

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 23, 2012

v

CASEY CLARENCE TROBRIDGE,

Defendant-Appellant.

No. 303413
Alger Circuit Court
LC No. 2010-001932-FH

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of ethnic intimidation, MCL 750.147b. Defendant was sentenced to 9 months in jail and 18 months' probation. The trial court ordered that defendant serve 45 days of his sentence immediately, and that the balance of the sentence be held until the end of defendant's probation. For the reasons stated in this opinion, we affirm.

In July 2010, defendant and Max Fisher knocked on the victim's door sometime after midnight. When the victim, who is an African-American man, opened the door he asked Fisher and defendant how they were doing. Fisher replied "we was doing fine 'til you got here," and went on to tell the victim not to "get too comfortable here; we don't like your kind around here." Fisher later pleaded guilty to attempted ethnic intimidation and admitted during defendant's trial that he told the victim "don't get comfortable because as a black man you're not welcome around here" while he was on the victim's porch. Defendant did not say anything while he was on the victim's porch. The victim went back inside and told his wife what happened. The victim's wife went outside and confronted defendant and Fisher about their comments. The victim's wife testified that after she confronted defendant and Fisher, defendant said, "you brought a nigger to our town, and we don't allow that kind here. And if you's care anything for your family, you's need to leave." The victim's wife testified that she was frightened and called 911. The 911 recording was admitted during trial as evidence.

I. PROSECUTORIAL MISCONDUCT

On appeal, defendant argues that the prosecutor repeatedly engaged in misconduct, thereby denying him his right to a fair trial.

Only one of the alleged incidents of misconduct by the prosecutor, a comment that defendant's ex-wife was "hidden in Green Bay," was objected to during trial and is accordingly

properly preserved for appellate review. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). “Where issues of prosecutorial misconduct are preserved, we review them de novo to determine if the defendant was denied a fair and impartial trial.” *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Because no objection was raised during trial to the additional alleged instances of prosecutorial misconduct, those additional claims are unpreserved. *Giovannini*, 271 Mich App at 414. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if plain error affecting substantial rights is present, “[r]eversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant’s innocence.” *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

We first address the preserved claim of error. Defendant argues that the prosecutor committed misconduct when she asserted during closing argument that defendant’s ex-wife could have cleared up a minor conflict in the testimony, but noted that she was not available at trial because she was “being hidden in Green Bay.” A prosecutor can comment on a defendant’s failure to produce corroborating witnesses whenever the defendant takes the stand and testifies on his own behalf, as occurred in this case. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Jackson*, 108 Mich App 346, 351-352; 310 NW2d 238 (1981). However, we conclude that it was improper to characterize defendant’s ex-wife’s absence as her being “hidden,” not only because there was no testimony to that effect, but also because it implies that defendant has taken steps to hide the truth from the jury.

Nonetheless, the fairness of the trial was not undermined by this singular comment. While the trial court did not specifically indicate that the comment was improper, it did tell the prosecutor that the matter had been “covered” in response to defendant’s objection. Given the way the matter of defendant’s ex-wife’s absence was handled during defendant’s cross-examination, the trial court’s comment can be understood as telling the prosecutor that the issue of the absence has been explained, which essentially undercuts any untoward implication left by the comment. Further, the trial court instructed the jury that in determining the facts of the case, it “should only accept things the lawyers say that are supported by the evidence.” Jurors are presumed to follow their directions, and there is nothing in the record to suggest that the jury did not heed this command. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, defendant did not request a curative instruction in the trial court that would have alleviated any prejudicial effect. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

Defendant next argues that the prosecutor engaged in misconduct by commenting on defendant’s failure to talk to police.

The prosecutor’s comments were a direct response to defense counsel’s argument in closing that defendant “came up here and said I had six months and I want to tell my side of the story.” The prosecutor responded, “listening to [defense counsel], you would think that somehow his client was obligated to wait six months to tell his story, that he had to, that’s the

way the system works. . . . [The sheriff deputy who responded to the scene of the crime] would have been happy to hear his story at any time in these last six months.” See *People v Crump*, 99 Mich App 711, 714; 298 NW2d 623 (1980).

Moreover, when a defendant does not invoke his right to remain silent, the prosecutor can use the defendant’s silence before or after his arrest as substantive evidence, unless there is a reason to conclude that the defendant’s silence was an invocation of his Fifth Amendment privileges. *People v Solmonson*, 261 Mich App 657, 664-665; 683 NW2d 761 (2004). There is no indication that defendant invoked his right to remain silent in this case, other than defendant’s testimony at trial that he chose not to speak to the police. However, it is clear defendant did not actually refuse to speak to police because he also testified that he repeatedly denied knowing what the responding officer was talking about when questioned about the incident underlying his prosecution. Thus, we find no error.

Next, defendant argues that the prosecutor acted improperly when she said that she would “regrettably” excuse two potential jurors. Given the personal and professional relationships between the prosecutor and the two potential jurors, the prosecutor’s comment was simply a courteous statement, easily understood as such and nothing more. Accordingly, defendant has not demonstrated plain error affecting his substantial rights.

Next, defendant maintains that the prosecutor improperly appealed to the jury’s sympathy when she stated the following:

They . . . had no opportunity to fabricate. What you heard on the tape of the 911 call placed within minutes of the defendant’s departure is pretty much exactly what you heard yesterday. I didn’t re-call [the victim] to ask him about his reference to the Klan in speaking to his wife because he never reported that as being factual when he talked to the police. Obviously that’s a part of his discussion with his wife.

But imagine for a moment being the only black person in Trenary. And I don’t think that any of us can do that. We would have to imagine that the entire population of Trenary is black and that we’re the only white person in Trenary to get a feeling of the separateness and the isolation.

But, again, imagine being the only black person in Trenary and having someone who is wearing the most feared and most reviled symbol of white supremacy that this world has ever known show up at your door at one o’clock in the morning and tell you that because of your race, you’re not welcome and that you need to leave, or else. It would certainly seem as though you were surrounded by the people in the white pointy hats. So the fact that he makes— shares that feeling or observation with his wife is of no significance.

The prosecutor began her summation by discussing “the issue of who’s telling the truth.” In support of her assertion that the victim and his wife were credible, the prosecution pointed to a 911 tape, made contemporaneously with the crime, that the prosecutor argued supported their trial testimony. In so doing, the prosecutor addressed the use of the word “Klan” on the tape.

The prosecutor stated that she did not need to test the accuracy of the reference because it was never reported to the police that defendant was a member of the “Klan.” The prosecutor asked the jury to consider why the victim would use such a reference by asking the jurors to consider how they would feel if they were African American in a predominantly white community and someone wearing a swastika comes to their home at 1:00 a.m. and tells them they need to leave the community because of their race. Thus, the prosecutor’s statement was not an appeal to the jury to sympathize with the victim and his wife, but an attempt to have the jury understand why the victim would use the word “Klan.”

Finally, defendant argues that the prosecutor committed misconduct by arguing that defendant fabricated his testimony.

A prosecutor may comment on the testimony and may make arguments concerning the defendant’s credibility, including comments on opportunity and motives to fabricate testimony. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). A prosecutor may also assert that a defendant’s testimony appears to be a “carefully drawn explanation[] of the testimony presented” if the evidence supports that inference. *Id.* at 15. However, the Court noted that it was not suggesting “that a prosecutor may, in every case, argue that a defendant who testifies has fabricated his testimony merely because he has sat through his trial and heard the evidence.” *Id.*

In this case, the prosecutor argued during her closing that “the defendants^[1] . . . have exploited their opportunities to conform their testimony to known facts,” and that defendant’s testimony “is really a much more glaring example of the ability to fabricate, the ability to conform your testimony to known facts He worked so hard to make those things fit that . . . the perjury is just incredibly transparent.” We agree with defendant that it was improper for the prosecutor to argue that he fabricated his testimony. There is no evidence that defendant was attempting to match his testimony to the facts adduced at trial. When the prosecutor asked him if he “had overnight to figure out how to deal with” the questions the prosecutor had asked Fisher, defendant responded, “yeah I guess.” This is not an indication that defendant was trying to match his testimony to the “known facts.”

While we agree that the prosecutor’s comment was error, there is no indication that this error resulted in defendant’s conviction despite his actual innocence, or that the comment deprived defendant of a fair trial by seriously affecting the fairness or integrity of the proceedings. Moreover, reversal is not warranted because the misconduct was not objected to and a curative instruction could have alleviated any prejudicial effect. *Callon*, 256 Mich App at 329-330. Additionally, the trial court instructed the jury that its job was to determine the credibility of the witnesses, and that the prosecutor’s statements were not evidence. “It is well established that jurors are presumed to follow their instructions.” *Graves*, 458 Mich at 486. Therefore, we conclude that the prosecutor’s misconduct did not constitute error requiring reversal.

¹ The prosecutor explained she would refer to “defendants” in plural because defendant and Fisher were both defendants at one time and they acted together. Fisher pleaded guilty to attempted ethnic intimidation before defendant’s trial.

II. MRE 609 EVIDENCE

Defendant argues that the trial court erred by not allowing him to introduce evidence under MRE 609(a)(1) that the victim was previously convicted of uttering and publishing. In a pretrial hearing, the trial court ruled that defendant could not introduce the victim's conviction to impeach the victim's credibility during trial because it determined that uttering and publishing was not a crime containing an element of dishonesty or false statement.

We review a trial court's decision regarding the admission or exclusion of evidence for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). A trial court abuses its discretion when its decision falls outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

"[A] preserved, non-constitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999), quoting MCL 769.26. Thus, the effect of any error is evaluated by assessing the error in "the context of the other evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *Id.* at 495. Errors regarding the admission of evidence are nonconstitutional. *People v Whittaker*, 465 Mich 422, 426; 635 NW2d 687 (2007).

On appeal, the parties do not dispute that uttering and publishing is a crime containing an element of dishonesty or false statement, or that the trial court erred when it ruled defendant could not use the conviction at trial. "Crimes of dishonesty or false statement are directly probative of truthfulness, and are therefore admissible under MRE 609(a)(1) without consideration of the balancing test of MRE 609(a)(2)(B)." *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992). However, the trial court's error does not warrant reversal because it is not more probable than not that it would have affected the outcome of the trial given the testimony of the prosecution's other witnesses, including the victim's wife. *People v Houthoofd*, 487 Mich 568, 587; 790 NW2d 315 (2010); *Whittaker*, 465 Mich at 428. Defendant was also not denied the right to present a defense. *People v Redmon*, 112 Mich App 246, 248, 255-256; 315 NW2d 909 (1982). Even though the conviction would have been a helpful tool, defendant was still able to challenge the victim's credibility. Therefore, we conclude that the trial court's error does not constitute error requiring reversal.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his conviction. Specifically, defendant maintains that there is no evidence that he made a credible threat toward the victim, and that the evidence shows only that he was present at the scene, and that his mere presence was not enough to convict him as an aider or abettor.

When reviewing a challenge to the sufficiency of the evidence, we consider all of the evidence presented in a light most favorable to the prosecution to "determine whether a rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). "The

credibility of witnesses and the weight accorded to evidence are questions for the jury, and any conflict in evidence must be resolved in the prosecutor's favor." *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). Circumstantial evidence and the reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Gayheart*, 285 Mich App 202, 216; 776 NW2d 330 (2009).

Defendant was convicted of ethnic intimidation in violation of MCL 750.147b. The prosecution argued that defendant was guilty as both a principal and as an aider and abettor, and the jury was given an aiding and abetting instruction. MCL 750.147b provides:

A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin, does any of the following:

- (a) Causes physical contact with another person.
- (b) Damages, destroys, or defaces any real or personal property of another person.
- (c) Threatens, by word or act, to do an act described in subdivision (a) or (b), if there is reasonable cause to believe that an act described in subdivision (a) or (b) will occur.

Pursuant to MCL 767.39, the law does not distinguish between a principal and those who aid or abet. MCL 767.39 provides:

Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such an offense.

A defendant's mere presence at the scene of a crime is not enough to convict the defendant of aiding and abetting. *People v Eggleston*, 149 Mich App 665, 668; 386 NW2d 637 (1986). The defendant must either have intent required by the crime, or "participate while knowing that the principal possessed the required intent." *Id.* The aider or abettor's state of mind can be inferred from a close association with the principal, as well as the individual's participation in planning or executing the crime. *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999). Minimal circumstantial evidence is sufficient to prove an actor's state of mind on issues such as knowledge and intent. *People v Kanaan*, 278 Mich App 594, 618, 622; 751 NW2d 57 (2008).

In this case, circumstantial evidence and the inferences from the evidence support a finding that defendant possessed a specific intent to intimidate or harass the victim because of his race or at least knew that Fisher had such intent and participated in the crime. There was evidence that both defendant and Fisher were standing on the porch or porch steps when Fisher told the victim not to get comfortable because his "kind" was not welcome. During trial, Fisher admitted that he told the victim not to get comfortable because he was a black man and was not welcome in the community. Fisher was wearing a black vest with a swastika on it the night the threats were made. Fisher admitted saying at his plea hearing that defendant went with him onto

the porch as “backup.” The victim testified that defendant did not appear surprised by what was going on. There was also testimony that defendant told the victim’s wife: “You brought a nigger to our town, and we don’t allow that kind here. And if you’s care anything for your family, you’s need to leave.” The victim’s wife testified that defendant’s threat “was a definite would” and that she was “petrified.” Moreover, the victim’s wife called 911, and specifically told the dispatcher that she was worried something would happen in the middle of the night. Viewing this evidence in the light most favorable to the prosecution, we conclude that defendant’s conviction is supported by sufficient evidence.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra