STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 298829 Wayne Circuit Court
JAMES MOORE, Defendant-Appellant.	LC No. 09-020960-FC

Before: MURPHY, C.J., and JANSEN and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 65 to roughly 89 years for the murder conviction and 2 ½ to 7 ½ years for the felon-in-possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from the August 1, 2009, fatal shooting of Tyrone Rayford on Conley Street in Detroit. Evidence indicated that defendant's cousin "Jay Rock" had an altercation with two teenage girls. The girls reported the incident to female relatives who lived on Conley Street and also telephoned Rayford, their uncle. Following a confrontation and argument between Jay Rock and the girls' relatives, Jay Rock was seen leaving the area. Subsequently, Rayford, who was visibly intoxicated and upset, arrived, comforted his nieces, and then stated that he would take care of the matter. As Rayford walked in the middle of the street, calling out for the "coward" who assaulted his nieces, he was shot six times, including once in the head. Witnesses testified that after the shooting, defendant approached with a gun in his hands, indicated that he did not intend to actually shoot Rayford, and fled through a vacant lot toward his home. At trial, defendant presented an alibi defense through himself, his wife, and his friend James Sobczak.

Defendant's first trial ended in a mistrial after the prosecutor attempted to impeach Sobczak's trial testimony that he was living with defendant at the time of the shooting with evidence that Sobczak was a registered sex offender who did not list defendant's address as his registered address. The trial court ruled that the evidence identifying Sobczak as a sex offender

violated MRE 609 and granted defendant's motion for a mistrial. Before defendant's second trial, the trial court denied defendant's motion to dismiss on double jeopardy grounds. Defendant was thereafter retried and convicted of second-degree murder and the firearm offenses.

I. DOUBLE JEOPARDY

Defendant first argues that his retrial was barred by double jeopardy because the prosecutor goaded him into moving for a mistrial by deliberately injecting the prejudicial evidence that Sobczak, defendant's alibi witness, was a sexual offender. We review a trial court's ruling regarding a motion to dismiss for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001). Whether double jeopardy bars a new trial, however, presents an issue of constitutional law that we review de novo. *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

At defendant's first trial, Sobczak testified that he had lived with defendant on Keystone Street for three years and was with defendant at the time of the shooting. On cross-examination, the following exchange occurred:

> *Q.* Mr. Sobczak, you've indicated that you've lived on Keystone for about three years, correct, as of August 1st of '09?
>
> *A.* Yes.
>
> *Q.* Did you fail to list this as a home address as *a sex offender?*
>
> *A.* No.
>
> *Q. Sir, you are a registered sex offender with the State of Ohio?*
>
> *A.* Yes. [Emphasis added.]

Defense counsel objected, arguing that the prosecutor violated MRE 609 by using a sex offense to impeach Sobczak's credibility. Defense counsel maintained that a mistrial was the only remedy to cure the prejudice, and defendant consented to the mistrial on the record. Among its reasons for granting a mistrial, the trial court was concerned that it could not "unring the bell . . . regarding a violation of Michigan Rule of Evidence 609, the impeachment of the witness, Mr. Sobczak." Subsequently, the trial court denied defendant's motion to dismiss, finding that defendant consented to the mistrial and that the mistrial was not based on prosecutorial misconduct.

The United States and Michigan Constitutions both protect against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Double jeopardy protection attaches when a jury is selected and sworn and is thus applicable before the conclusion of a trial. *People v Dawson*, 431 Mich 234, 251; 427 NW2d 886 (1988). If a trial ends before a verdict is rendered, such as where a mistrial is declared, the Double Jeopardy Clause may bar a retrial. *Id.* If a defendant moves for or consents to a mistrial "and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself," a retrial is generally

permitted. *Id.* at 253. "[E]ven [with] negligent prosecutorial error, . . . the public interest in allowing a retrial outweighs the double jeopardy bar." *Id.* at 257. But even where a defendant requests or consents to a mistrial, retrial is not permitted "where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial." *Id.* at 253, citing *Oregon v Kennedy*, 456 US 667; 102 S Ct 2083; 72 L Ed 2d 416 (1982). Thus, retrial is barred if the court finds that the objective facts and circumstances of the case indicate that the prosecutor's intentional misconduct goaded the defendant into moving for or consenting to a mistrial. *Dawson*, 431 Mich at 257; *People v Tracey*, 221 Mich App 321, 326; 561 NW2d 133 (1997) (retrial is permissible after a mistrial where there was manifest necessity to declare the mistrial or where the defendant consented to the mistrial absent intentional prosecutorial misconduct). The trial court's determination regarding the prosecutor's intent is a factual finding that is reviewed for clear error. *Dawson*, 431 Mich at 258.

Before defendant's second trial, the trial court ruled that evidence regarding Sobczak's legal obligation to register his residence and his failure to identify defendant's address as his registered residence was both relevant and admissible under the circumstances, but that his associated sex-offender status was not.[1] But contrary to defendant's argument, the objective facts and circumstances do not support a finding that the prosecutor's questions at the first trial were intended to goad defendant into moving for a mistrial. The prosecutor had evidence that the sex offender registry showed two listed addresses for Sobczak during the relevant period, neither of which was defendant's address on Keystone Street. This evidence was relevant to impeach Sobczak's trial testimony that he resided with defendant on the day of the shooting. MRE 401. The prosecutor made logical arguments to support her position, her arguments were not baseless, and she submitted caselaw to the trial court that she believed supported her position that the evidence was admissible. "[A] prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007). Although the trial court ultimately ruled at the first trial that the evidence disclosing Sobczak's status as a sex offender, which was the basis for Sobczak's legal duty to register his address, was unduly prejudicial, defendant has not demonstrated that the prosecutor engaged in the line of questioning to incite defendant into moving for a mistrial.

Moreover, the objective circumstances do not show that the prosecution gained any advantage by having a mistrial declared and proceeding to a second trial, and defendant has failed to provide any reason why the prosecutor would have been motivated to obtain a mistrial. To the contrary, defendant moved for a mistrial on the seventh day of trial, after the prosecutor had rested its case, and there is no indication that the prosecutor's case was going poorly. Moreover, the prosecutor vehemently argued against the mistrial motion. The prosecutor encouraged the trial court to provide a cautionary instruction to cure any perceived prejudice, which she claimed could properly guide the jury in evaluating the evidence, and she repeatedly disagreed with defendant's position that no curative instruction could remedy the situation.

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[1] We note that the prosecutor did not ask Sobczak any questions regarding his duty to register his home address at the second trial.

Under these circumstances, the record does not support defendant's claim that the prosecutor intentionally engaged in conduct to provoke defendant into moving for a mistrial. The trial court did not err in denying defendant's motion to dismiss on double jeopardy grounds.

II. REBUTTAL EVIDENCE

Defendant next argues that he was denied his right of confrontation when the prosecutor was allowed to present a DVD recording of his police interview as rebuttal evidence. Defendant argues that the admission of the recording violated his constitutional right of confrontation because the interview included testimonial hearsay statements made by the police officer, who had since died and thus was unavailable for cross-examination. As defendant acknowledges, he did not object to the admission of the DVD recording of his interview on confrontation grounds. Therefore, any review of this unpreserved constitutional claim would ordinarily be limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). Here, however, the record indicates that defendant actually waived any claim of error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

After the defense rested, the prosecutor asked to play the DVD recording of defendant's police interview as rebuttal evidence to refute some of defendant's trial testimony. After the court and the parties watched the DVD outside the jury's presence, the following exchange occurred:

The Court: [Prosecutor], that's the entirety of the rebuttal?

The Prosecutor: Yes, your Honor.

The Court: [Defense counsel], any objection?

Defense Counsel: *No.* [Emphasis added.]

On the following morning, the court recalled the case, and stated:

The Court: The posture of the case is the prosecutor's presenting an interview of the Defendant by the Homicide officer at the homicide Division and [defense counsel], *you have no objection to that, correct*?

Defense Counsel: *That is accurate your Honor.*

The Court: What else?

Defense Counsel: I am in receipt of, well I have in my possession a request for interview and interrogation. This is an interview that was performed on 8-1-2009. And the time of the interview is 9:40 a.m. Ending time of the interview is at 11:10 a.m. And I believe the People have offered to show twenty two minutes of

	the interview. I'm asking in the Rule of completeness, your Honor that the they be allowed to hear the balance of the interview.
The Court:	[Prosecutor.]
The Prosecutor:	Judge, my response is, my impeachment, this is rebuttal, specific impeachment of [defendant] as related to when he was first interviewed and Mirandized by Officer Ed Williams, his first posture and his first response versed in time is hey, I didn't have a gun. Hey, I didn't—
The Court:	Well fine, but what about this other interview, does it exist?
The Prosecutor:	Judge, we're checking it right now on the computer. Apparently, I'm not aware of it, Judge. I don't dispute—
The Court:	Well, let [the prosecutor] go forward with rebuttal. If there's surrebuttal, I'll take a look at it.
Defense Counsel:	I didn't hear the last part of what you said.
The Court:	If there's surrebuttal, I'll take a look at it out of the presence of the jury. Are you ready? [Emphasis added.]

The jury was brought out and the DVD was played for the jury. Thereafter, in response to the trial court's inquiry, defense counsel stated, "We have no rebuttal witnesses your honor."

Because defendant specifically acquiesced to the prosecutor playing the DVD of defendant's police interview as rebuttal evidence, he waived appellate review of this issue. *Carter*, 462 Mich at 215-216. Defendant's waiver extinguished any error. *Id.* at 216. Defendant "may not harbor error as an appellate parachute." *Id.* at 214. Defendant's contention that he objected to the prosecutor's request to play the DVD as rebuttal evidence mischaracterizes the record. After assenting to the evidence, defense counsel indicated that a document he had viewed suggested that the interview was 1-1/2 hours rather than 22 minutes. Defense counsel requested that the jury be allowed to hear the entire interview, rather than only the 22-minute portion that the prosecutor planned to present. The prosecutor was unaware of any additional interview content, but agreed to check if anything existed. The trial court agreed to proceed and stated that any additional matter would be open for surrebuttal. After the prosecutor played the 22-minute recording, defense counsel indicated that he had no rebuttal witnesses. Defense counsel made no further mention of any additional interview material, or that the interview as played was incomplete, and there is no indication in the record that the actual interrogation was longer than 22 minutes. Defendant's unsubstantiated belief that the interview might have been longer does not negate defense counsel's assent to the admission of the prosecutor's rebuttal

evidence as presented. Therefore, defendant has waived the issue, thereby extinguishing any error.

Even if this issue was not waived, however, there was no plain error. Defendant argues that the interrogating police officer's statements during the police interview were testimonial statements, the admission of which violated defendant's right of confrontation. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Chambers*, 277 Mich App at 10-11; see also *Crawford*, 541 US at 59 n 9. In this case, the recorded interview was not offered for the purpose of establishing the truth of the police officer's statements during the interview. Rather, it was offered to show defendant's statements during the interview for the purpose of rebutting defendant's inconsistent trial testimony. The officer's statements to defendant during the interview merely provided context for understanding defendant's statements. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich App at 11. Accordingly, defendant's right of confrontation was not violated and there was no plain error.

III. DEFENDANT'S STANDARD 4 BRIEF

Defendant also raises an unpreserved double jeopardy issue in a pro se supplemental brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4. This Court reviews defendant's unpreserved constitutional claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

Defendant argues that the prosecutor engaged in misconduct by knowingly presenting false testimony at the first trial and that this misconduct barred a retrial. Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. *Herndon*, 246 Mich App at 417. A prosecutor therefore has a constitutional duty to inform the trial court and a criminal defendant when a government witness offers perjured testimony. *People v Lester*, 232 Mich App 262, 276-277; 591 NW2d 267 (1998). A prosecutor may not knowingly use false testimony to obtain a conviction and must correct false evidence when it is presented. *Id.* at 277. Absent proof that the prosecutor knew that trial testimony was false, reversal is unwarranted. *Herndon*, 246 Mich App at 417-418.

Given that the first trial ended in a mistrial, not a conviction, and that the mistrial had nothing to do with allowing alleged perjured testimony to be presented, we fail to understand defendant's double jeopardy argument, and defendant provides no relevant supporting authority. See *People v Aceval*, 282 Mich App 379; 764 NW2d 285 (2009). Regardless, defendant's claims of false testimony and prosecutorial misconduct lack merit. Although defendant asserts that the prosecutor used false testimony from Akena Anderson, Arkeith Rayford, and the officer in charge of the case, he does not offer any evidence that their testimony was actually false. Rather, his arguments are simply that the witnesses' testimony was either inconsistent with other evidence, or was not believable. The mere existence of conflicting evidence, however, is

insufficient to establish that the prosecutor knowingly permitted false testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998) see also *People v Kozyra*, 219 Mich App 422, 429; 556 NW2d 512 (1996). Further, there is no indication in the record that, even if any of the witnesses testified falsely, the prosecutor knew that their testimony was false. Accordingly, there is no basis for concluding that the prosecutor engaged in misconduct. Rather, defendant's arguments concern witness credibility, which is for the jury to resolve. Indeed, as the first trial proceeded, the jury heard the alleged inconsistencies and the allegedly incredible testimony, and, by defendant's own account, the witnesses were often called upon by the prosecutor or defense counsel to explain previous statements or testimony that may have been unclear or inconsistent. Because there is no evidence that the prosecutor engaged in any misconduct in this regard during the first trial, let alone to the level of barring a retrial, we reject this claim of error.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Donald S. Owens