STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2011
v	No. 298360 Wayne Circuit Court
PAUL MORRIS SIMMONS, Defendant-Appellant.	LC No. 09-029641-FC

Before: TALBOT, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree murder, MCL 750.317, and possessing a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 20 to 40 years for the murder convictions and two years for the felony-firearm conviction. We affirm, but vacate one of defendant's convictions for second-degree murder.

I. BASIC FACTS

This case involves the killing of Elmon Bostic. On June 28, 2006, Elmon was shot five times in the alley behind the St. Julian Church Elementary School, located at the southwest corner of the intersection of Chalmers Street and Longview Street in Detroit.

On June 27, 2008, Elmon visited his mother, Nita Bostic, at her home. He came with defendant. They left in a blue Crown Victoria; defendant was the driver of the car.

The next morning, Elmon and defendant visited Pasua Keith at her home. They came in a blue Crown Victoria or Grand Marquise. For two or three hours, the two men played dice on the front porch. According to Keith, Elmon won several hundred dollars from defendant, and when defendant lost all his money, he gambled a set of speakers and a .38 caliber gun he had with him. Elmon won the speakers and the gun. Defendant was upset; he accused Elmon of cheating, but said that it was okay because he would get everything back. Elmon and defendant left Keith's house shortly after noon.

According to Tanjayika Allison, a teacher at the summer camp held at the St. Julian Church Elementary School, "[s]hots rang out" between 1:00 and 2:00 p.m. on June 28, 2006.

Allison looked out a classroom window a few minutes after hearing the gunshots and saw a blue Crown Victoria, driven by an African-American male, heading west on Longview Street.

Horace Smith lived at 14237 Longview Street. He was working on his roof on June 28, 2006. Between 1:00 and 2:00 p.m., he heard gunshots coming from behind the elementary school. He turned toward the school, and saw a young African-American male, holding a handgun at his side, get into a car. When he saw the car, which he identified as a Crown Victoria, turn west onto Longview Street, he climbed down from the roof and walked to the edge of the street. The car went past him. Smith identified defendant as the driver of the vehicle in an October 2009 lineup.

Andre Lewis received a telephone call from Elmon before 1:00 p.m. on June 28, 2006. Later that afternoon, he and Desmond McCoy saw defendant. They told defendant that they had heard Elmon had beaten him out of his money and his gun. Defendant replied that it was not true and that he was no dummy.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor's repeated acts of misconduct denied him his right to a fair trial. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). We review claims of prosecutorial misconduct on a case-by-case basis, examining the prosecutor's challenged remarks in context. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant asserts that the prosecutor on three separate occasions referenced crime statistics and that, by doing so, the prosecutor urged the jury to convict defendant in order to help stop the senseless violence in Detroit. A prosecutor may not argue that jurors should convict a defendant as part of their civic duty. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). A civic duty argument is improper because it appeals to the fears and prejudices of the jurors, thereby injecting issues broader than the defendant's guilt or innocence into trial. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

First, during opening argument, the prosecutor informed the jury that after the Cold Case Squad was formed in 2009, one of the first cases reviewed by the squad was Elmon's killing. The prosecutor then stated, "And it[] [Elmon's case is] known as Detroit Police/Homicide file 06-223. That means it was the 223rd homicide in the City of Detroit in 2006 on June the 28th." When read in context, the prosecutor's statement was part of an explanation for the almost four-year span between Elmon's killing and trial. Moreover, the prosecutor did not use the fact that there were at least 223 homicides in Detroit in 2006 as a basis for convicting defendant. After making the comment, the prosecutor summarized the evidence that he would introduce to establish defendant's guilt. The prosecutor's comment was not improper.

Second, during examination of Dr. Cheryl Loewe, the deputy chief medical examiner, the prosecutor asked Loewe if she had brought with her a file known in the medical examiner's office as case number 06-6132. Loewe replied that she had the file with her. She explained the case number: "That's a number assigned by the medical examiner, and '06 would refer to the year 2006, and 6132 would represent a case number assigned to the decedent not necessarily in sequence of death calls or cases brought into their work." Contrary to defendant's assertion, the number 6132 has no "shock value." Based on Loewe's testimony, the number has no direct relation to any crime statistics or to the senseless violence in Detroit. We find nothing improper in the prosecutor's question to Loewe.

Third, the prosecutor asked Officer Donald Rem, an evidence technician called to the scene of Elmon's killing, what percentage of his "business is homicide." Rem responded, "Greater per portion of it." The question was asked by the prosecutor as part of an exchange in establishing Rem's training and credentials as an evidence technician. The question, under any fair reading, cannot be construed as an argument for the jury to convict defendant as part of their civic duty. The prosecutor's question to Rem was not improper.

Defendant next asserts that the prosecutor vouched for the credibility of Lewis. A prosecutor may not vouch for the credibility of a witness by suggesting that he has special knowledge of the witness's truthfulness. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). A prosecutor may, however, argue from the facts that a witness is credible. *Id.*

The prosecutor argued to the jury that Smith had "absolutely nothing to gain, [and] everything to lose" in testifying. He further submitted that Smith was "a person of good credibility and that his testimony should be acceptable." Read in context, the prosecutor's argument to the jury did not constitute improper vouching for Smith's credibility. The prosecutor's argument did not convey a message that he had some special knowledge or facts indicating that Smith was credible. *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995). Rather, the prosecutor argued that, based on the evidence, Smith could be believed because he had nothing to gain from testifying—he had no connection to Elmon or Nita—but everything to lose—because "people" would now know him. The prosecutor's argument to the jury concerning the credibility of Smith was not improper.

Defendant also argues that the prosecutor denigrated defense counsel in his rebuttal closing argument. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); see also *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996) (a prosecutor may not personally attack defense counsel).

In his rebuttal closing argument, the prosecutor argued that defense counsel employed "an old technique" used by "good defense attorneys" called "divide, isolate, and conquer." According to the prosecutor, it was a technique used to prevent the jury from concluding "that the testimony is interconnected. . . . Get the witness who talks about the motive all by himself or get the witnesses who talk about the motive all by themselves." The prosecutor also stated that defense counsel's theory that Smith conspired with police officers was "balderdash, total and complete balderdash." He explained that defense counsel was "suggesting to you all the mistakes, sure, divide, isolate, and conquer, focus in on those mistakes." The prosecutor's

argument must be considered in light of defense counsel's closing arguments. *People v Unger*, 278 Mich App 210, 238; 749 NW2d 272 (2008). Defense counsel argued that Smith was not reliable, questioned whether Smith was being coached by police officers, questioned the credibility of Keith, Lewis, and McCoy, and lamented the lack of physical evidence. The prosecutor's argument was in response to defense counsel's argument. The prosecutor suggested that rather than looking at each piece of evidence separately, the evidence must be viewed in totality. The prosecutor's argument was not improper.[1]

III. ADMISSION OF EVIDENCE

Defendant argues that the trial court erred in allowing Nita to testify that defendant never expressed any condolences for Elmon's death and in allowing McCoy to testify that he did not attend Elmon's funeral. According to defendant, the testimony was irrelevant or, if it was relevant, the testimony was more prejudicial than probative. We disagree.

We review a trial court's evidentiary decisions for an abuse of discretion. *Unger*, 278 Mich App at 216. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.* at 217. Although defendant objected to the testimony of Nita and McCoy on grounds of relevancy, he did not object on grounds that the testimony was unfairly prejudicial. An objection based on one ground is insufficient to preserve appellate review on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We review unpreserved claims of evidentiary error for plain error. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. It is generally admissible. MRE 402; *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). Here, Nita testified that soon after she learned of Elmon's murder she contacted defendant to ask him what had happened to Elmon and the speakers. According to Nita, defendant replied that he did not know what happened to Elmon and that he had sold the speakers for $200. When Nita told defendant that she needed Elmon's share of the money because she needed money to bury Elmon, defendant stated that he would call her back. Nita testified that Elmon never expressed any condolences for Elmon's death, nor did he ever call her back. McCoy testified that he attended Elmon's funeral, but that defendant did not. While the testimony that defendant did not express any condolences to Nita and did not attend Elmon's funeral was not direct evidence of guilt, the testimony has a tendency to make it more probable that defendant was the person who killed Elmon. MRE 401. The evidence may have indicated defendant's consciousness of guilt. Accordingly, the trial court did not abuse its discretion in concluding that the testimony of Nita and McCoy was relevant.

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[1] If any portion of the prosecutor's closing or rebuttal argument was improper, any prejudice that defendant suffered was cured by the trial court's instructions that the jury was to decide the facts of the case, including the credibility of the witnesses, and that the arguments of the lawyers were not evidence. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.").

Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. All relevant evidence is prejudicial to some extent. *People v Murphy (On Remand)*, 282 Mich App 571, 582; 766 NW2d 303 (2009). It is only evidence that is unfairly prejudicial that should be excluded. *McGhee*, 268 Mich App at 613-614. "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the jury or where it would be inequitable to allow use of the evidence." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). Here, nothing in the record indicates that the jury would give undue or preemptive weight to the testimony of Nita or McCoy or that it would be inequitable for the jury to consider the testimony. Accordingly, the testimony of Nita and McCoy was properly admitted.

IV. SUFFICIENCY OF THE EVIDENCE

Defendant argues that because there was "scant, if any, direct evidence" linking him to the scene of the crime or to the weapon used to kill Elmon, there was insufficient evidence for the jury to convict him of second-degree murder. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* The credibility of the witnesses and the weight to be accorded to evidence are questions for the jury, *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009), and this Court will not interfere with the jury's determinations, *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the crime. *Id.*

In this case, Elmon was in defendant's company the morning of his killing. He and defendant played dice at Keith's house, and Elmon won defendant's money, speakers, and gun. The gun, according to Keith, was a .38 caliber. Defendant was upset with Elmon. He accused Elmon of cheating, but stated that he would "get everything back." Less than two hours after Elmon and defendant left Keith's house, Elmon was dead. The forensic firearms examiner testified that the bullets that killed Elmon were consistent with .38 caliber bullets. In addition, minutes after hearing gunshots, Allison saw an African-American male driving a blue Crown Victoria, the same model car defendant was driving earlier that morning and the night before, west on Longview Street. Smith, after he heard the gunshots, saw an African-American male run past St. Julian's Church Elementary School to a car. The car, which he identified as a Crown Victoria, went past him as he stood at the street edge. He identified defendant as the driver. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that defendant killed Elmon.

IV. DOUBLE JEOPARDY

Defendant received two second-degree murder convictions for the killing of Elmon. Dual murder convictions for the killing of one person violate a defendant's constitution protections against double jeopardy. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Accordingly, we vacate one of defendant's second-degree murder convictions.

Affirmed in part, vacated in part.

/s/ Michael J. Talbot
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher