STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENT MORRIS DOUGLAS,

Defendant-Appellant.

UNPUBLISHED
November 25, 2003

No. 241561
Macomb Circuit Court
LC No. 01-003094-FH

Before: Fort Hood, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of breaking and entering with intent to commit larceny, MCL 750.110, for which he was sentenced to a term of imprisonment of 23 to 120 months. We affirm.

I. Facts

This case arises from a nighttime breaking and entering of a business. The owner testified that he closed the store at midnight, at the time leaving in his desk approximately $2,000 in cash, some food stamps, and four payroll checks that had been cashed for customers, all bundled together with a rubber band. The owner added that he also left a gun in the desk and approximately $250 in rolled coins, mostly quarters, in a box on top of the desk. According to the owner, several hours after closing that night, he received a call from his alarm company, who had called the police on his behalf, shortly after which he called the alarm company back and learned that his store had been broken into. When the owner returned to his store, the damage awaiting him included a broken window and a forced office door.

The police responded to the area at approximately 5:00 a.m. and found defendant fleeing on foot. The police gave chase, and finally caught and arrested him. According to the police witnesses, defendant had in one pocket a large amount of cash and some checks, held together with a rubber band. Further investigation turned up, on a residential lawn near the break-in, a box with loose and rolled coins, which had apparently been thrown down. The police officer who transported defendant to the police station testified that defendant insisted that the money and checks he was carrying had been given to him by a white male in a car at Sixteen Mile and Gratiot.

Defendant represented himself at trial with the assistance of an advisory attorney. Defendant's motion for a new trial was denied.

II. Handwriting Expert

Before trial, defendant moved the trial court to appoint a handwriting expert, explaining that he wished to develop the theory that the police had manufactured evidence as concerned the checks he was alleged to have been carrying, and also medical records describing his immediate postarrest condition. Defendant stated that he had sent the prosecutor a letter detailing this request. The trial court elicited from defendant's advisory attorney that there would be a notice for discovery, and directed defendant to consult with his advisory attorney "as to the proper way to make a discovery request," and stated that if there was an objection from the prosecutor "we'll motion that up". The court stated that there was no resolution of the matter at the moment, and defendant and the prosecutor agreed. No further mention of a handwriting expert arose until the posttrial motion for a new trial. Defendant characterizes this as a failure to act on a proper request. We disagree.

A trial court's decisions on requests for discovery are reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). The trial court made plain that it expected further development of the prospect of a handwriting expert, including the entertainment and resolution of any objections the prosecutor might raise, through further proceedings to be initiated by defendant.[1] Generalized expressions of the need for an expert at public expense are not sufficient to compel the trial court to act; the defense bears the burden of showing the need for expert assistance. *People v Leonard*, 224 Mich App 569, 585; 569 NW2d 663 (1997). In this case, the trial court responded appropriately to defendant's initial motion, and the lack of further action on defendant's part in the matter indicates abandonment of it.

Further, defendant ably developed his theory of manufactured evidence at trial, e.g., through the use of handwriting comparisons.[2] *Id.* at 585. This further erodes any claim that defendant was prejudiced for want of an expert. As the trial court pointed out in responding to the motion for a new trial, "[t]he comparison of writing styles is not a subject so complex as to necessarily require the aid of an expert".

Defendant's interest in medical records concerned his protestations of police brutality, not the question of his guilt. Because the medical records concerned a collateral issue, and thus

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[1] Indeed, just before trial began defendant stated that he expected his only witness to be himself, unless events caused him to feel some need to bring a physician to testify concerning medical records. Defendant thus demonstrated neither a need for, nor an expectation of, a handwriting expert at that time.

[2] Before trial began, the court questioned defendant about his intention to represent himself and to follow the rules. Defendant indicated that he had participated in four prior jury trials and that during thirteen years of imprisonment had spent a lot of time in the prison library.

were of limited relevance at trial, defendant had little to gain from more stringently asserting that those records indicated that the police had treated him with excessive force when arresting him.

III. Photocopies

Photographic reproductions of the checks allegedly stolen from the business were admitted into evidence. Defendant objected to the admission of several of these exhibits, insisting that because he disputed the authenticity of those documents, the originals should have been produced. The trial court ruled the reproductions admissible on the ground that a proper foundation had been established.

This Court reviews a trial court's interpretation of a rule of evidence de novo as a question of law. *People v Gonzalez*, 256 Mich App 212, 217-218; 663 NW2d 499 (2003). Where the rules of evidence authorize a trial court to exercise discretion in deciding whether to admit evidence, the court's exercise of that discretion is reviewed on appeal for an abuse of discretion. *Id.* at 217.

MRE 1003 provides that "[a] duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original . . . ." In this case, defendant repeatedly challenged the authenticity of the checks. Assuming, without deciding, that for this reason the trial court erred in admitting the challenged exhibits, we nonetheless conclude that any error was harmless. A defendant pressing a preserved claim of nonconstitutional error bears the burden of showing that it is more probable than not that the error affected the outcome. *People v* Lukity, 460 Mich 484, 495; 596 NW2d 607 (1999), citing MCL 769.26. See also *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In this case, although defendant asserts that "the copies were self-serving for the police," he does not explain precisely why he could more plausibly have advanced his theory of manufactured evidence had the originals been produced. This failure of presentation forfeits appellate relief. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

At trial, defendant suggested that some of the handwriting was forged, and compared handwriting samples, with no indication that the reproductions at hand were of questionable legibility, or otherwise were less revealing of potential forgery than the originals would have been, and so relying on the copies put defendant at no disadvantage. Because defendant has failed to show that the lack of originals likely affected the outcome, *Lukity*, *supra*, we reject this claim of error.

IV. Motion for Mistrial

Defendant argues that the trial court erred in denying two separate motions for a mistrial. We disagree. This Court reviews a lower court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Id.* (citations omitted).

A. Syringe

A police officer who had joined in the chase of defendant, and who eventually captured him, testified that when searching the area of the chase for his radio afterward he found a syringe. Defendant objected in advance to any mention of the discovery of the syringe, the trial court addressed the issue and the prosecutor indicated that he would not elicit any mention of the syringe or other potential drug paraphernalia. Nevertheless, after the officer testified that he found his radio the prosecutor asked, "Did you find any other evidence in the area, . . . ?"

Defendant immediately objected, and a discussion was held outside the presence of the jury. The trial court denied defendant's motion for a mistrial, and instructed the jury, upon its return, as follows: "Members of the jury, you are to disregard the last question and answer in reference to a syringe. It has nothing to do with this case. This has nothing to do with [defendant] and this case and you're to completely disregard that."

We agree with the trial court that a mistrial was not warranted.[3] The single mention of a syringe found in the vicinity of the chase only indirectly implied a connection between it and defendant. Further, despite the obvious potential connection of a syringe with illegal drug use, we note that there is nothing inherently pernicious about possessing a syringe.[4] Because common experience admits of benign uses for a syringe, defendant's presumption that mere association with one invites serious prejudice is inapt. Finally, the trial court's emphatic curative instruction avoided any potential prejudice. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

B. Glass Fragments and Flashlight

Testifying on his own behalf, defendant confirmed that when he was arrested he had glass fragments and a flashlight in his pocket. Defendant explained that he needed the flashlight to help him start his car because of a defective ignition, and that the glass fragments originated as a broken bulb. A police detective testified that the glass fragments were initially assumed to have come from the breaking and entering, but that the analysis from a crime lab indicated that the glass taken from defendant did not originate from the crime scene.

The actual glass and flashlight were never admitted into evidence. However, while the jury was deliberating, defendant expressed concern that the glass fragments had been tendered to the jury. One of the prosecuting attorneys stated confidently that this was not the case, but further investigation revealed that both the glass fragments and the flashlight were included with the exhibits sent to the jurors. Those items were retrieved, and the admitted exhibits returned to

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[3] While we agree that a mistrial was properly denied, we find it unlikely that the question and answer were inadvertent and admonish the prosecutor, if deliberate, such trial tactics have no place in the proper conduct of a criminal trial.

[4] Not only do countless diabetics use them in the course of self-medication, but also bakers use them to spread frosting, wood workers use them to spread glue, etc.

the jury. In considering defendant's motion for a mistrial, the trial court observed that both unadmitted items had remained sealed in their envelopes. In lieu of declaring a mistrial the trial court instructed the jury as follows:

> Proposed People's Exhibit No. 20 was included, wrongfully included, and it should not [have] been included in the evidence given to you by the court, because No. 20, which was alleged to be a small flashlight was never admitted into evidence and not to be considered by you in any form or fashion as having anything to do with the defendant or this case, okay.
>
> I see it was never opened and remain[s] sealed. An unmarked envelop[e] was also furnished to you for your deliberations allegedly containing some shattered glass. Again, that was not to be sent to you nor should it be a part of you[r] deliberations because this shattered glass is absolutely nothing to do with the alleged crime nor the crime scene and it is no way to be construed as evidence of a connection between the defendant and the crime.
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> So you're to disregard those items in their entirety, okay.

"A trial court is not to provide the jury with unadmitted evidence." *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996). However, not every irregularity warrants a mistrial; a criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). In this case, although defendant has brought an error to light, he does not explain how he was prejudiced by it. Because the subject matter of the glass and the flashlight were in evidence, it is difficult to see how any prejudice resulted from presenting those actual physical objects to the jury, despite their not having been admitted into evidence. Further, to whatever extent the objects themselves were potentially prejudicial, any prejudice was averted in that the items, as given to the jury, remained in sealed envelopes and the court gave a proper curative instruction. We conclude that the trial court properly denied the motion for a mistrial.

V. Prosecutorial Misconduct

Defendant argues that the prosecutor denied him a fair trial by denigrating the defense in closing argument. We disagree. Defendant predicates this issue on the following two passages:

> You're not to consider these outrageous stories as I see them.
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> * * *
>
> And as far as manufacturing evidence and three police departments in collusion with one another, I ain't even going to give that the dignity of an answer. All I want you to do is go in there, use your common sense when evaluating the testimony of the people and evidence involved and that's all I ask.

As an initial matter, we observe that neither statement drew a defense objection at trial. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial

proceedings. *Carines*, *supra* at 763. Comporting with this standard is this Court's pronouncement in *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."

We conclude that the remarks of which defendant makes issue were not improper at all, let alone that they injected incurable prejudice into the case. A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, a prosecutor need not confine argument to the "'blandest of all possible terms.'" *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973).

"[T]he prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed." *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983) (citations omitted). Although a prosecutor may not suggest that he or she has personal knowledge that bears on a witness' credibility, where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). A prosecutor's expression of personal belief, expressed as derived from the evidence, is not improper. *People v Jansson*, 116 Mich App 674, 693-694; 323 NW2d 508 (1982).

The statements of which defendant complains nowhere suggested that the prosecutor had some personal, extra-judicial insights into the credibility of defendant. Instead, the prosecutor simply reminded the jury that defendant had offered a police officer a far-fetched explanation for why he was found near the scene of the crime carrying cash and checks of a sort stolen from the business, and admonished the jury to reject defendant's theory that the police and prosecutor had targeted defendant for wrongful prosecution.

Further, had there been any excesses in the prosecutor's argument, they were have been cured by the trial court's instructions to the jury to decide the case solely on the evidence, and that the statements of counsel are not evidence.

Affirmed.

/s/ Karen M. Fort Hood
/s/ William B. Murphy
/s/ Janet T. Neff