STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 16, 2004
v	No. 248374 Berrien Circuit Court
NAVARRE LANDO BIBBS, Defendant-Appellant.	LC No. 2002-411372-FC

Before: Griffin, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), first-degree home invasion, MCL 750.110a(2), and fourth-degree CSC, MCL 750.520e(1)(b), for breaking and entering a dwelling during the early morning hours of June 22, 2002, and, while inside the home, sexually penetrating a ten-year-old female and initiating sexual contact with her sleeping mother. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 180 to 720 months' imprisonment for the first-degree CSC conviction, 162 to 480 months' imprisonment for the home invasion conviction, and 21 to 48 months' imprisonment for the fourth-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant first asserts that the trial court erred in failing to, sua sponte, read to the jury CJI2d 4.14 to instruct the jury regarding the proper use of tracking dog evidence. We disagree.

This Court generally reviews claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The determination of whether a jury instruction is applicable to the facts of a particular case "lies within the sound discretion of the trial court." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). However, when tracking dog evidence has been admitted at trial, the trial court has a duty, even absent a request by counsel, to inform the jury that "tracking dog evidence must be considered with caution, is of slight probative value, and cannot support a conviction in the absence of other direct evidence of guilt." *People v Perryman*, 89 Mich App 516, 524; 280 NW2d 579 (1979).

In the present case, because defendant, with the exception of an objection to the trial court's flight instruction discussed *infra*, affirmatively expressed satisfaction with the trial

court's instructions as given, we conclude defendant has waived appellate review of this issue. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).[1] Because defendant waived this right, there is no error to review. *Id.* at 219; *People v Hall*, 256 Mich App 674, 679; 671 NW2d 545 (2003).

Defendant next asserts that the trial court erred by giving the jury a flight instruction. We disagree. "[I]nstructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if the evidence supports them." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975). "[W]hen a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge." *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995) (citations omitted). "It is well established that evidence of flight is admissible to show consciousness of guilt." *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). But such evidence "by itself is insufficient to sustain a conviction." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant contends the flight instruction was improper because no direct evidence was presented that established him as the person who fled from the scene. We disagree. As long as supporting evidence exists, a trial court properly gives a flight instruction. *People v Keen*, 446 Mich 866; 522 NW2d 334 (1994); *People v Johnson*, 171 Mich App 801, 804; 430 NW2d 828 (1988). The term "flight" has been defined to include such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody. *Coleman*, *supra* at 4. In the present case, the evidence supporting the trial court's instruction included both the complainant's positive identifications of defendant as her attacker and as the person passing outside her bedroom window immediately after the attack. Significantly, a neighbor, Earl Horner, testified that near the time the offense was committed, an individual fitting defendant's general description sneaked through his yard and eventually "ran" in the opposite direction away from the complainant's home. The police discovered fresh footmarks on the ground, and after examining the distance between the footmarks, a police officer concluded that defendant recently ran through the area. Because some evidence existed to support giving the instruction on flight, the trial court did not abuse its discretion. *Mills*, *supra*.

Defendant also argues the flight instruction was improper because the evidence demonstrated that he did not "flee" from the scene, but rather "walked" away. This argument is not properly preserved because he did not specifically object on this basis. Defendant only objected to the instruction on the ground that it presupposed his identity as the person who fled from the scene. Accordingly, our review of this issue is limited to whether defendant has shown a plain error affecting his substantial rights. *People v McPherson*, 263 Mich App 124, 138; ___

[1] We decline to address the merits of defendant's additional claims that the tracking dog evidence was improperly admitted and defense counsel was ineffective for failing to object to the admission of evidence. These cursory arguments are not properly preserved or presented for appellate review as defendant did not include the issues in his statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

NW2d ____ (2004), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). For the same reasons discussed *supra*, we find no plain error, thus defendant's claim must fail.

Defendant next contends the trial court's cautionary instruction failed to cure the prejudice caused by the prosecution's expert's vouching for the complainant's truthfulness. We disagree. Defendant correctly states that, in a child sexual abuse case, an expert may not vouch for the veracity of a victim. *People v Peterson*, 450 Mich 349, 352, 370; 537 NW2d 857, amended 450 Mich 1212 (1995). However, unresponsive testimony by a prosecution witness, although error, is not necessarily grounds for reversal. See *People v Barker*, 161 Mich App 296, 306; 409 NW2d 813 (1987), citing 2 Gillespie, Michigan Criminal Law & Procedure (2d ed), § 600, pp 203-204.

In the present case, the prosecution asked the expert to describe the complainant's psychological and emotional state and, instead, the expert volunteered that the complainant appeared truthful and accurate. While this was error, the impact of the expert's limited reference to the complainant's veracity was minimized when the expert conceded on cross-examination that the ten-year-old complainant could appear to be truthful but nonetheless be mistaken in her repeated identification, no matter how many times she identifies her presumed attacker after having made an initial mistake. Further, any prejudice was cured by the trial court's two curative instructions. The trial court immediately instructed[2] the jurors to disregard the expert's testimony as to the truthfulness of the victim and, later in its instructions before deliberations, instructed them not to consider any excluded evidence or stricken testimony in deciding the case. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant next asserts that the trial court abused its discretion by dismissing the only non-Caucasian juror for taking notes during the trial. The trial court provided paper and pens to the jury for the limited purpose of writing questions for the witnesses, which were to be read to the witnesses by the trial court. The trial court specifically instructed the jurors not to take notes during the trial. Juror number two disobeyed this directive and was dismissed from the jury by the trial court on the last day of trial. Defendant objected to the juror's dismissal on the basis that dismissal was a harsh remedy, and that cautioning the juror would have sufficed. Defendant's subsequent supplemental motion to set aside the verdict and for a new trial on the basis of the juror's dismissal was denied by the trial court. Defendant asserts the trial court abused it discretion by not cautioning rather than dismissing the juror, and contends that the juror's dismissal violated his Sixth Amendment right to an impartial jury drawn from a fair cross-section of the community.

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[2] As a curative measure after defendant's objection, the trial court advised the prosecution to ask the expert whether the complainant "coherently" described the assault. We decline to address defendant's cursory claim, first raised on appeal, that the terms "coherently" and "accurate" are synonymous with "truthful." An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment of an issue with little or no citation of supporting authority. MCR 7.212(C)(7); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

We disagree with defendant's assertions. We first note that in support of his assertion that the dismissal of the juror was in error, defendant abandons this issue by devoting only one short paragraph of his brief to legal analysis. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); MCR 7.212(C)(7). Even were we to address this issue, however, we would conclude that the trial court did not abuse its discretion in dismissing the juror or denying the motion for new trial.

Whether to allow jurors to take notes during trial is within the trial court's discretion. MCR 6.414; *People v Young*, 146 Mich App 337, 340; 379 NW2d 491 (1985). "[A] trial court's decision to remove a juror will be reversed only when there has been a clear abuse of discretion." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001); see MCL 768.18. In deciding whether to remove a juror, a trial court should weigh "a defendant's fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate." *Id*. at 562. An appellate court reviews a trial court's decision regarding a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

At the hearing on defendant's motion, the trial court expressed its concerns that the juror's inability to follow a simple instruction would negatively impact his future ability or willingness to follow the more complex instructions given before deliberations. The trial court did not abuse his discretion by removing the juror on these grounds. See MCR 2.516(B)(1); see also *Schutte v Celotex Corp*, 196 Mich App 135, 142; 492 NW2d 773 (1992) (presiding judge controls conduct of trial and reversal not warranted absent proof of prejudice). Moreover, while defendant has a fundamental interest in retaining the composition of the jury as originally chosen, this interest is balanced with the equally fundamental right to have a fair and impartial jury made up of persons able and willing to cooperate with the requirements and instructions of the trial court. *Tate*, *supra* at 562, citing *People v Dry Land Marina*, 175 Mich App 322, 325, 437 NW2d 391 (1989). A trial court may uphold this right by removing a juror unable or unwilling to cooperate. *Id*.

Defendant's reliance on *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 593 (1996), for the proposition that he has an absolute right to retain jurors on the jury once they have been selected is misguided. *Hubbard* recognizes a defendant's right to have an *opportunity* to select a jury drawn from a fair cross-section of the community; however, contrary to defendant's argument, *Hubbard* does not provide an unequivocal right to maintain a particular juror on the jury once that juror is empanelled. *Id*. at 472-473.

Next, defendant argues that prosecutorial misconduct deprived him of his right to a fair trial. We disagree. We review claims of prosecutorial misconduct de novo, *Abraham*, *supra* at 272, and examine the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *Id.* at 272-273. If a curative instruction could have alleviated any prejudicial effect, error warranting reversal will not be found. *People v Burton*, 401 Mich 415, 416-418; 258 NW2d 58 (1977).

Defendant first claims that the prosecution interjected reversible error by eliciting improper testimony, i.e. vouching for the complainant's veracity, from its expert witness. As we discussed, *supra*, not every instance of inappropriate subject matter mentioned before a jury,

warrants a new trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). "An unresponsive, volunteered answer to a proper question" does not normally require a new trial. *Haywood*, *supra* at 228; *Barker*, *supra* at 306. Because defendant does not claim nor present any evidence that the prosecutor knew the question would elicit the answer or "conspired with or encouraged the witness to give that testimony," *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990), the expert's volunteered testimony is insufficient to support a finding of misconduct.

In defendant's second claim of prosecutor misconduct, he contends the prosecution improperly, by referencing the sanctity of the jurors' homes and requesting a verdict that's "consistent with basic justice, justice for the [complainants'] family, just in terms of our homes and feeling secure therein," continued a civic duty theme that appealed to the fears and prejudices of the jurors. We disagree. Generally, prosecutors are afforded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors should not resort to civic duty arguments which appeal to the fears and prejudices of jurors. *Id.*

Reviewing the challenged remarks in context, we are not persuaded that the comments were so prejudicial to warrant reversal. The prosecution's remarks were fair comments about the evidence and the offenses for which defendant was charged. A prosecutor may properly argue all reasonable inferences arising from the evidence consistent with his theory of the case. *Bahoda*, *supra* at 282. Moreover, a prosecutor need not state inferences from the evidence in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Here, the prosecution theorized that defendant committed first-degree home invasion of a neighborhood dwelling for the specific purpose of sexually assaulting two of the sleeping occupants, one of whom was a ten-year-old female. The ten-year-old complainant testified she was scared and upset when she realized she was awoken by a stranger. During the sexual assault, she pleaded with defendant to stop because of the pain. The ten-year-old complainant attempted to scream but defendant covered her mouth. Thus, when viewed in context, the prosecutor's remarks were related to the home invasion and sexual assault to support the prosecutor's theory of the case. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Nonetheless, even if the comments were improper, any prejudice created by the prosecutor's comments was cured by the trial court's instructions to the jury that they must not let sympathy or prejudice influence their decision, the lawyers' statements and arguments are not evidence, and they may only consider the evidence when making their decision. *Abraham*, *supra* at 276.

In defendant's third claim of prosecutor misconduct, he next argues that reversal is required because the prosecutor engaged in misconduct by invoking the prestige of her office with her remarks that she did not personally believe defendant's family's testimony. We disagree that reversal is required on this basis. Prosecutorial vouching occurs when a prosecutor makes personal assurances of a witness' veracity or when a prosecutor claims to have personal information of which the jury is unaware, lending to the credibility of a witness. *Bahoda*, *supra* at 276. A prosecutor must argue the evidence and may not request that the jury find the defendant guilty based on the prosecutor's special knowledge or the prestige of his office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

Here, the prosecutor's remark regarding her personal belief was clearly improper, however, any prejudice by this isolated comment was cured by defendant's timely objection and request for a curative instruction. The trial court obliged and immediately instructed the jury to disregard any comments from the attorneys indicating their personal beliefs and reminded the jury that closing arguments only reflect the parties' theories of the case. The goal of a defense objection to prosecutorial remarks is a curative instruction. *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993). Because curative "instructions are presumed to cure most errors," *Abraham, supra*, 256 Mich App 279, defendant's claim of error fails.

Finally, defendant asserts that the cumulative effect of multiple instances of prosecutorial misconduct denied him a fair and impartial trial. Again, we disagree. While the cumulative effect of several minor instances of misconduct may warrant reversal although the individual errors would not, *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003), citing *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001), reversal is not warranted in this case because none of the contested statements were improper or "so seriously prejudicial" to deprive defendant of a fair trial. *McLaughlin, supra;* see *Watson, supra* at 594.

Affirmed.

/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra