STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 20, 2010
v	No. 289215 Wayne Circuit Court
JASON RICHARD BOMBRISK, Defendant-Appellant.	LC No. 08-002418

Before: MARKEY, P.J., and ZAHRA and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant, of Safe Breaking, MCL 750.531, Arson – Real Property, MCL 750.73, Arson – Insured Property, MCL 750.75, and Larceny in a Building, MCL 750.360. The trial court sentenced him as a habitual offender, second offense, MCL 769.10, to 3 to ten years' imprisonment for the Safe Breaking, Arson – Real Property and Arson – Insured Property convictions, and 1 to 4 years' imprisonment for the Larceny in a Building conviction, to be served concurrently. He appeals as of right. We affirm.

I. BASIC FACTS AND PROCEEDINGS

This case arose following the September 1, 2007 robbery and arson of Rick's Music Café (Rick's) in Redford Township, Michigan. Defendant, the night manager, arrived at Rick's between 8:00 and 9:00 p.m. He decided to close Rick's early and exited the building with the other two employees, activating the alarm at 12:30 a.m. Defendant, however, reentered the building and deactivated the alarm at 12:34 a.m. He claimed that he remained in the bar alone from 12:34 a.m. to 2:39 a.m., showering, watching TV, working on a contract for his other job, and resting. At 2:39 a.m., defendant activated the alarm, exited the building, and left on a motorcycle.

At 2:40 a.m., the alarm signaled that the back door had been opened and that there was motion in the dining room, which could include a change of temperature. The security company called Rick's but there was no answer. The security company then notified the Redford Police Department of the alarm at 2:45 a.m. Sergeant Nick Lentine of the Redford Township Police Department was the first officer on the scene, arriving at approximately 2:52 a.m. according to Redford Township Police Department computer dispatch records. He reported a large quantity of smoke coming out of the building. The Redford Township Fire Department arrived and entered the burning building. Firefighter Timothy Seal noticed a blue flame coming from the

basement area, which suggested either a natural gas fed fire or an accelerant fed fire. Investigations later confirmed that arson caused the fire.

The next morning officer Brian Segrest (Segrest) of the Redford Township Police Department began investigating a potential larceny at the fire scene. He observed that the basement office door had been kicked open and the cash drawer was upside down on the floor. Segrest learned that about $2,000 was missing from this office. Also, an ATM machine was found at the bottom of the basement stairs, broken into and missing approximately $2100. Suspicions turned to defendant, as there was little time for someone else to have broken inside the building (or been inside the building when defendant left), committed the thefts and started the fire before responders arrived. Defendant maintained that someone had either hid in the building or broke into the building immediately after he had left, committed the crimes and left before the responders arrived.

II. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

Determinations of the evidence issues are reviewed for abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). An appellate court should defer to the trial court's judgment, and if the trial court's decision results in an outcome within the range of principled outcomes, it has not abused its discretion. *People v Carnicom*, 272 Mich App 614, 616-617; 727 NW2d 399 (2006).

Further, whether defendant was denied his Sixth Amendment right to confrontation is a constitutional question subject to de novo review on appeal. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

B. Analysis

Defendant first argues that the trial court erred by preventing defense counsel from eliciting evidence of motive.

On cross examination, defense counsel attempted to question an insurance adjuster hired by the insurer of Rick's, Beger, about whether a conviction in this case makes it easier for the insurance company to deny the claim in the civil suit. The trial court sustained the prosecutor's relevance objection. Defense counsel maintained that the question was relevant, as it went to motive. According to defendant, the purpose of asking Beger this question was to "show the existence of possible bias, motive and prejudice of the insurance company, causing them to blame [defendant] for the arson in order to deny the insurance claim."

A witness's bias is always relevant; a defendant is entitled to have the jury consider any fact which may have influenced the witness' testimony. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

Here, the insurer hired independent claims adjustment company Cunningham, Felthouse, and Hayes to investigate the claim. Beger, the president of Cunningham, Felthouse, and Hayes, was assigned the file from the insurer and investigated the claim. He retained experts to

investigate the fire and review the bar's business records. It was not Beger's decision to decide whether the claim was paid, and he did not know why the claim was denied. While there is evidence indicating that Beger may not share the insurer's potential bias toward defendant, Beger admitted to performing tasks traditionally carried out by an insurer. Thus, defendant's claim that Beger's bias is relevant has some merit.

However, even assuming that the trial court's ruling was erroneous, we conclude any error was harmless. *People v Shepherd*, 472 Mich at 343, 347; 697 NW2d 144 (2005). Whether the error was harmless requires consideration of many factors, including the importance of the witness' testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. *People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998). A court must conduct a thorough examination of the record and evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error. *Shepherd*, 472 Mich at 347.

Here, all of the experts agreed that the fire had been intentionally set at the bottom of the basement stairs. Two of the experts opined that accelerants had been used. If defendant was not responsible for these crimes, there was approximately an 11 to 14 minute window for a third party to break into the building or come out of hiding, drag the ATM machine downstairs, break into the ATM machine, break into the office, start the fire, and leave before the first officer arrived. The owner of ATM service opined that based on his experience, he could not get into the ATM machine within eleven minutes. Given the strength of this evidence, we conclude that any error in precluding Beger's testimony was harmless.

Defendant's next claim of error flows from the following discourse between Sergeant Kevin Crittenden (Crittenden) of the Redford Township Police Department and the prosecutor:

> Q. And did you make any attempts to determine whether or not Guardian Alarm's times are the same as your dispatch times?
>
> A. Yes, I did. That occurred on September 1st
>
> Q. And what, if anything, did you determine?
>
> > *Defense counsel:* Well, this is hearsay. I object.
> >
> > *Prosecutor:* Timing has been in integral part of this particular case and, in fact, the Defense attorney asked the witness from Guardian Alarm if these two matched. Now, we have a witness who can tell us whether or not they matched.
> >
> > *Defense:* The witness who can tell us was the Guardian Alarm witness[1] and the right of confrontation suggests that these questions should have

[1] Presumably, defense counsel is referring to the only Guardian witness at trial, Flores. Flores is (continued…)

> been presented to Guardian Alarm rather than an officer in charge who's been sitting through trial and can now talk about what he's been told.
>
> *Trial Court:* Overruled.
>
> Q. Did you make any attempts to determine whether or not these two, your system dispatch and Guardian Alarm, matched?
>
> A. I did. I spoke to Operator Kuran (ph) at Guardian Alarm.
>
> Q. And what, if anything, did you find?
>
> A. That upon talking to her, asking her, via telephone what time her computer screen said and looking at our computer dispatch time, there was a difference of two minutes, approximately two minutes. Our time on our computer-aided dispatch being slower than their time, if that makes sense.

Under the Sixth Amendment to the United States Constitution, testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Shepherd*, 472 Mich at 347; see also MRE 801; 802; 804(b)(1). A statement is testimonial if the primary purpose of it or of the questioning which elicited it is to establish or prove past events potentially relevant to later criminal prosecution. *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732, 737 (2009). "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford v Washington*, 541 US 36, 59, n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Additionally, "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id*.

A thorough examination of the record shows that error, if any, was harmless beyond a reasonable doubt because Crittendon's testimony was largely cumulative, and corroborated by earlier admitted testimony. Earlier in the trial during cross-examination of Mohan, defense counsel asked "[d]id you make any efforts to determine if the time from Guardian Alarm was the same as the time from the police department?" Mohan indicated there was a difference of "[a]bout three minutes" At the time Crittenden testified, this testimony was already admitted before the jury. The only difference between Crittendon and Mohan's testimony is one minute and defendant fails to explain how one minute could have made any difference in his case. In defendant's brief, the extent of his argument on the harmless error issue is as follows.

> The error is not harmless beyond a reasonable doubt. Because timing was a critical part of the prosecutor's case against Mr. Bombrisk, the denial of the right to cross-examine the Guardian Alarm operator on this issue was not harmless. The remedy is new trial.

(…continued)

a customer service manager for Guardian and testified on the first day of trial about the times the alarm was set, deactivated, and tripped (Tr I, pp 154-159).

An appellant may not merely announce his position and leave it to the appellate court to discover and rationalize the basis for his claims, nor may he give only cursory treatment to an issue with little or no citation of supporting authority. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). In any event, given the corroborative and cumulative nature of Crittendon's testimony, it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error, if any. *Shepherd*, 472 Mich at 347.

III. SUFFICIENCY OF EVIDENCE

A. STANDARD OF REVIEW

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009).

B. ANALYSIS

Defendant supports his argument that the prosecution failed to meet its burden in this case with the following.

> No one saw who set the fire, or committed the safebreaking or the larceny. No physical evidence was found tying the crime to anyone. According to the prosecution's experts, the crime was one of opportunity: started eleven minutes after Jason Bombrisk set the alarm and left the building at 2:39 a.m.

However, circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). There is substantial circumstantial evidence and witness testimony implicating defendant as the perpetrator of these crimes. All of the experts agreed that the fire had been intentionally set at the bottom of the basement stairs. Two of the experts opined that accelerants had been used. If defendant was not responsible for these crimes, there was approximately an 11 to 14 minute window for a third party to break into the building or come out of hiding, drag the ATM machine downstairs, break into the ATM machine, break into the office, start the fire, and leave before the first officer arrived. Hanke, the owner of Franklin ATM service, opined that based on his experience, he could not get into the ATM machine within eleven minutes.

It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). This Court should not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). At defendant's trial, the jury looked to the evidence, drew inferences, and accorded sufficient weight to the inferences to find defendant guilty of all four counts beyond a reasonable doubt.

Defendant argues "[i]t was equally plausible that someone hiding in the building opened the back door at 2:40 a.m., and let others in who quickly pried the ATM machine and then set the

building on fire." However, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The prosecution's theory is that defendant was the person who stole the money and set the fire. While not negating every theory of innocence, the prosecutor successfully proved this theory beyond a reasonable doubt. Viewed in a light most favorable to the prosecutor a rational trier of fact could find that the essential elements of the crimes were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App at 677.

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

When there was no contemporaneous objection and request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger*, 278 Mich App at 235. A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

B. ANALYSIS

During rebuttal closing argument, the prosecutor stated the following:

> It's his [Crittenden's] job to decide what is going to be processed. And we know that he did a *thorough* investigation. He talked to all kinds of people. Three separate cause and analysis [sic] were done as it relates to this fire. He talked to everyone. And the only person that was ever even looked at is the Defendant. Why do you think that? Because the evidence all points to the Defendant.

Improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). In determining whether an invited response merits reversal, a court should consider the conduct that prompted the prosecutorial response and the proportionality of that response. *Id*.

During defendant's closing argument, defense counsel suggested that Crittenden's investigation was not thorough. In one instance, defense counsel highlighted that defendant offered to turn over his clothes to Crittenden that he said were the clothes he had on when he left the bar. At trial, Crittenden had testified that he chose not to take the clothes because defendant had returned to the building after the fire was extinguished so the clothes smelled of the building. During closing argument, defense counsel stated "how dare he decide not to seize evidence? It's not his call." In another instance, defense counsel suggested that Crittendon ignored exculpatory evidence. The prosecution never called the tow truck driver as a witness. During closing argument, defense counsel stated, "[n]ow why do you think we haven't heard from this man? Because when Sergeant Crittendon asked him those questions, they obviously didn't come back with answers that fits their theory of the conviction." Also during closing argument, defense

counsel stated, "there was no real effort to even track him down [the African American male] and see if he saw something." Here, the prosecutor was permissibly responded to defense counsel's suggestion that Crittendon's investigation was not thorough. *Jones*, 468 Mich at 353.

Appellate review of defendant's claim of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected substantial rights. *Brown*, 279 Mich App at 134. Additionally, a miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Watson*, 245 Mich App at 586. The prosecutor statement that the investigation was "thorough" was supported by admissible evidence and addressed issues raised by defense counsel. There was no plain error affecting defendant's substantial rights.

Affirmed.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher