STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 25, 2003
v	No. 241565 Oakland Circuit Court
ROBERT JAMES STEPHENS, Defendant-Appellant.	LC No. 2001-176314-FH

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

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree home invasion, MCL 750.110a(3).[1] He was sentenced to a prison term of two to fifteen years and appeals as of right. We affirm.

I. Underlying Facts

Defendant's conviction arises from allegations that, on the afternoon of November 2, 2000, he and his wife, codefendant Chanda Stephens,[2] entered the complainant's attached, open garage in a Lake Orion Township subdivision and stole a leaf blower and grass trimmer to sell to obtain money to purchase drugs. Chris Chlebek, the complainant's neighbor, testified that he observed a man and a woman quickly moving down the complainant's driveway, carrying lawn equipment. Chlebek indicated that the woman was moving faster than the man. According to Chlebek, the man and woman threw the lawn equipment in the backseat of a white Pontiac and sped away, with the woman driving. Chlebek followed them out of the subdivision, wrote down the license plate number, and reported the incident to the police. Thereafter, Chlebek contacted the complainant, who called 911.

Oakland County Sheriff's Deputy David Fournier testified that the police ran the license plate number for the white Pontiac, which was registered in codefendant Stephens name, and made several unsuccessful attempts to contact the suspects at the listed address. In late

[1] Defendant was originally charged with first-degree home invasion, MCL 750.110a(2).

[2] Codefendant Chanda Stephens was charged with first-degree home invasion, to which she pleaded guilty. A videotape of her plea was played for defendant's jury.

November 2000, the police discovered that codefendant Stephens was in jail for another offense. Deputy Fournier testified that, on December 4, 2000, he went to speak with codefendant Stephens in jail, but she invoked her *Miranda*[3] rights. On December 27, 2000, codefendant Stephens requested to speak with the police about the Lake Orion incident. After waiving her *Miranda* rights, codefendant Stephens gave an oral statement and a written statement, which were admitted at defendant's trial. According to her statements, she and defendant were addicted to drugs and were riding around the area looking for something to sell to obtain money to purchase drugs. When they noticed the complainant's open garage, she parked in front, and defendant went into the garage and gestured for her to come. She stated that she then went into the garage and defendant handed her a leaf blower, and he then picked up a grass trimmer. She stated that she came out of the garage first with defendant behind her, they put the items in the trunk of their car, and she drove away.

Codefendant Stephens told the officer that defendant was also in the same jail. The officer then spoke with defendant. According to the officer, defendant waived his *Miranda* rights and gave a written statement, which was admitted at trial. In his statement, defendant claimed that he and codefendant Stephens, who were both "sick from not doing heroin," were driving around looking for items to sell to purchase drugs. He stated that, when they saw the complainant's open garage, codefendant Stephens got out of the car, went into the garage, and took a leaf blower and grass trimmer.

At trial, however, defendant denied that he was guilty of the charged offense. He indicated that he had previously pleaded guilty to an unrelated charge of receiving or concealing stolen property, but did not plead guilty in this case because he was innocent. Defendant admitted that, on the day of the incident, he and codefendant Stephens, who were both addicted to heroin, were driving around an affluent neighborhood looking for aluminum scrap. He indicated that, when codefendant Stephens noticed the items in the open garage, she said that she was sick and was going to steal something to sell to purchase drugs. Defendant testified that, when he told codefendant Stephens that he was leaving, she took the car keys so he could not leave. He also indicated that he could not run away because the strap on his prosthetic leg was broken. Defendant claimed that codefendant Stephens then went into the garage, took the items, and put them into the backseat of the car. Defendant denied ever getting out of the car.

During defendant's testimony, the defense presented a letter, written by codefendant Stephens, dated June 26, 2001, exonerating defendant from any wrongdoing, and indicating that her previous statements were fallacious. Defendant denied threatening codefendant Stephens to persuade her to write the exculpatory letter.

II. Admission of the Codefendant's Statements Under MRE 804(b)(3)

Defendant alleges that the trial court abused its discretion by admitting the hearsay statements made by codefendant Stephens, wherein she implicated defendant, because they did not constitute declarations against her penal interest and violated his constitutional right of confrontation. We disagree. This Court reviews a trial court's decision to admit evidence for an

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). To the extent that this issue implicates the Confrontation Clause of the federal and state constitutions,[4] the constitutional issue is reviewed de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). Also, this Court reviews the trial court's findings of fact regarding the trustworthiness of a hearsay statement for clear error. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996).

"Hearsay is a 'statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.'" MRE 801(c); *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998). Hearsay is not admissible as substantive evidence unless an exception applies. MRE 802. MRE 804(b)(3) provides that when a declarant is unavailable as defined in MRE 804(a),[5] the declarant's out-of-court statement against interest may avoid the hearsay rule if certain thresholds are met:

> *Statement Against Interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Whether a statement is admissible under MRE 804(b)(3) depends on: "(1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement." *Barrera, supra* at 268; see also *People v Schutte*, 240 Mich App 713, 715-716; 613 NW2d 370 (2000).

A declarant's hearsay statement against penal interest that also implicates another person may be admissible as substantive evidence against the other person (1) if the statement is admissible as a matter of the law of evidence, MRE 804(b)(3), and, (2) its admission would not violate the defendant's right of confrontation. *People v Poole*, 444 Mich 151, 162; 506 NW2d 505 (1993). The first inquiry focuses on the reliability of the hearsay statement and takes into consideration its content and the circumstances under which the statement was made. *Id*. at 160-161. With regard to the second inquiry, the statement must be examined to determine whether it contains "particularized guarantees of trustworthiness" considering the totality of the

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[4] US Const, Am VI; Const 1963, art 1, § 20.

[5] Neither party challenges the trial court's ruling that codefendant Stephens was unavailable because she invoked the spousal privilege not to testify.

circumstances to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. *Schutte, supra* at 717-718, quoting *Poole, supra* at 165. In this regard, our Supreme Court has stated:

> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.
>
> On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.
>
> Courts should also consider any other circumstance bearing on the reliability of the statement at issue. While the foregoing factors are not exclusive, and the presence or absence of a particular factor is not decisive, the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. [*Poole, supra* at 165 (citation omitted).]

We agree with the trial court that the statements attributed to codefendant Stephens, although hearsay, were admissible as statements against her penal interest under MRE 804(b)(3). First, insofar that she implicated herself in the crime, the statements were clearly against her penal interest. Also, a reasonable person in her position would not have made the incriminating statements unless she believed they were true, especially considering her admission that both she and defendant were equally culpable in the crime. Additionally, her statement that both she and defendant went into the garage and stole the items comported with the report from the eyewitness, who observed the two coming down the complainant's driveway.

Furthermore, considering the totality of the circumstances in this case, codefendant Stephens' statements possessed sufficient indicia of reliability to be admitted against defendant, despite his inability to cross-examine her. Although codefendant Stephens made her statements to police officers, they were voluntary, made without prompting, and made after she initiated contact with the police to talk to them about the incident. Also, as the trial court noted, her statements were given in a narrative form. And, contrary to what defendant argues, the statements did not minimize her role in the crime or shift the blame solely onto defendant. Additionally, there is nothing in the record suggesting that the statements were made to avenge codefendant Stephens or to curry favor, that codefendant Stephens had a motive to lie or distort the truth, or that she was suffering from drug withdrawal, as defendant claims. To hold that the statements were not sufficiently trustworthy would require this Court to conclude that codefendant Stephens was attempting to deceive the police, even though she implicated herself in the crime, and there was no factual support for that conclusion.

In sum, we conclude that the trial court did not abuse its discretion by concluding that codefendant Stephens' statements were within the scope of MRE 804(b)(3), and contained "particularized guarantees of trustworthiness" considering the totality of the circumstances to allow their admission as substantive evidence against defendant without violating his right of confrontation. See *Poole, supra*; *Schutte, supra*.[6]

III. Prosecutorial Misconduct

Defendant alleges that he was denied a fair trial by numerous instances of prosecutorial misconduct. We disagree.

A. Standard of Review

This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *Bahoda, supra* at 266-267; *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). When a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error affecting the defendant's substantial rights, i.e, affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999); *Schutte, supra* at 720.

B. Improperly Calling Codefendant Stephens as a Witness

We reject defendant's claim that the prosecutor engaged in misconduct when he called codefendant Stephens as a witness knowing that she would invoke her spousal privilege and refuse to testify, thereby prejudicing defendant. Defendant correctly acknowledges that Michigan courts have recognized that there is a "danger that an adverse inference may be drawn from a claim of testimonial privilege" when an alleged accomplice invokes the privilege in the presence of the jury. See *People v Giacalone*, 399 Mich 642, 645-646; 250 NW2d 492 (1977) (citation omitted). Therefore, a lawyer may not knowingly call a witness knowing that she will claim a valid privilege and refuse to testify. See *id*. at 645.

Here, defendant did not object to the prosecutor's action below, and there is no reasonable likelihood that he was prejudiced by the prosecutor's alleged improper conduct. First and foremost, the prosecutor did not call the witness in the presence of the jury. Rather, before trial, the witness was questioned and given an opportunity to invoke her testimonial privilege *outside* the presence of the jury. In fact, the jury selection process had not yet commenced. Furthermore, contrary to what defendant argues, the prosecutor did not engage in misconduct by seeking to admit codefendant Stephens' out-of-court statements under MRE 804(b)(3). An invocation of the spousal privilege serves only to prevent a spouse from testifying on the witness stand; out-of-court statements, if otherwise allowable, are not excluded by the privilege. See

[6] Although defendant argues that *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 144 L Ed 2d 117 (1999), supports reversal, this Court has held that *Poole, supra*, remains binding precedent because *Lilly* was a plurality opinion and a majority of the U.S. Supreme Court did not hold that the Confrontation Clause imposes a blanket ban on the use of accomplice statements. See *Beasley*, *supra* at 558-559.

People v Fisher, 442 Mich 560, 575; 503 NW2d 50 (1993). Accordingly, this claim does not warrant reversal.

C. Voir Dire

We also reject defendant's claim that the prosecutor improperly "began to paint him as a violent criminal like Jesse James" during voir dire. Contrary to what defendant argues, the prosecutor's remarks did not suggest that there was evidence known to the prosecutor that defendant was a train or bank robber, or a violent criminal. Rather, viewing the prosecutor's remarks in context, they were focused on illustrating to the jury the concept of aiding and abetting, which at least one juror did not understand. Furthermore, even if the example used by the prosecutor did not exactly comport with the law, any error was not outcome determinative. The court properly instructed the jury on the concept of aiding and abetting, instructed the jury to follow the law as instructed by the court, advised the jury that the lawyers' comments were not evidence, and advised the jury that the case should be decided on the basis of the evidence, which was sufficient to cure any perceived prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001), citing *Bahoda*, *supra* at 281. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

D. Opening Statement

Defendant next claims that, during opening statement, the prosecutor inappropriately "painted" him as a heroin addict, vouched for the credibility of the police, and limited the jury to either acquitting him or finding him guilty of the primary offense, i.e., first-degree home invasion. Defendant did not object to the prosecutor's opening statement, and no clear or obvious error is apparent. *Carines*, *supra*. First, we find no error in the comments relating to defendant's use of heroin, or the purchase of drugs as being the motive for the crime. Opening statement is the appropriate time to state a fact that will be proven at trial, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and these facts were presented by the prosecution through the admission of codefendant Stephens' statements. In those statements, codefendant Stephens stated that she and defendant were heroin users, and committed the crime because they needed money to buy more drugs. In addition, from the inception of trial, the defense acknowledged that defendant was addicted to drugs at the time of the offense. Accordingly, this claim is without merit.

We likewise reject defendant's claim that the prosecutor improperly vouched for the police during opening statement. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Although the challenged comments, viewed in isolation, may seem problematic, otherwise objectionable comments do not require reversal if they are made in response to defense arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, during voir dire, defense counsel asked several questions regarding whether the prospective jurors believed that police officers could lie, have their own agenda, or have personal reasons to be untruthful. Viewed in context, the prosecutor did not improperly vouch for the police officers' credibility or limit the jury's verdict, but rather permissibly advanced the prosecution's theory that the evidence would demonstrate that defendant committed the crime.

Moreover, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, and that the lawyers' comments were not evidence, which was sufficient to cure any perceived prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.

E. Elicitation of Prejudicial Evidence

We also reject defendant's claim that, during the prosecutor's direct examination of a police witness, he improperly elicited testimony that defendant was in jail on another offense at the time of the officer's initial contact with defendant. Because defendant did not object to this comment below, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra*. At trial, part of the defense was that, after the date of the offense in this case, defendant pleaded guilty to an unrelated offense because he had committed that crime, but did not plead guilty to the subject crime because he was innocent. Given the defense strategy, it is highly unlikely that the fact that defendant was jailed when the police were investigating this case affected the outcome. Therefore, reversal is unwarranted on this basis.

F. Improper Inference that Defendant Prevented Codefendant Stephens from Testifying

Defendant alleges that the prosecutor denied him a fair trial when the prosecutor made objections and comments suggesting that the defense "was doing something underhanded" to prevent codefendant Stephens from testifying, even though she was unavailable because she had invoked her spousal privilege. We disagree. We initially note that, through his partial and selective recitation of the record, defendant has mischaracterized the proceedings. Contrary to what defendant argues, we do not agree that the prosecutor's comments require reversal for several reasons. First, as noted by the trial court, defense counsel placed the matter of codefendant Stephens' absence and ultimate sentence before the jury, despite the trial court's pretrial ruling that no mention was to be made regarding the witness' unavailability or her ultimate sentence. Because defendant "opened the door" to this matter, he cannot now complain of an error he precipitated. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Furthermore, given defense counsel's actions, the prosecutor's comments were not intended to imply that the defense did something "underhanded" to prevent codefendant Stephens from testifying, but were focused on refuting the defense's potential insinuation that the prosecution was thwarting the witness from testifying. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *Kennebrew, supra*. Moreover, the trial court instructed the jury that the witness was "unavailable to testify for reasons not attributable to either the prosecution or the defense," that the lawyers' comments were not evidence, and that the jury should follow the law as instructed by the court. The court's instructions were sufficient to cure any perceived prejudice stemming from the prosecutor's alleged improper comments. *Long, supra*. Accordingly, reversal is not warranted on this basis.

G. Infringement of Defendant's Right to Remain Silent

We reject defendant's claim that the prosecutor infringed on his constitutional right to remain silent when he questioned defendant concerning his disclosure of a June 26, 2001, exculpatory letter written by codefendant Stephens. We initially note that, despite defendant's posit of the issue, it does not concern his constitutional right to remain silent. In any event, we

conclude that the prosecutor's general questions regarding when the letter, which was admitted during defendant's direct examination, was received and disclosed, were not improper. Although a prosecutor may not imply that a defendant must prove something or present a reasonable explanation because such an argument tends to shift the burden of proof, see *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), he may question a witness on those matters that were raised by the defense on direct examination. *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976).

Furthermore, after the trial court sustained defendant's objection to the question regarding whether defendant directed defense counsel to disclose the exculpatory letter to the police, defendant failed to request a curative instruction or otherwise request any other action by the trial court. The prosecutor did not pursue this line of questioning any further or mention it during closing argument. Finally, in its final jury instructions, the court instructed the jury that defendant did not have to offer any evidence or prove his innocence, and that the prosecution was required to prove the elements of the crimes beyond a reasonable doubt, which were sufficient to cure any possible prejudice. *Long*, *supra*. In sum, because defendant has failed to demonstrate that he was prejudiced by the prosecutor's conduct, reversal is not warranted on this basis. *Carines, supra*.

H. Denigration of Defendant

Defendant next argues that, during cross-examination, the prosecutor denigrated him by ridiculing his socio-economic status and his intelligence level. We disagree. A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda, supra* at 283. But, in this case, viewed in context, the record does not demonstrate that the prosecutor engaged in inappropriate cross-examination. Rather, it appears that, in most instances, the prosecutor was directing defendant to answer the questions. This conclusion is supported by the record, which reveals numerous instances where defendant's answers were either not responsive or argumentative. A prosecutor is not required to make his points using the blandest possible terms. See, generally, *Schutte, supra* at 722. We also note that, immediately before the prosecutor asked defendant if he knew the meaning of "chivalry," defendant had volunteered that "[he] ain't got that bright of an education." In sum, under the circumstances, we find no prosecutorial misconduct for which relief is warranted.

I. Rebuttal

We also reject defendant's claim that the prosecutor's rebuttal argument was improper. Defendant did not object to the prosecutor's remarks below and, thus, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra*. Defendant has not shown that the prosecutor's comments affected his substantial rights. The prosecutor's remarks, viewed in context, were focused on refuting defense counsel's assertions made during closing argument that codefendant Stephens was culpable and that the police took advantage of her because of her "heroin withdrawal," and defense counsel's discussion of defendant's injuries and shortcomings. As previously indicated, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *Kennebrew, supra*. Further, although the prosecutor's discussion regarding his and defense counsel's "bickering" may have been improper, the remark was fleeting, involved only a brief portion of the argument, and was not so inflammatory that defendant was prejudiced. Finally,

the trial court's instructions that the lawyers' comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury should follow the law as instructed by the court, were sufficient to cure any perceived prejudice. *Long*, *supra*. In sum, this claim does not warrant reversal. *Carines, supra*.

IV. Sentencing

Defendant's final claim is that he is entitled to resentencing because the trial court improperly scored offense variable ("OV") 9 (number of victims),[7] and improperly enhanced his sentence on the basis of its determination that he was guilty of first-degree home invasion. However, we note that defendant has fully served his minimum sentence and is no longer incarcerated. According to the Michigan Offender Tracking Information System (OTIS), he was placed on parole on April 23, 2003. Because it is impossible for this Court to fashion a remedy for the alleged sentencing errors, the issues are moot and we need not decide them. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

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

[7] Because the offense of which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines apply to this case. MCL 769.34; *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000).