing witness instruction because the prosecution exercised due diligence in attempts to serve Nathan and therefore the missing witness instruction was not warranted. *Id.* at 388-389, 391.

Defendant next argues there was insufficient evidence to support his convictions, specifically that he discouraged or attempted to discourage the witnesses from testifying at present or future proceedings and that he possessed a firearm from which an object could be shot or propelled using explosives, gas, or air. Claims of insufficient evidence are reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). In reviewing this claim, "a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (citations omitted). "An actor's intent may be inferred from all of the facts and circumstances, . . . and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517-518; 583 NW2d 199 (1998) (citations omitted). Defendant argues there was no evidence that his threats were intended to discourage involvement in present or future proceedings. However, Ms. Faulkner testified defendant called her sons snitches after the preliminary examination in the Hurst case, defendant held a gun when he told her that Nathan was a snitch and he would blast him, and defendant told Nathan he was a snitch and that he [defendant] was going to kill Nathan. Nathan and his brother were listed as witnesses for the upcoming trial. Taken in a light most favorable to the prosecution, a rational jury could infer, based on the evidence, that the alleged threats pertained to the upcoming trial, not just the past preliminary examination, and that the prosecution proved all the elements of the crime beyond a reasonable doubt. *Fetterley*, 229 Mich App at 517-518; *Wolfe*, 440 Mich at 516.

As to the sufficiency of the evidence for the firearm charges, Ms. Faulkner testified that she believed the gun was a real automatic pistol, and that she had seen real firearms before.

From her testimony, a rational jury could determine defendant had a pistol that met the definition of a firearm and, thus, that the prosecution proved all the elements of the firearm charges beyond a reasonable doubt. *Wolfe*, 440 Mich at 516.

Defendant argues he was denied effective assistance of counsel when his trial counsel did not object to the alleged prosecutorial misconduct. This issue was not preserved and review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002) (citation omitted). To establish a claim of ineffective assistance of counsel, a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). To show prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303 (quotation omitted). "Obviously, defense counsel is not required to make frivolous or meritless motions or objections." *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (citation omitted). In this case, there was no prosecutorial misconduct and objections for most of the claimed errors would have been frivolous or meritless. *Id.* Defense counsel's failure to make meritless objections does not fall below an objective standard of reasonableness. *Toma*, 462 Mich at 302. Regardless, even if objections were warranted, defendant has not demonstrated prejudice such that he is entitled to relief. *Id.* We note that defendant requested an evidentiary hearing. However, he has failed to follow the requirements necessary to seek such a hearing. MCR 7.211(A), (C)(1).

Next, defendant argues that the PSIR must be corrected because at sentencing counsel agreed OV1 should be scored at 5, but the PSIR reads "OV 1 was scored at 25 points." The issue of whether inaccurate information is used at sentencing is a constitutional issue. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990) (citations omitted). Issues of constitutional law and statutory interpretation are reviewed de novo. *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53 (1999), cert den 528 US 1164; 120 S Ct 1181; 145 L Ed 2d 1088 (2000), reh den 529 US 1062; 120 S Ct 1577; 146 L Ed 2d 476 (2000) (citation omitted). MCR 6.425(E)(2) requires that if the trial court finds merit to a challenge to information in a PSIR, the challenged information is to be corrected or deleted and defendant's lawyer be allowed to review the corrected report before it is sent to the Department of Corrections. The prosecution has provided documentation that a corrected PSIR was actually sent to the Department of Corrections. Because defense counsel does not have this correction, a copy of the PSIR must be provided to defense counsel by the prosecution and, if defendant has a challenge to the correction, he is permitted to file a motion in trial court.

Defendant also raises two issues in a Standard 4 brief on appeal. First, he argues his convictions violate double jeopardy. "A challenge under the double jeopardy clauses of the federal and state constitutions presents a question of law that this Court reviews de novo." *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003) (citation omitted). The issue is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000). Carrying a concealed weapon cannot be the underlying felony for felony-firearm. *People v Sturgis*, 130 Mich App 54, 60; 343 NW2d 230 (1984). Here, however, defendant's convictions do not violate double jeopardy because the felony-firearm conviction was attached to either the witness intimidation or felon in

possession convictions. A defendant can constitutionally be charged and convicted of both felon in possession and felony-firearm. *Calloway*, 469 Mich at 452. Defendant's convictions do not violate the double jeopardy. *Id.*

Finally, defendant challenges the scoring of PRV 5, arguing that the trial court improperly considered juvenile convictions for which he did not have counsel, citing *United States v Tucker*, 404 US 443, 448-449; 92 S Ct 589; 30 L Ed 2d 592 (1972). However, defendant validly waived his right to counsel in those cases, so *Tucker* is inapplicable. Further, defense counsel agreed at sentencing that the guideline range was 43 to 129 months. Defendant waived any claim regarding scoring errors when his attorney expressly agreed with the scoring calculations. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed, but we order a copy of the corrected PSIR be provided to defense counsel in accordance with MCR 6.423(E)(2) and defendant may file a motion with the trial court if he believes the corrections do not resolve the OV1 issue raised on appeal. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kurt T. Wilder
/s/ Douglas B. Shapiro