STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 18, 2004
v	No. 249887 Wayne Circuit Court
NIMROD JOEL MAYFIELD, Defendant-Appellant.	LC No. 01-010559

Before: Borrello, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of attempted car jacking, MCL 750.529a and MCL 750.92, armed robbery, MCL 750.529, and resisting and obstructing a police officer, MCL 750.479 (as enacted prior to amendment by 2002 PA 270). He was sentenced to five to ten years' imprisonment for the attempted car jacking conviction and twelve to twenty years' imprisonment for the armed robbery conviction.[1] Defendant appeals as of right, arguing that he sustained his burden of proof and established legal insanity, that the prosecutor committed misconduct by making numerous improper comments during closing rebuttal argument, and that the trial court erred during sentencing where it failed to recognize that it could depart downward from the guidelines because of defendant's impaired mental state. We affirm the convictions, holding that defendant failed to preserve the argument that the jury's decision on the insanity defense was against the great weight of the evidence and that, even if preserved, the verdict was sound where the evidence did not preponderate heavily against the verdict, the evidence was conflicting, and the jury properly assessed expert credibility. Further, we hold that there was no prosecutorial misconduct as the evidence supported the prosecutor's comments and the comments were not otherwise improper; assuming misconduct and plain error, defendant did not show that it affected his substantial rights, led to the conviction of an otherwise innocent person, or compromised the integrity of the judicial proceedings. Finally, we hold that, assuming we

[1] The judgment of sentence reflects only the armed robbery and attempted carjacking convictions and sentences. However, a review of the trial and sentencing transcripts reveals that defendant was also convicted of resisting and obstructing an officer and sentenced to time served, i.e., fifty days in jail. Defendant was acquitted of felony-firearm, MCL 750.227b. We also note that defendant was sentenced as a third-habitual offender, MCL 769.11.

even have authority to review a sentence within the guidelines range, the trial court properly chose not to depart from the guidelines.

I. BASIC FACTS – TRIAL TESTIMONY

A. Events Giving Rise to Criminal Charges

Mr. Stacey Rasor testified that on the last Monday in August 2001, he was on his first day of work as a service technician for a heating and air conditioning company when he stopped at a public pay phone at an abandoned service station to call the shop and his wife sometime around noon. Rasor was sitting in the driver's seat of his service van while making the phone calls. The van was in "park" with the keys in the ignition and the engine running. While speaking with his wife, Rasor noticed a man walking on the sidewalk near his van. The individual, walking in a direction heading from the back of the van toward the front of the vehicle, first passed the van and then doubled back, heading straight toward the van. Rasor testified that the person was not wearing a shirt, shoes, or socks, and his pants were "kind of pulled down" exposing his underwear.[2] The next thing Rasor knew, the individual was beside him at the driver's side door with a gun pointed at Rasor's head. Rasor identified defendant in court as the person who pointed what appeared to be a gun at his right temple.

Defendant, while pointing the gun at Rasor's head, told Rasor to "get the f**k out of the van." The victim explained that defendant did not make the statement in an angry voice but sounded more anxious than anything. Defendant forced Rasor to leave the van through the passenger side door after Rasor had first attempted to exit the vehicle from the driver's side. After Rasor was outside the vehicle, he observed defendant still standing next to the driver's side door. Defendant then either entered or leaned into the van and asked Rasor where the keys of the still running vehicle were located. Rasor told defendant that the keys were in the ignition, and Rasor then proceeded to run from the scene to another local business where he called 911. While waiting for the police to arrive, Rasor stepped out of the business where he made the 911 call and observed his van at the same location where it had been parked at the time of the crime. Defendant was nowhere to be seen.

Police arrived shortly, and Rasor was taken in a police vehicle to a location about a block from the crime scene. Police asked Rasor to view a person that the police had sitting in the back of another police cruiser. Rasor identified the individual sitting in the back of the police car as the perpetrator--it was defendant. Rasor testified that during the commission of the crime, defendant did not make any strange gestures or strange noises, other than pointing the gun at Rasor. Defendant did not appear to be singing to himself, nor did he appear to be reacting to anything that Rasor could not see. Rasor stated that defendant did not appear to be afraid of Rasor.

[2] Evidence presented at trial reflected that it was very hot on the day of the crime.

On cross-examination, Rasor indicated that the van contained expensive tools and defendant could have, and "should have," driven away. But the van remained behind, and the only thing that was missing from the vehicle were the keys.

Police officer Douglas McDonald next took the stand. He testified that he and his partner, officer Eric Brown, responded to the 911 call and, upon reaching the vicinity of the crime, observed defendant, who fit the general description given by the complainant, running northbound down the sidewalk. The officers pulled up to defendant, and McDonald ordered him to stop. Defendant replied that he did not have to talk to the police, and he started walking southbound at a fast pace. The police followed in their cruiser, and defendant then began heading east to the rear of a building. Defendant again changed directions and started heading north and then west, cutting through a building area and alley. Defendant kind of made a square in terms of the directions he was running. McDonald testified that defendant was definitely running away from the cruiser.

Defendant then began running southbound again when the police were able to cut him off with their cruiser. Another police vehicle arrived at that time, and defendant stopped and raised his hands in the air after police drew their firearms. According to McDonald, defendant was not talking to himself, not saying anything bizarre such as claiming that he was receiving messages from God, nor was he staring or looking around as if something else was attracting his attention. As soon as McDonald holstered his weapon, defendant tried to flee again, but there were now many officers on the scene. Defendant was tackled as he struggled against the officers and attempted to resist arrest. It took six officers to physically subdue defendant. McDonald acknowledged that he could not recall if defendant said anything in particular while being subdued, as there were a number of citizen onlookers who were yelling at police.

Defendant was arrested, handcuffed, and searched. Defendant had thrown down a set of keys when McDonald had first approached him, and a second set of keys was found on defendant's person during the pat down search. The set of keys that were initially thrown on the ground belonged to Rasor. Defendant told McDonald that his name was Remecro Smith, but identification found on defendant reflected that he was Nimrod Mayfield. A gun was never found. Defendant did not exhibit any unusual or bizarre behavior as McDonald took him down to the 12th Precinct.

Officer Eric Brown testified in a manner that was generally consistent with the testimony of officer McDonald, although Brown did not recall a second set of keys being found on defendant's person, nor did he recall onlookers yelling at the police.

Officer Brian Bayles testified that he was working as a prisoner detention officer at the 12th Precinct following the crime. He was in charge of a cellblock and processed prisoners. He came into contact with defendant sometime after the arrest and did not observe any strange, unusual, or bizarre behavior on defendant's part. At a later point, Bayles went to defendant's cell to take him for processing. On Bayles' command to step out of the cell, which was made three times, defendant did not move and kept muttering "what." Bayles explained that the police had to take a mug shot of defendant and further process him. Defendant finally stepped out of the cell. As they started to walk away from the cell, defendant stated, "I am Mohammed," and soon thereafter he punched Bayles in the face. Bayles dropped to one knee, and defendant punched him two more times. Defendant was silent as he struck the officer. Bayles and

defendant then engaged in a physical struggle, which included pushing, shoving, tackling, and scratching, and Bayles then punched defendant in the face. Soon a number of police officers came to Bayles' assistance, and defendant was subdued. Bayles did not recall defendant making any statements while being subdued.

The prosecution rested, defendant moved for a directed verdict, the trial court partially granted the motion by reducing the carjacking charge to attempted car jacking, and defendant proceeded with his proofs.

Defendant's first witness was Anthony Houston, who is the principal of Redmond Middle School. On the date of the crime, defendant was employed by the school as an aide to one of the school's special education teachers. Defendant had worked for the school since November 1999. Houston recalled defendant coming to him and asking to talk about things on the day of the robbery, but before the crime was committed. Defendant's behavior and demeanor were not what Houston had been accustomed to seeing with respect to defendant. Defendant told Houston that he needed help, that "[t]hey're after me[,]" and that "I've been called to the ministry and I'm under attack and I don't know what to do." Defendant's eyes were somewhat red and they were "fleeting" back and forth a little. Houston further testified that defendant was somewhat sweaty, edgy, agitated, and appeared distressed. Defendant was dressed appropriately. Houston was concerned but had to attend to a staff meeting, although he intended to meet with defendant later. Subsequently, he looked for defendant but could not locate him. The time that Houston last saw defendant was near the same time the crime occurred. The school was not far from the crime scene. Houston indicated that defendant had not exhibited any prior unusual behavior during his employment.

B. Expert Testimony on Legal Insanity

Defendant next called to the stand Dr. Steven Miller, a licensed psychologist with a specialty in forensic psychology. The parties stipulated that Miller is an expert in forensic psychology.

Miller had reviewed the police report, met with defendant, and reviewed the report prepared by the state psychologist. Miller met once with defendant for about three and a half hours.[3] Miller testified that the county jail had been prescribing Zyprexia for defendant and that the drug is an anti-psychotic medication used to control such symptoms as delusions, hearing voices, or extreme anxiety. During the course of Miller's interview with defendant, Miller learned that defendant had been raised by his mother and stepfather; defendant's biological father had been killed when defendant was very young. Defendant had special education needs growing up relative to a speech problem and heavy stuttering. Defendant was also teased often about his name. He completed school through the tenth grade.

Further, although defendant was placed in the psychiatric unit of the jail and given anti-psychotic medication, he did not inform Miller of any psychiatric history during his youth or up

[3] On cross-examination, Miller acknowledged that the meeting only lasted two and a half hours.

to about the time of the crime. A day or so before the robbery, defendant began experiencing obsessive ideas about religion and God. Miller testified as follows about that time frame:

> On that Sunday when he had gone to church, he indicated to me that he had perceived that the preacher at church was talking directly to him, that he felt that he had a special purpose, that the preacher was communicating this special purpose to him, that he was a messenger of God and that, you know, he had this – he was going to become a preacher himself and he felt – he described it as more like a mood change, kind of manic mood change and he felt elated, kind of euphoric. And he said that he couldn't wait to talk to the principal [principal was a preacher] which he was going to be expected to meet up with on Monday when they started the school year and this was going to be the first school year day.

Defendant told Miller that he went to school and told the principal and a coworker about his desire to preach. There was an individual sitting behind defendant's coworker when defendant expressed his thoughts, and defendant did not recognize the person. Defendant immediately began believing that the unknown individual wanted to kill him. Defendant next observed a school counselor speaking on a phone, and defendant believed that the counselor was talking about him. Defendant also started feeling as if he was being tracked and became convinced that someone placed a bomb in his car. Miller characterized defendant's perceptions as delusional and paranoid. After leaving the school in his car,[4] defendant got out of the vehicle and approached a fruit and magazine vendor and supposedly told the vendor that someone was after defendant and trying to kill him. Defendant told Miller that he then asked the vendor to take him to a temple, but the vendor told him to drive himself, and the vendor gave defendant some directions to the temple. Defendant, afraid to further drive his car because of the perceived bomb, then boarded a bus. Defendant believed that the bus passengers were laughing at him about statements defendant was making, and defendant removed his shirt, pants, shoes, and socks and left them on the bus as he departed. Defendant believed that one of the bus passengers was the devil and possessed a bomb.

Defendant, now on the street, saw numerous people using phones, and he believed those people were tracking him. At about this time, defendant happened upon Rasor sitting in his van, talking on the pay phone. Defendant believed that Rasor was tracking him and had a bomb. Defendant took Rasor's keys because he did not want Rasor to track or follow him. Defendant next encountered the police, and defendant informed Miller that he did not know why he ran from the police other than he was frightened of the whole situation. Defendant later stated that he thought the police were also against him.

Miller testified that defendant's paranoid and delusional thoughts were characteristic of someone having a psychotic episode. Miller opined that, on the date of the crime, defendant "was mentally ill at the time and that he was legally insane." Providing more detail, Miller

[4] On cross-examination, Miller testified that defendant told him that he started the car by reaching inside through the window to turn over the ignition in fear that it might blow up. Defendant also stated that while driving, he thought other drivers were after him.

expressed his opinion that defendant was not capable of conforming his conduct to the requirements of the law, nor was he capable of appreciating the wrongfulness of his conduct.

On cross-examination, Miller conceded that he did not do any psychological testing of defendant,[5] that he met with defendant eleven months after the crime, and that defendant told him that he had smoked marijuana a few days before the crime and on the day of the crime. Miller testified that he was not definitively asserting that defendant was a paranoid schizophrenic at the time of the crime because schizophrenia has a requirement of six months of symptomology before it can be a firm diagnosis. Miller believed, however, that defendant was schizophrenic at the time he was examined by Miller, and the diagnosis contained in his report reflected "schizophrenia, paranoid type, alcohol and cannabis abuse, by history[.]" Defendant was about twenty-nine years old in August 2001, and Miller acknowledged that people who suffer from schizophrenia typically experience the onset of symptoms prior to age twenty-nine and that the disease involves a slow process. Miller further acknowledged that his diagnosis and opinion were dependent on defendant being truthful and that Miller did not conduct any other investigation. He also testified that marijuana induced blackouts or actions do not reflect legal insanity.

Defendant exercised his constitutional right not to testify, and the defense rested. The prosecution presented rebuttal evidence in the form of testimony by Dr. Edith R. Montgomery, who is the senior psychologist in evaluations at the Third Circuit Court Psychiatric Clinic. The parties stipulated that Montgomery is an expert in forensic psychology. Montgomery examined defendant approximately eight months after defendant's arrest, and she had defendant perform four psychological tests, which were the Minnesota Multiphasic Personality Inventory II (provides personality profile), the Wonderlic Intellectual Measure (measures intellectual functioning), the Human Figure Drawing (indicates level of functioning), and the Bender Gestalt (used to rule out mental retardation or brain impairment). Montgomery also reviewed police and investigation reports concerning the crime. Montgomery's report of her interview with defendant indicated that he was alert, clear-minded, spoke in a clear rational manner, and was oriented to time, place, and person. He did report having impaired memory relative to the crime. Defendant was not having hallucinations, nor was he delusional at the time of the interview; he did not appear mentally ill, and he is not mentally retarded.

With respect to defendant's educational functioning, Montgomery testified that it was in the low to average range. Montgomery stated that defendant had a history of alcohol and substance abuse (marijuana). She further testified that defendant could give her information about events that transpired on the morning of the crime and before it occurred, but he expressed a lack of recollection regarding the crime itself. Defendant recalled driving to work, going to a meeting, leaving at some point thereafter, and then his next memory was of being in his holding cell. Montgomery believed that it was possible that defendant's memory was poor or non-existent because of a marijuana blackout, although defendant denied ever having prior blackouts

[5] Subsequently, Miller testified that he may have given defendant one psychological test, but he could not say for certain, nor could he express the outcome of the test, as the test would be buried in storage without Miller having adequate time to locate and retrieve the document.

due to his substance abuse. Defendant told Montgomery that, on the day before the crime, he had some problems with paranoia and was tearful; however, he denied any history of psychiatric treatment. Regarding the testing of defendant, Montgomery testified:

> [A]ccording to the responses he made on the psychological measures, it suggested that he had a tendency to present himself in a very positive light. It also suggested that he was having some problems with depression, anxiety and anger and may be at risk for expressing his impulses inappropriately. In addition, it indicated that there was a tendency possibly to be manipulative. And then one other final thing that I noticed, there was some difficulty in relationships.[6]

Montgomery testified that what defendant described as occurring around the time of the crime did not fit the typical or common onset symptoms of paranoid schizophrenia and that signs of schizophrenia usually first appear between the ages of sixteen and twenty-four. Defendant did not fit the definition of a paranoid schizophrenic. Further, Montgomery testified that defendant's claims of hallucinations and delusions were not consistent with schizophrenia in that generally schizophrenics report hearing voices from someone unknown and not present and the voices make specific statements that are derogatory and suggest the killing of oneself.

Montgomery testified that it was unusual for persons with mental illness to have a very limited memory of events at one time and then have a very detailed recollection a few months later as here where defendant later provided Dr. Miller with much greater insight and details. Montgomery opined that defendant was not legally insane at the time the crime was committed and that there was no evidence that he did not understand his behavior, nor understand that what he was doing was wrong; defendant was criminally responsible and could conform his conduct to the requirements of law.

On cross-examination, Montgomery acknowledged that if defendant were on psychiatric medication when he was interviewed, it would typically control any hallucinations and delusions. Montgomery had spoken to defendant's mother, who described defendant as somewhat paranoid, and a review of defendant's claims and assertions made to others suggested that he may possibly have been experiencing paranoia or a transient psychotic state in August 2001, but her personal observation of defendant said otherwise.

The parties made their closing statements, instructions were read to the jury, and the jury deliberated and subsequently found defendant guilty of attempted carjacking, armed robbery, and resisting and obstructing a police officer.

[6] Montgomery reported that defendant "is at risk of making immature decisions where he doesn't think through the consequences of his behavior."

II. ANALYSIS

A. Legal Insanity

Defendant argues on appeal that he sustained his burden of proof and established that he was legally insane on the date the offenses were committed. He maintains that the jury verdict was wrong. In support of his position that he was legally insane, defendant relies on the unusual circumstances of the crime, e.g., requesting keys when they were clearly in the ignition of the running van, taking only the keys where he easily could have driven off with the vehicle or taken other valuables in the van, wearing no shirt or shoes, and running from police in the pattern of a square. Defendant further relies on his "Mohammed" pronouncement made during the altercation with officer Bayles, the expert testimony of Dr. Miller, evidence of events leading up to the crime, and alleged serious deficiencies in the testimony of Dr. Montgomery.

The defense of insanity is controlled by statute, MCL 768.21a. This statutory provision provides, in pertinent part:

> (1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he . . . committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1400a[7] of the Michigan Complied Laws, or as a result of being mentally retarded as defined in . . . the mental health code . . ., that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.
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> (3) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence. [See also *People v Carpenter,* 464 Mich 223, 230-231; 627 NW2d 276 (2001).]

Although defendant makes some reference to principles concerning sufficiency of the evidence, this case does not entail such an issue because the prosecutor was not required to prove legal sanity, rather defendant had to prove the affirmative defense of legal insanity by a preponderance of the evidence under MCL 768.21a. See *People v Lemmon,* 456 Mich 625, 633-636; 576 NW2d 129 (1998)(discussing and distinguishing sufficiency claims and those predicated on the argument that the verdict was against the great weight of the evidence).

[7] MCL 330.1400a has since been repealed, 1995 PA 290, and mental illness is now defined in MCL 330.1400(g). *People v Mette,* 243 Mich App 318, 325; 621 NW2d 713 (2000). MCL 330.1400(g) defines mental illness as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."

Defendant argues that he proved by a preponderance of the evidence that he was legally insane and that the verdict should have so reflected with an acquittal. Essentially, defendant is contending that the verdict was against the great weight of the evidence. An argument that a verdict is against the great weight of the evidence must be preserved with a motion for new trial under MCR 2.611(A)(1)(e). *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997); *People v Dukes*, 189 Mich App 262, 264; 471 NW2d 651 (1991). In the case at bar, defendant never filed a motion for new trial to challenge the jury's verdict, which would have given the trial court the opportunity to consider the matter, thus the insanity issue has not been properly preserved for appellate review. Moreover, assuming the lack of a preservation hurdle, the issue does not have substantive merit.

Relative to a claim that the verdict was against the great weight of the evidence, a new trial may be granted "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, *supra* at 627. In general, testimony that conflicts or questions with respect to the credibility of witnesses are not sufficient grounds for granting a new trial. *Id.* at 643.

Here, there was evidence presented that may have led the jury to reasonably conclude that Dr. Miller was not as credible as Dr. Montgomery on the grounds, amongst others, that Miller did not conduct psychological tests and relied solely on defendant's account of events, that defendant's marijuana use may have caused his behavior, and that defendant was feigning insanity and did not suffer a psychotic or schizophrenic episode. Further, the evidence may have led the jury to reasonably conclude that defendant's actions in choosing to approach Rasor and not others who crossed defendant's path, brandishing a firearm, ordering Rasor to leave the van, and later running from police showed an ability by defendant to appreciate the wrongfulness of his actions, a capacity to recognize reality, and the ability to conform his conduct to the requirements of the law. Ultimately, there was sound conflicting evidence regarding legal insanity, and the jury exercised its authority to weigh the evidence, assess credibility, and resolve the conflicting evidence. The evidence did not preponderate heavily against a finding of legal sanity, nor would it be a miscarriage of justice to allow the verdict to stand.

B. Prosecutorial Misconduct

Defendant argues that the prosecutor engaged in numerous instances of misconduct during rebuttal argument.

In general, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo, but any related factual findings by the trial court are reviewed for clear error. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context and in light of the defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

Defendant did not object below to any of the prosecutor's comments now challenged on appeal. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Schutte,* 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant first argues that the prosecutor denigrated defense counsel by asserting that counsel was asking the jury to disregard their oath to follow the law, by repeated use of the words "imprecise" and "imprecision," which suggested that defense counsel was deliberately misleading the jury, by charging that counsel was having a delusion, and by telling the jury that he had long-time personal knowledge of defense counsel.

A prosecutor is not permitted to denigrate defense counsel by suggesting that counsel is intentionally attempting to mislead the jury. *Watson, supra* at 592. The prosecutor's comments, however, must be considered in light of the defense counsel's comments. *Id.* at 592-593. Otherwise improper remarks may not require reversal where the prosecutor is merely responding to defense counsel's arguments. *Id.* at 593.

With respect to the comment about the jurors allegedly being asked by defense counsel not to follow the law, the prosecutor was merely pointing out that the defense of legal insanity, and more particularly the claim of paranoid schizophrenia, pertains to the date on which the crime was committed. The prosecutor stated:

> So if counsel's asking you to find his client not guilty, he's not asking you to follow the law, because the law refers to the date of the offense and even his witness didn't say that was the situation at the time of the offense.

The prosecutor's comments, which more accurately relates to the interpretation of the expert testimony and the law of insanity, was not improper.

In regard to the claim that defense counsel was being accused of misleading the jury by the prosecutor's use of the terms "imprecise" and "imprecision," the record reflects that the prosecutor used those terms to forcefully challenge defense counsel's interpretation of the evidence and counsel's areas of focus, not to accuse defense counsel of lying. The prosecutorial comments were not improper.

With respect to the claim that the prosecutor disparaged defense counsel by charging that counsel was having a delusion, the prosecutor was making the comment as it related to the asserted failure by defense counsel to show paranoid schizophrenia or any mental illness at the time of the offenses. A prosecutor may use "hard language" when it is supported by evidence and is not required to phrase arguments in the blandest of all terms. *People v Ullah,* 216 Mich App 669, 678; 550 NW2d 568 (1996). Emotional language may be used in closing argument and is an important tool in counsel's forensic arsenal. *Id.* at 679. There was no plain error.

In regard to defendant's claim that the prosecutor told the jury that he had long-time personal knowledge of defense counsel, it is true that a prosecutor may not use the prestige of his or her office to inject personal opinions during argument. *People v Bahoda,* 448 Mich 261, 286; 531 NW2d 659 (1995). Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot speak of the credibility, or lack of credibility, of others to the effect that he has some special knowledge concerning another's

truthfulness. See *id.* at 276. A review of the record indicates that the prosecutor's comment was in response to an argument made by defense counsel during his closing argument, that the comment was not derogatory by any means, and that the comment did not reflect upon defense counsel's truthfulness.

Defendant next argues that the prosecutor misled the jury by insinuating that evidence of legal insanity came only from Dr. Miller, where other evidence helped establish legal insanity. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence presented during trial. *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992). "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *Watson, supra* at 588 (citations omitted). Our review of the record shows that the prosecutor, after challenging the reliability of Miller's testimony, simply attacked the value placed on other evidence by defendant to show legal insanity. The prosecutor did not tell the jury that they could not legally consider or rely on non-expert testimony to show legal insanity, but rather he argued that they should not consider the evidence as proof of insanity because the evidence did not necessarily reflect the workings of a legally insane individual. The prosecutor was only presenting proper argument based on the evidence and reasonable inferences arising from the evidence.

Finally, defendant contends that the prosecutor gave unsworn testimony not predicated upon evidence when he told the jury that certain conduct during the commission of the crime was not consistent with or indicative of a paranoid state of mind. There was no misconduct as the prosecutor's comments reflected reasonable inferences arising from evidence actually presented and because the comments were made in response to defense counsel's closing argument that defendant's actions throughout the crime were consistent with and indicative of a paranoid state of mind.

In conclusion, there was no plain error. Moreover, assuming misconduct and plain error, it did not affect defendant's substantial rights where defendant did not show prejudice, and reversal is also unwarranted where defendant was not actually innocent, nor the integrity of the judicial proceedings compromised. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

C. Sentencing

Lastly, defendant argues that he is entitled to resentencing where the trial court ignored significant evidence of an impaired mental state and failed to recognize that it had the discretion to depart downward from the guidelines for such a reason. Defendant was sentenced within the guidelines range on each of the convictions.

The crimes at issue took place after January 1, 1999; therefore, the legislative sentencing guidelines are applicable. MCL 769.34(2); *People v Babcock*, 469 Mich 247, 255 n 6; 666 NW2d 231 (2003). It would appear that we lack any authority to review this issue where MCL 769.34(10) provides that "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." The sentence here was within the guidelines, and there are no claims of scoring error or inaccurate sentencing information. Rather, defendant is arguing

that the trial court failed to recognize its ability to make a downward departure and should have departed downward on the basis of mental impairment. We leave for another day the question of whether this Court can review a sentence within the guidelines range where the trial court has mistakenly concluded that it did not have authority to depart under the circumstances of a particular case. Assuming that review is permitted, we find that the trial court properly chose not to depart from the guidelines.

A sentencing court is generally mandated to sentence a defendant within the guidelines range, except it may depart from the guidelines if the court has a substantial and compelling reason for the departure. MCL 769.34(2)&(3); *Babcock, supra* at 256. The factors taken into consideration by the court to support a departure must be objective and verifiable. *Id.* at 257. Further, the reasons justifying a departure should keenly or irresistibly grab one's attention and should be recognized as being of considerable worth in deciding the length of a sentence. *Id.* Substantial and compelling reasons to depart from the guidelines exist only in exceptional cases. *Id.* The sentencing court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the characteristic has been given inadequate or disproportionate weight. MCL 769.34(3)(b); *Babcock, supra* at 258 n 12.[8]

We first note our belief that defendant's alleged mental impairment or illness is not objective and verifiable but rather the subject of psychiatric interpretation that is largely subjective. The trial court indicated that it would not even consider departure unless defendant could cite case law allowing a departure predicated on mental illness, which defendant failed to present. Considering that defendant's mental illness or state is not objective and verifiable, the trial court's ruling was not in error despite the court's focus on mental illness as it related to substantial and compelling reasons for departure and not on whether it was objective and verifiable. Further, even if objective and verifiable, the trial court's statements against departure, which observed that the jury did not find defendant legally insane, that lifelong marijuana use played a role, and that persons with mental illness do not generally commit crimes, would support the court's ruling.

[8] The existence or nonexistence of a particular factor used to justify a guidelines departure is reviewed for clear error. *Babcock, supra* at 264-265. Whether a factor is objective and verifiable is reviewed de novo. *Id.* at 265. Whether a reason for departure is substantial and compelling is reviewed for an abuse of discretion. *Id.* The abuse of discretion standard, in the context of a departure from the guidelines, requires recognition that the trial court is in a better position to make a determination whether substantial and compelling factors exist to support departure and gives the court's determination appropriate deference. *Id.* at 270. "The deference that is due is an acknowledgment of the trial court's extensive knowledge of the facts and that court's direct familiarity with the circumstances of the offender." *Id.*

III. CONCLUSION

Defendant failed to preserve the argument that the jury's decision on the insanity defense was against the great weight of the evidence and, assuming preservation, the verdict was sound where the evidence did not preponderate heavily against the verdict, the evidence was conflicting, and the jury properly assessed expert credibility. Further, there was no prosecutorial misconduct as the evidence supported the prosecutor's comments and the comments were not otherwise improper; assuming misconduct and plain error, defendant did not show that it affected his substantial rights, led to the conviction of an otherwise innocent person, or compromised the integrity of the judicial proceedings. Finally, we hold that, assuming we even have authority to review a sentence within the guidelines range, the trial court properly chose not to depart from the guidelines.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff