

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE DESHAWN HINES,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 261377

Macomb Circuit Court

LC No. 04-002102-FC

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve 10 to 22 ½ years in prison for the conspiracy and armed robbery convictions, and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. Basic Facts and Procedural History

This case arises from the armed robbery of a Taco Bell restaurant in Warren. The restaurant manager, Joyce Martina, testified at trial that shortly after arriving at the restaurant at 8:00 a.m., a man, who was later identified as Karl Duckett, entered the store carrying a nine-millimeter handgun and, after announcing a robbery, demanded money. Martina retrieved money from the restaurant safe and turned to hand it to Duckett when a second man appeared with a shotgun. After the second man also demanded money, Martina placed between \$825 and \$875 worth of bills and rolled coins into a Taco Bell bag, which she then gave to the men.

Rennard Walker testified that on the morning of the robbery he was looking out his girlfriend's living room window two houses away from Taco Bell when he noticed two men near the restaurant between 7:30 and 8:00 a.m. Walker saw the first man walking on the sidewalk near the restaurant, and the second man sitting inside a Chrysler New Yorker or Dodge Dynasty with out-of-state license plates. Walker observed the second man get out of the car and both men walk into the restaurant. About two minutes later, Walker saw the men return to the car; the first man was holding a bag, and the second man was carrying a shotgun. Walker observed the men get into the car and drive away. Although he was not asked to identify the second man at the preliminary examination or at a lineup, Walker identified defendant as the second man at trial.

The police quickly traced the car seen by Walker to the apartment complex where defendant lived and, at approximately 8:40 a.m., set up surveillance of the vehicle. At about 9:35 or 9:40 a.m., Sergeant John Whitley of the Detroit Police Department observed Duckett carry an apparently heavy white bag to the car. Duckett then moved a rifle from the floor of the backseat to the trunk of the car, after which he and defendant got into the car and began to drive away but were stopped and arrested by police. At the time of the arrest, defendant had \$252 in his pocket and Duckett was carrying \$590 in cash. A Taco Bell bag full of rolled coins was also found during a search of the car.

Detective Keith Vandekircove testified that he questioned defendant after his arrest, and that defendant initially denied any involvement in the robbery. However, defendant, in his own handwriting, later wrote a statement for Vandekircove. In his statement, defendant explained that Duckett had stayed the night at his apartment and, in the morning, asked him to “hit a lick,” or commit a robbery. Defendant stated that Duckett selected Taco Bell as a target and that Duckett had a handgun. Defendant told Vandekircove that he wanted to pick another target after he noticed that a woman was watching them and talking on her telephone. Defendant explained that Duckett insisted on robbing Taco Bell, and defendant followed with a shotgun. Defendant admitted that he received \$200 from the proceeds of the robbery, and stated that he and Duckett returned to defendant’s apartment after the robbery.

Victoria Chrisman testified that she was with defendant on the morning of the robbery because she had stayed at his apartment the night before. Chrisman recalled that an unidentified African-American man was watching television on the couch when she arrived the night before. According to Chrisman, this man knocked on defendant’s bedroom door in the middle of the night and announced that he was leaving and would return. Chrisman asserted that when she left between 7:45 a.m. and 8:00 a.m. for school, defendant remained at the apartment.

Defendant testified on his own behalf and denied any involvement in the robbery. Defendant admitted that Duckett was a friend and that Duckett had stayed at defendant’s apartment the night before the robbery. Defendant asserted that Duckett and a man named DeAndre Beyers knocked on his bedroom door at about 6:00 or 6:30 a.m., when they left the apartment, and Duckett informed defendant that he would return. Defendant maintained that Chrisman was with him in his bedroom. Defendant claimed that Duckett and Beyers returned to the apartment at about 8:45 or 9:00 a.m., after which he and Duckett left the apartment together and were arrested.

II. Analysis

A. Prosecutorial Misconduct and Ineffective Assistance of Counsel

Defendant argues that the prosecutor committed misconduct when he asked defendant to comment on the credibility of prosecution witnesses and when he vouched for the credibility of witnesses during his closing and rebuttal arguments. Defendant further argues that he was deprived of the effective assistance of counsel as a result of his trial counsel’s failure to object to the prosecutor’s conduct in this regard. We disagree.

To preserve claims of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Although defense counsel raised an objection during the prosecutor's questioning of defendant regarding the veracity of prosecution witnesses, he did not do so on the ground asserted on appeal as error. Because defendant did not object on the same ground he raises on appeal, his challenge of the prosecutor's questioning in that regard has not been properly preserved for appellate review. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Because defendant failed to object to the prosecutor's remarks during his closing and rebuttal arguments, that issue also has not been preserved for appellate review. *Ackerman, supra*. We therefore review these issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that an error occurred, that the error was plain, and that the plain error affected his substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Bauder*, 269 Mich App 174, 180; 712 NW2d 506 (2005), citing *Carines, supra* at 763.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Abraham, supra* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Generally, it is not proper for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses because a defendant's opinion is not probative on this matter and credibility is for the trier of fact to determine. *Ackerman, supra* at 449. However, unfair prejudice warranting relief will not be found to have arisen from such conduct where the record demonstrates that the defendant "dealt well" with and was not otherwise harmed by the questioning. *People v Buckey*, 424 Mich 1, 17-18; 378 NW2d 432 (1985); see also *People v Knapp*, 244 Mich App 361, 384-385; 624 NW2d 227 (2001) (finding no unfair prejudice to have inured from the prosecutor's questioning where the defendant's theory was that two witnesses had conspired to have the defendant arrested).

Here, the record shows that defendant denied any involvement in the robbery and claimed that he wrote the inculpatory statement only because Vandekircove threatened him. The record further shows that defendant denied having attempted to remove money from his pockets at the time of his arrest and that in response to this testimony, the prosecutor asked defendant whether Vandekircove and Whitley had lied when they testified that defendant tried to empty his pockets at the time of his arrest and had voluntarily acknowledged participation in the robbery in writing.

As in *Knapp, supra*, although it may have been improper for the prosecutor to ask defendant whether Vandekircove had lied, defendant was not harmed by the error because the question supported defendant's theory that Vandekircove had coerced a statement from him. Further, the transcript demonstrates that defendant dealt rather well with the prosecutor's questions and was not otherwise harmed by the questioning, the answers to which were presumed by his theory of defense. *Id.*; *Buckey, supra*. Consequently, we do not find that defendant has demonstrated the plain error necessary for relief.

Nor do we find that defendant has shown error, plain or otherwise, in the prosecutor's statements during closing and rebuttal argument. Although a prosecutor may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *Bahoda, supra* at 276, a prosecutor is generally permitted to argue from the evidence that a witness is worthy or not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Our review of the prosecutor's closing and rebuttal statements reveals no instance where the prosecutor indicated a personal belief as to any witnesses' truthfulness on the basis of special knowledge. Rather, the record demonstrates that the challenged remarks were properly based on the evidence presented at trial and were responsive to the defense argument that Vandekircove somehow forced defendant to prepare the inculpatory written statement. *Ackerman, supra* at 452; *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). The challenged remarks were also properly responsive to defense counsel's attack on Walker's failure to identify defendant under oath prior to trial. *Ackerman, supra*; *Messenger, supra*. Consequently, the prosecutor's remarks do not constitute vouching and did not deny defendant a fair trial.

Regarding defendant's claim that his trial counsel was ineffective for failing to object to the prosecutor's questioning of defendant and remarks during closing and rebuttal arguments, because defendant failed to move for a new trial or an evidentiary hearing on these claims, our review is limited to mistakes apparent on the record. *Rodriguez, supra* at 38. Whether the facts in the record suggest that defendant has been deprived of his right to the effective assistance of counsel presents a question of constitutional law that we review de novo. See *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, the defendant must show that his counsel's performance was deficient, and that the deficiency was so prejudicial that there is a reasonable probability that but for counsel's unprofessional error the trial outcome would have been different. *LeBlanc, supra* at 578. Here, as discussed above, the prosecutor's questioning of defendant regarding whether Vandekircove and Whitley were lying, although improper, was not unfairly prejudicial. Therefore, it is not reasonably probable that objection to this line of questioning would have altered the outcome of defendant's trial. Moreover, the prosecutor's remarks during closing and rebuttal arguments were responsive to defense arguments, and thus not improper. Defense counsel is not required to make futile or meritless objections. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

B. Evidence of Third-Party Guilt

Defendant claims that the trial court abused its discretion when it denied defendant's request to permit questioning of Detective Kevin Howell about a hearsay statement regarding the involvement of a third man in the robbery. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

Defense counsel conceded at trial that the statement at issue was an out-of-court statement made for the truth of the matter asserted. On appeal, however, defendant fails address the hearsay issue. Rather, he asserts that he is entitled to a new trial because the excluded evidence was relevant and would have created a reasonable doubt about his guilt. However,

although relevant, evidence that is hearsay and does not meet any exception to the rule against admission of such evidence is inadmissible. MRE 802. Thus, we must consider the hearsay implications of the alleged evidence.

MRE 801(c) provides that hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Pursuant to MRE 802, hearsay is inadmissible unless the rules of evidence provide otherwise. Although the record is unclear about the exact substance of Howell’s proposed statement, we are able to glean that Howell obtained the information from defendant. Defendant’s alleged statement to Howell constitutes hearsay. It was not made by the declarant, Howell, and it was sought to be offered to prove the truth of the matter asserted—that another man was involved in the robbery. MRE 801(c). Defendant does not identify any exceptions that apply to render the alleged statement admissible, and we do not find any exceptions applicable. Therefore, the trial court did not abuse its discretion.

C. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his convictions. We disagree. We review *de novo* challenges to the sufficiency of the evidence in criminal trials to determine whether, viewing the evidence in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002).

In challenging the evidence to support his convictions, defendant does not argue that the elements of the charged offenses were not proved. Rather, defendant argues that the evidence was insufficient to support his identity as a participant in the charge crimes. As discussed above, however, there was evidence that defendant admitted his planned participation in the charged crimes in writing. Further, Walker identified defendant as the person he saw carrying a shotgun while approaching the Dynasty or New Yorker with out-of-state plates. Although Martina and Sanders were unable to identify defendant as the second man, their testimony revealed that this man carried a shotgun, demanded all the money from the safe, and ordered Martina to get on the ground. A 12-gauge shotgun was found in a car matching the detailed description given by Walker, and this car was located in the parking lot of defendant’s apartment complex. Defendant and Duckett approached the car and attempted to leave the parking lot in it. The police found shotgun shells in defendant’s apartment and in the car, along with Taco Bell shirts, and a Taco Bell bag full of rolled coins. Defendant was carrying \$252 when he was arrested. Sanders recalled that the second man, the one with the shotgun, was wearing black shoes, black pants, a black shirt, and a black hat. Martina remembered the man with the shotgun being dressed in all black. Walker asserted that defendant was wearing a blue jacket, black pants, and a skull cap. The police found a pair of pants and a shirt matching the descriptions given in defendant’s apartment. A black knit cap and a black sweatshirt were found in the trunk of the car.

Although defendant presented evidence contradicting the prosecution’s case, issues of witness credibility are for the jury, and we will not interfere with the role of the trier of fact in determining the weight of the evidence or the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Viewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could have found that defendant participated in the crimes beyond a reasonable doubt. *Randolph, supra*.

D. Cumulative Error

Defendant contends that he was denied due process and a fair trial because of the cumulative effect of the errors alleged above. We disagree. Only the unfair prejudice of several actual errors can be aggregated to determine their cumulative effect. *LeBlanc, supra* at 591-592 n 12. Moreover, “[r]eversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial.” *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002). Because we have determined that defendant was not prejudiced by any errors, this issue is without merit. *Id.*; *LeBlanc, supra*.

E. Sentencing

Defendant claims that his sentences are unconstitutional because the trial court scored the sentencing guidelines by relying on facts that were not determined by the jury beyond a reasonable doubt in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005). We disagree. In *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme Court reiterated that *Blakely, supra*, and by extension, *Booker, supra*, is inapplicable to Michigan’s indeterminate sentencing scheme. We are bound by this decision and defendant is not, therefore, entitled to resentencing.¹

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

¹ Because *Drohan* precludes application of *Blakely*, defendant’s challenge to his sentence on the alternative ground that his trial counsel was ineffective for having failed to raise *Blakely* at sentencing must also fail, as defendant cannot demonstrate any prejudice arising from his counsel’s failure in this regard. *LeBlanc, supra*.