STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED May 30, 2006
v	No. 258353 Wayne Circuit Court
KELLY NOBLES, Defendant-Appellant.	LC No. 01-004225-01

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm during the commission of a felony, MCL 750.227b, five counts of assault with intent to commit murder, MCL 750.83, intentionally discharging a firearm toward an occupied structure, MCL 750.234b, and carrying a concealed weapon (CCW), MCL 750.227. He was sentenced to concurrent terms of life imprisonment without parole for the murder conviction, 13 to 30 years' imprisonment for each of the assault convictions, one to four years' imprisonment for the discharging a firearm at a building conviction, and two to five years' imprisonment for the CCW conviction, together with a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the December 31, 2000, shooting at the Unique Coney Island on Gratiot near Outer Drive in Detroit. Kolby Bohannon, his brother Rockmound Bohannon, Roderick Jeter, and defendant drove to the Coney Island in search of some men who had fought with Kolby Bohannon earlier that day. As Kolby Bohannon entered the restaurant to speak with the men, Randall Hall and Ladarius Edwards, he was struck and killed by gunfire when one of the men who accompanied him to the Coney Island fired repeatedly into the restaurant. The prosecution presented testimony from at least two witnesses identifying defendant as the shooter, while defendant maintained that the decedent's brother was responsible for the shooting.

I

Defendant first argues that the trial court erred by permitting the prosecutor to impeach his testimony with an out-of-court statement to the police by Rod Jeter, which defendant maintains the prosecutor instead utilized as substantive evidence of his guilt. This Court reviews for an abuse of discretion a trial court's ultimate decision whether to admit evidence, but

considers de novo any preliminary questions of law involved in the decision to admit the evidence. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

During lengthy cross-examination by the prosecutor, defendant denied earlier testimony by Candace Whaley, Jeter's girlfriend until he was shot and killed in August 2001, that Jeter and Whaley had lived with defendant between January 2001 and March 2001, that defendant had threatened Jeter and Whaley daily, and that defendant had referred to Jeter as a snitch. Defendant repeatedly asserted that Whaley had lied during her testimony because she did not like him. Defendant also denied that a threatening, tape-recorded answering machine message he had left with Whaley had anything to do with Jeter, who according to defendant was killed before defendant left the message, or that he knew about the circumstances surrounding Jeter's death. Later, as the prosecutor summarized the discrepancies between Whaley's and defendant's testimony, the following exchange occurred:

> *Prosecutor*: And so everything you did to Rod Jeter about telling him what to say and what happened at the Coney Island, calling him a snitch once he told Homicide you were the one who shot the gun?
>
> *Defendant*: Roderick Jeter to my knowledge never told Homicide that I shot no gun. Miss Whaley—
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> *Prosecutor*: Didn't you get your discovery packet from your attorney?
>
> *Defendant*: Miss Whaley never, ever lived with me. She never talked to me.
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> *Prosecutor*: Now, you just—sir, you just told us that you were not aware of Mr. Jeter's statement as to—
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> * * *
>
> . . . Well, Mr. Nobles, you just told us that you have no idea . . . that Rod Jeter identified you as the person who shot at the Coney Island. Isn't that what you just told us?
>
> *Defendant*: Yes.
>
> *Prosecutor*: Let's see if this refreshes your memory.
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> *Defense counsel*: Objection, your Honor, to the use of the statement in the form the People intend to use it.
>
> *Prosecutor*: Offered for impeachment, your Honor.
>
> *The Court*: All right. Ladies and gentlemen, the prosecutor wants to use the statement of a witness who's not available to testify. I already told you that Rod Jeter is not, but so this statement is not being offered for the truth of the matter asserted and you cannot use it for that purpose. Do you

understand? It's not used to prove the elements of any offense. It's used to impeach the testimony of the Defendant only. . . .

* * *

Prosecutor: I'll just read from it, Judge.

Sir, do you remember getting this as part of your discovery?

Defendant: Never.

* * *

Prosecutor: Okay. Do you remember reading Rod Jeter's statement?

Defendant: From my knowledge Rod Jeter never made a statement. This happened on January 1st. He died eight months later. He has never came [sic] in and testified against me.

Prosecutor: But you called him a snitch because?

Defendant: I never called him a snitch.

* * *

Miss Whaley told you that.

Prosecutor: And do you remember reading the statement of Roderick Jeter dated March the 5th, 2001 to Lieutenant Ray Nolan of the Detroit Police Department Homicide Section, Question: . . .

Defense counsel: Your Honor, I've got to object.

Prosecutor: I'll paraphrase.

The Court: Get to the point.

Prosecutor: Thank you, Judge.

Kolby was—Kolby was driving my car. I don't have a license. We went over after Kolby sees the guys that hit him in the head the night before. Kolby pulled into the street and jumped out and ran into the Coney Island doorway. . . . Then I started hearing shots. [Defendant] was shooting. I don't know if anyone else was shooting. He was shooting at the Coney Island. Do you remember reading that in Rod Jeter's statement?

Defendant: Never, I never had a statement from Rod Jeter.

* * *

. . . I'm saying Roderick Jeter never had a statement. He never testified against me.

* * *

. . . I don't know where you got that statement from or where you probably made it up from, but I have never seen it.

* * *

I don't know. I don't know what Roderick Jeter said to Homicide.

* * *

To my knowledge there's never been a statement from him.

Prosecutor: Okay. Because that's why you didn't want Rod Jeter to go to court and that's why you sent them out of town because of this statement on March the 5th, 2001, isn't that correct?

Defendant: No, I never sent Roderick Jeter out of down [sic]. Roderick Jeter went out of town on his own to buy drugs.

Prosecutor: So when Roderick Jeter says I started hearing shots, [defendant] was shooting, he was shooting at the Coney Island, this is your best friend who says you did the shooting, not Rocky Bohannon?

Defendant: Rocky is not my best friend.

After defendant finished his testimony, the trial court summarized the basis for its decision to admit the prosecutor's references to Jeter's statement as follows:

It is [hearsay] if it's offered for the truth of the matter, but if it's offered for another purpose it's a non hearsay purpose. [Defendant]'s saying I don't have knowledge that Jeter was going to implicate me and Jeter never said anything to implicate me. That's what [defendant] said.

Well, having said that the prosecutor doesn't have to take valid competent evidence and pretend it doesn't exist. The prosecutor can impeach the Defendant with that to show that the Defendant actually did know and that Rod Jeter actually would have if he's testifying in conformity with the statement, have made those statements; therefore, impeaching [defendant]. There's nothing improper.

It's not the classic impeachment. It's not straightforward impeachment. It's a little more subtle, but the statement—I told the jury right then and there, you're not to consider it for the truth of the matter and it's not offered for that reason. It's only offered to impeach the credibility of the Defendant and that's why it's offered.

* * *

> . . . Defendant got up there and said Rod Jeter wasn't going to say anything about me. I didn't know Rod Jeter was going to say anything. Rod Jeter never made a statement against me so there's no reason on earth for me to do this to Rod Jeter and, yeah, I made the phone call, yeah, that's my voice, but that had to do with something totally unrelated. It had to do with some prior threat, somewhere else which the jury is entitled to believe if they find that to be true, but on the other hand, the prosecutor is certainly entitled to say that [defendant's] statement on that point is not credible and here's why.
>
> That's a far cry from introducing the statement as substantive evidence for the truth of the matter and I've blocked the prosecutor from just reading the statement in because I told her to get to the point of the impeachment, period, at least I tried. . . .

The trial court further explained that the prosecutor's references to Jeter's statement were relevant to defendant's motive in allegedly committing the charged crimes of "obstruction of justice and attempt to suborn perjury."[1]

When defendant elected to testify, he repeatedly denied that he "called Rod Jeter a snitch," accused Whaley of making up her testimony to the contrary because she didn't like defendant, and averred that he left the "pine boxes" recorded message for Whaley after Jeter had died. Based on the evidence, the prosecutor had the right to impeach defendant's testimony. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995) (explaining that generally, when the defendant testifies on his own behalf, "his credibility may be impeached and his testimony assailed like that of any other witness"); *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002) (citing MRE 607 in support of the proposition that any party may attack the credibility of a witness); *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988) (holding that once a defendant testifies to a subject, thus opening the door, cross-examination by the prosecution is proper). The prosecutor's brief references to the content of Jeter's statement to the police, specifically that Jeter had identified defendant as the Coney Island shooter, tended to impeach and undermine defendant's insistence that he had never called Jeter a snitch and had no reason to have threatened Jeter, as Whaley testified defendant had done. Additionally, before the prosecutor referred to the content of Jeter's statement, the trial court instructed the jury to consider Jeter's statements for impeachment purposes only, and not as substantive evidence of defendant's guilt. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (jurors are presumed to follow their instructions). Consequently, the trial court did not abuse its discretion by allowing the prosecutor to question defendant regarding the content of Jeter's statement to the police for impeachment purposes. *Matuszak*, *supra* at 47.[2]

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[1] Defendant was charged with obstruction of justice, MCL 750.505, and inciting perjury, MCL 750.425, in a separate case, which was consolidated with this case for trial. The jury found defendant not guilty of the obstruction of justice and perjury charges.

[2] Moreover, the prosecutor's references to the prior statement to the police by Jeter, a deceased

(continued…)

II

Defendant next raises numerous claims of alleged misconduct by the prosecutor during her cross-examination of defendant and during her closing and rebuttal arguments. Many of these alleged instances were not preserved for appellate review by a timely objection at trial. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

We review properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

We consider the prosecutor's conduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Appellate review of allegedly improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We review unpreserved claims of prosecutorial misconduct only for plain error affecting the defendant's substantial rights. *Schutte*, *supra* at 720. No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *Id.* at 721.

After reviewing the trial record, we conclude that defendant has failed to substantiate that the prosecutor engaged in any improper cross-examination or argument, let alone that any misconduct prejudiced his right to a fair trial or amounted to plain error that affected his substantial rights. With respect to defendant's various arguments, we hold that: (1) the prosecutor did not insinuate during questioning of Officer Dale Collins that defendant had killed Jeter, but merely sought to establish Jeter's death by shooting as the reason he would not appear at trial, (2) the prosecutor did not improperly suggest that the jury consider the content of Jeter's out-of-court statement as substantive evidence of defendant's guilt when making the "speaking from the grave" comments, but properly argued that defendant's references to Jeter as a snitch and repeated threats to Jeter and Whaley, "indirectly" showed defendant's guilt; and (3) the prosecutor did not improperly comment on or question defendant regarding his constitutional right to remain silent when he injected the topic into the proceedings by his testimony.

(…continued)

and unavailable witness, solely for impeachment purposes do not violate the Confrontation Clause. *People v McPherson*, 263 Mich App 124, 132-134; 687 NW2d 370 (2004).

Additionally, with regard to defendant's complaint that the prosecution badgered him during cross-examination, we conclude that: (1)the prosecutor properly inquired about the details of several of defendant's many prior arrests, including whether he had given the police aliases and incorrect dates of birth when arrested because of his representations that he had never been in trouble before or lied about his identity, MRE 608(b); *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997); *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997); (2) the prosecutor reasonably inquired whether defendant previously had lied to the police and was lying to the jury at trial because of defendant's conflicting characterization of his criminal history, *People v Strunk*, 184 Mich App 310, 324; 457 NW2d 149 (1990); (3) the prosecutor's questions did not suggest that defendant was Jeter's killer, but merely inquired whether he recalled specific, prior testimony from the police that Jeter had been fatally shot; and (4) the prosecutor's challenge to defendant's explanation for the threatening voice message was not improper based on the manner in which defendant testified. Lastly, the prosecutor accurately summarized Rocky Bohannon's testimony regarding defendant's leading role in the Coney Island shooting, and then properly argued on the basis of this testimony and the reasonable inferences arising therefrom that defendant had acted as "the enforcer." *Schutte*, *supra* at 721; see also *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (explaining that a prosecutor need not limit argument to the "blandest of all possible terms").

III

Defendant next argues that the trial court erred by denying his motion for a new trial on the basis that the prosecutor's failure to use due diligence to locate endorsed witness Ladarius Edwards prejudiced his right to a fair trial. When reviewing a trial court's decision whether to grant a new trial, this Court reviews for clear error the court's factual findings, and for an abuse of discretion the court's ultimate ruling on the motion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000).

Regardless of whether *People v Cook*, 266 Mich App 290, 294-296; 702 NW2d 613 (2005), or *People v Pearson*, 404 Mich 698, 722-726; 273 NW2d 856 (1979), controls this issue, the trial court properly denied defendant's motion for a new trial. The record reflects that the trial court carefully considered the content of Edwards's statement to the police, which contained information primarily cumulative to other testimony at trial, before concluding that in light of the fact that Edwards did not view the commencement of gunfire toward the Coney Island, "*[t]he failure to produce Edwards was not prejudicial to the defendant to the extent a new trial is warranted*." (Emphasis added). Given the trial court's consideration of Edwards's out-of-court statements against the trial record, we cannot conclude that the trial court clearly erred in making its factual findings or that the court abused its discretion in denying defendant's motion for a new trial. *Crear*, *supra*. Furthermore, no further evidentiary hearing to determine potential prejudice is required because the trial court provided the adverse inference instruction to the jury regarding the failure to produce Edwards, and the trial court factually concluded that defendant had not been prejudiced by the prosecution's failure to call Edwards, a cumulative witness, at trial. *Cook*, *supra* at 294-296; see also *Pearson*, *supra* at 722-726.

IV

Defendant lastly asserts that the trial court erred by consolidating for trial the murder, assault, and firearm charges with the obstruction of justice and subornation of perjury charges

against him arising from a separate, amended information. We review for an abuse of discretion a trial court's decision whether to consolidate or sever charges for trial. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

At the time of defendant's trial, MCR 6.120(A) contemplated that "[t]wo or more informations or indictments against a single defendant may be consolidated for a single trial." But MCR 6.120(B) required that on a defendant's motion, the court had to "sever unrelated offenses for separate trials." The rule defined "related" offenses as those based on "the same conduct," MCR 6.120(B)(1), or "a series of connected acts constituting a part of a single scheme or plan," MCR 6.120(B)(2). For discretionary joinder or severance decisions, the rule also provided the following guidance:

> On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. . . . [MCR 6.120(C).]

The trial court found that the murder, assault, and firearm charges in the initial information related to the obstruction of justice and subornation of perjury charges in the second information,[3] and defendant fails to specifically argue on appeal that the murder, assault, and firearm charges qualify as unrelated to the obstruction of justice and subornation of perjury charges. We agree that all of the charges relate because, although the obstruction and perjury charges allegedly extended from "1/1/01-8/8/01" (Amended felony information, 10/22/01), the murder, assault, and firearm charges and the obstruction and perjury charges were "based on" "a series of connected acts or acts constituting a part of a single scheme or plan." MCR 6.120(B)(2). The murder, assault, and firearm charges arose from the Coney Island shooting, the obstruction of justice count alleged that defendant had threatened Jeter, a witness to the Coney Island shooting, and the subornation of perjury count asserted that defendant urged Jeter "to identify someone other than Kelly Nobles as the person who shot and killed Kolby Bohannon" at the Coney Island on January 1, 2001.

Regarding the fairness elements in MCR 6.120(C), the trial court opined as follows:

> The prosecution's theory is that [all] th[e offenses charged] still stem out of a single matter which is the homicide.
>
> * * *

[3] The trial court explained that although the specific offenses in each information differed, "[t]he prosecution's theory is that they still stem out of a single matter which is the homicide," and that the obstruction and perjury charges "related to the principle [sic] action of the underlying case."

> Homicide in terms of the obstruction of justice. That might be admissible under [MRE] 404 or it might be admissible just to show consciousness of guilt and you might have that evidence in without having to defend against it and they get two bites of the apple for the same thing and I think they all ought to be joined under fairness to both . . . Defendant and the state and insofar as that, it's appropriate to probate [sic] the fairness to both the parties and a fair determination of . . . Defendant's guilt or innocence it's not fair that they get two bites at the apple that they produce that evidence at trial and then if he's acquitted on the first one they can say, okay, now we can try him on the second charge after that evidence has already been presented to a single finder of fact.
>
> . . . [A]nd the relevant factors the Court has to consider are the timeliness of the motion and it is timely; the drain on the party's resources.
>
> He'd have to defend against two separate and distinct counts if that were admitted and that certainly is relevant. It certainly stems from the first—based on the prosecution's theory on the first case in her brief. I don't think it would confuse or prejudice either case, would confuse or prejudice the jury from the number of charges or their complexity or the nature of the evidence.
>
> There's no harassment going on there. It is convenient that it all be done in one setting and I don't see how it effects [sic] . . . your readiness for trial . . . .

Because the trial court correctly found the murder, assault, and firearm offenses related to the obstruction of justice and subornation of perjury charges, and because the trial court expressly considered the factors prescribed by MCR 6.120(C) in its determination whether the consolidation promoted fairness, we conclude that the court acted within its discretion when it determined that joinder of all the charges promoted fairness to both parties. *Duranseau*, *supra*.[4]

Affirmed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

[4] Defendant erroneously insists that the consolidation unfairly prejudiced him because it permitted the prosecutor to introduce in the primary murder case evidence of Jeter's otherwise inadmissible statement to the police and evidence that defendant had threatened Jeter after the shooting. Evidence of a defendant's threats against witnesses, like those Whaley testified defendant made to her and Jeter after the shooting, including the tape-recorded threat by defendant to get wooden boxes for Whaley and Jeter, are "generally admissible" because they constitute "conduct that can demonstrate consciousness of guilt." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996); see also *Duranseau*, *supra* at 208 (upholding the trial court's refusal to sever charges "because the evidence pertaining to the other charges, which defendant believes caused him prejudice, would have been admissible in each of the trials as evidence of intent").