STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 2009
v	No. 284512 Monroe Circuit Court
CHARLES V. FACKELMAN, Defendant-Appellant.	LC No. 07-036291-FH

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for first-degree home invasion, MCL 750.110a(2), two counts of assault with a dangerous weapon, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 45 months to 20 years' imprisonment for the first-degree home invasion conviction, one to four years' imprisonment for each of defendant's two assault with a dangerous weapon convictions, and two years' imprisonment for defendant's felony-firearm conviction. We affirm.

Defendant first argues that the trial court improperly admitted portions of a psychiatric report into evidence, although the trial court did not admit the report itself into evidence, and in doing so, violated defendant's Sixth Amendment right to confront the witnesses against him. We disagree. Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, where, as here, a challenge to the admission of evidence is unpreserved, this Court reviews the admissibility of the evidence for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Further, an unpreserved constitutional issue is reviewed for plain error affecting substantial rights. *Id*. at 752-753. A plain error affects a defendant's substantial rights when the error results in outcome-determinative prejudice. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). A criminal defendant may obtain relief based on an unpreserved error if the error is plain and affected substantial rights, and it either resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Under the Sixth Amendment of the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. Similarly, the Michigan Constitution protects a criminal's right to be confronted with his accusers. Const 1963, art 1, § 20. By protecting a defendant's right to cross-

examine such witnesses, the right to be confronted with the witnesses against him ensures the reliability of the evidence. *People v Jambor (On Remand)*, 273 Mich App 477, 487; 729 NW2d 569 (2007). However, this Court has specifically held that a defendant's "right to confrontation is not violated by the prosecution failing to call witnesses that defendant could have called to testify." *People v Cooper*, 236 Mich App 643, 659; 601 NW2d 409 (1999).

This Court has recognized that "for testimonial evidence to be admissible against a defendant, the declarant must be unavailable and the defendant must have had 'a prior opportunity for cross-examination' of the declarant." *People v McPherson*, 263 Mich App 124, 132; 687 NW2d 370 (2004), quoting *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Although neither the United States Supreme Court nor the Michigan Supreme Court has defined precisely what constitutes "testimonial hearsay," this Court, in *McPherson*, recognized that the *Crawford* Court determined that "statements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *McPherson*, *supra* at 132 (internal quotation marks, brackets, and citations omitted). Furthermore, rather than defining what constitutes an "interrogation," the *Crawford* court employed the term "in its colloquial, rather than in any technical legal, sense." *Crawford*, *supra* at 53 n 4. However, the Confrontation Clause "'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.'" *McPherson*, *supra* at 133, quoting *Crawford*, *supra* at 59 n 9. Further, this Court has held that where the prosecution used out-of-court statements for impeachment, the evidence is used for a purpose other than to prove the truth of the matter asserted, and does not constitute testimonial hearsay. *McPherson*, *supra* at 134.

MRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Absent an applicable exception, hearsay is inadmissible. MRE 802.

In this case, it is undisputed that Dr. Agha Shahid's March 30, 2007, psychiatric evaluation, prepared two days after the incident, was not admitted into evidence at defendant's trial. The prosecution contends that it used the report for impeachment of defendant's expert witness, clinical psychologist Dr. Zubin Mistry, and did not use the report to prove the truth of the matter asserted. We agree with the prosecution that, to the extent that it used Dr. Shahid's report to impeach Dr. Mistry, the evidence did not constitute inadmissible testimonial hearsay. See *McPherson*, *supra* at 134. Dr. Mistry opined at trial that defendant was legally insane during the March 28, 2007, incident. However, defendant argues that the prosecutor relied upon the contents of the report as substantive evidence when he examined Dr. Jennifer Balay, the prosecution's expert witness, who opined that defendant was, in fact, legally sane during the incident.

Dr. Shahid's March 30, 2007, report, which the prosecutor used during his direct examination of Dr. Balay, constituted "testimonial hearsay," within the evolving definition of that phrase provided by the *Crawford* and *McPherson* Courts. See *McPherson*, *supra* at 132. The report was "testimonial" in nature because, like a statement taken by a police officer during a custodial interrogation, the statements attributed to defendant by Dr. Shahid appear to be responses to questions posed by Dr. Shahid for purposes of defendant's psychiatric examination. In other words, like a statement taken by a police officer, Dr. Shahid's report appears to consist of defendant's responses to Dr. Shahid's questions, which were then recorded by Dr. Shahid.

Further, during the prosecutor's direct examination of Dr. Balay, he used the quotations from Dr. Shahid's report as substantive evidence to prove the truth of the matter asserted. The prosecution used the quotations from Dr. Shahid's report to prove that defendant did, in fact, recall events relating to the March 28, 2007, incident, which was the matter asserted by the prosecution, and supported on direct examination by the prosecution's expert witness, Dr. Balay. See MRE 801(c); MRE 802.

The portions of the report quoted by the prosecutor on direct examination of Dr. Balay constituted inadmissible testimonial hearsay, accordingly, the trial court erred in admitting these portions of the report as evidence. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, because defendant cannot show that this error resulted in outcome-determinative prejudice, or "in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings[,]" defendant is not entitled to relief. See *Jones*, *supra* at 355.

Here, the ultimate issue at trial was not whether defendant actually engaged in the conduct that led to his criminal charges; instead, the question was whether defendant's acts should be excused because defendant was legally insane,[1] having allegedly suffered a psychotic episode during defendant's encounter with victims Randy Krell and Thomas Williams. Setting aside the prosecution's improper direct examination of Dr. Balay, we observe that Dr. Balay premised her opinion, that defendant, although mentally ill, was able to conform his conduct to the requirements of society and appreciate the wrongfulness of his conduct, on observations unrelated to the contents of Dr. Shahid's report. For instance, Dr. Balay opined that sitting in a dark room and rocking back and forth does not necessarily indicate that a person is or has been in a psychotic state. Further, because defendant was hospitalized for 12 or 13 days, and failed to express delusional or psychotic ideas to either defendant's social worker or another mental health professional during defendant's hospitalization, Dr. Balay concluded that defendant "was not psychotic at anytime during this depression."

Moreover, Dr. Balay determined that defendant's actions, such as directing Krell's movements, following Krell, and breaking down a door to gain access to Krell, were "methodical and controlled." That defendant drove to his mother's residence and hid his gun in a hot-air duct indicated to Dr. Balay that defendant's actions were not only methodical and controlled, but also that defendant "understood the wrongfulness of his conduct." Accordingly, the jury could have relied upon these observations underlying Dr. Balay's opinion, that defendant was not suffering a psychosis at the time of the March 28, 2007, incident. We conclude that, because defendant cannot demonstrate that the trial court's error in admitting the testimonial hearsay used by the prosecutor in his direct examination would result in a miscarriage of justice, or affected the outcome of the case, his argument to the contrary lacks merit. See *Jones*, *supra* at 355.

[1] "Legal insanity is an affirmative defense requiring proof that, as a result of mental illness or being mentally retarded as defined in the mental health code, the defendant lacked 'substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or conform his or her conduct to the requirements of the law." *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001), quoting MCL 768.21a(1).

Defendant next contends that the prosecutor committed misconduct when (1) the prosecutor quoted from Dr. Shahid's report during the prosecutor's cross-examination of Dr. Mistry and direct examination of Dr. Balay, and (2) during closing argument improperly referred to Dr. Shahid's report and further misconstrued the contents of Dr. Shahid's report. We disagree.

A defendant must raise a timely and specific objection in the trial court in order to preserve the issue of prosecutorial misconduct on appeal. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Defendant failed to raise an objection to any of the instances of alleged prosecutorial misconduct; therefore, the issue is not preserved on appeal. *Id*. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *Carines*, *supra* at 752-753.

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor is not required to present her arguments using only the blandest terms possible. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). "A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Reversal is not required if the prejudicial effects of the prosecutor's comments during closing argument could have been cured by a timely jury instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first contends that the prosecutor committed misconduct when he quoted Dr. Shahid's report during the prosecutor's cross-examination of Dr. Mistry. As we observed in our discussion relating to defendant's confrontation claim, the prosecutor properly cross-examined Dr. Mistry relating to the bases of his opinions, and did not commit misconduct when he quoted passages from Dr. Shahid's report to impeach Dr. Mistry. See *McPherson*, *supra* at 134. "It is well settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion." *People v Lonsby*, 268 Mich App 375, 382-383; 707 NW2d 610 (2005). To the extent that defendant contends that the report was used as hearsay, we observe that the prosecutor did not use the statements in the report to prove the truth of the matter asserted; rather, the prosecutor used the statements to demonstrate the effect of the statements on Dr. Mistry. Accordingly, we conclude that defendant's first prosecutorial misconduct argument lacks merit.

Defendant next asserts that the prosecutor committed misconduct when he quoted Dr. Shahid's report during the prosecutor's direct examination of Dr. Balay. As explained herein, the prosecutor used Dr. Shahid's report as "testimonial hearsay," and as such, the prosecutor questioned Dr. Balay improperly. Further, MRE 703 provides, in pertinent part:

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence.

The prosecutor should have sought the admission of Dr. Shahid's report as a basis for Dr. Balay's opinion. See MRE 703. However, even if the prosecutor committed misconduct when he used Dr. Shahid's report during cross-examination of Dr. Balay, defendant's prosecutorial misconduct claim fails because defendant cannot demonstrate outcome-determinative prejudice, or that the misconduct resulted "in the conviction of an innocent person, or seriously affected the

fairness, integrity, or public reputation of the proceedings[,]" defendant is not entitled to relief. See *Jones*, *supra* at 355.

Although Dr. Balay premised her opinion that defendant was legally sane at the time of the incident, in part, on Dr. Shahid's observation regarding defendant's claimed lack of memory, Dr. Balay explained that psychosis and memory loss were unrelated. Because Dr. Balay specifically testified that defendant's asserted lack of memory did not indicate that he was suffering a psychotic episode during the March 28, 2007, incident, defendant cannot show that the prosecution's use of Dr. Shahid's report during the prosecutor's direct examination of Dr. Balay affected the outcome of the case, or that the prosecutor's use of the report resulted "in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings." See *Jones*, *supra* at 355. Accordingly, we conclude that defendant's prosecutorial misconduct claim lacks merit.

Defendant next argues that the prosecutor committed misconduct when he improperly referred to Dr. Shahid's report during closing argument, and further committed misconduct when he misrepresented statements in Dr. Shahid's report. Defendant correctly points out that Dr. Shahid's report does not state that defendant remembered threatening Krell with a gun or breaking down the door and entering Williams' house. We observe that the prosecutor's statements relating to the report were facts not in evidence. We also note that the prosecutor's reference to statements not in the report went beyond reasonable inferences to be drawn from the evidence, and instead, constituted improper argument. See *Ackerman*, *supra* at 450. However, because the prejudicial effect of the prosecutor's comments could have been cured by a timely jury instruction, reversal is not required. See *Watson*, *supra* at 586. At the conclusion of closing arguments, the trial court instructed the jury that the lawyers' statements and arguments are not evidence. Generally, jurors are presumed to have followed their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, defendant cannot show that the prosecutor's improper argument resulted "in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings." See *Jones*, *supra* at 355. Accordingly, defendant's prosecutorial misconduct claim lacks merit.

Defendant next argues that he received the ineffective assistance of counsel because his counsel failed to object to the prosecutor's use of Dr. Shahid's report at trial, and because counsel failed to procure Monroe County Sheriff's Deputy Joseph Lambert to testify at trial. Lambert was present at the time defendant was arrested, and later observed defendant's behavior during defendant's hospitalization. We disagree.

Pursuant to this Court's order,[2] the trial court conducted a *Ginther*[3] hearing on February 27, 2009, and concluded that defendant received the effective assistance of counsel. Accordingly, defendant's claim of ineffective assistance of counsel is preserved on appeal. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). An ineffective assistance of

[2] *People v Fackelman*, unpublished order of the Court of Appeals, entered November 21, 2008, (Docket No. 284512).

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's findings of fact for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed de novo. *Id*.

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id*. Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors in order to show prejudice. *Id*. at 302-303. Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *Matuszak*, *supra* at 58.

Defendant first argues that counsel ineffectively assisted him by failing to object during the prosecutor's cross-examination of Dr. Mistry. However, because the prosecutor used the report for the limited purpose of impeaching Dr. Mistry's credibility, the prosecutor did not offer the report to prove the matter asserted; rather, the prosecutor used the report to demonstrate its effect, if any, on Dr. Mistry's opinion. "It is well settled that an expert witness may rely on hearsay evidence when the witness formulates an opinion." *Lonsby*, *supra* at 382-383. Because the prosecution properly relied upon one of the bases of Dr. Mistry's opinion as impeachment evidence during cross-examination, defendant did not receive the ineffective assistance of counsel when his counsel failed to object. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that he received the ineffective assistance of counsel because his attorney failed to object when the prosecutor quoted Dr. Shahid's report during the prosecutor's direct examination of Dr. Balay. We agree that the prosecutor improperly used Dr. Shahid's report as testimonial hearsay to prove the truth of the matter asserted, i.e., that defendant did have memories of events relating to the March 28, 2007, incident, as explained herein. At the evidentiary hearing, although defense counsel did not explain specifically why he did not object to the prosecutor's quotation of Dr. Shahid's report during Dr. Balay's direct examination, counsel did testify that, as a matter of trial strategy, counsel attempted to avoid calling the jury's attention to Dr. Shahid's report more than necessary. Defense counsel further denied that he perceived a confrontation problem with respect to the prosecution's use of testimonial hearsay.

We can, in hindsight, conclude that defense counsel should have objected, on the ground that use of the testimonial hearsay violated defendant's Sixth Amendment right to confront witnesses against him, when the prosecutor quoted from Dr. Shahid's report during the prosecutor's direct examination of Dr. Balay. However, we cannot conclude that trial counsel's strategic decision to avoid calling attention to Dr. Shahid's report was unreasonable under the circumstances at the time it was made. See *Matuszak*, *supra* at 58. Further, defendant cannot "demonstrate a reasonable probability that the outcome would have been different but for"

counsel's failure to object when the prosecutor quoted from Dr. Shahid's report during the prosecutor's direct examination of Dr. Balay. See *Toma, supra* at 302-303. As explained herein, although the issue regarding defendant's ability to recall events concerning the incident did form a basis for Dr. Balay's opinion that defendant was not insane, Dr. Balay testified also regarding other factors, and described defendant's actions as methodical and controlled, and that defendant "understood the wrongfulness of his conduct." As such, Dr. Balay opined that although defendant was suffering from a mental illness, defendant was able to conform his conduct to the requirements of society, and was further able to appreciate the wrongfulness of his conduct. Accordingly, defendant's ineffective assistance of counsel claim fails. *Id*.

Defendant next argues that he received the ineffective assistance of counsel because counsel failed to object to the prosecutor's improper remarks during closing argument. As we observed in the discussion of defendant's prosecutorial misconduct claim, the prosecutor did argue facts that were not in evidence, and further, attributed statements to Dr. Shahid that were not set forth in Dr. Shahid's March 30, 2007, report. Defense counsel testified that as a matter of trial strategy, he did not object because, at the time, he thought that the jury did not believe the prosecutor. Defense counsel's failure to object to the prosecutor's comments was objectively unreasonable under the circumstances. See *Matuszak, supra* at 58. The prosecutor argued from facts not in evidence, contrary to MRE 703, and argued that the document contained statements that it did not, and then stressed to the jury the importance of those statements to the prosecution's case. Even if trial counsel believes that the jury is rejecting a prosecutor's argument, under these circumstances, it was objectively unreasonable to decide not to displace trial strategy and object. *Id*.

However, defendant cannot show a reasonable probability that but for counsel's failure to object, the outcome would have been different. See *Toma, supra* at 302-303. However, after closing arguments the trial court specifically instructed the jury that the prosecutor's statements and arguments were not evidence, and cautioned the jury that it should credit the statements of the lawyers only to the extent that their statements were supported by the evidence. Generally, jurors are presumed to have followed their instructions. *Graves, supra* at 486. Accordingly, we conclude that because defendant cannot show a reasonable probability that but for counsel's failure to object, the outcome would have been different, defendant's ineffective assistance of counsel claim lacks merit. See *Matuszak, supra* at 58; *Toma, supra* at 302-303.

Defendant next contends that he received the ineffective assistance of counsel because his counsel failed to procure Lambert as a witness. "[T]he failure to call a witness constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant fails to demonstrate that counsel's decision not to call Lambert might have made a difference in the outcome of the trial. Counsel testified at the evidentiary hearing that he, defendant's former attorney, defendant himself, and defendant's wife all decided that Lambert would not be called as a witness. Further, at the evidentiary hearing, Lambert did not specifically testify regarding defendant's behavior when he was arrested, and admitted that when he encountered defendant at the hospital, he did not know whether defendant had been medicated. Because Lambert's testimony would have added very little to defendant's defense

and defendant and his counsel decided, as a tactical matter, against calling Lambert as a witness, defendant's ineffective assistance of counsel claim lacks merit. See *Dixon*, *supra* at 398; *Kelly*, *supra* at 526.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis