STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMON LASHONE MASON,

Defendant-Appellant.

UNPUBLISHED
April 8, 2008

No. 274620
Saginaw Circuit Court
LC No. 06-027007-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b, one count of felon in possession of a firearm, MCL 750.224f, one count of carrying a concealed weapon, MCL 750.227, and one count of intentional discharge of a firearm from a motor vehicle, MCL 750.234a. Defendant was sentenced as a habitual second offender, MCL 769.11, to concurrent mandatory five-year sentences for the felony-firearm convictions to be served prior to concurrent prison terms of 47 to 90 months for felon in possession of a firearm, 47 to 90 months for carrying a concealed weapon, and 40 to 72 months for intentionally discharging a firearm. We affirm.

I. Prosecutorial Misconduct

Defendant asserts that prosecutorial misconduct prevented him from receiving a fair trial. Specifically, defendant contends that a reference during the prosecutor's opening statement identifying defendant as the shooter in the drive by shooting constituted misconduct based on the failure to produce testimony at trial consistent with this statement. Defendant failed to object to the prosecutor's opening statement. When the misconduct alleged is not properly objected to, this Court reviews a claim of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1990). Error requiring reversal will not be found if a "curative instruction would have alleviated any prejudicial effect." *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003).

It is a recognized precept that prosecutors have "great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Opening statements comprise the proper time for a prosecutor to state the facts that counsel believes will be proven at trial. MCR 6.414(C); *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976).

Contrary to defendant's contention the prosecutor elicited testimony at trial from Officer Trace Vargas that during her interview of the victim, Earl Morris, at the crime scene that he identified defendant as the shooter. Even though the victim later denied having made this identification, the prosecutor was within his right to set forth his theory of the case based on evidence that was produced at trial. In addition, the trial court instructed the jury that statements and arguments by the attorneys did not constitute evidence. Because jurors are presumed to follow their instructions, this directive from the trial court would have eliminated any potential for prejudice to defendant. *People v Dennis*, 464 Mich 567, 581-582; 628 NW2d 502 (2001).

Next, defendant argues that the prosecutor committed misconduct by leading a witness and introducing a line of questioning that was irrelevant. The test for prosecutorial misconduct is whether a defendant was denied an impartial and fair trial. *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999) (citation omitted). "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 to determine whether the defendant was denied a fair and impartial trial." *Id.* at 435 (citation omitted).

During trial, the prosecutor called Morris to testify regarding his observation of the events that occurred. Morris became uncooperative during questioning. Consequently, the prosecutor began asking leading questions, to which defendant's attorney objected. The prosecutor asked the court for "a little latitude" and requested that he be allowed to treat Morris as a hostile witness. The trial court agreed and allowed the questioning to proceed.

Initially, we note that defendant fails to cite any legal authority to support his claim that the prosecutor's use of leading questions constituted misconduct necessitating the reversal of defendant's convictions. "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 Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant's failure to cite any supporting legal authority constitutes an abandonment of this issue. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (citation omitted).

In addition, the record does not support defendant's contention that the prosecutor acted improperly. Pursuant to MRE 607, "[t]he credibility of a witness may be attacked by either party, including the party calling the witness." The prosecutor was attempting to get Morris to acknowledge that he had spoken with Officer Vargas at the scene and had identified defendant as the shooter. Morris became hostile and denied being familiar with any of the officers or that he provided Officer Vargas with information pertaining to defendant. It therefore became necessary for the prosecutor to lead Morris in order to elicit and highlight his prior inconsistent statements. Ultimately, Morris acknowledged that he had received threats regarding his testimony. Reading the record in context, we believe the prosecutor acted properly in trying to demonstrate to the jury the factors that were inhibiting Morris's willingness to testify about what he had told Officer Vargas at the crime scene. Further, reversal is not required merely because leading questions were asked during trial. To warrant reversal, "it is necessary to show some prejudice or pattern of eliciting inadmissible testimony." *People v White*, 53 Mich App 51, 58; 218 NW2d 403 (1974). See also *People v Hooper*, 50 Mich App 186, 196; 212 NW2d 786 (1973). Because defendant has not demonstrated prejudice, reversal is not required.

Defendant also contends that the prosecutor acted improperly by vouching for Morris's credibility. "A prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005), citing *Bahoda*, *supra* at 276. However, contrary to defendant's assertion, the prosecutor never vouched for Morris or claimed to have any special knowledge regarding his credibility. Rather, the prosecutor merely used prior inconsistent statements given by Morris in an attempt to secure this witness's admission that he was nervous because of threats he had received in order to provide the jury with a comprehensive background for their evaluation of this testimony. Viewing the challenged statements and questions in their complete context, we find that prosecutorial misconduct did not occur.

II. Admission of Testimony

Defendant argues the trial court abused its discretion by admitting the testimony of Officer Vargas regarding Morris's identification of him as the shooter pursuant to MRE 803(2). We review preserved evidentiary issues for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007). On appeal, defendant also contends that the admission of this testimony was improper under MRE 801(d)(1)(B) as a prior consistent statement.

Defendant's assertion in his brief that the testimony was inadmissible as hearsay because it did not meet the requirements of MRE 801(d)(1)(B) as a prior consistent statement is both nonsensical and misplaced. Admission of the challenged testimony was not pursued under this rule. Defendant implies on appeal that admission of the testimony violated his rights under the Confrontation Clause[1] based on the testimonial nature of the statement. *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, the Confrontation Clause guarantee is typically implicated when a witness is unavailable for cross-examination at trial. *Crawford*, *supra* at 59; *People v Katt*, 468 Mich 272, 292 n 12; 662 NW2d 12 (2003). Defendant conveniently ignores the availability of Morris for cross-examination and that he was specifically questioned by defense counsel regarding his statement to police. To the extent defendant implies that the failure of Morris to recall or acknowledge his conversation with Vargas, frustrated or impeded his right to confront this witness, we note the Court's prior opinion indicating that the Confrontation Clause does not

> guarantee every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion or evasions. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony. [*United States v Owens*, 484 US

[1] US Const, Am VI.

554, 558; 108 S Ct 838; 98 L Ed 2d 951 (1988), quoting *Delaware v Fensterer*, 474 US 15, 21-22; 106 S Ct 292; 88 L Ed 2d 15 (1985).]

We note that the trial court stated at the time of defendant's objection to the questioning that it would admit the testimony to be elicited under MRE 803(1) as a present sense impression. However, at sentencing the trial court indicated that it admitted the testimony pursuant to MRE 803(2) as an excited utterance and, in his appellate brief, defendant challenges it under this provision of the evidentiary rules.

Hearsay is defined as a statement, other than made by a declarant while testifying, offered to prove the truth of the matter asserted. MRE 801(c). In general, hearsay evidence is not admissible unless it meets an exception delineated by the rules of evidence. MRE 802; *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). MRE 803(2) provides, in relevant part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (2) **Excited Utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

As a result, there are "two primary requirements for excited utterances: 1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). In accordance with prior decisions of this Court, "[t]here is no express time limit for excited utterances." *People v Walker*, 265 Mich App 530, 534; 697 NW2d 159 (2005), vacated in part and remanded 477 Mich 856 (2006). Rather, MRE 803(2) "focuses on the lack of capacity to fabricate, not the lack of time to fabricate." *Id.* at 534.

In this instance, the prosecutor laid a proper foundation for admission of the statement by Morris to police. The record indicates that Officer Vargas arrived at the scene within one hour of the events and within five minutes of being dispatched to the crime scene. When she arrived, Morris acknowledged that he was present at the time of the shooting. Officer Vargas testified that Morris was "excited" and that "he was fidgety, [and] moving around" and that she "worked hard at trying to calm him down enough to get information." Based on the wide discretion provided to a trial court in determining whether a declarant remained under the stress of an event, *Walker, supra* at 534, we find that the trial court did not abuse its discretion in admitting the victim's statements pursuant to MRE 803(2).

Next, defendant argues Officer Vargas's testimony regarding statements made by his cousin constituted hearsay. Initially, we would note that it was defense counsel who elicited testimony from Officer Vargas during cross-examination pertaining to information obtained from defendant's cousin. As a result, defendant has waived any challenge to the admission of this testimony. See *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). In addition, the trial court has indicated that it admitted the detective's testimony regarding statements by this individual, not for their truth, but to demonstrate and explain the subsequent actions taken by

police in their investigation. As a result, the statement did not constitute hearsay. See *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000).

III. Great Weight of the Evidence

Defendant next asserts the trial court did not give due consideration to his argument concerning the great weight of the evidence and, thus, improperly denied his motion for a new trial on that ground. We review a trial court's decision to grant or deny a new trial, based on the great weight of the evidence, for an abuse of discretion. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A trial court "may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). In addition, "absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination thereof." *Id.* at 642 (citation and internal quotation marks omitted).

Defendant contends the testimony elicited from Officer Vargas did not confirm beyond a reasonable doubt that he was the shooter or driving the car from which the shots were fired. Defendant argues that Morris ran away during the shooting and did not see the shooter and that at trial Morris denied recognizing defendant or confirming his address, cell phone number, license plate number, or the make and model of his automobile, which he allegedly provided to police.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Here, the evidence did not preponderate against the jury's verdict. The prosecutor asked Morris questions on the stand to illustrate to the jury that Morris was scared to testify about what he had told Officer Vargas after the shooting occurred. Officer Vargas testified that Morris identified defendant, his car, his birth date, his cell phone number, and the vehicle license plate. Officer Vargas testified that she collected shell casings from the roadway and off defendant's automobile windshield wipers. In addition, Officer Vargas and another officer discovered and confiscated a gun in defendant's car that was tucked between the seat and the armrest. The prosecutor presented the gun, spent shells, and photographs of the vehicle with the gun inside and shells on the windshield wipers to the jury as evidence.

Issues pertaining to witness credibility were for the jury to determine. *Musser*, *supra* at 219. Nothing in the record indicates it was unreasonable for the jury to believe Officer Vargas's testimony regarding the evidence secured through her investigative efforts and the statements made to her by Morris. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for a new trial. See *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

IV. *Blakely* Violation[2]

Relying on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant asserts the trial court engaged in improper judicial fact finding when determining his sentence. Specifically, defendant argues the trial court violated *Blakely* by sentencing defendant as though he had been convicted of assault with intent to commit murder, even though he was acquitted of these charges. We would note that defendant's assertion of error regarding the lower court's original sentencing determination is precluded as Michigan's sentencing scheme has been held to be unaffected by *Blakely* based on Michigan's use of an indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Accordingly, we reject defendant's challenge to the scoring of the offense variables on this ground.

Defendant has also asserted entitlement to re-sentencing by an alternative judge. Based on our determination that defendant has failed to demonstrate error by the trial court in sentencing defendant, coupled with defendant's failure to provide any legal authority in support of his request for reassignment, we find that this issue has been abandoned on appeal. "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." *Kelly*, *supra* at 640-641.

V. Offense Variable Scoring Errors

Finally, defendant argues that at sentencing, the trial court improperly scored certain offense variables (OVs). Specifically, defendant contends the trial court engaged in improper fact finding when it scored the challenged variables as though defendant has been convicted of the charges that he acted with intent to commit murder even though the jury acquitted him of these charges. Issues concerning the proper scoring of sentencing guidelines variables are reviewed for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). The factual findings by a trial court pertaining to its sentencing determination are reviewed for clear error. MCR 2.613(C). A scoring decision by a trial court will be upheld if there exists any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

At the outset we note that the argument set forth by defendant is relatively indistinguishable from his assertions regarding the trial court's violation of *Blakely*, which we have already addressed and rejected, *supra.* In addition, although defendant asserts scoring errors regarding OV 1, OV 9, OV 10 and OV 14, he fails to delineate or define the asserted error other than to vaguely suggest that the trial court improperly considered inaccurate information in

[2] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

their scoring.[3] Based on defendant's cursory treatment of this issue, we find that he has effectively abandoned it on appeal. *Matuszak, supra* at 59.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Deborah A. Servitto

[3] We note that a review of the sentencing transcript in this matter does verify that defendant objected to the scoring of OV 1, OV 9 and OV 10. However, we assume that defendant's assertion of error, on appeal, regarding the scoring of OV 14 is misplaced as this offense variable was scored at zero. The sentencing information report does indicate a scoring of ten points on OV 13, which was objected to by defendant at the time of sentencing.