STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2003
v	No. 238504 Berrien Circuit Court
JERRY LEWIS, Defendant-Appellant.	LC No. 2000-405061-FH

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and possession with intent to deliver codeine, MCL 333.7401(2)(b). He was sentenced to lifetime probation for the cocaine conviction and to 180 days in jail for the codeine conviction. Defendant appeals as of right. We affirm.

Defendant was a passenger in a vehicle driven by his brother-in-law, Sammy Kemp. Kemp's vehicle was pulled over after police officers Koza and Clayton observed defendant throw a cigarette butt out of the window of the vehicle and observed that Kemp and defendant were not wearing seatbelts. As the vehicle pulled over, officer Koza noticed that defendant was moving his hands about the vehicle. Kemp was arrested for driving with a suspended license and was placed in the patrol vehicle.

Officer Koza testified that he had a conversation with Kemp that led him to proceed with a subsequent search of defendant. Officer Koza indicated that Kemp informed him that he and defendant had just left a house where defendant picked up crack cocaine and that defendant had the cocaine on his person. A pat down search of defendant revealed only loose Tylenol #3 pills (Tylenol with codeine) in defendant's pocket. The officers told defendant that they wanted to do a strip search, and defendant said "that was fine, that [the officers] wouldn't find anything on him."

A strip search was conducted at the police station. The officers visually inspected defendant, but did not ask defendant to bend over, turn around, spread his legs, or move around or lift his scrotum. Finding nothing, officer Koza again searched the vehicle using a dog.

Lieutenant Lange then asked defendant to remove his clothing again, and defendant responded, "Okay. . . . I don't have anything on me." Defendant was asked to step out of his underwear, widen his stance, and lift his scrotum. At that time, officer Faraone testified that he saw a "clear plastic bag jammed up in between his scrotum and pressure fit between his legs." Defendant removed the bag, tossed it on the desk, and said, "That ain't mine."

Defendant's defense was that the police planted the evidence on defendant's person. Defendant's brother, Marqui Lewis, testified that he was at his mother's home when he observed the police pull over Kemp's vehicle, place Kemp in the patrol car, and pat down defendant. He then observed an officer bring defendant to the back of the vehicle and heard the officer tell defendant to "open his pants." The police searched defendant with his pants open up to four times, and "went all up in here and felt all up in there."

Defendant testified that he was subjected to a pat down search at the scene and then taken to the rear of the vehicle where the officer had him unbutton his pants and hold them open. He testified that the officer grabbed his underwear, pulled them up, felt all around his private area, then turned defendant around and spread his "ass cheek." Defendant indicated that this type of search occurred three or four times, with different officers conducting each search.

Defendant further testified that approximately fifteen police officers and fifteen FBI agents were in the holding area at the police station during the strip search. He stated that during the search officer Koza used a glove and opened defendant's buttocks and had defendant lift his scrotum. According to defendant, this type of strip search occurred two or three more times, and that after the last strip search the officers and agents left the room. Two officers later returned with "the first bag of cocaine" defendant had ever seen in his life and told defendant he was going to go to prison for the bag of cocaine.

During cross-examination, defendant admitted to speaking with witness Hines about the possibility of her testifying on his behalf but denied telling her that police had planted drugs on him at the scene of the traffic stop. Hines testified that from her yard she was able to see that police were searching defendant but was unable to see the type of search conducted. Hines testified that a couple of months after the arrest defendant asked her testify, and she indicated that she would testify but that she did not see anything. Defendant then told her that officers had planted drugs on him but did not tell her what testimony to give. Hines admitted that defendant gave her the impression that he wanted her to say that the police had planted drugs on him at the scene.

Defendant then returned to the witness stand and testified that, while he did search the neighborhood for witnesses, he did not tell anyone how to testify. During the subsequent cross-examination of defendant, the conviction of defendant's brother, Tony Lewis, was entered into evidence. Defendant denied talking to or threatening Kemp concerning his possible testimony in court and denied that anyone in his family, including Tony, talked to Kemp about the arrest:

> Q: Are you sure or you just don't know whether he did or didn't?
>
> A. No, sir. What are they going to talk to Mr. Kemp for?

> Q. Well, there was some exchange. There was a police report filed. In fact, Mr. - - your brother, Tony Lewis, pled guilty to an assault against Mr. Kemp. Isn't that right?

At this time, defense counsel objected on the ground that the testimony was irrelevant. The prosecution maintained that the conviction was admissible on the basis of "consciousness of guilt, whether defendant or members of his family are contacting witnesses." The court overruled the objection and a certified copy of Tony's conviction for assault and battery and a copy of the information listing Kemp as the victim were entered into evidence.

Tony Lewis testified that the assault on Kemp never happened, that he was forced to plead guilty or go to jail. Tony stated that his conviction had nothing to do with defendant's case and, instead, maintained that his conviction was retaliation by the township and prosecutor for filing a number of complaints against the township. During cross-examination, Tony testified that an officer fabricated the portion of the admitted police report that stated that Tony had complained that Kemp "snitched" on defendant.

Defendant first argues that hearsay evidence was improperly admitted when officer Koza was permitted to testify about statements about defendant allegedly made to him by Kemp. This Court reviews for an abuse of discretion a decision by a trial court to admit evidence. *People v Catt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

The prosecution moved to admit Kemp's statements to Koza through Koza's testimony in the event that Kemp failed to appear for trial. The prosecutor explained that Koza would testify that Kemp told him several times that defendant was in possession of narcotics and that this testimony was needed to explain the actions by officer Koza and other officers in detaining and strip searching defendant. The trial court admitted the testimony, finding that the admission of the statements for the purpose of showing why the officers proceeded with the subsequent searches of defendant was not hearsay. The court noted that the defense theory that police had planted drugs on defendant made "the question of why the police were so persistent in their search important and the statement of Mr. Kemp . . . to Officer Koza was very probative then."

MRE 801(c) defines hearsay as "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." A statement, offered to show why police officers proceeded in a certain manner rather than its truth, is not hearsay. *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982). The trial court properly found that the challenged testimony was not offered to prove to the jury that defendant actually held cocaine but rather to explain why the police officers continued with their search of defendant after their initial pat down searches revealed no narcotics. .

Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Here, the probative value of the disputed testimony was increased by the circumstances of the initial stop and by defendant's assertion that police had planted the drugs on him. Without this testimony, the jury would have been left wondering why a seemingly simple traffic stop ended with a strip search.

Relying on *People v Wilkins*, 408 Mich 69; 288 NW2d 583 (1980), after remand 115 Mich App 153; 320 NW2d 326 (1982), defendant argues that Koza's testimony should have been

limited to stating that he was acting on behalf of Kemp's statements, without explaining the information contained in those statements. In *Wilkins,* the court held that testimony by officers that an informant indicated that defendant was carrying a concealed weapon should have been limited to the fact that the officers were responding to a tip because the police officers' state of mind was not relevant. Here, however, defendant directly challenged the investigative methods of the police officers so that the testimony was relevant and its probative value increased, and the trial court noted that limiting the testimony would diminish the real probative value of the testimony. Additionally, the trial court used a limiting instruction to minimize the prejudicial effect of the testimony. The court instructed the jury immediately after the testimony and again before deliberations that the testimony could only be used to consider whether the police had a good reason to search defendant and not whether defendant actually possessed the drugs.[1]

Defendant next argues that the trial court erred by admitting evidence of Tony Lewis' conviction for assault and battery against Kemp. He asserts that the evidence was not relevant to show defendant's consciousness of guilt because no connection was made between defendant and the threat or action.

Evidence that a defendant threatened a witness is generally admissible to show the defendant's consciousness of guilt. *People v Scholl,* 453 Mich 730, 740; 556 NW2d 851 (1996). Because such evidence is so prejudicial to the defendant, to be admissible on the basis of consciousness of guilt, the prosecutor must present evidence that the threat "was made at the instigation of the defendant, or with his consent or approval, or at least with the knowledge or expectation that it had been or would be made." *People v Salsbury,* 134 Mich 537, 569-570; 96 NW 936 (1903); see also *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982). The prosecutor asserts that, because of the family relationship between defendant, his brother, and Kemp, and because of defendant's claim that police have harassed his family for years, defendant "would undoubtedly have known about [the assault on his behalf]."

No authority exists to support the proposition that a familial relationship between a defendant and a third party who threatens a witness is a sufficient connection to show a defendant's consciousness of guilt. Rather, *People v Culver*, 280 Mich 223, 224-226; 273 NW 455 (1937) supports a finding that relationship alone is insufficient to connect a defendant to threats or other attempts to tamper with witnesses.[2] Here, no evidence was presented that defendant asked, approved or, or even expected Tony to assault Kemp on his behalf. Without such evidence, evidence of Tony's conviction and the information related to the conviction were

[1] Because the testimony was not hearsay, defendant's right to confrontation was not violated. *Tennessee v Street,* 471 US 409, 411; 105 S Ct 2078; 85 L Ed 23d 425 (1982).

[2] In *Culver*, testimony was introduced over the defendant's objection that the brother-in-law of the defendant's wife offered money to the complainant to retract her statement that the defendant had raped her. The Supreme Court concluded that such testimony concerned a collateral matter, was highly prejudicial to the defendant, and was improperly admitted, particularly where the jury might infer that the defendant was responsible for the alleged bribe. *Id.* at 226.

not admissible to show defendant's consciousness of guilt.[3] We find, however, that the admission of evidence regarding Tony's conviction was harmless and does not require reversal of defendant's conviction.

Whether a preserved nonconstitutional error is harmless depends on the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *People v Whittaker,* 465 Mich 422, 427; 635 NW2d 687 (2001). Appellate courts should not reverse a conviction unless the error was prejudicial. *People v Matteo,* 453 Mich 203, 210; 551 NW2d 891 (1996).

Here, even eliminating evidence of Tony's conviction, overwhelming evidence was presented to support a finding that defendant possessed with intent to deliver the cocaine found on his person. The jury weighed the testimony of the witnesses and apparently found the officers' testimony regarding defendant's possession of drugs more reliable than defendant's assertion that the police planted the evidence.

Last, defendant asserts that he was denied a fair trial by improper prosecutorial comments during closing arguments. Defendant failed to object to the allegedly improper comments. Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We have reviewed the comments to which defendant objects and find that the comments were made in response to defendant's argument that police officers had planted drugs on defendant and were permissible. It is permissible for a prosecutor to argue, based on the facts, that one witness is more believable than another. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Contrary to defendant's suggestion, the prosecutor did not tell the jurors that they must find that the officers lied in order to convict defendant. Further, we reject defendant's suggestion that the prosecutor made an improper civic duty argument when he stated that regardless of the jury's decision, that officers would "go out there and try to keep it safe," and that the job of the police is to "catch the bad guy." When read in context, the prosecutor, in response to defendant's allegation of police misconduct, emphasized the lack of motive the officers had to plan evidence and stressed the fact that the officers chose to resubmit their case to their superior when they could have, instead, dropped the case because of the allegations of misconduct.[4]

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[3] Nor was the evidence admissible to impeach defendant's credibility. Although defendant's testimony that Tony had not been convicted for assaulting Kemp is in contradiction to the subsequent admitted conviction, without some evidence that defendant knew about the conviction this contradiction is not relevant to defendant' s truthfulness.

[4] In light of our conclusion that the comments challenged on appeal were not improper, we reject defendant's additional argument that counsel was ineffective for failing to object to the

(continued…)

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad

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comments. A lawyer is not required to assert a meritless objection. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).