

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LOUIS BECK,

Defendant-Appellant.

UNPUBLISHED

May 26, 2000

No. 212446

Kalamazoo Circuit Court

LC No. 97-000700-FH

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of failing to stop at a serious personal injury accident, MCL 257.617; MSA 9.2317. The trial court sentenced him to one year of imprisonment and five years of probation. We affirm.

Defendant first argues that the prosecutor committed misconduct requiring reversal by reading testimony from an investigative subpoena hearing into the record. We review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We review each case on its own particular facts and analyze allegedly improper acts in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). A determination of impropriety must rest on an evaluation of all the facts, evidence, and arguments in a case. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

The exchange about which defendant complains occurred between the prosecutor and Duane Bright, a prosecution witness:

Q: Describe his demeanor that night. How was he acting?

A: His eyes were all red. He looked as if he might have been crying.

Q: *In fact you previously testified that he was crying that night. Correct?*

A: Yes. [Emphasis added.]

Defendant contends that the prosecutor should have first allowed Bright to refresh his recollection under MRE 612 before the prosecutor mentioned the substance of the prior testimony in front of the jury. However, MRE 801(d)(1)(a) indicates that a prior, inconsistent statement given by a witness while under oath and subject to the penalty of perjury at a court proceeding is admissible as substantive evidence. Here, the earlier statement by Bright was (1) sufficiently inconsistent with his trial testimony so as to be admissible under MRE 801(d)(1)(a), and (2) given under oath while subject to the penalty of perjury at a court proceeding. Accordingly, the statement was admissible under MRE 801(d)(1)(a), and defendant was therefore not denied a fair trial by the prosecutor's reference to the statement.

Defendant argues that the prosecutor committed additional misconduct by referring to a police report in which defendant allegedly confessed to Bright. Defendant believes that the prosecutor should have first questioned Bright about defendant's alleged confession before referring to the confession contained in the police report. We agree that the prosecutor acted improperly by impeaching Bright with the confession in the police report before obtaining an inconsistent statement (such as a statement from Bright that defendant had told him nothing about the incident in question). However, reversal based on prosecutorial misconduct is warranted only if the defendant was denied a fair trial, *Paquette, supra* at 342, and improper acts must be reviewed in context. *Legrone, supra* at 82. Here, Bright *subsequently* gave an inconsistent statement, testifying that defendant had not told him anything about his involvement in the crime. Because a proper foundation for the prosecutor's question was eventually obtained, defendant's argument, which focuses on the lack of a foundation, does not warrant a reversal of defendant's conviction. See *Paquette, supra* at 342.

The rejection of defendant's arguments regarding the prosecutor's use of the investigative subpoena testimony and the police report while examining Bright is appropriate on an additional basis. Prosecutorial misconduct does not require reversal unless "it is more probable than not that the error was outcome determinative." *People v Brownridge (On Remand)*, 237 Mich App 210, 215-216; 602 NW2d 584 (1999), quoting *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Bright's prior testimony about defendant's crying was not a highly probative piece of evidence compared to the other facts elicited at trial, and two witnesses other than Bright testified that defendant confessed to the crime. Under these circumstances, any errors by the prosecutor in using the investigative subpoena testimony and the police report in examining Bright were not outcome determinative and do not require reversal. *Id.*

Defendant argues that the prosecutor committed yet more misconduct by reading additional testimony from the investigative subpoena hearing into the record. However, defendant's appellate brief (1) does not indicate during which witnesses' testimony the alleged misconduct occurred, (2) does not provide the substance of the prosecutor's allegedly improper statements, (3) does not cite to any portion of the record where the allegedly improper statements can be found, and (4) provides no specific arguments for any of the alleged instances of prosecutorial misconduct but merely states that the prosecutor handled his other witnesses improperly.¹ Under these circumstances, we conclude that defendant has effectively waived review of this issue. See *People v Fields*, 49 Mich App 652, 658; 212 NW2d 612 (1973); see also MCR 7.212(C)(7).

Defendant further contends that the prosecutor committed misconduct during his closing argument. Defendant argues that the prosecutor (1) improperly stated that defendant had alcohol on his breath during trial, (2) misrepresented the evidence while trying to challenge defendant's alibi, (3) improperly stated that defendant was an alcoholic who drank every day, (4) improperly referred to the victim's violent death, (5) improperly stated that defendant was "not emotional," (6) argued facts not in evidence when stating that defendant used I-94 to go to St. Joseph and to frequent a bar near the site where the victim was killed, and (7) improperly implied that Duane Bright knew more about the crime than he stated while testifying.

We note that defendant properly preserved only his objections to the first two aforementioned instances of alleged prosecutorial misconduct. With regard to the first instance of alleged misconduct – the statement that defendant's breath smelled of alcohol during trial – defendant immediately objected, and the trial court noted that it recalled defendant denying that his breath smelled of alcohol during trial. We conclude although the prosecutor's comment was erroneous, any prejudice that resulted from the comment was cured by the trial court. Moreover, the trial court specifically instructed the jury to rely on its own recollection of the facts and to not consider the attorneys' arguments as facts. Under these circumstances, reversal is not warranted. *Brownridge, supra* at 215-216.

With regard to the second instance of alleged misconduct – the challenge to defendant's alibi evidence – we find no impropriety, since the prosecutor was simply pointing out an inconsistency between the testimony of defendant's wife (who testified that she spent the night of May 4, 1996 with defendant at a motel) and the testimony of defendant and his friend Robert Eastman (whose testimony, read together, indicated that defendant spent the night of May 4, 1996 with two other women at their house).

Defendant's remaining, unpreserved challenges to plaintiff's closing argument do not reveal any impropriety, since the prosecutor's comments were relevant and were supported by the evidence or reasonable inferences drawn from the evidence. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). First, Robert Eastman testified that defendant was an alcoholic, and defendant admitted to drinking every day both during trial and around the date when the accident occurred. Second, the prosecutor's reference to the victim's violent death was supported by the testimony of Dr. Stephen Cohle, and the violence of the death was relevant to prove that defendant realized he had hit someone and then purposefully drove away. Third, defendant's wife testified that he was not an emotional person. Fourth, the prosecutor's reference to defendant using I-94 to travel to St. Joseph and to frequent a specific bar was a reasonable inference based on the testimony of both Robert Eastman and defendant's brother. Finally, the prosecutor's indication that Duane Bright knew more than he said was also a reasonable inference based upon the testimony of both Bright and Jess Kalis. Accordingly, reversal based on prosecutorial misconduct is unwarranted. *Id.*

Finally, defendant argues that his trial attorney rendered ineffective assistance of counsel by failing to object to the prosecutor's reading of statements from the investigative subpoena hearing. Defendant's argument is self-contradictory, however. He contends that his trial counsel should have objected, yet states that "[t]he [c]ourt foreclosed objections by ruling early on that certain statements could come into the record." He additionally states that a failure to object is irrelevant if the defendant

was deprived of a fair trial, contends that he was indeed denied a fair trial, yet inexplicably goes on to argue that his trial counsel was ineffective for failing to object. Defendant's lack of a reasoned argument, his lack of citations to the transcript, and his failure to even allege any prejudice under *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994), lead us to conclude that this issue has been waived for appeal. See *Fields, supra* at 658; see also *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999) (“[a] party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim”).

Affirmed.

/s/ Hilda R. Gage

/s/ Patrick M. Meter

/s/ Donald S. Owens

¹ Specifically, defendant indicates that the prosecutor “handled his other witnesses in the same manner he ‘impeached’ witness Bright.” We note that because the prosecutor did not err in examining Bright using the investigative subpoena testimony, and because defendant merely argues that the prosecutor acted “in the same manner” with regard to the remaining witnesses, it would be inappropriate for us to conclude that the prosecutor erred with regard to the remaining witnesses.