

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BLANE VERNON SMALLWOOD,

Defendant-Appellant.

UNPUBLISHED

April 27, 2010

No. 289081

Livingston Circuit Court

LC No. 07-016995-FH

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of second-degree home invasion, MCL 750.110a(3). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 66 months to 20 years in prison. We affirm.

Defendant first argues that the trial court deprived him of his right to present a defense when it refused to admit defendant's mother's testimony, which defendant argues supported his defense that the complainant fabricated the break-in to extort money or sex from defendant's mother. The court determined that the testimony as proffered was not relevant and thus could not be admitted. We review de novo a defendant's claim that he was denied his right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). "The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

In *People v Unger (On Remand)*, 278 Mich App 210, 249-251; 749 NW2d 272 (2008), this Court explained the importance of a defendant's right to present a defense:

Few rights are more fundamental than that of an accused to present evidence in his or her own defense. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." This Court has similarly recognized that "[a] criminal defendant has a state and federal constitutional right to present a defense."

However, an accused's right to present evidence in his defense is not absolute. "A defendant's interest in presenting . . . evidence may thus 'bow to accommodate other legitimate interests in the criminal trial process.'" States have been traditionally afforded the power under the constitution to establish and implement their own criminal trial rules and procedures. [Internal citations omitted.]

It is axiomatic that a trial court has a legitimate interest in assuring that only relevant evidence is admitted at trial. MRE 402. Accordingly, it is tautological that the right to present a defense extends only to relevant and admissible evidence. See *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984). Evidence is relevant if it has 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. While all relevant evidence is generally admissible, MRE 402, even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, MRE 403.

We agree with the trial court's analysis and its comments that the proffered evidence was more in the nature of a character attack rather than an attack on the complainant's credibility. However, assuming that the evidence was relevant and that it had some tendency to support defendant's theory that the complainant fabricated the breaking and entering and, thus, it did go to the issue of credibility, the trial court did not err in its exclusion of the testimony. MRE 608(b) makes it clear that "[s]pecific instances of the conduct of a witness for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence."

Next, defendant argues that he is entitled to a new trial based on several instances of alleged prosecutorial misconduct. We disagree. Because defendant failed to object to the challenged conduct, this issue is unpreserved. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review unpreserved errors for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Issues of prosecutorial misconduct are not considered by weighing the similarities of the alleged misconduct to conduct previously ruled on by an appellate court, but on a case-by-case basis with the conduct considered in context of the arguments and facts of the individual case. See *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004); *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant first argues that the prosecutor intentionally distorted the testimony of defendant's coworker and neighbor, Ron Ferris, when she stated the following in her rebuttal argument: "But the reality is that when really push came to shove, and when Mr. Ferris was pushed, he agreed that what he told the officer was right and was true." This statement refers to

testimony adduced concerning whether defendant asked Ferris if the complainant was home, and if so, how Ferris responded. Defendant's argument focuses on that portion of Ferris's testimony where he indicated that he did not specifically remember either defendant asking him the question or his response. While it is true that a prosecutor may not intentionally misstate evidence or argue facts not in evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994); *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003), here the prosecutor did neither. A review of Ferris's testimony reveals that while he did indicate at first that he was unsure about whether he told defendant that the complainant was not home, Ferris eventually testified that he had indeed said so. Accordingly, the prosecutor did not misstate the evidence in this case.

Next, defendant argues that the prosecutor argued facts not in evidence when she asked the jury to consider a police report documenting Ferris's account of what he told defendant about the complainant not being home, as well as when the prosecutor suggested that defendant's mother influenced Ferris's wavering memory. As to the former, the prosecutor's argument did not specifically refer to the written report prepared by police. Rather, the prosecutor simply asserted that Ferris had made certain statements to a police officer, and that the officer's trial testimony was consistent with the assertion. Additionally, Ferris ultimately acknowledged the accuracy of the officer's version. Therefore, no error has been shown.

Regarding defendant's assertion of error predicated on the reference made to defendant's mother, the prosecutor's arguments were reasonably inferred from the testimony. Ferris's testimony on the issue of what he told defendant about the complainant being home did shift. And while Ferris denied being influenced by his conversation outside the courtroom with defendant's mother, he also admitted confirming with the prosecutor just prior to testifying that he did tell defendant that the complainant was not home. Further, the challenged statement in the prosecutor's closing argument was a parenthetical digression from the primary point being made; i.e., that "even though Ron Ferris seemed a little bit reticent about testifying, . . . what was most truthful were the statements he made to the officer within four days of when this happened." As for the comments on rebuttal, they were not a direct assertion that Ferris had been deceitful, but a juxtaposing of the undeniable changing character of Ferris's testimony while in the presence of defendant's mother at the proceedings. They also came in response to defendant's closing assertion that Ferris was "as honest as he could be about testifying something seven months ago." See *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Further, we presume the jury followed the court's clear instructions that trial counsels' arguments were not evidence. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Finally, defendant contends that the prosecutor improperly argued that defendant knew the victim was not home because there was no evidence to support that assertion. However, again, Ferris confirmed that he told defendant that the victim was not home. Therefore, defendant's argument is without merit.

Having concluded that the prosecutor's trial conduct was proper, we necessarily reject defendant's assertion of ineffective assistance of counsel predicated on the assumption of misconduct. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999). Similarly, we also reject defendant's cumulative-error argument. Having found no error, this argument necessarily fails. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering