STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2004
v	No. 242443 Wayne Circuit Court
ORLANDO PEAY, Defendant-Appellant.	LC No. 97-000120

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for amendment of the judgment of sentence to reflect 538 days of sentence credit.

Defendant's convictions arise from the shooting death of Clifton Smith, who was shot while he was visiting defendant's ex-wife. The prosecution's theory was that defendant wanted to keep Smith away from his ex-wife and children. The prosecution presented evidence that defendant had earlier tried to have Smith arrested for stealing cars. The prosecution theorized that, when that failed, defendant took matters into his own hands and shot Smith twice.

I

Defendant first argues that the prosecutor improperly commented during rebuttal argument on his exercise of the marital privilege, MCL 600.2162, thereby depriving him of a fair trial. Because defendant did not object to the remarks in question, this issue is not preserved. Therefore, defendant must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 nn 5-7; 531 NW2d 659 (1995). A prosecutor is afforded great latitude in closing argument, and may argue the evidence and reasonable inferences arising therefrom in support of his theory of the case. *Id.* at 282.

However, the prosecutor must refrain from making prejudicial remarks. *Id*. at 283. While prosecutors have a duty to see to it that a defendant receives a fair trial, they may use "hard language" when the evidence supports it, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be considered in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Otherwise improper remarks may not require reversal where they are made in response to arguments by defense counsel. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996); see also *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Tamela Peay, defendant's ex-wife at the time of this offense, testified at defendant's first trial, but remarried defendant before his second trial. She did not testify at defendant's second trial because defendant asserted the marital privilege. MCL 600.2162. In defense counsel's closing argument, he commented on Tamela Peay's absence, stating that it was the prosecutor's duty to produce Peay as a witness at trial as part of the prosecution's burden of proof. In his rebuttal argument, the prosecutor responded to defense counsel's remarks by explaining why he could not produce Peay at trial, because defendant had asserted the marital privilege, which barred Peay from testifying. Considered in context, the prosecutor's remarks were responsive to defense counsel's closing arguments and do not amount to plain error. In this regard, this case is distinguishable from *People v Spencer*, 130 Mich App 527; 343 NW2d 607 (1983), which did not involve responsive comments offered to clarify defense arguments.

Defendant also asserts that the prosecutor's remarks improperly informed the jury about the marital privilege when the trial court never instructed the jury on the privilege. We disagree. The trial court informed the jury in its instructions that "a husband and wife shall not be examined as a witness for or against the other without his or her consent." Plain error has not been shown.

II

Next, defendant argues that where he asserted the marital privilege to bar Tamela Peay from testifying at his second trial, MCL 600.2162(2), the trial court erred by allowing Peay's testimony from his first trial to be admitted as former testimony. Because defendant did not object to Peay's former testimony on this ground at trial, he must show a plain error affecting his substantial rights. *Carines, supra*.

The marital privilege only applies while spouses are legally married. *People v Warren*, 462 Mich 415, 422; 615 NW2d 691 (2000). At the time Peay testified at defendant's first trial, she was not married to defendant. In this circumstance, the marital privilege did not bar Peay's former testimony under MRE 804(a)(1) and (b)(1), where defendant's assertion of the marital privilege rendered her unavailable at the time of defendant's second trial. *People v Whalen*, 129 Mich App 732, 736; 342 NW2d 917 (1983). The decisions from other jurisdictions on which

defendant relies are all distinguishable. It was not plain error for the trial court to admit Peay's former testimony.[1]

III

Defendant argues that a new trial is required because the prosecutor made a misstatement of fact in his opening statement. We disagree. Because defendant did not object to the prosecutor's remarks at trial, we review this unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra*.

In his opening statement, the prosecutor stated that the evidence would show that the victim was shot once in the groin or genitals, and explained his theory that the location of the victim's wounds suggested that defendant shot the victim because of sexual jealousy toward defendant's ex-wife and the victim. Specifically, during the prosecutor's opening statement, he informed the jury:

> You're going to hear about how a person by the name Clifford Smith died. You're going to hear evidence that will show you that Clifford Smith died as the result of being shot twice with a shotgun, once in the abdomen and once in his groin.
>
> * * *
>
> We don't have to show the motive, although I think when you hear the Medical Examiner's testimony you're going to know the motive because of where Mr. Smith ends up getting shot.
>
> * * *
>
> Police are, of course, called, they find Mr. Smith in the hallway bleeding, in critical condition. He said he's shot in the abdomen with a shotgun, he's shot in the groin, in his genitals.

[1] Although not raised by defendant on appeal, the recent United States Supreme Court decision in *Crawford v Washington*, 541 US __; 124 S Ct 1354, 1364; 158 L Ed 2d 177 (2004) does not change our determination with regard to the challenged statements made by the unavailable witness. For purposes of the Sixth Amendment confrontation clause the United State Supreme Court indicated that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford, supra*, 541 US at __; 124 S Ct at 1364. The Court held that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id*. 541 US at __; 124 S Ct at 1374. The admitted testimony was testimonial as it was Peay's testimony from defendant's first trial. Here, Peay was unavailable because of spousal privilege, but defendant had the prior opportunity to cross-examine her at his prior trial. Because the defendant had ample opportunity to cross-examine Peay, at his first trial, the admission of the testimony did not deny defendant the opportunity to confront witnesses against him.

* * *

> We don't have to show motive, but look at where he shoots him. He didn't want him around his former wife.

The medical examiner testified that the victim was shot in his lower pelvic area, just above his genitalia. The victim's pelvic bone was fractured and there was also a soft tissue injury to his right buttock area. Although the evidence indicated that the victim was not actually shot in the genitals, the evidence established that he was shot in the groin area, close to the genital area, and the location of the wounds was still supportive of the prosecutor's theory that the victim was shot because of sexual jealousy. Because it is apparent that the prosecutor's remarks were not made in bad faith, nor were the statements prejudicial to defendant, reversal is not required. *People v Wolverton*, 227 Mich App 72, 75-78; 574 NW2d 703 (1997); see also *Carines, supra*.

IV

Defendant next argues that he was convicted on the basis of inadmissible hearsay evidence. Because defendant failed to object to the testimony in question, we review this issue for plain error. *Carines, supra*.

Gale Roberson testified about statements that Tamela Peay made ten to fifteen minutes after the shooting regarding defendant shooting the victim. According to Roberson, Peay looked scared and upset, and was yelling and excited. Although Peay's statements were hearsay, MRE 801(c), the statements were made shortly after a startling event, i.e., a shooting, the statements related to that event, the circumstances indicated that Peay was still in an excited state, and the amount of time that passed between the shooting and the statements did not suggest that Peay had the capacity to fabricate the statements. Because the circumstances surrounding Peay's statements indicate that the statements qualify as an excited utterance under MRE 803(2), defendant has not shown that their admission amounted to plain error. *People v Larry Smith*, 456 Mich 543, 550-551; 581 NW2d 654 (1998). Additionally, where the evidence indicated that the victim was shot with a shotgun, that defendant was the only other person in the home with the victim and Peay at the time of the shooting, that Peay saw defendant with a shotgun, that Peay heard two shots fired and saw that the victim was injured, and heard defendant make incriminating statements about the shooting, we find no plain error in the admission of Peay's statements on the basis that Peay lacked personal knowledge about the shooting. MRE 602.[2]

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[2] Although not raised by defendant on appeal, the recent United States Supreme Court decision in *Crawford, supra*, does not change our determination with regard to the challenged statements. We note that the challenged statements were not "testimonial," in nature and, thus, are not barred by the Confrontation Clause. See *id.* 541 US at __; 124 S Ct at 1364, 1374. The statements defendant contends were improperly admitted, were not testimonial in nature as a government official did not elicit them, the statements were not any type of "*ex parte* in-court testimony or its functional equivalent," and the statements were not given with an eye toward trial. See *id.* at 541 US at __; 124 S Ct at 1364; see also *People v Geno*, __ Mich App __; __ NW2d __ (Docket No. 241768, issued April 27, 2004), slip op p 4. The Court in *Crawford* did not define "testimonial"

(continued…)

We also find no plain error affecting defendant's substantial rights in the admission of the victim's out-of-court statement to Officer Patricia Lofton as a dying declaration because there was no outcome determinative error. See *Carines, supra* at 761-767. There was ample evidence to show that the victim was conscious of his impending death at the time he made the statement. *People v Siler,* 171 Mich App 246, 251; 429 NW2d 865 (1988); see also MRE 804(b)(2); *People v Parney,* 98 Mich App 571, 581; 296 NW2d 568 (1979). But the Untied State Supreme Court recently held that where a hearsay statement is "testimonial," the Confrontation Clause bars the prosecution from using it against a criminal defendant unless the declarant is available to testify at trial, or the defendant had a previous opportunity to cross-examine the declarant. *Crawford v Washington,* 541 US __; 124 S Ct 1354, 1363-1367; 158 L Ed 2d 177 (2004). The Court held that this is so regardless of whether or not the statement falls within a state-law hearsay exception or bears indicia of reliability, overruling *Ohio v Roberts*, 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597 (1980). *Crawford, supra,* 541 US at __; 124 S Ct at 1369-1372. However, the Court noted, and considered without deciding, that testimonial dying declarations might be an exception to this bar and stated that they would be the only exception. *Id.* at 541 US at __; 124 S Ct at 1367 n 6. Nonetheless, it is unnecessary for us to make any such determination, with regard to whether dying declarations are admissible, because in light of the overwhelming evidence against defendant the admission of the victim's statement did not change the outcome of the trial, and, thus, there is no plain error affecting defendant's substantial rights. *Carines, supra* at 761-767; *People v Geno*, __ Mich App __; __ NW2d __ (Docket No. 241768, issued April 27, 2004) slip op, p 11; see also *Delaware v Van Arsdall,* 475 US 673, 684; 106 S Ct 1431; 89 L Ed 2d 674 (1986); *Alder v Burt,* 240 F Supp 2d 651, 676 (ED Mich 2003).

V

Next, defendant argues that a new trial is required because the prosecutor improperly engaged in judge shopping throughout this case. We disagree.

In a prior appeal, this Court rejected defendant's argument that the prosecutor engaged in judge shopping at the preliminary examination stage. *People v Orlando Peay,* unpublished opinion per curiam, issued September 22, 1998 (Docket No. 205917). This Court's prior decision is the law of the case with regard to the issue of judge shopping at the preliminary examination phase and we are bound to follow that decision. *People v Hermiz*, 235 Mich App 248, 254; 597 NW2d 218 (1999).

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instead left it "for another day." *Id*. at 541 US at __; 124 S Ct at 1374. But the Court in *Crawford* noted that "whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Id*. The statements at issue in the present case are not akin to any of those type statements listed as testimonial in *Crawford*. The Court in *Crawford, supra*, 541 US at __; 124 S Ct at 1374, provided that "where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." Therefore, we conclude that the challenged testimony, with regard to the nontestimonial statements, was not improper pursuant to *Crawford*, and was properly admitted under Michigan hearsay law.

Defendant also argues that this case was erroneously assigned to Judge Cynthia Hathaway, and instead should have been assigned to Judge Daniel Ryan. Because defendant did not object to the assignment to Judge Hathaway, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *Carines, supra*.

It appears that the presiding judge reassigned this case to Judge Ryan for defendant's first trial pursuant to Wayne Circuit LCR 6.100(C), because Judge Hathaway was not available to hear defendant's case on the day scheduled for trial. There is nothing in the record to suggest that the prosecutor played an improper role in having the case reassigned to Judge Ryan.

Defendant primarily argues that this case should not have been assigned to Judge Hathaway because, when it was originally filed, it was assigned to Judge Robert Ziolkowski. When the case was subsequently assigned to Judge Hathaway, however, defense counsel questioned the assignment, indicated that he intended to look into the issue, but then never pursued the matter or move to have the case reassigned. Because defendant was aware before trial that there might be some question whether the case was properly assigned to Judge Hathaway, but elected to proceed to trial without ever challenging the assignment to Judge Hathaway, we conclude that he may not now raise the assignment issue on appeal. A defendant may not harbor error as an appellate parachute. *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Furthermore, if the case was improperly assigned to Judge Hathaway under MCR 8.111(D), defendant was required to show prejudice as a result of the improper assignment. *People v McCline*, 442 Mich 127, 133-134; 499 NW2d 341 (1993). Although defendant claims that the prosecutor manipulated the assignment of the case, nothing in the record supports that claim. It is presumed that Judge Hathaway was assigned this case by lot, as required by MCR 8.111(B). Contrary to what defendant asserts, a violation of MCR 8.111 would not involve jurisdictional error. Jurisdiction is conferred on a court by statute or under the constitution, not court rule. *Dep't of Treasury v Central Wayne Co Sanitation Authority*, 186 Mich App 58, 63; 463 NW2d 120 (1990).

For the above stated reasons, we reject this claim of error.

VI

Defendant, next, argues that trial counsel was ineffective for failing to properly preserve the issues previously discussed in this opinion. We disagree.

When reviewing defendant's claim of ineffective assistance of counsel, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *Id.* at 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Even if defense counsel had preserved each of the foregoing issues, for the reasons discussed above, defendant has failed to show that there is a reasonable probability that the outcome of trial would have been different had counsel objected. Therefore, defendant has not established that he was denied the effective assistance of counsel. *Id*.

We also reject defendant's request to remand this matter for an evidentiary hearing on this issue. Defendant has not shown that further development of the record is necessary in order to decide this issue. *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

Based on the record, upon review de novo of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. See *LeBlanc, supra* at 579.

VII

Defendant also argues that he was previously denied the effective assistance of appellate counsel during the prosecutor's appeal of an earlier order dismissing this case, because appellate counsel failed to inform him of the appeal.

Even if counsel was deficient for failing to notify defendant of the earlier appeal, defendant has not established that he was prejudiced by the deficiency. Defendant was represented by counsel, who filed a brief on defendant's behalf. Defendant does not challenge the competency of his former appellate attorney's representation. Instead, defendant argues that, had he been notified of the appeal, he could have assisted counsel in achieving a more favorable result. But defendant does not explain what additional arguments could have been advanced in order to achieve a more favorable result. Thus, defendant has not demonstrated that he was prejudiced by counsel's alleged deficient performance. *Pickens, supra*. We also reject defendant's request to remand this matter for an evidentiary hearing on this issue, inasmuch as defendant has not made an adequate offer of proof showing that an evidentiary hearing is necessary. *Simmons, supra.*

VIII

Lastly, defendant argues that the trial court erred by awarding him only twenty-two days of sentence credit toward his felony-firearm sentence. At sentencing, the trial court agreed to correct the amount of sentence credit reflected in the presentence report, but it never did so. Defendant argues, and the prosecutor agrees, that defendant is entitled to 538 days of sentence credit. MCL 769.11b. Accordingly, we remand this case for the limited purpose of amending the judgment of sentence to reflect 538 days of sentence credit.

We affirm defendant's convictions and sentences, but remand for amendment of the judgment of sentence to reflect 538 days of sentence credit. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Jessica R. Cooper