

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE DAMON HILMON,

Defendant-Appellant.

UNPUBLISHED

March 16, 2006

No. 258097

Wayne Circuit Court

LC No. 04-004613-01

Before: Davis, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony, MCL 750.227b, and malicious destruction of property more than \$200 but less than \$1,000, MCL 750.377a(1)(c)(i). Defendant was sentenced to one year of probation for his felonious assault convictions, two years' imprisonment for his felony-firearm conviction, and restitution of \$1,300 for his malicious destruction of property conviction. We affirm.

Defendant first argues on appeal that the trial court abused its discretion in denying his motion for a new trial because the verdict was against the great weight of the evidence. We disagree. We review the trial court's decision to deny a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). The evidence must preponderate "so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

The elements of felonious assault are that defendant committed: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). A felony-firearm conviction requires that defendant possessed "a firearm during the commission of, or the attempt to commit, a felony." *Id.*, 505. A malicious destruction of property conviction requires that defendant intended to injure or destroy the property in question. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

Some of the testimony presented was in conflict. The repossession men, Pascual Castillo and Jesse Castillo, who went to defendant's home to repossess his car disagreed about where they parked, whether Pascual went to verify the car's VIN by himself, how many gunshots defendant fired, and how defendant came to ram his car into Jesse's car. However,

“[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001), citing *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). The Castillos presented consistent testimony that defendant shouted at them, threatened them, and fired at least a single shot from his window. Both maintained that when defendant fired from the window Jesse ran behind the car and Pascual went behind a tree and called 911. Both maintained that defendant used his car to ram Jesse’s car and hit defendant’s neighbor, Kimberly Mason’s, fence. Officer McDonald testified that when he met the Castillos, Jesse’s car was freshly damaged. Mason testified that she did not hear gunshots that day, but she confirmed that she heard a loud noise, then noticed that someone had hit her fence, and she heard someone shout “call the police.” When Mason opened her door again she noticed that defendant had parked his car in front of her house but then he got out of the car and went into his house, which is consistent with the Castillo brothers’ testimony.

The conflicts fall short of the patently incredible, inherently implausible, or seriously impeached or uncertain testimony required to justify a new trial. See *Lemmon*, *supra* at 643-644. That Mason did not recall hearing gunshots or seeing defendant with a gun does not disprove them, especially in light of her testimony that she was ill that day and attempted to avoid becoming involved. The lack of weapons or bullet holes at the scene likewise does not preclude a gun having been fired there. David Townsend, a forensic firearms examiner, testified that the casings recovered from defendant’s yard were likely several days old. However, his testimony was disputed by David Pauch, a firearms examiner and tool mark examiner, who maintained that it is impossible to determine how much time has passed since a casing was fired.

The jury was presented with evidence from which it could reasonably conclude that defendant committed an assault on both Jesse and Pascual with a dangerous weapon, and with the intent to place them in reasonable apprehension of an immediate battery, thus satisfying the requirements for defendant’s felonious assault convictions. *Avant*, *supra* at 505. The jury was presented with evidence from which it could reasonably conclude that defendant possessed a firearm at the time he committed that assault, satisfying the requirements for defendant’s felony-firearm conviction. *Id.* The jury was presented with evidence from which it could reasonably conclude that defendant maliciously damaged Jesse’s car because defendant intended to injure or destroy the car when he rammed his Firebird into it. *Nelson*, *supra* at 459. The role of the jury is to determine questions of fact and assess the credibility of witnesses and, as the trier of fact, the jury is the final judge of credibility. *Lemmon*, *supra* at 637. Although inconsistent testimony was presented, after review of the entire record we conclude that the verdict does not preponderate so heavily against the evidence that it would be a miscarriage of justice to let the verdict stand. *Musser*, *supra* at 218-219. The court did not abuse its discretion in denying defendant’s motion for a new trial.

Defendant next argues that the prosecutor committed several acts of misconduct, depriving him of his right to a fair trial. We disagree. Because defendant did not object below, we review the record for plain error affecting the defendant’s substantial rights, and will only reverse if the “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, 448-449; 669 NW2d 818 (2003), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). 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 the defendant’s argument.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant argues that the prosecutor improperly attacked Townsend’s credibility and honesty by implying that Townsend was being paid illegal fees and that Townsend was withholding key evidence. We disagree. Townsend’s testimony was essentially that the bullet casings found at defendant’s home were too old to have been fired on the day in question. Our review of the record shows that the prosecutor questioned Townsend about his fees to call attention to the fact that Townsend was being paid by defendant, which went to Townsend’s credibility and potential bias, not to imply that his compensation was illegal. A prosecutor may question a witness to show bias. *People v Yarbrough*, 183 Mich App 163; 454 NW2d 419 (1990). The prosecutor’s questions regarding Townsend retaining the casings until the day of trial did not improperly imply that Townsend withheld evidence, but rather that the police did not perform their own examination of the casings after Townsend. This line of questioning properly pertained to the reliability of Townsend’s results and the lack of verification of those results. The prosecutor “is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *Ackerman, supra* at 450.

Defendant also argues that the prosecutor improperly injected broader issues than innocence and guilt in his closing argument. We disagree. Defense counsel questioned the Castillos’ decision to stay at the scene when defendant started to fire shots at them. In response, the prosecutor told the jury, “you’re the ones that are going to have to use your reason and common sense” and “when you’re using your reason and common sense, think a little bit about what and who the Castillo brothers are.” The “propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The statement at issue was not a civic duty appeal, but rather, an appeal for the jury to use “reason and common sense.” Even if the prosecutor’s comments crossed the line into a civic duty argument, any minimal prejudice was cured by the trial court’s instructions that the jury had to decide the case on the evidence and that the remarks of counsel were not evidence. *Thomas, supra* at 456.

Defendant next argues that he was denied his constitutional right of confrontation because the trial court permitted improper hearsay statements to reach the jury. We disagree. We review a preserved challenge to the admission of hearsay evidence based upon deprivation of the right to confrontation de novo. *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000). However, unpreserved constitutional challenges are reviewed by this Court for plain error affecting substantial rights. *Carines, supra* at 764. Defendant properly preserved two of the three alleged hearsay statements for appellate review.

Defendant first contends that Pascual’s repeated statements that “she heard the fires,” referring to the 911 dispatcher he talked to, are hearsay. We disagree. 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.” MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. MRE 801(a). A declarant is a person who makes a statement. MRE 801(b). At no point did Pascual testify that the 911 dispatcher gave him any indication that she actually heard the shots. Rather, the statement was

speculation made by Pascual while he was testifying about the events that transpired and while he was subject to cross-examination. The court did not err in allowing the statement because the statement “she heard the fires” was not hearsay, and no objection to the statement was made on any other ground. For the same reason, Pascual’s statement that “it’s on the tape” is also not hearsay.

Defendant also contends that Officer McDonald’s statement that “we were dispatched to that location for shots fired at the repo man,” referring to the 911 dispatch he received, is inadmissible hearsay. We disagree. Officer McDonald’s statement was not admitted to prove the truth of the matter asserted. Rather, it was admitted to explain why police officers were at the scene. Further, Pascual supplied the information on which the dispatch was based, and he was available for cross-examination. The trial court did not err in failing to instruct the jury to disregard the statement. See *People v Jackson*, 113 Mich App 620, 624; 318 NW2d 495 (1982).

Defendant argues that the trial court failed to instruct the jury properly. However, defense counsel affirmatively stated that he had no objections to the instructions as given, waiving this issue for appellate review. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Defendant finally argues that he received ineffective assistance of counsel. We disagree. Because defendant did not move for a new trial or move for an evidentiary hearing below, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). Findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). 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 counsel's errors, the result of the proceeding would have been different. *People v Walker*, 265 Mich App 530, 545; 697 NW2d 159 (2005).

Defendant contends that trial counsel was ineffective on the basis of the issues discussed *supra*. Having concluded that there was no prosecutorial misconduct and no improper hearsay evidence, counsel cannot have been ineffective for failing to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). However, defendant also contends that counsel was ineffective for failing to request proper jury instructions on the elements of felony firearm, the specific intent required for felonious assault, the standard by which the jury should judge police officers’ testimony, and defendant’s constitutional right not to testify. A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). “Even if somewhat imperfect, instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights.” *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000), citing *People v Reed*, 393 Mich 342, 349-350; 224 NW2d 867 (1975).

Defendant first argues that counsel should have requested an instruction defining the kind of “firearm” required for a felony-firearm conviction. Specifically, defendant contends that the jury could have found that the shots were fired from a BB gun or starter pistol, neither of which is prohibited by statute. However, there is no evidence in the record from which the jury could draw that conclusion. Further, such an instruction would be logically inconsistent with counsel’s

trial strategy of maintaining that *no* shots were fired that day. Trial counsel need not “advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Counsel was not ineffective for failing to request an instruction that was not supported by the evidence or was against his theory of the case.

Defendant argues that counsel was ineffective for failing to request a specific intent instruction regarding felonious assault. We disagree. The trial court instructed the jury that felonious assault required that defendant “intended” to injure Pascual and/or Jesse. When the charge is reviewed in its entirety, it “covers the substance of” any alleged omission. *Canales, supra* at 574. Likewise, defendant’s contention that counsel was ineffective for failing to request a jury instruction that it should judge the testimony of a police officer by the same standards used to evaluate any other witness fails because the trial court actually instructed the jury “the fact that a witness might be a police officer doesn’t mean their testimony is more likely or less likely to be truthful.” Counsel was not ineffective for failing to request additional instructions where the instructions as given were proper.

Finally, defendant argues that counsel was ineffective for failing to request a jury instruction that defendants are constitutionally entitled not to testify and that exercising that right should not be held against him. The “no adverse inference” instruction is not mandatory in a trial with only one defendant. *People v Hampton*, 394 Mich 437, 438; 231 NW2d 654 (1975). Nevertheless, presuming trial counsel made an objectively unreasonable error in failing to request the instruction, defendant has not shown that the outcome of the trial would have been different. *Walker, supra* at 545. Defendant relies on the cumulative effect of this error and his other alleged errors, but this is the only error we find. We do not find defendant prejudiced thereby.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot