STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 12, 2008
v	No. 276059 Saginaw Circuit Court
WESLEY LATHAN WILSON, Defendant-Appellant.	LC No. 06-027899-FC

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals of right his conviction of one count of conspiracy to commit bank robbery, MCL 750.531 and MCL 750.157a, and two counts of bank robbery, MCL 750.531. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of six to 18 years on each of the three counts. We affirm.

Defendant first argues that statements made by the alleged principal actor in the bank robberies, which were admitted through the testimony of another witness, were improper hearsay evidence of a codefendant that deprived defendant of his Sixth Amendment[1] right to confrontation. At trial, plaintiff solicited testimony from a witness concerning statements made by the alleged principal bank robber. When defendant objected, plaintiff agreed that the evidence was hearsay, but argued that defense counsel had opened the door to the evidence.

Michigan has adopted the rule of curative admissibility, but has recognized that the rule is one within the discretion of the trial court: "[T]he admission of such evidence is not a matter of absolute right, but rests in the sound discretion of the court." *Grist v Upjohn Co*, 16 Mich App 452, 483; 168 NW2d 389 (1969).

> Under the rule of curative admissibility, or the "opening the door" doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission. See *United States v. Segall*, 833 F.2d 144, 148 (9th Cir.1987); *United States v.*

[1] US Const, Am VI.

> *Makhlouta*, 790 F.2d 1400, 1402-03 (9th Cir.1986); I J. Wigmore, Evidence § 15 (Tillers rev. 1983). The doctrine does not permit the introduction of evidence that is related to a different issue or is irrelevant to the evidence previously admitted. McCormick on Evidence § 57 (3d ed. 1984). [*United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988).]

For the rule to apply, however, there must initially be an introduction of inadmissible evidence. See *Grist, supra* at 482-483.

The objected-to testimony concerned what the principal actor had told the witness about his involvement in the crimes when the principal returned home after committing the robberies. This general line of questioning had been inquired into by both parties prior to defendant's objection. At the time of the objection, the trial court was within its discretion to find that the door had been opened to the subject. However, as the prosecutor continued along this line, the witness eventually began to testify regarding statements made by the principal actor that directly implicated defendant. The "'truthfinding function of the Confrontation Clause is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination.'" *People v Watkins*, 438 Mich 627, 656; 475 NW2d 727 (1991), quoting *Lee v Illinois*, 476 US 530, 541; 106 S Ct 2056; 90 L Ed 2d 514 (1986) (emphasis removed). The admission of an accomplice's statement, implicating a defendant, "does not violate the Confrontation Clause if the prosecution can establish that his statement bore adequate indicia of reliability," or "if the statement fell within a firmly rooted hearsay exception." *People v Washington*, 468 Mich 667, 671-672; 664 NW2d 203 (2003). Michigan courts have not held that a statement against the declarant's penal interest, pursuant to MRE 804(b)(3), is a "firmly rooted hearsay exception." *Id*. at 672.

As a threshold matter for MRE 804 admission, the declarant must be unavailable to testify. A witness that refuses to testify based on the Fifth Amendment[2] privilege against self-incrimination, satisfies this requirement. *Id*. In *Washington*, counsel for the codefendant stated on the record that his client would refuse to testify based on his Fifth Amendment privilege. *People v Washington*, 251 Mich App 520, 526-527; 650 NW2d 708, rev'd 486 Mich 667 (2002). Here, there is no indication on the record that the principal actor would refuse to testify. See *Washington, supra*, 468 Mich at 673-674 (refusing to accept as evidence statements by defense counsel that a witness had a history of mental illness because there was not evidence presented on the record). However, given the other evidence tending to show that defendant drove the principal actor to and from the robberies—including defendant's own testimony—it cannot be said that the error affected the outcome of the trial. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Defendant next argues that the trial court abused its discretion by refusing to take a plea offered by defendant. This Court reviews a trial court's decision to accept or reject a plea for an abuse of discretion. *People v Grove* 455 Mich 439, 460; 566 NW2d 547 (1997). A court's discretion to accept an offered plea is restricted by the requirement that the court ensure that the

[2] US Const, Am V.

defendant's "plea is understanding, voluntary, and accurate." MCR 6.302(A); see *People v Safforld*, 465 Mich 268, 272; 631 NW2d 320 (2001). The court must additionally make certain inquiries and disclosures, including an inquiry into whether there is "support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." MCR 6.302(D)(1). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

As the plea agreement was being placed on the record, defendant raised some concerns about his prior statement. These concerns were sorted out. While the court was ensuring that defendant understood his plea, it became apparent that defendant was crying. However, defendant insisted on continuing with the plea. When the court asked defendant if he understood his rights and wished to give them up, defendant stated that he wished to give them up, but asked if he would get leniency. Shortly afterward, the court stated that it would not take defendant's plea. "[F]or the record," the court stated, "this gentleman is in tears. He is upset, and—and I am not going to go home in my conscience and allow this gentleman to plead guilty under these circumstances." Given the confusion surrounding the plea, and deferring to the court's superior position to assess the dynamic of what was going on than this Court can on a dry reading of the written transcript, it was reasonable for the court to refuse to take the plea at that time. *Id.*

Defendant next argues that certain questioning and statements by the prosecutor constituted misconduct. "A claim of prosecutorial misconduct is reviewed de novo." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). But if unpreserved, "prosecutorial misconduct may only be reviewed for plain error." *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007). Review is "on a case-by-case basis, looking at the prosecutor's comments in context, and in light of the defense arguments and the relationship of the comments to evidence admitted at trial." *Id*.

Defendant argues that questions directed toward a police officer concerning a search of a house where the principal bank robber was living constituted misconduct because the evidence tended to improperly connect defendant with illegal drug use or possession. However, the testimony explained how the officer came to be involved in the bank robbery investigation. Additionally, the search warrant that was executed in the hope of finding illegal drugs resulted in the discovery of evidence of the robbery. This testimony was at least minimally relevant to show the course of the officer's investigation into the robberies, and thus the prosecutor's questioning was simply a good-faith effort to develop relevant evidence. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007) ("A prosecutor's good-faith effort to admit evidence does not constitute misconduct."). Further, none of the testimony indicated that defendant used or possessed any narcotics. In fact, the prosecutor attempted to ensure that that inference was not made when he stated in the presence of the jury, "I'm not trying to accuse [defendant] of being a drug dealer."

Defendant also argues that the prosecutor committed misconduct by implying that defendant decided to fabricate testimony after hearing the overwhelming evidence presented against him. Specifically, the prosecutor argued as follows: "He realized the evidence is overwhelming, so he took the stand and he did something which he wasn't required to do. The People have to prove the intent of the case. The defendant's required to prove nothing. That's the protection of the law."

A prosecutor should not denigrate a defendant by making "intemperate and prejudicial remarks." *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). A prosecutor also "may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness." *McGhee, supra* at 630. "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor was not vouching for a witness based on "special knowledge" or using intemperate remarks to denigrate defendant. Rather, the prosecutor was arguing that based on the testimony presented, defendant's story was not worthy of belief. The prosecutor did not denigrate defendant as the defendant, but argued against his credibility as a witness. Plaintiff had the right to comment on defendant as a witness in the same manner that plaintiff could have commented on the testimony of any other witness. *Id.*[3]

Defendant also argues that the prosecutor improperly made a personal attack against defense counsel. Because defendant did not preserve this issue, it is reviewed for plain error affecting substantial rights. *Odom, supra* at 413. "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 692; 629 NW2d 411 (2001). "When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, [the prosecutor] is in effect stating that defense counsel does not believe his own client." *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984).

The prosecutor began his rebuttal closing by responding to defense counsel's comment that if he "were representing [the principal actor], I guess I would have to say . . . you win." The prosecutor correctly pointed out that defense counsel could not actually concede the case against the principal actor if he were acting on his behalf. However, the prosecutor then linked that argument with a clear implication that the veracity of defense counsel's argument on behalf of defendant was suspect. Specifically, the prosecutor stated that defense counsel was "an advocate for whoever he represents," and that defense counsel's statements were "suspect because it shows that it's an advocate for one side saying, I know what all the evidence says, and I know what common sense might say, but I want you to take the position of my client who has said this." In other words, defense counsel does not believe in his client, does not believe in what he is saying, and is simply trying to mislead the jury because that is his job.

---

[3] A closer question, one not raised by defendant, is whether the prosecutor impinged upon defendant's right to testify. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v Arkansas*, 483 US 44, 51; 107 S Ct 2704; 97 L Ed 2d 37 (1987), quoting *Faretta v California*, 422 US 806, 819 n 15; 95 S Ct 2525; 45 L Ed 2d 562 (1975). Arguing that defendant chose to testify because he knew the case against him was overwhelming tends to tread on his right to testify to meet the charges raised against him. Nonetheless, the jurors were instructed that it was their "job to decide what the facts of the case are, to apply the law as [given by the court] . . . , and in that way decide the case." They were also instructed that "[t]he lawyers' statements and arguments are not evidence." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Assuming, arguendo, that the comments were improper, the record does not support a finding that defendant was prejudiced by the comments or that they "'resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" *Odom, supra* at 413, quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). The comments were during rebuttal, after both sides had the opportunity to argue the facts of the case, and constituted a very small part of plaintiff's argument. Moreover, the jurors were instructed that it was their "job to decide what the facts of the case are, to apply the law as [given by the court] . . . , and in that way decide the case." They were also instructed that "[t]he lawyers' statements and arguments are not evidence." "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these same reasons, we also reject defendant's cumulative effect argument. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Defendant finally argues that the trial court should not have relied on two offenses the parties agreed were not to be relied upon for scoring prior record variable (PRV) 5. Defendant's argument displays a basic misunderstanding about what occurred below. At sentencing, defendant raised two separate objections to the scoring of PRV 5. First, defendant argued that two misdemeanors listed on the presentence investigation report—harassing and alarming conduct and causing or risking public—should not be used to calculate PRV 5 because he was never charged with them. The trial court denied the challenge. In his subsequently filed written objections, defendant again challenged the scoring of PRV 5. This time, defendant conceded that harassing and alarming conduct and causing or risking public could be scored. However, defendant argued that two other listed misdemeanors—both open intoxicant, as a passenger—should not be scored, which would result in PRV 5 being scored at five points instead of ten. Plaintiff agreed that PRV 5 should be reduced from ten to five and the court granted the change. The sentencing information report indicates that PRV 5 was scored at five points. Thus, no error occurred.

Defendant also argues that the court improperly relied on facts that were attributable to the principal actor, and not defendant, in sentencing defendant. Because defendant did not preserve this issue, it is reviewed for plain error affecting defendant's substantial rights. *Callon, supra* at 332. At issue is the trial court's reference to the principal actor's use of "disgusting disguises." An examination of the court's statement in context reveals that the court was concerned with the fact that defendant had argued that he was innocently driving the principal actor around without knowing of the bank robberies. The trial court was using the fact that defendant was driving a person with pubic hair glued to his face to illustrate that the court did not believe that defendant could have innocently driven the man around from bank to bank. In doing so, the court was properly accounting for the facts surrounding the offenses, and defendant's participation in the offenses. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000).

Affirmed.

/s/ Jane E. Markey
/s/ Helene N. White
/s/ Kurtis T. Wilder