STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299517 Saginaw Circuit Court
ANTHONY COLEMAN, Defendant-Appellant.	LC No. 08-030136-FC

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant Anthony Coleman appeals as of right his convictions of conspiracy to commit armed robbery, MCL 750.157a, armed robbery, MCL 750.529, carrying or possessing a firearm during the commission of a felony (felony-firearm), namely armed robbery, see MCL 750.227b, possessing a firearm while ineligible to do so (felon in possession), MCL 750.224f, felony-firearm related to his being a felon in possession, and carrying a concealed weapon, MCL 750.227, after a second jury trial.[1] The trial court sentenced Coleman as a fourth habitual offender, see MCL 769.12, to serve 25 to 50 years in prison for his conspiracy to commit armed robbery, armed robbery, being a felon-in-possession, and carrying a concealed weapon, which sentences were to be served concurrently. The trial court also sentenced Coleman to serve two years in prison for each felony-firearm conviction, which sentences were to be served concurrent to each other, but prior to the remaining four sentences. The trial court gave Coleman 671 days' credit toward his felony-firearm convictions. On appeal, Coleman argues that the prosecutor committed misconduct when he commented on Coleman's failure to produce evidence and that the trial court deprived him of a defense when it precluded him from offering evidence to establish that he did not have a motive to commit robbery and to establish that he had a learning disability. Because we conclude that there were no errors warranting relief, we affirm.

[1] Coleman's first trial ended in a mistrial after the jury could not agree on a verdict.

I. BASIC FACTS

Christopher Hill testified that he formerly worked the third shift at a 7-11 convenience store in Saginaw, Michigan. He related that he was smoking a cigarette outside near his truck during the early morning hours of December 13, 2007, when a tall man—about 6 feet 1 or 2 inches—approached the store's entrance. Hill remarked that the man had a ski-mask covering his face. Hill asked him to remove the mask, but he did not.

Hill said he went into the store shortly after the man entered. The man went to a cooler, got a pop, and then walked to the counter. Hill passed the man on his way to the counter and the man "was acting like he was maybe digging for change to pay for his pop . . . ." So Hill walked passed him to go behind the counter. As he passed by, the man put a gun to Hill's back. After Hill opened the register, the man took the cash—a handful of ones, fives, [and] maybe one ten." The man then left. Hill called the police and he saw officers driving around the area "within the minute"—"they responded very quick."

Matthew McMahon testified that he lived about a block from the 7-11 store involved in the robbery. He was up because he worked third shift and stayed up late. He had opened a second story window and leaned out to smoke a cigarette before going to bed at about 3:30 or 3:45 in the morning. As he smoked, he noticed a car parked across the street "kind of blocking" his neighbor's driveway. The car was white with a dark cloth top on the back half. McMahon said that the car appeared empty, but then it suddenly started up and the lights came on. The driver pulled away and drove toward Main Street, which was near the location of the 7-11, performed a U-turn, returned and stopped in the middle of the road. McMahon said that the driver got out of the car at about the time another man appeared "running around the corner coming from Main Street towards the car, and I heard the driver saying, 'Come on, come on, come on.'" McMahon thought the other man must have gotten into the car because he did not see the man after the driver got back into the car and drove off.

Officer Douglas Jordan testified that he responded to a dispatch about a robbery that had occurred at a 7-11 store. It was 3:38 in the morning on December 13, 2007. Jordan proceeded to the store, spoke to Hill, and took a description of the man that robbed the store: a black male, 33 to 38 years of age, 6 foot 4, 230 pounds, and wearing a beige ski mask, gloves, sweatpants, and dark jacket. Jordan said he put out the description over his radio.

Detective Matthew Gerow testified that he was a patrolman back in December 2007 and that he was patrolling Saginaw's southwest side when he heard a dispatch concerning an armed robbery at a 7-11 store. Gerow said that he drove to the area and began to circle the nearby blocks "listening for dogs barking or chain link fence rattling, any sign of movement in the blocks there." As he was driving down one street, he heard someone shout "Officer, Officer." Gerow looked up and saw a man leaning out of a second story window. The man asked him if "something had happened" and Gerow asked why he asked.

McMahon testified that, five to seven minutes after the man in the white car drove off, he saw a police officer driving down his street with no lights on. He yelled to the officer and told him about the white car and the man running from Main Street. Gerow said that the man in the window told him that he "just seen a black guy wearing all dark clothing with a knit hat jump

into a vehicle that . . . sped off." Gerow took a description of the vehicle and put it out "over the police radio."

Officer Anthony Teneyuque testified that he was driving toward the 7-11 store after hearing the dispatch concerning an armed robbery. He said he heard the description of the suspect—a tall, heavy, black man in dark clothing—and of the white car with the cloth top. Teneyuque stated that there were no cars on the roads at the time. As he was crossing the Center Street Bridge on the way to the 7-11 store, he noticed a white car with a cloth top being driven in the opposite direction. He decided to turn around and speed up to investigate the white car. He stopped the car and walked up to the driver's side door.

Teneyuque said that Coleman was the driver and that there was no other person in the car. He asked Coleman to get out, which Coleman did, and then explained that he was investigating an armed robbery. He also asked Coleman if he could search his car and Coleman told him that he could. For reasons of safety, Teneyuque placed Coleman in the back of his patrol car before he searched Coleman's car. He said that he did not find anything in the car and, because Coleman did not match the description of the suspect, he thought there was no further reason to detain him. However, when he went to report the stop by radio, he stood near the white car's trunk and heard a noise coming from it. He opened the trunk and discovered a large man, who was later identified as Corey Harper, lying inside in a half-fetal position. Harper was wearing dark clothing and clutching a handful of cash. He later found gloves and a handgun in the trunk. Teneyuque noted that the stop occurred at 3:46 a.m.

Coleman testified on his own behalf. Coleman said that, on the morning at issue, he was out at a friend's house and got a call that another friend's home "had got shot up." He decided to go visit this friend at about two in the morning to see if he was ok. However, he was having trouble finding the home where this friend went to stay after the shooting, so he was driving up and down the road. At that time, Harper came running up to him and related that someone was trying to kill him. Coleman said that he knew Harper from the neighborhood. Coleman testified that he decided to help Harper; so he put him in the trunk. Coleman explained that Harper was "too big" and he was afraid that whoever was trying to kill Harper might "shoot the whole car up", if they saw Harper in the car. Coleman said that he did not see Harper with gloves or a gun. He said he was merely trying to take Harper back to their neighborhood, where he would be safe, when an officer pulled him over.

Coleman admitted that he did not flag down an officer to help with Harper's situation. He stated that he did not seek an officer's help because "they never help us." He also admitted that he did not tell the officer who pulled him over that Harper was in the trunk. Teneyuque testified that he asked Coleman why he did not reveal that Harper was in the trunk and Coleman responded that he "didn't want to get into Mr. Harper's business." Coleman testified that he did not tell Teneyuque about Harper because he knew that Harper was in a gang and he feared retaliation. He also explained that people from his neighborhood "don't talk to police."

After the close of proofs, the jury rejected Coleman's claim that he was just an innocent victim of circumstance and found him guilty on all counts. The trial court later sentenced Coleman as stated. This appeal followed.

II. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Coleman first argues that the prosecutor committed misconduct when he remarked on Coleman's failure to corroborate his claim that he was working, which he could not do given that the prosecutor successfully moved to prevent him from presenting the receipts that would have corroborated his work claims. This Court reviews claims of prosecutorial misconduct de novo to determine whether the improper remarks deprived the defendant of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

B. ANALYSIS

At trial, Coleman asserted that he had no motive to commit a robbery. He stated that he supported himself by performing lawn care and snow removal services for a realtor. Coleman told the jury that he was "well off" and even had his own "credit cards." When asked the name of the realtor for whom he worked, Coleman initially stated that he had forgotten his name; he explained that the realtor just mailed his payments. But Coleman also repeatedly referred to receipts that would prove that he worked for the realtor; indeed, he noted—in the jury's presence—that the prosecutor had prevented the admission of the receipts because "you want to lie in court." The trial court had earlier precluded the admission of the receipts, which were apparently hand written by Coleman's wife, because Coleman did not reveal the existence of the receipts until just before the current trial. After locating the realtor's business card, Coleman remembered that his name was Wesley Stone. However, Coleman did not call Stone to testify on his behalf.

In his rebuttal argument, the prosecutor emphasized the evidence that Coleman had not told his probation officer that he was working and that Coleman otherwise failed to present evidence that corroborated his employment claim:

> Why don't you tell your probation officer you've been working? Because you haven't been? Can you really buy the argument he wouldn't say that because that was October and the grass cutting is over? Aren't you supposed to be trying to impress your probation officer with all the things you're doing right? But, no, he doesn't bring it up at all. As a matter of fact, he tells him not working, doing odd jobs, yet we hear about him working for some guy, Wesley Stone I think he said, who mails him checks for lawn work. He's in Bay City. Remember? Where's Wesley? Where's the guy that's writing the checks? Where are the checks? Where's anything?

A prosecutor might commit misconduct by commenting on a defendant's failure to produce evidence. See *People v Shannon*, 88 Mich App 138; 276 NW2d 546 (1979); see also *People v Guenther*, 188 Mich App 174, 180; 469 Nw2d 59 (1991) (stating that a prosecutor may not suggest in closing argument that a defendant must prove something). But such cases are limited to instances where the defendant did not testify or proffer evidence in support of a particular theory. *Shannon*, 88 Mich App at 145 (distinguishing its case from those where the prosecutor properly commented on the defendant's failure to produce a witness to corroborate a

theory actually advanced at trial). It is, however, well-settled that, once a defendant presents a particular theory to the jury for consideration, the prosecutor can comment on the defendant's failure to present evidence to support that theory. See *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995).

Here, Coleman's defense was that he was the victim of circumstance. To bolster this theory, he testified that he had no motive to commit a robbery for a few dollars because he was "well off" and working in lawn care and snow removal. Although the prosecutor does not have to prove motive, evidence of motive—or a lack thereof—can be relevant to show that the defendant was more or less likely to commit the charged offense. See *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995) (noting that evidence of marital discord is relevant to show motive to murder, just as evidence of marital harmony would be relevant to show lack of motive to murder). Thus, when Coleman presented evidence that he had no motive to commit the robbery, the prosecutor had every right to comment on the weakness of Coleman's evidence showing a lack of motive. *Fields*, 450 Mich at 115-116. As can be seen from the remarks about which Coleman complains, the prosecutor emphasized that the evidence that Coleman never told his parole officer about his new employment, despite the fact that one would presumably want one's parole officer to be aware of such an important fact. The prosecutor also noted—in passing—that Coleman had not called his purported employer to the stand or offered any checks into evidence that would show how much he had earned. These remarks were all proper; Coleman was in a better position to reveal who his employer was and to call him to the stand to corroborate his employment claims. But he failed to call Stone to the stand. Coleman presumably also had access to the checks or copies of the checks from his employment, but did not produce them. Indeed, Coleman failed to reveal his employment in lawn care and snow removal during discovery, during his preliminary examination, during his last trial, or before the present trial. Given the testimony from his parole officer, the prosecutor could properly argue that the reason Coleman did not produce Stone or Stone's checks was because he was not actually working for Stone. *Id.*

In addition, the remarks cannot be said to exploit the trial court's decision—as Coleman claims on appeal—to prohibit him from presenting "employment corroboration" evidence. This is because the trial court made no such prohibition; it precluded him from presenting newly "discovered" receipts drawn up by his wife, because he had not disclosed the receipts—or indeed his employment history—until the second day of the present trial, which the court determined amounted to a discovery violation. And, contrary to Coleman's claim at trial, the prosecutor did not directly comment on his failure to produce "receipts." Rather, the only comment that could even be considered improper was the prosecutor's closing comment, "Where's anything?" This last remark might—in a stretch—be considered an improper reference to Coleman's failure to produce the precluded receipts. But it can just as easily be understood as a summation of the prosecutor's statements immediately preceding that remark; namely, that Coleman did not call Stone to the stand and did not present copies of Stone's checks to show that he was actually "well off" and, therefore, did not need to commit a robbery to get money. When this isolated remark is considered in light of Coleman's trial counsel's closing argument and the evidence adduced at trial, we cannot conclude that it was improper. *Bahoda*, 448 Mich at 267 n 7 (explaining that the prosecutor's comments must be examined in context and noting that each case must be considered on its own facts to determine whether the conduct denied the defendant a fair trial).

Even if this two-word comment could be considered improper, we do not agree that it deprived Coleman of a fair trial. *Id.* at 266-267. The evidence that Coleman knowingly participated in Harper's robbery of the 7-11 store—although circumstantial—was quite strong. Coleman's convoluted explanation of the circumstances that innocently explain how Harper came to be found in his trunk during a traffic stop shortly after an early morning robbery is so far-fetched that it actually served to highlight the strength of the circumstantial evidence tending to show that he agreed to provide Harper with the transportation for the robbery. Further, the prosecutor had no burden to prove that Coleman had a motive to commit robbery, see *People v Oliphant*, 399 Mich 472, 489; 250 Nw2d 443 (1976) (noting that motive is never an element of a criminal offense), and the fact that Coleman had employment did not, in any event, negate the motive of pecuniary gain—it is entirely plausible that Coleman would participate in the robbery to obtain additional money despite being "well off." Given that Coleman's motive theory was weak, that the evidence tended to show that he was not actually working despite his testimony to the contrary, and that the purportedly improper comment was quite minor, even if improper, the comment does not warrant relief. *Bahoda*, 448 Mich at 267.

The prosecutor did not commit misconduct and, even if were to conclude otherwise, the prosecutor's remark would not warrant relief.

III. PRECLUSION AS A DISCOVERY SANCTION

A. STANDARD OF REVIEW

Coleman next argues that the trial court abused its discretion when it precluded him from presenting his receipts at trial as a discovery sanction. This error, he asserts, deprived him of the ability to present a defense and so prejudiced his trial that it warrants reversal of his convictions. He also argues that the trial court erred when it precluded him from presenting evidence that he had a learning disability to explain why he could not remember the name of his employer. This Court reviews a trial court's decision to preclude the use of evidence for an abuse of discretion. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id.*

B. PRECLUSION OF THE RECEIPTS

During the second day of trial, Coleman's trial counsel informed the trial court that he had received some receipts showing that Coleman was earning a "decent income" from lawn care and snow removal. Coleman's trial counsel acknowledged that the discovery deadline had passed, but asked for permission to use the evidence in his client's case because the receipts were "exculpatory." The prosecutor objected to the request to use the receipts because it would amount to "trial by ambush." The prosecutor noted that Coleman did not present the receipts at his preliminary examination or at his first trial, and did not mention them at this trial until the second day; indeed, he noted that Coleman had had two years to come up with the receipts. The prosecutor stated that—at this late stage—he had no way to challenge the "validity" of the receipts and the person who would purportedly lay the foundation for them—Coleman's wife—had been sitting in the courtroom throughout the trial. The prosecutor also noted that they were "not exculpatory" and were not even relevant because they did not appear to cover the period at

issue. The court questioned the relevance of the receipts, but determined—in any event—that it would preclude the use of the receipts as a discovery sanction.

Although a defendant has a constitutional right to present a defense, that right is not absolute; the defendant must still comply with the rules and statutes designed to ensure that the trial is fair. *Yost*, 278 Mich App at 379. Here, Coleman waited until the second day of his second trial to reveal the existence of the receipts. And, despite his claim that he could not have revealed them earlier because he had thought them lost, he also failed to disclose the existence of this employment prior to the present trial. That is, it was not just that he failed to disclose the existence of the receipts, he also failed to disclose that he worked for a man named Stone performing lawn care and snow removal prior to this trial. By failing to disclose these claims, he prevented the prosecutor from investigating this employment prior to trial. Further, the receipts were apparently hand written by Coleman's wife. Hence, in order to adequately challenge the receipts, the prosecutor would have required time to try and locate Stone, investigate Coleman's bank accounts, and ultimately depose Coleman's wife. As such, the late production of these receipts was highly prejudicial to the prosecution and could likely only be remedied through an adjournment of the trial. Likewise, the receipts had limited relevance to show that Coleman had income during the period at issue and Coleman still had the opportunity to present other less prejudicial evidence tending to show that he had a source of income. Given these considerations, we cannot conclude that the trial court abused its discretion when it prohibited the use of these receipts. *Id.*

C. PRECLUSION OF EVIDENCE OF LEARNING DISABILITY

During his redirect testimony, Coleman's trial counsel asked Coleman whether he had a learning disability and the prosecutor objected. Coleman's trial counsel informed the court that he wanted to ask the question in order to explain to the jury why it was that Coleman could not remember names and street names. At this point, Coleman interrupted and complained that the prosecutor "know this. He didn't want to allow that, either." The court then sustained the prosecutor's objection and instructed the jury that it could not consider evidence that had not been disclosed prior to trial. After the court excused the jury, Coleman's trial counsel asked to clarify the ruling:

> MR. HERRMANN: I just want to clarify in my own mind the Court's ruling just now. I think what I was trying to bring up as far as his learning disability, the inability to remember the name of the guy he worked for, that question was asked.
>
> THE COURT: That's a fair question. I think the answer is where we get off into the speech to the jury about wanting to get out of here, and so that's where I'm drawing the line.

After this, the court clarified that it did not think that Coleman could offer evidence concerning his learning disability to show that he was not "mentally competent." The court also noted that Coleman's trial counsel had already elicited testimony showing that Coleman could not read and write and that he did not remember his employer's name. Finally, the trial court asked Coleman's lawyer to counsel Coleman about his tendency to make non-responsive comments about the evidence.

From the record, it is not clear that the trial court actually precluded Coleman from testifying about his learning disability for the purpose of explaining his inability to remember the name of the man that he worked for. Rather, the court seemed to preclude testimony that he had a learning disability to show that he was not mentally competent in a broader sense, which was proper. See *Yost*, 278 Mich App at 353-355. The court was also plainly focused on Coleman's proclivity for interjecting improper and non-responsive commentary on the evidence, the court's rulings, and the prosecutor's conduct. In any event, to the extent that the trial court might have erred by precluding Coleman from offering testimony about his learning disability for a proper purpose, see *id.* at 355 (stating that a defendant might properly present evidence of his or her limited intellectual capabilities for a purpose other than to negate specific intent), we cannot conclude that such an error warrants relief.

Coleman's trial counsel presented evidence that Coleman could not read or write, which tended to show that he some sort of learning deficiencies and also tended to explain why he might not be able to recall the names of streets or the name of the man for whom he worked. Thus, any additional testimony concerning a clinical learning disability would have only marginal additional relevance toward explaining his mnemonic short-comings. Moreover, on the following day's testimony, Coleman testified that he had difficulty remembering names and that that difficulty was related to his inability to read and write. He also testified that he is easily confused. Finally, he testified that he refreshed his recollection and recalled the name of the realtor for whom he performed lawn work, which was Wesley Stone. Consequently, the trial court actually allowed Coleman to present significant testimony concerning his limitations. Given this, we cannot conclude that any error in the trial court's decision to limit Coleman's testimony about his learning disability prejudiced his trial. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck