

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 21, 2012

v

DARAY SHONTE HARVEY,

Defendant-Appellant.

No. 301531
Muskegon Circuit Court
LC No. 10-059424-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of being a prisoner in possession of a weapon, MCL 800.283(4), and felonious assault, MCL 750.82. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 4 to 20 years' imprisonment for being a prisoner in possession of a weapon, and 4 to 15 years' imprisonment for felonious assault, the sentences to be served consecutive to the prison sentence that defendant was serving at the time of sentencing. Because defendant's convictions were not against the great weight of the evidence, the evidence was sufficient to support the convictions, defendant was not denied his right of confrontation, the prosecutor did not commit misconduct, the trial court had jurisdiction to try defendant's case and venue was proper in the Muskegon Circuit Court, and the trial court properly imposed consecutive sentences, we affirm.

Defendant's convictions arise out of an altercation that he had with David Rapasky, a fellow inmate at the Muskegon Correctional Facility. Defendant, a Pennsylvania prisoner housed at the facility pursuant to a lease agreement with the state of Michigan, engaged in a physical fight with Rapasky while holding a homemade weapon, known as a "shank." Corrections officer Stan Bush saw defendant strike Rapasky several times in a bathroom before leaving the bathroom and discarding the weapon into a trash can.

Defendant first argues that his convictions were against the great weight of the evidence and that the evidence was insufficient to support them because it overwhelmingly showed that he was not the perpetrator and did not establish that he possessed a weapon. Because defendant failed to preserve his great weight argument for our review by raising it in a motion for a new trial, our review is limited to plain error affecting his substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). "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, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). We review de novo challenges to the sufficiency of the evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

A verdict is against the great weight of the evidence if "the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id.* at 645-646 (quotation marks and citation omitted). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Questions involving credibility are to be resolved by the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

Defendant argues that the only witness who identified him as participating in the altercation was Bush, but Bush's testimony was unreliable because the situation in the bathroom was chaotic and Bush was not familiar enough with defendant to identify him. Bush testified that he saw defendant fighting with Rapasky while holding an object in his hand that Bush later identified as a shank. Defendant repeatedly struck Rapasky with the hand that held the shank. As defendant walked away, he stopped near a trash can and removed his hand from his pocket. Bush immediately heard a thump in the trash can, and the weapon was found inside the trash bag that was inside the trash can. On cross-examination, defense counsel impeached Bush regarding whether he saw or heard the weapon go into the trash can, whether defendant used his right hand or left hand when he disposed of the weapon, whether Bush saw the green thread on the weapon, and whether defendant actually "threw" the weapon into the trash can. Bush's credibility, and that of the other inmates who testified that defendant was not involved in the fight, was a question to be resolved by the jury. *Avant*, 235 Mich App at 506. Moreover, Bush's testimony was not so far impeached that it was deprived of all probative value. *Lemmon*, 456 Mich at 645-646.

Defendant also argues that the evidence showed that, at most, he participated in a fist fight because no forensic evidence linked him to the weapon found in the trash can, Bush did not see defendant stab Rapasky with the shank, and Bush did not actually see defendant drop the weapon into the trash can. Bush testified that he saw defendant repeatedly strike Rapasky with his hand and that defendant was holding an object in his hand. Defendant then walked away, stopped near a trash can, and removed his hand from his pocket, following which Bush heard a thump inside the trash can. A shank was found in the trash bag that was inside the trash can, and Rapasky sustained 21 wounds during the incident. "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999). Viewed in the light most favorable to

the prosecution, the evidence allowed a rational trier of fact to conclude that defendant used the shank to assault Rapasky. *Wolfe*, 440 Mich at 515.

Accordingly, because the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand, defendant has failed to establish plain error with respect to his great weight of the evidence argument. *Musser*, 259 Mich App at 218-219. Further, because a rational trier of fact could determine, based on the evidence, that defendant assaulted Rapasky with the shank recovered from the trash can, the evidence was sufficient to support defendant's convictions. *Wolfe*, 440 Mich at 515.

Defendant next argues that he was denied his constitutional right of confrontation when Michigan State Police Trooper John Forner testified that Rapasky identified defendant as his assailant. Although defense counsel objected to the testimony, he objected on the basis that the testimony was hearsay rather than on the basis that defendant now asserts on appeal. An objection on the basis of hearsay does not preserve for appellate review a challenge that the testimony violated the Confrontation Clause. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Accordingly, we review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Walker (On Remand)*, 273 Mich App 56, 66-67; 728 NW2d 902 (2006).

"The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *Walker*, 273 Mich App at 60-61. "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Frazier*, 446 Mich 539, 543; 521 NW2d 291 (1994).

Here, the Confrontation Clause is inapplicable because Rapasky appeared at trial and was cross-examined. While defendant acknowledges that Rapasky testified at trial, he argues that Trooper Forner's testimony nevertheless violated his right of confrontation because Rapasky was unavailable due to his lack of memory. Defendant correctly indicates that during the prosecutor's examination of Rapasky, Rapasky testified that he could not remember what he told Forner during Forner's investigation of the incident. This Court has held, however, that a defendant is not denied his right of confrontation when a witness claims a lack of memory. *People v Watson*, 245 Mich App 572, 584; 629 NW2d 411 (2001). In any event, Forner's statement was not admitted into evidence because the trial court sustained defense counsel's hearsay objection and directed the jury to disregard the statement. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, defendant has failed to establish plain error affecting his substantial rights.

Defendant next argues that the prosecutor committed misconduct by stating during rebuttal closing argument that defense counsel was trying to mislead the jury with "red herrings." Because defendant failed to preserve this issue for our review by objecting to the prosecutor's comments, our review is limited to plain error affecting his substantial rights. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

Generally, “[a] prosecutor is afforded great latitude regarding his or her arguments” made during trial, “[b]ut the prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury.” *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). In determining whether a prosecutor’s comments constitute misconduct, the remarks “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 Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). “[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Defendant asserts that the following remarks that the prosecutor made during rebuttal closing argument improperly suggested that defense counsel was intentionally trying to mislead the jury:

It’s always funny that the defense attorneys, I know Mr. Wilson pretty well, we’ve worked together for awhile, they always fall back on the same argument when they don’t have anything. Don’t look at my client, don’t listen to the witnesses who say they saw what they saw, don’t listen to anything else. Don’t pay attention to that. Listen to something over here. Let’s point the finger at the police that they didn’t do their job; let’s point the finger at the inspectors that they didn’t do their job. Let’s point the finger everywhere else but right where it belongs, on the defendant. It’s an old trick that they used to do in England when people were hunting the foxes. You take the red herring fish out and you run the red herring along the trail and that would throw the dogs off the trail. And that’s what Mr. Wilson is trying to do to you today. He’s saying look at everything over here, but don’t see what’s in front of your eyes or what the testimony was from Officer Bush.

* * *

Mr. Wilson made a big deal out of threw, throw, dropped. I don’t know about most people but when you throw something in the trash you throw it in the trash or you dropped it in the trash. That’s another red herring.

The record shows that the prosecutor’s argument properly responded to defense counsel’s closing argument. During closing argument, defense counsel asserted that the police investigation “was ridiculous[.]” and that “[t]here was none.” He also argued that Bush’s testimony was incredible based on discrepancies in Bush’s written statements concerning the incident, including whether defendant “dropped” or “threw” the shank into the trash can. The prosecutor’s rebuttal closing argument properly responded to defense counsel’s argument and claimed that defense counsel was trying to divert the jury from the real issue with “red herrings.” Because the prosecutor’s remarks were made in response to defense counsel’s argument, they were proper. See *People v Dobek*, 274 Mich App 58; 732 NW2d 546 (2007); *Watson*, 245 Mich App at 593. Accordingly, defendant has failed to establish plain error. Further, because the remarks were proper, defense counsel did not render ineffective assistance of counsel by failing to object to them. “Counsel is not required to raise meritless or futile objections[.]” *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Defendant next argues that the trial court lacked jurisdiction to try his case and the prosecutor failed to establish that venue was proper in Muskegon County because defendant was an inmate of the state of Pennsylvania and was physically located in Muskegon only because the state of Pennsylvania leased the facility where defendant was housed. Because issues involving a state's territorial jurisdiction implicate subject-matter jurisdiction, they cannot be waived and may be raised at any time. See *People v Erwin*, 212 Mich App 55, 64; 536 NW2d 818 (1995); *People v Betts*, 34 Cal 4th 1039, 1049; 103 P3d 883 (2005); *State v Willoughby*, 181 Ariz 530, 537 n 7; 892 P2d 1319 (1995). Because defendant failed preserve his venue challenge by raising it in the trial court, our review of that issue is limited to plain error affecting his substantial rights. *Ackerman*, 257 Mich App at 448.

MCL 762.2 provides, in relevant part:

(1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state

(2) A criminal offense is considered under subsection (1) to be committed partly within this state if any of the following apply:

(a) An act constituting an element of the criminal offense is committed within this state.

(b) The result or consequences of an act constituting an element of the criminal offense occur within this state.

(c) The criminal offense produces consequences that have a materially harmful impact upon the system of government or the community welfare of this state, or results in persons within this state being defrauded or otherwise harmed.

Thus, pursuant to MCL 762.2(2)(a), "Michigan has jurisdiction over any crime where any act constituting an element of the crime is committed within Michigan." *People v King*, 271 Mich App 235, 243; 721 NW2d 271 (2006).

Here, it is undisputed that the offenses were committed in Michigan and defendant was physically located in this state. Thus, under MCL 762.2, the trial court had jurisdiction to try defendant's case. Defendant argues that because the state of Pennsylvania leased the facility where he was housed, his criminal acts occurred in a Pennsylvania prison and the state of Pennsylvania had jurisdiction over his case. Defendant likens this situation to that involving offenses committed on Indian reservations by and against tribe members, regarding which the state lacks jurisdiction. Indian tribes, however, are sovereign entities and defendant cites no authority indicating that the same legal principles apply in the circumstances presented in this case. Defendant's failure to brief the merits of his assertion results in his abandonment of the issue. See *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 730 (2004).

Further, venue was proper in the Muskegon Circuit Court. "Venue is a part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt." *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004). "The general venue rule is that defendants should be tried in the county where the crime was committed." *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010). Here, the prosecutor established that the offenses

were committed in Muskegon County at the Muskegon Correctional Facility. Thus, venue was proper in the Muskegon Circuit Court, and defendant has failed to demonstrate plain error.

Finally, defendant argues that the trial court lacked authority to order that his sentences be served consecutive to the Pennsylvania sentence that he was serving at the time that he committed the offenses. Because defendant failed to object to the imposition of consecutive sentences in the trial court, our review of this issue is limited to plain error affecting his substantial rights. *Ackerman*, 257 Mich App at 448.

Generally, in Michigan, “concurrent sentencing is the norm[,]” and “[a] consecutive sentence may be imposed only if specifically authorized by statute.” *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). Pursuant to MCL 768.7a(1),

[a] person who is incarcerated in a penal or reformatory institution in this state, or who escapes from such an institution, and who commits a crime during that incarceration or escape which is punishable by imprisonment in a penal or reformatory institution in this state shall, upon conviction of that crime, be sentenced as provided by law. The term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution in this state.

Defendant argues that MCL 768.7a(1) is inapplicable because he was serving a Pennsylvania sentence when he committed the instant offenses and he is now serving his Pennsylvania sentence in a Pennsylvania prison given that the lease agreement for prison space in Michigan has terminated. He relies on *People v Alexander*, 234 Mich App 665; 599 NW2d 749 (1999), and argues that this Court should reach a similar result in this case.

In *Alexander*, 234 Mich App at 668-669, the trial court imposed a consecutive sentence pursuant to MCL 768.7a(1) on a defendant who escaped from a Louisiana prison and was apprehended after he committed a home invasion in Michigan. This Court held that MCL 768.7a(1) was inapplicable because the defendant was neither incarcerated in an institution in Michigan when he committed the subsequent crime, nor was he serving a term of imprisonment in this state when the subsequent crime was committed. *Id.* at 676-677. This Court stated:

[T]he statute allows consecutive sentencing for those who commit crimes while *in* a penal or reformatory institution in Michigan or while *on escape status from* a penal or reformatory institution in the state of Michigan. In addition, the statute in question states that “[t]he term of imprisonment imposed for the crime shall begin to run at the expiration of the term or terms of imprisonment which the person is serving or has become liable to serve in a penal or reformatory institution *in this state.*” MCL 768.7a(1); MSA 28.1030(1)(1) (emphasis added). This indicates that a defendant is to begin his subsequent term when he has completed the previously imposed term “in this state.” Defendant is not serving a term of imprisonment in an institution in this state, nor has he become liable to serve a term of imprisonment in an institution in this state (with the exception of the sentence imposed in the present case). The end of his term of imprisonment in

Louisiana, therefore, is not included within the defined starting point of a subsequent consecutive sentence.

[W]hen considered in its entirety, the plain meaning of the statute is that consecutive sentencing is to be imposed only where a Michigan prisoner or an escapee from a Michigan institution commits a subsequent crime. [*Id.* at 676-677 (emphasis in original).]

This Court's decision in *Alexander* is inapplicable in this case where defendant was incarcerated in a penal institution in Michigan and was serving a term of imprisonment in this state. As stated in *Alexander*, 234 Mich App at 677, the statute applies when a Michigan prisoner commits a subsequent crime, which is what occurred in this case. Pursuant to the plain language of the statute, the trial court was required to impose a sentence beginning at "the expiration of the term or terms of imprisonment" that defendant was "serving or has become liable to serve" in an institution "in this state." MCL 768.7a(1). Thus, the statute required that defendant's sentence be served after the term of imprisonment that he was serving in this state when he committed the subsequent felony, expired. The fact that defendant was transferred to a prison in Pennsylvania after the lease agreement for Michigan prison space terminated is irrelevant, and the statute does not provide an exception for prisoners who are transferred or serve portions of their terms of imprisonment outside of Michigan. Because the statute required defendant's sentences to begin after the term of imprisonment that he was serving in Michigan expired, the trial court properly ordered that his sentences be served consecutive to the sentence that he was serving at the time of sentencing.

We note that our decision is consistent with the purpose of the statute "to deter persons convicted of one crime from committing other crimes by removing the security of concurrent sentencing." *People v Kirkland*, 172 Mich App 735, 736-737; 432 NW2d 422 (1988). "The statute should be construed liberally in order to achieve the deterrent effect intended by the Legislature." *People v Weatherford*, 193 Mich App 115, 118; 483 NW2d 924 (1992). In *Kirkland*, 172 Mich App at 736, this Court held that the statute was applicable to a federal inmate who committed a crime while he was housed at a community treatment center in Detroit. This Court noted that "the words 'incarcerated in a penal or reformatory institution' have been liberally construed to apply to inmates who are participating in community corrections programs, assigned to halfway houses, or on extended furlough when they committed additional crimes." *Id.* at 737. This Court further stated,

To further the statutory purposes of the consecutive sentencing statute, we hold that it also applies to inmates of federal penal or reformatory institutions located within the State of Michigan. If the purpose of the statute is to deter recidivism by eliminating concurrent sentencing, it would make no sense for the Legislature to exclude inmates of federal institutions. Additionally, we note that the statutory language refers to institutions in the state, not institutions of the state. [*Id.*]

Our decision today is consistent with the principles discussed in *Kirkland*. Further, it is also consistent with *Alexander*, in which the defendant was not incarcerated and did not escape from

an institution in Michigan at the time that he committed the subsequent offense. Accordingly, defendant has failed to establish plain error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens