STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2011
v	No. 299159 Oakland Circuit Court
JESSIE LEE KNOLTON, Defendant-Appellant.	LC No. 2009-229568-FC

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for armed robbery, MCL 750.529. Defendant was sentenced as a fourth habitual offender, MCL 769.13, to 12 ½ to 40 years' imprisonment for the armed robbery. We affirm.

I. BACKGROUND

On September 29, 2009, Paul Karr, the victim, closed his business around 7:00 p.m. and drove to the First Place Bank on 12 Mile Road and Telegraph in Southfield to make a deposit. When Karr arrived at the bank, he exited his vehicle and began to walk through the parking lot towards the bank's main entry door. Suddenly, codefendant Edward Knolton (Edward), defendant's brother,[1] approached Karr pointing a small, silver caliber revolver at Karr and stated "give it up." Karr was shocked and stood still for one to two seconds until defendant unexpectedly grabbed Karr's shoulders from behind and pulled Karr backwards. Karr resisted defendant's pull by hunching forward. However, defendant maintained his grip on Karr's shoulders while Edward began striking Karr in the head several times with a blunt object. During this attack, one of the two men removed Karr's cell phone, three checks, and a bank deposit slip from Karr's right cargo pants pocket. Then Karr, who was still bent forward and hunched over, pulled his gun out of his left hip holster[2] and pointed it at Edward's knee. Once the two men saw Karr's gun, they stopped attacking him, ran to their vehicle, and drove away.

[1] Edward was not a party to these proceedings.

[2] Karr has a valid CCW permit.

At least three people witnessed the armed robbery and the police were called. Shortly after 7:20 p.m., Officer Nicholas Smiscik, from the Southfield Police Department, began trailing defendant's vehicle southbound on the Lodge Freeway. After additional police backup arrived, Smiscik initiated a traffic stop and, ultimately, defendant and Edward were arrested. After a jury trial, defendant was found guilty of armed robbery. This instant appeal ensued.

II. ANALYSIS

A. INSTRUCTIONAL ERROR

Defendant asserts that the trial court erred when it refused to give jury instruction CJI2d 4.5(2) because Karr's prior inconsistent written statement should have been used by the jury as both impeachment and substantive evidence pursuant to MRE 801(d)(1)(A), or MRE 803(1) or (2). This Court reviews claims of instructional error de novo. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Evidentiary issues are reviewed for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). "A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes." *Id*.

Jury instructions must fairly present the issues to be tried and sufficiently protect a defendant's rights. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "A defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her." *Dobek*, 274 Mich App at 82. "The trial court's role is to clearly present the case to the jury and to instruct it on the applicable law." *Id*. The instructions must include all elements of the charged offenses, and must not exclude relevant issues, defenses, and theories if supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005). CJI2d 4.5 provides:

> (1) [i]f you believe that a witness previously made a statement inconsistent with [his / her] testimony at this trial, the only purpose for which that earlier statement can be considered by you is in deciding whether the witness testified truthfully in court. The earlier statement is not evidence that what the witness said earlier is true.
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> (2) Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at this trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.

The use note for this instruction states:

> [t]his instruction is intended to explain to the jury in paragraph (1) that prior inconsistent statements are normally admissible only to impeach a testifying witness. Paragraph (2) addresses those situations in which the out-of-court statement is admissible both to impeach and as substantive evidence because of non-hearsay or admissible hearsay. MRE 801(c)-(d), 803, 803A, 804.

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007), citing MRE 801(c). Under MRE 801(d)(1)(A), a prior inconsistent statement is not hearsay if:

> (1) … [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition….

Accordingly, a prior inconsistent statement is not hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the prior statement is inconsistent with the declarant's testimony, which was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. *People v Malone*, 445 Mich 369, 377-379; 518 NW2d 418 (1994).

MRE 803(1), the hearsay exception for a present sense impression, allows "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." "The admission of hearsay evidence as a present sense impression requires satisfaction of three conditions: (1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998).

MRE 803(2), the hearsay exception for an excited utterance, allows admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." There must be sufficient evidence that (1) the startling event actually occurred and (2) that the declarant was still under the stress of the startling event. *People v Barrett*, 480 Mich 125, 133-134; 747 NW2d 797 (2008). The question is not strictly one of time, but whether the declarant had the possibility to consciously reflect. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).

The trial court properly denied the requested jury instruction, CJI2d 4.5(2), because it correctly concluded that Karr's written statement to the police was inadmissible as substantive evidence pursuant to MRE 801(d)(1)(A) or MRE 803(1) or (2). Karr's written statement was not given under oath and, thus, it cannot be excluded as hearsay pursuant to MRE 801(d)(1)(A). *Malone*, 445 Mich at 377-379. Moreover, it is not disputed that Karr wrote his statement at least one hour after he was attacked. Therefore, there is no foundation for allowing the written statement into evidence under the present sense impression hearsay exception, MRE 803(1). *Hendrickson*, 459 Mich at 236. Likewise, there is no basis to conclude that Karr was still under the stress caused by his attack when he wrote the statement. Although Karr acknowledged that his blood pressure was high and he was almost in shock at the time he wrote the statement, he also stated that at least one hour had lapsed since the attack. Defendant has not proven that Karr was unable to consciously reflect before writing the statement, and thus, the statement is not admissible under the excited utterance hearsay exception, MRE 803(2). *Barrett*, 480 Mich at 133-134; *Smith*, 456 Mich at 551. Consequently, Karr's prior inconsistent statement was admissible only as impeachment evidence and the trial court properly declined to read CJI2d 4.5(2).

B. PROSECUTORIAL MISCONDUCT

Defendant asserts several claims of prosecutorial misconduct, none of which were objected to at trial. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. To avoid forfeiture of the issue under plain error, the defendant must show that: (1) an error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To show plain error affecting the defendant's substantial rights, the defendant must prove prejudice occurred, meaning that the error must have affected the outcome of the lower court proceedings. *Id*. If the defendant satisfies all three factors, "this Court must then exercise discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*.

A prosecutor may not engage in conduct or make an argument that rises to the level of denying defendant a fair and impartial trial. *Dobek*, 274 Mich App at 63-64. Prosecutorial misconduct claims are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of [the] defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Prosecutors are generally given great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), citing *People v Duncan*, 402 Mich 1, 16-18; 260 NW2d 58 (1977).

Defendant argues that the prosecution improperly shifted the burden of proof during its closing argument when it commented that defendant had just gotten out of prison and argued during its closing and rebuttal arguments that, based on the evidence presented, Karr, Rhonda Ginsburg, and Kenneth Fisher were credible witnesses. The prosecution is allowed to make arguments based on admissible evidence and may argue all reasonable inferences that arise from the evidence. *Aldrich*, 246 Mich App at 112. In reviewing the prosecution's comments in context, the prosecution was presenting its theory of the case by making reasonable arguments based on the evidence provided during trial. The prosecution did not state that defendant had just been released from prison, but did properly argue that the jury could reasonable infer that defendant knew about Edward's plan to commit armed robbery because Edward had recently been released from prison. Likewise, the prosecution properly argued that it was reasonable to infer that Karr, Ginsburg, and Fisher were credible witnesses based on the evidence presented during trial.

Defendant also contends that the prosecution improperly shifted the burden of proof during its rebuttal argument when it stated that only defendant or Edward would be able to present evidence that they discussed the armed robbery beforehand. "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence, or comment on the defendant's failure to present evidence" because such an argument impermissibly shifts the burden of proof. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). But, a prosecutor is permitted to respond to a defendant's theory of defense and argument. *Thomas*, 260 Mich App at 454. The prosecution did not imply that defendant needed to prove something or provide a reasonable explanation.

Rather, the prosecution was properly responding to defense counsel's closing argument that there was no evidence of a prior discussion regarding the armed robbery between defendant and Edward when it stated that only defendant or Edward could present evidence regarding whether they had a conversation about committing the armed robbery beforehand. The prosecution's commentaries during its closing and rebuttal arguments were proper.[3]

Next, defendant contends that the prosecution improperly vouched for the credibility of its witnesses in its closing and rebuttal arguments by informing the jury that none of its witnesses had a reason to lie. While the prosecution cannot vouch for a witness's credibility in a manner that suggests that they have special knowledge regarding the witness's truthfulness, *Bahoda*, 448 Mich at 276, "a prosecutor may comment on his own witnesses' credibility during closing argument," *Thomas*, 260 Mich App at 455, by arguing any reasonable inference that may arise from the evidence, *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). In reviewing the prosecution's comments in context, we conclude that defendant was not denied a fair trial. The prosecution was properly asking the jurors to evaluate the credibility of all the witnesses based on the evidence, and in light of their common sense and experience.

Defendant asserts that the prosecution improperly asserted during its opening statement that defendant lacked a job or income and improperly questioned him during cross-examination about his lack of employment or income. Generally, evidence of poverty or employment status is inadmissible to show a motive or predisposition to commit the charged crime. *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). However, prosecutorial misconduct cannot be based on good faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The prosecution is entitled to attempt to introduce evidence which it legitimately believes will be accepted by the court so long as that attempt does not actually prejudice the defendant. *Id*. at 660-661. To begin, we note that neither the prosecution nor defense counsel claimed during opening statements that defendant lacked a job or income. However, during the prosecution's cross-examination of defendant, defendant was asked if he was employed and what his source of income was at the time the charged offense occurred. While it does not appear that this elicitation by the prosecution was to show motive or a predisposition to commit the charged crime, it is also unclear why the prosecution engaged in this line of questioning because it was not logically relevant to a material fact of the charged crime. See *People v Mardlin*, 487 Mich 609, 615; 790 NW2d 607 (2010), citing MRE 401. Nonetheless, defendant fails to establish plain error because the elicitation does not appear to be

[3] Defendant also argues that the prosecution improperly shifted the burden of proof when it posed a series of questions in its closing and rebuttal arguments and implied that defendant was required to answer them to prove his innocence. Defendant failed to provide a record citation to support his claim. In addition, a review of the record reveals that the prosecution did not pose a series of burden shifting questions to the jury during its closing or rebuttal. Without any support in the record for defendant's claim, his argument is without merit. See *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990) ("'Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.'").

a studied attempt by the prosecution to demonstrate that persons in dire financial straits are predisposed to break the law. *People v Fowlkes*, 130 Mich App 828, 838; 345 NW2d 629 (1983). Moreover, we note that it appears that defense counsel's failure to object to this testimony was purposeful because defense counsel also inquired into this same area on cross-examination to establish that defendant was on social security disability because of a brain aneurysm that resulted in short term memory problems. In fact, it appears that defense counsel elicited that testimony to establish his theory that defendant's medical problems prohibited him from understanding that Edward was plotting an armed robbery.

Furthermore, a timely curative instruction generally eliminates any possible prejudicial effect that may have resulted from prosecutorial misconduct. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The trial court properly instructed the jury that defendant was innocent until proven guilty, the prosecution bears the burden of proving each element of each charged crime beyond a reasonable doubt, the fact that defendant was charged with a crime was not evidence, and the attorneys' statements and arguments were not evidence. Thus, any potential prejudice arising from the prosecution's allegedly improper comments was dispelled. *Bahoda*, 448 Mich at 281. Defendant cannot show plain error affecting his substantial rights.

Finally, defendant argues that the cumulative effect of the alleged prosecutorial errors denied him his due process rights. "The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106. Because no error of consequence occurred, the cumulative effect doctrine is inapplicable.

C. OV 19

Defendant argues that the trial court erred in scoring OV 19 at 10 points. Defendant failed to properly raise this issue before the trial court or in a timely motion to remand with this Court. *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Unpreserved sentencing challenges are reviewed for plain error affecting the defendant's substantial rights. *Id*. at 312, citing *Carines*, 460 Mich at 763-764. A sentencing court has discretion in determining the number of points to be scored, provided that the evidence adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court must affirm a sentence within the applicable guidelines range, absent an error in the scoring or reliance on inaccurate information in determining the sentence. *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000), citing MCL 769.34(10).

Under OV 19, 10 points are scored if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In scoring OV 19, the trial court may depart from the general rule of only considering conduct that occurred before the completion of the sentencing offense and consider "conduct that occurred after the sentencing offense was completed." *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). Defendant interfered with the administration of justice when he fled from the scene after committing the armed robbery and refused to comply when the police ordered him to exit his vehicle before

being arrested. See *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004) (holding that interfering with the administration of justice includes hindering a law enforcement officer's criminal investigation). The trial court properly scored 10 points under OV 19. Defendant's minimum sentencing guidelines range has not changed and he is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 88-92; 711 NW2d 44 (2006).

D. *BLAKELY* VIOLATION

Defendant contends that the Michigan sentencing guidelines are unconstitutional pursuant to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), because they allow a trial court to sentence a defendant above the statutory maximum sentence based on facts not found by the jury. Defendant failed to raise this issue before the trial court, and it is contrary to established precedent. *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006); see also *People v McCuller*, 479 Mich 672; 739 NW2d 563 (2007).

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray