STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2011
v	No. 296987 Ingham Circuit Court
KEVIN WAYNE HARRISON, Defendant-Appellant.	LC No. 07-000694-FC

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

After a jury trial, defendant, Kevin Wayne Harrison, was convicted of armed robbery, MCL 750.529, and was sentenced 8 to 40 years' imprisonment.[1] Defendant appeals as of right. We affirm.

I. BASIC FACTS

During the evening of April 22, 2007, and into the early morning of April 23, 2007, Emmalee Perkins, the victim, was working alone at the Speedway gas station in Delhi Township. At about 12:40 a.m., Perkins was sitting at a desk when a customer came into the Speedway mart. The customer was a tall and heavy set 20 to 30 year-old white male with dirty blond hair and "scruffy" facial hair. The customer approached Perkins and asked for two packs of cigarettes, one of which was a pack of Newport cigarettes. Perkins got two soft packs of

[1] Defendant was previously convicted in 2008 for armed robbery and sentenced on October 9, 2008. Defendant subsequently moved the trial court for a new trial based on newly discovered evidence – the statements of a fellow inmate, Douglas Droste, that he, and not defendant, committed the robbery – and ineffective assistance of counsel – the failure to establish a timeline for defendant's alibi and call necessary alibi witnesses. The trial court granted the motion based on ineffective assistance of counsel. The prosecutor filed an application for leave to appeal that decision, but this Court denied that application. *People v Kevin Wayne Harrison*, unpublished order of the Court of Appeals, entered June 12, 2009 (Docket No. 291863). Defendant was retried and now appeals his conviction as of right.

cigarettes and put them on the counter. The customer then asked if Perkins could give him hard packs instead. Perkins turned around, got two hard packs, and put them on the counter.

The customer then pulled out a black semiautomatic handgun with his right hand, pointed it at Perkins, and asked Perkins to give him "the cash." Perkins took the money ($340) from her register, put the money into a plastic bag and gave it to the robber. The robber left the Speedway mart, walking straight through the gas station parking lot, by the gas pumps, and across the street to an apartment complex called Dover's Crossing. Perkins locked the door to the Speedway mart and called 911.

Deputy Robert McElmurray of the Ingham County Sheriff's Office reported to the Speedway gas station at about 12:44 a.m. McElmurray set up a perimeter, unsuccessfully attempted to obtain fingerprints from the Speedway mart, and took a statement from Perkins. The store manager gave McElmurray a copy of Speedway's surveillance video for that night. The Ingham County Sheriff's Office provided the video to the Michigan State Police, which enhanced the videotape and created still photographs. The Ingham County Sheriff's Office then released the video and photographs of the robbery to the media.

After the video and photographs were released to the media, Aaron Domanik received an email with a link to an internet webpage containing a news story about the robbery and the video of the robbery. Domanik identified the robber as defendant. Domanik and defendant worked together as cellular telephone salesmen at T-Mobile. According to Domanik, defendant was tall (six foot three inches), heavy set, had facial hair, and smoked Newport cigarettes. Domanik contacted the Ingham County Sheriff's Office and spoke to Detective Rodney Beals on April 26, 2007. Domanik told Beals that he saw the videotape of the robbery on the internet and recognized defendant as the robber.

Beals located a photograph of defendant on the Ingham County Sheriff's Office database and assembled a six-person photographic lineup, which included defendant's photograph. Beals showed the lineup to Perkins on April 27, 2007. Perkins identified defendant as the robber, stating "that's definitely him, he's looking at me" and that she was 100 percent certain. Perkins stated that she recognized defendant's jaw line and facial hair and the shape of his ears.

Beals interviewed defendant on May 3, 2007. Defendant waived his *Miranda*[2] rights and was very cooperative. Beals informed defendant that he was a suspect in the robbery of the Speedway gas station. Defendant responded that he could not have committed the robbery because he was in Grand Rapids with his girlfriend, Alexis Remensnyder, at the time of the robbery.

After defendant's first trial, LaVerne Wakefield and Michael Sweet were inmates with defendant at the Ingham County Jail and overheard a conversation that defendant had with another inmate named Douglas Droste. Defendant asked Droste where he was on April 22,

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[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

2007. Droste laughed and responded that he was robbing a Speedway gas station near Dover's Crossing. According to Wakefield, defendant asked Wakefield to write a letter about what he overheard. Wakefield agreed and gave the letter to defendant.

During Perkins's testimony at trial, the prosecutor brought Droste into the courtroom. Perkins testified that she was "a hundred percent sure" that Droste was not the person who robbed her. Perkins stated, "I've never seen that guy before."

As stated above, the jury found defendant guilty of armed robbery. Defendant now appeals.

II. PROSECUTORIAL MISCONDUCT

Defendant first argues that the prosecutor committed misconduct during closing and rebuttal arguments. We review defendant's preserved prosecutorial misconduct arguments de novo "to determine whether defendant was denied a fair trial." *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). We review defendant's unpreserved arguments for plain error. *Id.* at 451.

Prosecutors are afforded "great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotation marks omitted). They may argue the evidence and any reasonable inferences from the evidence related to their theory of the case. *Id.* A prosecutor's remarks should be evaluated in context, in light of defense counsel's arguments and the relationship these comments bear to the admitted evidence. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

With respect to defendant's first preserved argument, defendant contends that the prosecutor referred to facts during his closing argument that were not in evidence. We disagree. Contrary to defendant's argument that Perkins failed to testify that she saw Droste in the hallway, Perkins testified that she was in the hallway with Droste. As a result, the prosecutor properly argued facts in evidence. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Next, defendant argues that the prosecutor shifted the burden of proof by arguing that certain defense witnesses did not ever proclaim defendant's innocence to the police. Again, we disagree. A prosecutor may not attempt to shift the burden of proof onto a defendant during closing arguments. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, as noted above, prosecutors are given great latitude during closing arguments to argue the evidence and all inferences relating to the prosecutor's theory of the case, which is what the prosecutor did in this case. *Thomas*, 260 Mich App at 456. We note that alibi witnesses' credibility may be challenged based on their failure to come forward to police with alibi information. *People v Gray*, 466 Mich 44, 46-48; 642 NW2d 660 (2002). The prosecutor argued that the inference from the testimony that he elicited from various witnesses regarding their failure to assert defendant's innocence to the police was that defendant committed the armed robbery because no one who testified to facts supporting defendant's innocence went to the police in support of defendant. The prosecutor's argument was proper.

Next, defendant claims that the prosecutor improperly argued that the jury could convict defendant solely on the basis of one statement that he made to Detective Beals that he was in Grand Rapids with his girlfriend when the robbery occurred. Defendant does not provide this Court with any citation to legal authority to support his argument that this statement was improper. Therefore, this issue is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("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 with little or no citation of supporting authority."). Notwithstanding defendant's abandonment, we conclude that the prosecutor properly argued the evidence presented. Although the jury technically could not convict defendant solely on the basis of his statement to Beals, it appears that the prosecutor was attempting to emphasize the value of defendant's statement to the prosecution's case, not to mischaracterize his burden of proof. Moreover, any potential error was remedied by the court's instruction to the jury to consider only the evidence and the statements of the prosecutor were not evidence. See *Seals*, 285 Mich App at 22 ("Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements."). Accordingly, this argument fails.

Defendant's final preserved argument is that the prosecutor committed misconduct by making a civic duty argument. The prosecutor stated:

> Emmalee Perkins deserves justice and keep in mind she was robbed at gunpoint by this individual right here. And that he needs to be held accountable for his actions. I want you to send him a message. I want you to tell him that you're not going to be fooled by these acts of deception, by these lies, by this alibi. That you're not going to tolerate this type of violent assaultive behavior[.]

Prosecutors may not ask jurors to convict a defendant because it is their civic duty to do so. *Bahoda*, 448 Mich at 282. Further, a prosecutor may not appeal to the "fears and prejudices of the jurors" because doing so "injects issues broader than the guilt or innocence of the accused into the trial." *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005). In this case, the prosecutor improperly argued that it was the jury's civic duty to convict defendant and hold him accountable for his actions. The prosecutor's argument was unrelated to the evidence and whether the prosecutor proved beyond a reasonable doubt that defendant committed the crimes for which he was charged. The prosecutor, instead, erroneously injected broader issues related to the justice system and the jury's role into the jury's deliberations. However, the error was harmless because any error caused by the prosecutor's statements was cured by the court's instructions to the jury that it should not be influenced by sympathy and prejudice, the prosecutor's comments were not evidence, and the case should be decided solely on the basis of the evidence. See *Seals*, 285 Mich App at 22.

With respect to defendant's unpreserved prosecutorial misconduct arguments, defendant first argues that the prosecutor discussed his own personal beliefs and opinions that defendant was guilty during his closing and rebuttal arguments. Prosecutors may not express their personal opinion of a defendant's guilt or a witness's truthfulness. *Bahoda*, 448 Mich at 282-283; *Thomas*, 260 Mich App at 455. A prosecutor may not invoke the prestige of his office or indicate that he has special knowledge concerning the veracity of witnesses. *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004). With respect to the arguments that defendant

challenges in this case, we conclude that the prosecutor properly argued the evidence and reasonable inferences from the evidence. Despite defendant's arguments to the contrary, the prosecutor did not express his personal opinion of defendant's guilt or a witness's truthfulness or place the prestige of his office behind his arguments, but contended that the evidence proved defendant's guilt beyond a reasonable doubt. The prosecutor's mere use of the words "I believe" and "I think" during his closing and rebuttal arguments did not render his arguments improper. See *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973) ("If the prosecutor says 'I believe' rather than 'the evidence shows', this in and of itself does not constitute reversible error.").

Next, defendant contends that the prosecutor inappropriately commented on defendant's state of mind. We reject this argument. The prosecutor clearly did not remark on defendant's state of mind, but rather, commented on Domanik's state of mind at the time Domanik contacted the Ingham County Sheriff's Office. The prosecutor properly argued the evidence and reasonable inferences from the evidence. *Bahoda*, 448 Mich at 282.

Subsequently, defendant posits that the prosecutor denigrated the defense and accused defense counsel of intentionally misleading the jury by arguing that defendant attempted to "pull the wool over" the prosecutor's and the jury's eyes. A prosecutor may not state that defense counsel was attempting to mislead the jury, see *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010), but he may argue that a defendant's testimony was not worthy of belief, see *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). And, the prosecutor was not required to make his argument in the blandest terms. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Even if we agree that the prosecutor's argument was improper, the court's instruction was sufficient to cure any potential prejudice. *Seals*, 285 Mich App at 22. Specifically, the court instructed the jury that the prosecutor's arguments were not evidence and that they should only accept things the lawyers said that were supported by the evidence or by their own common sense and general knowledge. See *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008) (holding that this same instruction was sufficient to cure the prejudicial effect of a prosecutor's statement that defense counsel deliberately attempted to mislead the jury with "red herrings" and "smoke and mirrors").

We reject defendant's next argument that the prosecutor improperly stated that DNA evidence is conclusive proof of guilt. The prosecutor essentially argued that, unlike in CSI television shows, evidence other than DNA evidence may be used to prove guilt. The prosecutor wanted to ensure that the jury would not hold the prosecution to a higher burden of proof than was required. Moreover, even if one could fairly infer from the prosecutor's statement that DNA evidence is conclusive evidence of guilt, defendant has not established that the statement amounted to plain error since the prosecutor did not present DNA or fingerprint evidence at trial.

Defendant's final unpreserved prosecutorial misconduct argument is that the prosecutor belittled a defense witness, Droste, during his closing argument by stating, "I'm not going to stand here and tell you that you should let your daughter go out with him." We disagree. Indeed, Droste was a rebuttal witness for the prosecution. The prosecutor's comment was an attempt to acknowledge to the jury that Droste was involved in criminal activity, which could negatively impact Droste's credibility. A prosecutor may comment on his own witness's credibility during closing argument. *Thomas*, 260 Mich App at 455. The prosecutor was not

required to comment on Droste's credibility by using bland terms. *Ullah*, 216 Mich App at 678-679.

III. BOLSTERING THE VICTIM'S CREDIBILITY

Defendant's final argument is that Detective Beals improperly vouched for Perkins' credibility. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 765; 597 NW2d 130 (1999). "[I]t is improper for a witness to comment or provide an opinion on the credibility of another witness[.]" *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, a lay witness may provide opinion testimony about topics based on his perception that are helpful for understanding his testimony or another fact at issue. MRE 701. We conclude that Detective Beals did not improperly vouch for Perkins' credibility when he responded to the prosecutor's question about why he left Droste out of the photographic lineup shown to Perkins. When answering the prosecutor's question, Beals properly provided an opinion based on his experience and perception regarding whether Droste was the person in the photograph and video of the Speedway robbery to explain why he did not include Droste in the lineup.

We also reject defendant's claim that counsel was ineffective for failing to object to Beals's testimony concerning Droste. Counsel was not required to make a futile objection. *Thomas*, 260 Mich App at 457. Even assuming that Beals's testimony was inadmissible, defendant cannot establish that the erroneous admission of the testimony affected the outcome of his trial and that, with respect to his ineffective assistance of counsel claim, there is a reasonable probability that the result of his trial would have been different if counsel had objected. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This is especially the case given Perkins' testimony in court that defendant was the person who robbed her and Droste was not.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly