0STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 18, 2004
v	No. 249210 Wayne Circuit Court
ARTURO JUAN WHITE, Defendant-Appellant.	LC No. 02-005241-01

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of first-degree premeditated murder, MCL 750.316(1)(a), three counts of first-degree felony murder, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the shooting deaths of three victims. He was sentenced to concurrent terms of life imprisonment for each of the six murder convictions, and thirty-eight months to five years' imprisonment for the felon-in-possession conviction, and to a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions, but remand for modification of the judgment of sentence.

The prosecutor introduced testimony at trial that had been previously given by a witness at a proceeding pursuant to an investigative subpoena. The witness had testified at the subpoena proceeding that he saw defendant, carrying an AK-47, enter the victims' house shortly before the killings. The witness had also testified that defendant came to his house later, still carrying a weapon, and threatened that he would kill the witness unless he drove defendant to the hospital. At trial, the witness admitted that he made the statements under oath, but denied that they were true.

Evidence was also introduced of the witness' oral and written statements to police, indicating that defendant told the witness he was going to rob someone, that the witness saw defendant enter the victims' house with an AK-47, and that defendant later told him that he had been shot, and that "some people tried to rob him, but he killed them." The witness testified at trial that he understood when he gave his statements that he had the right to remain silent and the right to have an attorney present. The witness acknowledged that he told the police that defendant threatened to kill him and his mother if he told the police what happened, and that

defendant told the witness that he would be watched to be sure he did not "snitch.[1]" The witness testified at trial that none of the things he told the police were true.

Girlfriends of one of the victims testified that the victims were planning to engage in a drug transaction with "friends from around the block to make some extra money."

According to the caller ID in the victims' home, the last call made from the home was to defendant's telephone number. No guns or drugs were found in the house. There was evidence that more than one type of weapon had been fired, a trail of blood leading away from two of the victims and bloodstains outside on the driveway, but no blood analysis or gunshot residue tests were conducted by the police.

Defendant also gave the police a statement, in which he admitted that he was in the house at the time of the killings, where he took cocaine and "cooked it up," but claimed that he had also been a victim of the crime by two unknown men. Defendant suffered from six gunshot wounds and said that he pretended to be dead until the assailants left, and then went to the hospital. Defendant told the police that he did not check on the other victims or call 911 because he did not want to be involved.

On appeal, defendant argues that the subpoenaed testimony of the witness should have been suppressed because it was coerced and obtained in violation of the witness' right to counsel, and also because the prosecutor failed to comply with statutory procedures governing investigative subpoenas, see MCL 767A.1 *et seq*. We disagree.

Questions of statutory interpretation are reviewed de novo, *In re Request for Investigative Subpoena*, 256 Mich App 39, 44; 662 NW2d 69 (2003), as are constitutional issues, *In re Investigative Subpoena re: Homicide of Lance C. Morton*, 258 Mich App 507, 509; 671 NW2d 570 (2003).

In response to defendant's challenges, the trial court concluded that, even assuming arguendo that defendant had standing to raise an issue involving the witness' rights, there was no evidence in this case of procedural defects. We agree and need not address the question of standing here, because defendant fails to identify a valid challenge to the witness' testimony. As the trial court stated, in light of the allegations in the petition for the investigative subpoena (i.e., that the perpetrators were still at large and the prosecutor feared witness tampering), there was good cause to waive the statutory seven-day notice requirement. MCL 767A.4(2).

Further, we find no basis in the record for defendant's claim that the witness' investigative subpoena testimony was coerced and involuntary, and obtained in violation of the witness' right to counsel. Indeed, the witness testified at trial that, at the subpoena proceeding, he was advised of his statutory rights, including the right to have an attorney present, and told that he could refuse to answer any question that he thought might incriminate him. The witness

[1] The witness was required to appear at defendant's preliminary examination, where he testified that his statements implicating defendant were all lies. The witness' home burned down soon afterwards.

testified at trial that a court reporter was present to transcribe his subpoenaed testimony. After the witness made his subpoenaed statement, while the reporter was still present, the witness was given an opportunity to change the statement and, he testified at trial, he chose not to do so. At trial, the witness admitted that he made the statement that was transcribed, but testified that the statement was not true. The trial court did not err in denying defendant's request to suppress the witness' investigative subpoena testimony.

Defendant concedes that out of court statements are admissible under MRE 801(d)(1)(A) when they are given under oath, in a trial, hearing or other proceeding, and are inconsistent with the witness' trial testimony. Defendant argues, however, that the trial court abused its discretion when it admitted the witness' investigative subpoena testimony as substantive evidence in this case. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). Preliminary issues of admissibility are reviewed de novo, but it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Id.*

MRE 801(d)(1) provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

Defendant does not dispute that the witness' investigative subpoena testimony was inconsistent with his trial testimony, or that it was given under oath subject to the penalty of perjury. Rather, he argues that being called to testify pursuant to an investigative subpoena is a police investigation, not a judicial proceeding and, therefore, such testimony is not given at "a trial, hearing, or other proceeding" for purposes of this rule. We disagree.

In *People v Chavies*, 234 Mich App 274, 281-284; 593 NW2d 655 (1999), this Court held that grand jury testimony is admissible at a defendant's trial under MRE 801(d)(1)(A). In the present case, while the witness' investigative subpoena testimony was given in an investigative context, the prosecutor's inquiry was more akin to a grand jury proceeding than an interview by law enforcement officers. As noted, the witness was advised that he could have an attorney, he testified under oath and his testimony was recorded.

Defendant cites *United States v Livingston*, 213 US App DC 18; 661 F2d 239, 240-243 (1981), in support of his argument that the witness' investigative subpoena testimony was not admissible under MRE 801(d)(1)(A). Although not binding on this Court, we find the analysis in the federal case useful. We conclude, however, that *Livingston* actually supports the admissibility of the testimony under this rule. In analyzing the federal counterpart to Michigan's rule, FRE 801(d)(1)(A), the court in *Livingston* held that a statement given to a postal inspector at the witness' residence, which the witness then signed swearing to its accuracy, did not "satisfy the rule's requirement of 'a trial, hearing, or other proceeding.'" *Livingston*, *supra* at 242. The Court found that the crucial distinction between the interview conducted by the inspector and the "proceeding" referenced by the court rule is whether an "official verbatim record" is made so that there is "overwhelming proof that the witness did in fact make the prior inconsistent statement." *Id.*

Here, the investigative subpoena procedure was "investigatory, ex parte, inquisitive, sworn, basically prosecutorial, held before an officer other than the arresting officer, recorded, and held in circumstances of some legal formality." See *Livingston*, *supra*, 661 F2d at 243. The statement was made under oath and was transcribed by a court reporter. Moreover, there was "overwhelming proof that the witness did in fact make the prior inconsistent statement," because the witness here testified at trial that he had, in fact, made the statement. Thus, the decision in *Livingston* supports our conclusion that the witness' testimony here qualifies for admission under MRE 801(d)(1)(A).

Defendant's reliance on *United States v Lloyd*, 10 F3d 1197, 1216 (CA 6, 1993), is also misplaced. The court in *Lloyd* merely stated that statements given to an investigating officer do not fall within the purview of the rule allowing the admission of statements given under oath at a trial, hearing, or other proceeding. The decision does not support defendant's position that the investigative subpoena testimony at issue here is not admissible. We therefore conclude that the witness' prior investigative subpoena testimony, which was inconsistent with his trial testimony, was admissible as substantive evidence at defendant's trial.

Finally, defendant argues that alleged procedural defects in obtaining an investigative subpoena may be considered in determining the admissibility of investigative subpoena testimony at a future trial under MRE 801(d)(1)(A). As noted previously, even assuming that defendant has standing to raise this issue, we find no evidence from the witness' description of the proceeding that there were any procedural defects.

Defendant also argues that he was denied a fair trial because of prosecutorial misconduct. We disagree. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are examined in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). However, where a defendant fails to object to alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *Noble*, *supra* at 660. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant first argues that the prosecutor improperly appealed to the jury's sympathy and emotions. Although defendant correctly observes that such appeals are improper, *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001), he has not demonstrated that reversal is warranted on this basis. The challenged remarks were brief, and the trial court sustained defense objections on this basis when counsel choose to raise them. Further, the court instructed the jury not to allow sympathy or prejudice to influence its decision, not to consider the statements of counsel, to base its decision only on properly admitted evidence, and to set aside all biases and prejudices. Under these circumstances, the prosecutor's remarks did not deprive defendant of a fair trial.

Regarding the prosecutor's elicitation of a witness' prior statements, we have already held that the witness' prior investigative subpoena testimony was properly admitted as substantive evidence. Additionally, the trial court made clear that the witness' prior statements to the police were admissible only for purposes of impeachment, and could not be considered as

substantive evidence. Jurors are presumed to follow the court's instructions. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Thus, the prosecutor's conduct in eliciting the foregoing testimony, acknowledged by plaintiff as clumsy, did not amount to misconduct that deprived defendant of a fair trial, or constitute plain error resulting in prejudice. "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003).

We also reject defendant's argument that reversal is required because the prosecutor injected unfounded and prejudicial speculation. As defendant argues, a prosecutor may not inject unfounded prejudicial innuendo into the proceedings. *People v Burrell*, 127 Mich App 721, 726; 339 NW2d 239 (1983). In this case, defendant challenges the prosecutor's attempts to question a police witness about how narcotics transactions usually take place, and whether there was any evidence that defendant had been using drugs with the victims before they were shot. The trial court also sustained defense objections to the prosecutor's questions concerning a perpetrator's motives for taking weapons from a crime scene. The prosecutor's questioning did not approach a level of prejudicial innuendo found to require reversal. Compare *People v Whalen*, 390 Mich 672, 683; 213 NW2d 116 (1973); *Burrell*, *supra*.

Defendant argues that hearsay statements were improperly admitted as substantive evidence. We disagree. The statements made during an investigative subpoena hearing were admissible under MRE 801(d)(1)(A), which provides for the admission of a prior inconsistent statement when the witness testifies at trial and is subject to cross-examination, and the prior statement "was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding." As noted previously, at trial, the witness admitted making the subpoenaed statement, but denied that it was true. The witness' other statements to the police were introduced as impeachment evidence, and the jury was properly instructed that they were to be considered only for impeachment, not for their truth, and were not to be considered in determining defendant's guilt or innocence. "A previous inconsistent statement of a witness, admissible to impeach credibility, is not regarded as an exception to the hearsay rule because it is not offered as substantive evidence to prove the truth of the statement, but only to prove that the witness in fact made the statement." *Merrow v Bofferding*, 458 Mich 617, 631; 581 NW2d 696 (1998); see also *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994).

We agree, however, that a statement made by one of the victims to his girlfriend, indicating that he intended to engage in a drug transaction with persons who lived around the corner, and a similar statement made to his other girlfriend, were not admissible as a present sense impression under MRE 803(1), because they were not made while the victim was perceiving an event or condition at the time he spoke. However, in light of defendant's statement to the police that he was at the house using drugs at the time of the crime, it is not more probable than not that the victim's statements were outcome determinative, and any error in their admission is harmless on this record. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Finally, we agree that defendant's six convictions of first-degree murder, arising from three deaths, is improper and violates defendant's double jeopardy rights. The appropriate remedy is to modify defendant's judgment of sentence to reflect only three convictions of first-degree murder, each supported by two theories, premeditated murder and felony murder. *People*

v Long, 246 Mich App 582, 588; 633 NW2d 843 (2001). Accordingly, we remand for this purpose.

Affirmed and remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot