

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTONIO TOLBERT,

Defendant-Appellant.

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UNPUBLISHED

October 12, 2006

No. 262792

Wayne Circuit Court

LC No. 04-012632-01

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for possession with intent to deliver between 50 and 449 grams of cocaine, MCL 333.7401(2)(a)(iii). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 12 to 20 years' imprisonment for the conviction. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

Defendant's conviction stems from an attempted drug transaction that occurred in Detroit on March 12, 2004. Police received a tip from a confidential informant that defendant was "supposed to be dropping off cocaine" in a green Chevrolet Malibu at a store on the date in question. Police set up surveillance at the location and eventually saw defendant in a green Chevrolet Malibu. When police attempted to stop the vehicle, it accelerated and the police pursued it until the Malibu pulled to the side of the road and stopped. Defendant exited the vehicle and ran away on foot holding a "white bag" in his right hand. As he ran, defendant threw the "white bag" onto the roof of a house. Police outflanked defendant in the foot race and apprehended him. Police also recovered the "white bag."<sup>1</sup>

During police questioning, defendant indicated that he was transporting cocaine to drop it off for another person referred to as "G" who the police believed to be a "major dealer." Defendant indicated that he was interested in assisting the police with an ongoing narcotics investigation and so the police released defendant. Because defendant did not cooperate with or

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<sup>1</sup> Forensic testing showed that the "white bag" contained 371.2 grams of cocaine with an estimated street value of more than \$12,000.

contact the police after his release, the police arrested him pursuant to a subsequent arrest warrant. Thereafter, a jury convicted defendant as charged. He now appeals as of right.

Defendant first argues that the trial court abused its discretion in admitting the substance of a confidential informant's tip identifying defendant as the person who would be delivering cocaine. Defendant specifically contends that it denied him his state and federal constitutional right to confront the witnesses against him and that it was inadmissible hearsay. Generally, claims of constitutional error are reviewed de novo on appeal. *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004). A trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. The Michigan Constitution also guarantees the same right. Const 1963, art 1, § 20. In *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that, under the Confrontation Clause of the Sixth Amendment, "testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant." See also *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

However, the *Crawford* Court did not set forth a "precise articulation" of what is considered "testimonial" evidence. *Crawford, supra* at 68. At a minimum, the United States Supreme Court recognized that testimonial statements include "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52. The Sixth Circuit Court of Appeals, has held that "statements by a confidential informant are testimonial and are thus subject to the dictates of the Confrontation Clause." *United States v Cromer*, 389 F 3d 662, 675 (CA 6, 2004). And this Court has held that "[t]he content of a confidential informant's tip is generally inadmissible as hearsay." *People v Starks*, 107 Mich App 377, 383; 309 NW2d 556 (1981). Moreover, admission of the substance of the informant's tip "is not justified to show an officer's state of mind, since the state of mind is not relevant." *Id.* at 383-384.

In the present case, the prosecutor examined Officer Brian Watson as follows:

Q. And did you have contact that day [March 12, 2004] with a confidential informant?

A. Yes.

Q. And did that confidential informant give you some information?

A. Yes, they [sic] did.

Q. Who was that information regarding?

A. It was regarding the person. It was regarding the person sitting at the defense table, white shirt, cream pants, Antonio Tolbert.

Q. And did that person give you information regarding a car Mr. Tolbert would be in?

A. Yes.

Q. What kind of car?

A. It was a green Chevy.

Q. And did that person give you information where Mr. Tolbert would be?

A. Yes.

Q. Where was he supposed to be?

A. Pretty much at a party store off Joy Road.

Q. And was Mr. Tolbert supposed to have anything with him?

A. He was supposed to have been dropping off cocaine.

Q. As a result of getting that information, what did you do?

A. We set up surveillance in the area. It was a team set-up [sic]. It was with a Conspiracy Unit and Sixth Precinct personnel, their 30 series, their booster car. Also we had a marked scout car. So we had uniform presence, non-uniform [sic] presence in the area. [Emphasis added.]

The confidential informant's statements to Watson are testimonial in nature. See *Crawford, supra* at 51-52; *Cromer, supra* at 675. Further, the record reveals that Watson's testimony regarding the nontestifying and undisclosed informant's statements went beyond what has been deemed acceptable, nonspecific testimony. *People v Wilkins*, 408 Mich 69, 73; 288 NW2d 583 (1980). Indeed, the jury was presented with a statement that defendant would be in possession of cocaine at a specific location and that he would be delivering or "dropping off" the cocaine. This strengthened the prosecutor's theory of the case, i.e., that defendant possessed the cocaine, that he knew that it was cocaine and that he had the intent to deliver it. A hearsay statement is an out-of-court statement offered to prove the truth of the matter asserted. MRE 801(c). Hearsay statements are inadmissible unless they fall under a specific exception provided by the rules of evidence. MRE 802. In light of Watson's other non-specific testimony that police were informed of a tip targeting defendant, admission of the confidential informant's statements that defendant possessed the cocaine with the intent to deliver it was clearly offered for the truth of the matter asserted and was improper hearsay evidence. Thus, the trial court abused its discretion in allowing Watson to reference the confidential informant's statements and defendant's state and federal right of confrontation were violated.

However, after a review of the entire record, we find the violation to be harmless. "Harmless error analysis applies to claims concerning Confrontation Clause errors." *Shepherd, supra* at 348. "[A] reviewing court must 'conduct a thorough examination of the record' in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been

the same absent the error.” *Id.*, quoting *Neder v United States*, 527 US 1, 19; 119 S Ct 1827; 144 L Ed 2d 35 (1999). The admission of evidence that violates a defendant’s right to confrontation is not harmless if “the ‘minds of an average jury’ would have found the prosecution’s case ‘significantly less persuasive’” without the evidence. *People v Banks*, 438 Mich 408, 430; 475 NW2d 769 (1991), quoting *Schneble v Florida*, 405 US 427, 432; 92 S Ct 1056; 31 L Ed 2d 340 (1972).

It is clear beyond a reasonable doubt that the jury would have convicted defendant absent the trial court’s admission of the confidential informant’s statements. First, the prosecution presented eyewitness testimony of the arresting officers identifying that defendant possessed the white plastic bag of cocaine and that defendant attempted to flee from the officers during his arrest. Officers Theodore Talbert and Keith Bullard both testified they saw defendant run from the vehicle after it stopped. During the foot chase, Bullard saw defendant throw the white plastic bag onto a roof. Subsequent testing of the contents of the bag revealed that it contained 371.2 grams of cocaine. Second, video footage of defendant’s flight from the automobile offered at trial showed that defendant fled from the vehicle holding the white plastic bag of cocaine in his hand. The police officers descriptions of defendants’ clothes matched the description of the person shown on the videotape. Finally, the jury considered defendant’s written confession at trial, wherein he admitted to knowingly possessing cocaine that he intended to deliver to another person. Thus, in light of the foregoing evidence, a reasonable jury would not have “found the prosecution’s case ‘significantly less persuasive’” without Watson’s testimony regarding the confidential informant’s statements. *Banks, supra* at 430, quoting *Schneble, supra* at 432. Any error was harmless beyond a reasonable doubt.

Defendant next argues that the trial court erred in denying his motion to remove two jurors as alternates after closing arguments because of comments each juror made to defense counsel during closing arguments. A trial court’s decision whether to dismiss a juror following an allegation of misconduct is reviewed for an abuse of discretion. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). “An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made.” *Id.*

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The jury is required to consider only the evidence received in open court, and is not permitted to consider extraneous facts not introduced in evidence. *Id.* To warrant relief, a defendant must show that the jury was exposed to extraneous influences that “created a real and substantial possibility that they could have affected the jury’s verdict.” *Id.* at 88-89. However, removal of a juror is “at the discretion of the trial court, weighing a defendant’s fundamental right to a fair and impartial jury with his right to retain the jury originally chosen to decide his fate.” *Tate, supra* at 562.

In *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960), the Supreme Court set forth the standard of review to be applied in cases where there is an allegation of juror misconduct:

[I]t is well-established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for

misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice.

“Misconduct can be demonstrated with evidence pertaining to outside or extraneous influences, but cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements.” *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). Further, MCL 768.18 provides, in relevant part:

Should any condition arise during the trial of the cause which in the opinion of the trial court justifies the excusal of any of the jurors so impaneled from further service, he [sic] may do so and the trial shall proceed, unless the number of jurors be reduced to less than 12.

In the instant case, during defense counsel’s closing argument Juror Four stated, “don’t insult my intelligence,” and Juror Eight remarked, “I don’t want to hear that crap. Blah, blah, blah.” However, the jurors’ comments, indicating their disagreement with defense counsel’s closing argument, were merely a “juror thought process” that was verbalized during trial. *Messenger, supra* at 175. Defendant has failed to show that the jurors were exposed to any extraneous influences that created a real and substantial possibility that could have affected the jury’s verdict. *Budzyn, supra* at 88-89. The jurors’ comments may have been a break in the trial court’s decorum, but they did not deny defendant a fair trial. Further, the trial court cured any alleged error by instructing the jury that they may consider only evidence that has been properly admitted and by explaining what would be considered evidence. Jurors are presumed to follow the instructions the trial court gives them. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Finally, pursuant to MCL 768.18, the trial court’s dismissal of two jurors, at random, left twelve jurors properly approved of by defendant to determine the verdict. We conclude that defendant has not shown that there was no justification or excuse for the trial court denying defendant’s request to excuse both jurors and he is not entitled to relief on this claim.

Defendant next raises five separate arguments that he was denied the effective assistance of counsel. Because defendant failed to move for a new trial or a *Ginther*<sup>2</sup> hearing below, this Court’s review is limited to mistakes that are apparent from the lower court record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s factual findings for clear error, and its constitutional determinations de novo. *Id.*

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise.” *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To establish a claim of ineffective assistance of counsel, a defendant must show “(1) that his trial counsel’s performance fell below an objective standard of reasonableness and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for

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<sup>2</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

counsel's errors, the result of the proceeding would have been different." *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that counsel was ineffective for failing to move before or at trial to suppress his post-arrest written confession because defendant had not signed it and it contained the wrong date. A review of the lower court record does not support the factual predicate for defendant's argument. Although Watson testified that he erroneously dated one of the multiple pages on the Police Department Interrogation Record, Watson clearly testified that defendant initialed and signed his confession on March 12, 2004. There is no indication in the record that defendant's confession contained the wrong date. Defense counsel is not ineffective for failing to make a meritless motion or a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Any motion to suppress defendant's statement based on the fact that it contained the wrong date or that defendant did not sign it would have been futile. Thus, defendant has failed to show that defense counsel was ineffective.

Moreover, there is no indication that defendant did not knowingly and voluntarily make the confession. In determining whether defendant's confession was knowing, voluntary and intelligent, this Court applies an objective standard and examines the totality of the circumstances. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998), citing *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). "Such circumstances may include the age, education, intelligence level, and experience of the defendant, the duration of the defendant's detention and questioning, the defendant's mental and physical state, and whether the defendant was threatened or abused." *Fike, supra* at 181-182.

Defendant does not articulate any factor at issue during the police interview that would suggest coercion or involuntariness. Based on the limited record presented, there is no indication that defendant's confession was involuntary or that the trial court would have suppressed it had defense counsel moved for its exclusion before or during trial. Even if defendant's confession had been excluded, he fails to establish prejudice because there was still sufficient evidence to convict him of the crime based on the eyewitness testimony of the arresting officers and the videotape of defendant's flight. We conclude that defendant was not denied the effective assistance of counsel on this claim.

Defendant next argues that he was denied the effective assistance of counsel because defendant's first attorney failed to move before trial for discovery of the police videotape showing the stop of the vehicle and defendant's subsequent flight. The record reveals that after an initial delay due to a question regarding the location of the videotape, the prosecutor provided defendant's trial counsel with the videotape on the first day of trial. A defendant who asserts that he was denied the effective assistance of counsel must demonstrate that there was a mistake that caused him prejudice. *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998).

The record reveals that the videotape showed defendant fleeing from the green Chevrolet holding a white plastic bag in his right hand. Evidence offered at trial showed that the white plastic bag contained 371.2 grams of cocaine. We conclude that defendant has failed to show how he was prejudiced by defense counsel's failure to request the videotape prior to trial. The videotape was not exculpatory. To the contrary, it tended to prove the prosecutor's theory of the

case by corroborating defendant's confession and the eyewitness testimony of the arresting officers. Defendant has not shown that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Walker, supra* at 545. Defendant's claim of ineffective assistance of counsel is without merit.

Defendant next argues that counsel was ineffective for failing to object to the trial court's jury instruction regarding defendant's confession. "Jury instructions are reviewed in their entirety to determine if error requiring reversal occurred." *People v McKinney*, 258 Mich App 157, 162; 670 NW2d 254 (2003) (citations omitted). "It is the function of the trial court to clearly present the case to the jury and instruct on the applicable law." *Id.* Trial counsel's failure to object to a proper instruction cannot serve as the predicate for an ineffective assistance claim, because an attorney is not required to make a meritless objection. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

In the instant case, viewed in their entirety, the instructions were legally accurate and adequately protected defendant's rights. The trial court correctly instructed the jury based on CJI2d 4.1 regarding defendant's confession. Thus, any objection by defense counsel would have been meritless. *Hawkins, supra* at 457. Defendant has failed to affirmatively demonstrate that, but for his counsel's failure to object to the instruction, the result of the proceedings would have been different. *People v Ortiz*, 249 Mich App 297, 311-312; 642 NW2d 417 (2001). Defendant was not denied the effective assistance of counsel on this claim.

Defendant finally argues that he was denied the effective assistance of counsel because defense counsel failed to object to the testimony of the forensic chemist, Michael Williams, that he received the white plastic bag containing the cocaine six months before the commission of the charged offense. During the prosecutor's examination of Williams, he testified that he received the white plastic bag on "January 26, 2004." A review of the lower court record reveals that Williams may have been mistaken regarding the date he received the package in light of Officer Stephen Geelhood's testimony that it was submitted to Williams at the "end of June [2004]." However, defendant has not overcome the presumption that defense counsel's failure to object to Williams's testimony was trial strategy. *LaVearn, supra* at 216. The fact that Williams and Geelhood testified to conflicting dates regarding when the cocaine was submitted for testing is relevant to the weight of the evidence and the credibility of each witness. Defense counsel may have determined that the conflicting testimony was favorable to defendant's case because it tended to cast doubt on the officers' investigation. Thus, defendant has failed to show that counsel was ineffective.

Defendant next argues that the prosecutor committed misconduct on four separate occasions. Defendant preserved one claim of prosecutorial misconduct by objecting below, but failed to preserve the other three arguments on appeal. See *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003), citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Preserved claims of prosecutorial misconduct are reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Callon, supra* at 329.

The test for 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 considered “on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant first argues that the prosecutor engaged in misconduct by failing to disclose police reports that referenced the confidential informant prior to trial. The record does not support defendant’s argument. The record reveals that defendant was supplied with a copy of the police reports prior to trial and that they referenced a confidential informant. The record shows the preliminary complaint records indicated that the police officers were looking for a “target vehicle,” that the investigating officers “were armed with information regarding vehicle and passenger to be stopped for the trafficking of illegal narcotics” and that defendant should be in the front passenger seat on March 12, 2004. Further, reversal is only warranted if defendant can show the intentional suppression of exculpatory evidence or the destruction of potentially useful evidence in bad faith. See *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Because defendant has failed to show that the prosecutor either suppressed or destroyed the police complaint records prior to trial, defendant has failed to show that the prosecutor engaged in misconduct.

Defendant next argues that the prosecutor engaged in misconduct by calling defendant a “liar” during closing arguments. Generally, “[p]rosecutors are accorded great latitude regarding their arguments and conduct,” and they are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). Prosecutors may use “hard language” when it is supported by the evidence and are not required to phrase arguments in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Further, a prosecutor may argue from the facts that the defendant is not worthy of belief, i.e., a prosecutor may characterize the defendant as a “liar,” if the comment is based on the evidence produced at trial. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

Although defendant is correct in noting that he did not testify at trial, the record shows that during closing arguments, the prosecutor was arguing that defendant had the motivation to deny that he was the person who committed the crime in his confession. The prosecutor’s statement referenced Watson’s testimony that the cocaine had a “street value” of \$12,000. The prosecutor was also referring to defendant’s subsequent confession that he ran from the police because he had an outstanding warrant, not because he was in possession of the cocaine. Viewed in the context of the prosecutor’s entire closing argument, the characterization of defendant as a “liar” strengthened the prosecutor’s theory that defendant had knowledge of the contents of the white plastic bag when he made his confession. *Bahoda, supra* at 282; *Howard, supra* at 548. Therefore, defendant has failed to establish plain error affecting his substantial rights. *Carines, supra* at 774.

Defendant next argues that the prosecutor engaged in misconduct by eliciting testimony from Watson that defendant wanted to cooperate with the police investigation. Watson testified that defendant had approached him at the preliminary examination and offered to assist in the ongoing investigation. An admission of a party opponent is admissible pursuant to MRE 801(d)(2). See *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). A

prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Ackerman, supra* at 448. Because Watson's testimony was elicited to show defendant's own statement, the prosecutor did not engage in misconduct.

Next, defendant argues that the prosecutor denied him a fair trial by failing to show the entire police videotape of the stop of the vehicle. The record reveals that the entire police videotape is approximately 45 minutes in length. At trial, the prosecutor introduced a short segment of the videotape during Ballard's testimony. The evidence reveals that prosecutor offered the videotape to show the police pursuit of the vehicle, the stop and defendant's subsequent flight from the vehicle. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Ackerman, supra* at 448. Evidence of flight is admissible because it may show consciousness of guilt, although it is not sufficient to sustain a conviction. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The prosecutor's actions in showing a portion of the videotape could not have denied defendant a fair and impartial trial, and he is not entitled to relief on this basis.

Defendant finally argues that the trial court abused its discretion in not allowing him more time prior to trial to review the videotape. Because defendant failed to move for additional time at trial to review the videotape, we review for plain error affecting substantial rights. *Carines, supra* at 774. The record shows that, once the police videotape was recovered, the trial court allowed defense counsel to view it: (1) once with the prosecutor; and (2) a second time with defendant. Defendant has failed to establish plain error based on the record presented.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter  
/s/ Pat M. Donofrio