STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE JAMES PARKER,

Defendant-Appellant.

UNPUBLISHED
November 8, 2012

No. 305656
Saginaw Circuit Court
LC No. 10-034816-FH

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant Lonnie James Parker of possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1] We affirm defendant's convictions and sentences.

On August 12, 2010, an unidentified woman called 911 and reported that "a guy is threatening peoples in the neighborhood" and "he says he got a gun." The woman identified the "guy" as "Lonnie Parker" and indicated that he was "grabbing his pocket and say he had a gun, say he gonna kill 'em." In the background, the voice of Caryn Skinner was audible. She identified the suspect as "Lonnie Parker" and stated that he had "been in prison 30 years." Caryn also indicated that her son, Cameron, had "checked [defendant] out." Caryn then took the phone and told the 911 operator that defendant "just got out of prison" and was acting "like he got a gun." Caryn claimed that defendant lived with his mother and had accused Caryn and her son of breaking into his mother's house. Caryn asserted that defendant threatened to hit her.

Two Saginaw police officers responded to the call. They approached defendant as he dried his freshly washed truck in his mother's driveway. When the officers walked toward defendant, he darted to the front of the truck, crouched down by the front driver's side tire, stood back up, and only then spoke to the officers. An officer inspected the area and found a handgun underneath the truck near the front driver's side tire. Suspiciously, the ground was wet, but the gun was dry. As defendant was a convicted felon who had not had his right to possess a firearm restored, the officers placed him under arrest. Defendant asserted at trial that he was framed by

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[1] The jury acquitted defendant of carrying a concealed weapon in violation of MCL 750.227.

Caryn and Cameron Skinner, a mother-son team whom defendant accused of breaking into his mother's house. This defense was unsuccessful and defendant was convicted of felon in possession and felony-firearm.

I. CONFRONTATION RIGHT

Defendant contends that the trial court violated his right to confront the witnesses against him by admitting a recording of the 911 call into evidence despite that the callers were not presented as witnesses at trial. Defendant preserved his confrontation challenge by objecting to the admission of the 911 tape on this ground at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).[2] We generally review a trial court's decision to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "Whether the admission of [evidence] violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo." *People v Fackelman*, 489 Mich 515, 524; 802 NW2d 552 (2011).

The Confrontation Clause provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with all witnesses against him . . . ." US Const, Am VI; see also Const 1963, art 1, § 20. It precludes the admission of testimonial statements as substantive evidence absent the opportunity to challenge the declarant face-to-face. *Fackelman*, 489 Mich at 528. A statement is testimonial if it is "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004) (alteration in original) (quotation marks and citation omitted).

Davis v Washington, 547 US 813, 817-818; 126 S Ct 2266; 165 L Ed 2d 224 (2006), involved a victim's statements made to a 911 operator during and immediately after an incident of domestic violence, as well as to two police officers who responded to her call. Just as in this case, the individual who contacted 911 did not appear at trial. *Davis* described the difference between testimonial and nontestimonial statements as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. [*Id.* at 822.]

Like in *Davis,* the unidentified caller's statements to the 911 operator primarily described actual events as they were unfolding, which the callers justifiably perceived as an on-going emergency. According to the caller, defendant was "threatening people" by declaring he had a gun, and was "grabbing his pocket" to substantiate his claim. When Caryn Skinner took the

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[2] Defendant also brought a motion for new trial based on the admission of this evidence, which the trial court denied.

phone, she volunteered background information concerning defendant that was not responsive to any question posed by the operator. Nevertheless, the primary purpose of the call was to report defendant's aggressive behavior and that he appeared to be armed with a weapon. Because the primary purpose of the 911 operator's questions was to enable the police to effectively respond to an emergency, we discern no *Crawford* violation.

II. TESTIFYING REGARDING DEFENDANT'S GUILT

Defendant asserts that he was denied the right to a fair trial because the trial court allowed a police officer to testify regarding his opinion of defendant's guilt. It is impermissible for a witness to express his or her opinion regarding the defendant's guilt or innocence. *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). This determination must be left to the trier of fact with few exceptions. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). Yet, a review of the current record shows that defendant takes the challenged testimony completely out of context.

At trial, the following colloquy occurred between the prosecutor and Saginaw police officer Robert Ruth:

> *Q.* And, sir, at some point did you talk to the witness on Atwater Street?
>
> *A.* I did. I waited until Officer Severs pulled up. First of all, I had [defendant] come away from his vehicle and –
>
> *Q.* Let me stop you right there, sir. Why did you do that?
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> *A. For an officer's safety standpoint. I saw the furtive gestures of him going to the front of the vehicle. I've been a police officer long enough to know and understand when people see ya, they just don't walk away like that unless they're trying to hide something, especially if they walk away, make a furtive move down, come back up and come back acting like they're doing the same thing they did prior to me seeing them.*
>
> *Mr. O'Farrell.* Your Honor, I would object to those statements as being a conclusion.
>
> *The Court.* I'll allow the testimony. Go ahead.
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> * * *
>
> *Q.* So you asked the defendant to step away from the vehicle for officer safety?
>
> *A.* Officer safety purposes. [Emphasis added to delineate challenged testimony.]

Reading the challenged testimony in context, Officer Ruth was not expressing an opinion regarding defendant's guilt. Officer Ruth merely explained why he asked defendant to step away from the truck. The cases cited by defendant are inapposite. In *People v Hubbard*, 209 Mich

App 234, 243; 530 NW2d 130 (1995), this Court found overly prejudicial the admission of drug-dealer profile evidence. The prosecution in Hubbard presented an expert witness who testified regarding 11 characteristics common among drug dealers. In closing argument, the prosecutor tied the evidence to those 11 characteristics and argued that the similarity proved the defendant's guilt. *Id.* at 238. In the current case, Officer Ruth did not testify that defendant's furtive movements proved he had hidden the gun under the truck. Rather, the officer explained why defendant's actions created a concern for officer safety.

In *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985), the prosecutor brazenly asked the defendant, "So you're guilty of the crime?" No such inquiry was directed to defendant in this case. In *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975), a prosecution witness was improperly allowed to testify that he told the defendant that he would not encourage his employer to rehire the defendant because the witness believed the defendant was guilty of robbing the employer. The witness testified that the defendant made no comment regarding the witness's opinion. *Id.* No such opinion or "adoptive admission" was made in this case. As Officer Ruth did not state an opinion regarding defendant's guilt as in the cited cases, we discern no error.

III. PROSECUTORIAL MISCONDUCT

Finally, defendant contends that the prosecutor deliberately misstated facts and attempted to shift the burden of proof onto defendant in rebuttal closing argument. Specifically, defendant challenges the following comments:

> Now, did you hear from this witness stand that Cameron Skinner and his mother Caryn Skinner was trying to set up the defendant? You didn't hear that. Again, that's the phantom defense. Did you hear that they even knew that the defendant had a prior felony? You didn't hear that. So that's an assumption that is not in evidence, that they want you to make, so that you will believe that it's possible that Cameron Skinner would walk across the street, take a gun, put it under his tire, then walk back across the street. That's the assumption that they want you to make. Why are they not here? Ladies and gentlemen, we cannot force these witnesses to come to court.

The prosecutor is precluded from mischaracterizing the evidence presented at trial. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). And this prosecutor did incorrectly state that there was no evidence that the Skinners knew of defendant's criminal past. In the recorded 911 call, the jury heard Caryn state in the background that defendant had spent 30 years in prison. When Caryn took the phone herself, she told the operator directly that defendant had spent time in prison.

However, as defendant did not object on this ground at trial, our review is limited to "outcome-determinative, plain error." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). "[W]e cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). Had defendant requested a curative instruction, the court could have immediately corrected the characterization of the evidence or reminded the jurors that they must rely on their

own memories regarding the evidence. In any event, the trial court did instruct the jurors at the conclusion of closing arguments that it was their "job to decide what the facts of the case are" and that the "lawyers' statements and arguments are not evidence." On this record, we discern no error requiring reversal.[3]

Further, contrary to defendant's argument, the prosecutor did not shift the burden of proof. "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010).

> [W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

"[B]y commenting on the nonproduction of corroborating [evidence, the prosecutor] is merely pointing out the weakness in defendant's case," not shifting the burden of proof. *Id.* at 112.

At trial, defendant presented the testimony of a neighbor that he witnessed a man that looked like defendant standing near defendant's truck on the morning of the incident. Defendant did not, however, present any evidence specifically linking Cameron Skinner as the man who was near his truck that day. The prosecutor properly commented on the weakness of defendant's proffered defense by noting the lack of direct evidence that the Skinners had framed him and arguing that the defense was an unsupported assumption.

The prosecutor's statements were also responsive to defense counsel's arguments. In closing argument, defense counsel commented on the absence of the Skinners at trial.

> When we get to Caryn we have the tape of what she was saying then to another person who's on the phone, but does she come into court to tell you anything about what she saw or didn't see? Caryn Skinner never appeared as a witness. And the prosecution was obligated to produce her as a witness.
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> * * *
>
> Who else wasn't produced? Cameron Skinner, the son. Now, Cameron Skinner's name came up to the police right away. Mother and son. Sergeant

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[3] We further note that had the trial court properly excluded the recorded 911 tape from evidence, there actually would not have been any evidence that the Skinners were aware of defendant's criminal history.

> Ruth talked about that. I talked to the one lady. Cameron was already gone. . . . So nobody has talked to Cameron. Why did Cameron take off? Why has he never been located? He was listed as a witness for the prosecution.
>
> The guy over by the house, over by the car, you know, you got a dispute with this fellow who has an issue because his mother's house has been broken into. You can set him up. Did Cameron set him up and take off? How do you know? Why didn't he come to court? Why can't they find him? Why are they looking for him today? They called the jail to make sure he's not in jail.
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> * * *
>
> Now the police find the gun. . . . The question is, who put it there, during this dispute that happened before the police ever got there. Is it the guy who ran off, or is it the guy who stood there, a guy who's committed a felony before. But that doesn't make him guilty of this offense. It means that he can't have a gun though. It means that anybody who knows that he's had a felony knows that he's in deep trouble if the cop charges him with a gun. Anybody who's checking him that morning, because he's got a dispute with his mother about breaking into [defendant's] mother's house, can solve that problem real quick by setting him up. Is that a motive? Is that why Cameron hasn't ever appeared?
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> * * *
>
> You can have your suspicions of [defendant]. He was there. A gun was there. Heck yes it could have been him. Heck yes it could have been Cameron Skinner.

The prosecutor did not shift the burden onto defendant to present the Skinners as substantive witnesses at trial. After the challenged commentary, the prosecutor informed the jury that he had attempted to serve subpoenas on the Skinners but they had moved since defendant's arrest. The prosecutor explained the absence of these witnesses in response to defendant's arguments. The prosecutor's argument simply did not amount to misconduct requiring reversal.

IV. BOND PENDING APPEAL

In a brief filed *in propria persona* pursuant to Supreme Court Administrative Order 2004-6 Standard 4, defendant contends that the trial court improperly denied his motion for bond pending appeal. After the jury entered its guilty verdict, the court revoked defendant's bond pending sentencing over defendant's objection and referred the case to the Department of Corrections. Defendant then filed a written motion for bond pending appeal. Defense counsel referred to the motion at a presentencing motion hearing. The trial court indicated that the motion was premature because defendant had yet to be sentenced. At the sentencing hearing, however, defense counsel failed to remind the court about its pending motion and the court never addressed the motion on its merits.

"Following conviction, the defendant is no longer entitled to the presumption of innocence and release on bail or bond becomes a matter of discretion, not of right." *People v Tate*, 134 Mich App 682, 693; 352 NW2d 297 (1984). "In a criminal case the granting of bond pending appeal and the amount of it are within the discretion of the trial court, subject to applicable law and rules." MCR 7.209(B)(2). "During the pendency of an appeal," the trial court may, within its discretion, grant bond "if the offense charged is bailable and if the offense is not an assaultive crime . . . or a sexual assault of a minor." MCL 770.9.

Despite that defendant formally requested bond pending appeal in a written motion presented to the court, the trial court never exercised its discretion to rule on it. "[T]he failure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion." *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990). However, this issue is now moot as defendant's appeal has resolved in the prosecution's favor. Accordingly, there is no relief that we could grant defendant in this regard.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher
/s/ Amy Ronayne Krause