

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

WALTER EUGENE WILSON,

Defendant-Appellant.

UNPUBLISHED

May 15, 2003

No. 233164

Oakland Circuit Court

LC No. 00-174635-FH

Before: Wilder, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree fleeing and eluding a police officer, MCL 750.479a(3), second-degree retail fraud, MCL 750.356d, and driving while license suspended (DWLS), MCL 257.904(1)(b). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 2-1/2 to 20 years' imprisonment for the fleeing and eluding conviction, 171 days time served for the retail fraud conviction, and ninety-three days time served for the DWLS conviction. He appeals as of right. We affirm.

Defendant's convictions arise from allegations that, on the afternoon of July 12, 2000, he stole three cases of beer from a Ferndale Rite Aid drug store and, thereafter, led police on a three-mile, high-speed chase down Woodward Avenue into Detroit. Nicole Wilson, the assistant manager at the store, testified that, on the day of the incident, a black male wearing a gray shirt and a hat approached her and asked for the location of the beer cooler. Shortly thereafter, the man left the store with three cases of beer without paying for it. Lee Kwon, a cashier, looked at the surveillance camera and saw the robber getting into a green station wagon. She ran outside, noted the license plate number, and gave it to the police.¹

Ferndale Police Officer James Ture testified that, shortly after hearing a dispatch involving a retail fraud committed by a black male driving a green station wagon with a black

¹ Neither store employee could identify defendant as the perpetrator. The assistant manager indicated that she was with the perpetrator only momentarily. The cashier indicated that, while the perpetrator was in the store, her attention was focused on assisting another customer. The cashier opined that defendant did not look like the man captured on the store videotape. Detective George Hartley viewed the store videotape, but opined that the tape was such a poor quality that an attempt to enhance it would have been useless.

female passenger, he observed the suspect vehicle on Woodward about a half-mile from the Rite Aid store. Officer Patrick Lemke also observed the green station wagon, and noted that the license plate number matched the number that was broadcast over the dispatch. Both pursued the vehicle down Woodward Avenue in fully marked police cars, with their sirens and lights activated. While traveling in the 35 mph zone, the station wagon reached estimated speeds of 75 to 85 mph and ran a red light. At one point, Officer Ture pulled up to the rear passenger side of the vehicle and got a side view of the driver, whom he described as a black male with a “lumpy or pointed skull,” wearing a gray shirt. Officer Lemke was not able to identify the driver.

Eventually, the green station wagon attempted to make a left turn at the intersection of Woodward and Six Mile Road, but struck a curb causing one of the tires to flatten. At that point, Detectives John Thull and George Hartley, who had been advised of the chase, arrived in the area where the station wagon became disabled. When Detective Thull pulled alongside the car, defendant sat up and the two “looked at each other momentarily.” The officers then pulled in front of the car, and defendant jumped out and ran. Detective Thull chased defendant through the neighborhood, but defendant eventually jumped a fence and escaped.

Meanwhile, Detective Hartley approached Theresa Singleton, who was the female passenger in the green station wagon, and she gave the officer defendant’s name. The officers searched the car and found that it contained three cases of beer and a hat.² Upon returning to the police station, Detective Thull was shown a photograph of defendant, which was retrieved using the information from Singleton, and identified him as the driver of the green station wagon.³ Detective Thull also subsequently picked defendant out of a lineup, and identified him at trial.

Singleton, who had dated defendant for more than three years, testified that she was with defendant in his green station wagon on the day of the incident. She indicated that, when they stopped at the Rite Aid, defendant went into the store, subsequently came out running, threw some beer in the backseat, and drove away at a high rate of speed. When Singleton noticed the police behind them, she told defendant to stop the car. He told her to “shut up,” and that he “wasn’t getting caught for nothing.” She indicated that defendant continued down Woodward until he turned left at Six Mile Road and one of his tires “blew out.” She testified that, when a police car pulled alongside of them, defendant jumped out of the car and ran. She thereafter gave an officer defendant’s name. Singleton also told the officer that she and defendant were going to a motel, and that “the plan” was to sell the beer to obtain money to pay for a motel room.

During trial, the defense maintained that defendant was misidentified, and that Singleton gave defendant’s name to avoid being charged with a crime, and because she had ill feelings toward him for ending their relationship.

² Partial fingerprints were lifted from the car, but could not be positively identified as belonging to defendant.

³ Detective Hartley testified that he could not identify the driver because he saw him for only a fleeting second, but noted that he was a black male, of average height and weight, wearing a gray shirt and pants.

Defendant first argues that the trial court abused its discretion by denying his motion for a new trial or, in the alternative, an evidentiary hearing on the basis of juror misconduct. We disagree.

This claim is based on defense counsel's post-verdict discussion with some jurors, wherein some apparently indicated that they noticed that defendant's shoes had no laces. Defense counsel asserted that the jury discussed defendant's lack of shoelaces during deliberations and presumed that defendant must be in custody for prior convictions. Defendant moved for a new trial, arguing that the jury's observation of his lack of shoelaces and subsequent presumption that he had prior convictions constituted an impermissible extraneous influence, which denied him a fair and impartial trial. The trial court denied defendant's motion for a new trial.

This Court reviews a trial court's decision denying a motion for a new trial for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

We find no abuse of discretion. It is well established that "once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). An exception exists where juror misconduct can be demonstrated with evidence that the jury was exposed to outside or extraneous influences, such as undue influence. *Budzyn, supra* at 88, 91; *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997); *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293; 494 NW2d 811 (1992). A defendant must also show that the extraneous influences "created a real and substantial possibility that they could have affected the jury's verdict." *Budzyn, supra* at 89. However, juror misconduct "cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements." *Messenger, supra*.

Initially, we note that this claim must fail because defendant has not presented any admissible evidence, by way of affidavits, to support his argument that the jury was exposed to or influenced by extraneous information. Rather, he relies on defense counsel's reiteration of certain jurors' statements, which is merely hearsay. See *Budzyn, supra* at 92 n 14.⁴

However, even if we were to consider defense counsel's statements, defendant has failed to demonstrate juror misconduct. A presumption by some jurors that, because defendant was not wearing shoelaces, he must have prior convictions does not constitute an impermissible outside or extraneous influence, but rather represents the jurors' normal expressions of personal opinion or thought processes. Even though the jurors' personal analysis could be deemed inappropriate,

⁴ In *Budzyn*, our Supreme Court stated that an "attorney cannot testify with respect to these juror's [sic] statements because that testimony would be hearsay."

errors caused by a jury's faulty reasoning are inherent in the verdict and cannot be challenged. *Hoffman, supra* at 294-295. Further, the jurors promised to follow the law as instructed by the court and, before deliberations, the court reminded the jury that it took an oath to decide the case based only on the properly admitted evidence and the law as instructed by the court. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Moreover, we "will not reward counsel's postdischarge inquiries regarding the internal thought processes of the jurors." *Hoffman, supra* at 291.⁵ Accordingly, because defendant has not demonstrated that the jury's verdict was influenced by an outside or extraneous influence, the trial court did not abuse its discretion by denying his motion for a new trial or, in the alternative, an evidentiary hearing.⁶

II

Defendant next argues that he was denied his right to due process by the admission of three officers' in-court identifications that were tainted by impermissibly suggestive pretrial procedures. To support this claim, defendant indicates that, after a passenger in the getaway car gave an officer defendant's name, the officers returned to the police station, pulled up his photograph, and identified him after viewing that one photograph.

Because defendant failed to raise this claim below, we review this unpreserved claim for plain error affecting defendant's substantial rights, i.e., affecting the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001).

Photographic identification procedures violate a defendant's due process rights if they are so impermissibly suggestive as to give rise to a substantial likelihood that there will be a misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An improper suggestion may arise when a witness is shown only one person or a group in which one person is

⁵ This Court has stated that it

will not reward counsel's postdischarge inquiries regarding the internal thought processes of the jurors. The havoc and potential for abuse would be immense if we were to allow counsel to open the jury room door after the jury has been discharged and examine, analyze, and impeach the internal thought processes of the jury. [*Id.* at 291.]

⁶ Within this issue, defendant suggests that he was "compel[led]" to sit through trial wearing jail clothing. "Only if a defendant's clothing can be said to impair the presumption of innocence will there be a denial of due process." *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987). However, defendant failed to timely object at trial to his lack of shoelaces, which waives this issue. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985). Moreover, in this case, defendant was not compelled to wear jail clothing, but was wearing civilian clothing. In fact, defense counsel stated during defendant's motion for new trial that he had purchased the clothing for defendant, but did not notice that he was not wearing shoelaces. Thus, not only is this issue waived, but there is no indication in the record that defendant was compelled to wear jail clothing.

singled out in some way. *Id.* As such, to the extent that the three officers identified defendant as the perpetrator after viewing only his photograph, a suggestion of an improper identification procedure may arise.⁷

However, defendant's claim regarding the admissibility of the alleged identifications made by two of the three officers is misplaced. Officer Ture testified at trial that, although he viewed defendant's photograph, he could not positively identify him as the perpetrator, noting that, during the chase, he got only a side view of the driver. Further, Detective Moore did not testify at trial, but Detective Hartley testified that he believed the officer had identified defendant in a lineup. Detective Hartley acknowledged, however, that he was aware that Detective Moore had indicated that he could not positively identify defendant. Moreover, there was no evidence or indication that Detective Moore had viewed defendant's photograph before allegedly identifying him in a lineup.

With regard to Detective Thull, it is undisputed that he viewed only defendant's photograph and positively identified him as the perpetrator. However, even if the pretrial identification could be considered unduly suggestive and impermissibly tainted, an in-court identification is still appropriate where there is an independent basis for the in-court identification, untainted by the suggestive pretrial identification. *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977); *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). In determining whether an independent basis exist, the factors to be considered include: (1) the witness' prior knowledge of the defendant; (2) the witness' opportunity to observe the criminal during the crime; (3) the length of time between the crime and the disputed identification; (4) the witness' level of certainty at the prior identification; (5) discrepancies between the pretrial identification description and the defendant's actual appearance; (6) any prior proper identification of the defendant or failure to identify the defendant; (7) any prior identification of another as the culprit; (8) the mental state of the witness at the time of the crime; and (9) any special features of the defendant. *Id.*

After reviewing the record, we are satisfied that the relevant factors predominate in favor of an independent basis for Detective Thull's in-court identification of defendant. Although the detective never saw defendant before the day of the robbery, he had ample opportunity to observe defendant. Detective Thull testified that, when he pulled alongside the green station wagon, defendant sat up and the two "looked at each other momentarily." He indicated that, at that point, he had a direct and unobstructed view of defendant from approximately six-feet away. He further indicated that it was approximately 3:00 p.m., was a "warm sunny day," and was "[b]right and clear." He testified that he then pulled in front of the car, which was approximately ten-feet from the green station wagon, got out of the car, and observed defendant jump out of his car and run. Detective Thull thereafter chased defendant through the neighborhood until defendant jumped a fence and escaped. Detective Thull testified that there was no doubt that defendant was the man sitting in the driver's seat of the green station wagon. He also indicated that he identified defendant two months after the incident in a corporeal lineup. Given the witness' opportunity to observe defendant on the day of the incident, there was a sufficient

⁷ Because a passenger in the car gave an officer defendant's name, this is not a typical case of a witness being shown only one person or a group in which a person is singled out.

independent basis to admit his in-court identification at trial. Accordingly, defendant has failed to demonstrate a plain error and, thus, reversal is not warranted on this basis.

In relation to this claim, defendant also argues that he is entitled to a new trial because defense counsel was ineffective for failing to move to suppress the officers' identifications. We disagree.

Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

As previously indicated, the record demonstrates that there was a sufficient independent basis supporting Detective Thull's in-court identification and, thus, a motion to suppress would have been futile.⁸ Counsel is not required to make a frivolous objection, or advocate a meritless position. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Likewise, because Officer Ture did not positively identify defendant at trial, and there was no indication that Detective Moore was exposed to any impermissible pretrial identification procedure, any challenge in this regard would have also been futile. *Id.* Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged inaction, the outcome would have been different. *Effinger, supra.* Therefore, defendant is not entitled to a new trial on this basis.

III

Defendant also argues that he is entitled to a new trial because irrelevant and prejudicial evidence was admitted through the testimony of a police witness. We disagree.

Contrary to defendant's claim, defense counsel did not object to the portion of Detective Hartley's testimony that defendant now challenges. Therefore, we review this unpreserved evidentiary claim for plain error affecting defendant's substantial rights. *Carines, supra.*

During defense counsel's examination of Detective Hartley, he questioned him regarding the alleged flaws of the case against defendant, including the weakness of the identification testimony, and his failure to enhance the store videotape, or to have a DNA test conducted on a hat found in the green station wagon. Defendant now challenges the following excerpts of Detective Hartley's testimony:

⁸ We note that defense counsel vigorously attacked Detective Thull's identification during cross-examination and closing argument.

Q. And the only two people who have ever identified [defendant] in this case as the suspect who committed this offense was [sic] Ms. Singleton and Ms. Thull-Officer Thull? Isn't that correct?

A. *And Detective Moore.*

Q. Pardon me?

A. And Detective Moore.

Q. Who's Detective Moore?

A. Who (undeterminable).

Q. Who's Detective Moore?

A. He was also at the line up and he was also at the scene where we chased the subject.

Q. You're aware of the fact that Detective Moore said he wasn't positive who it was, correct?

A. Yes. That's what I read. But he also picked number 4 [defendant's number at the lineup].

Q. . . . So, you had [the hat] available to you to have it checked for fibers or DNA or to see if any hair samples would match the Defendant?

A. Yes.

Q. Okay. And was that done?

A. No.

Q. Why not?

A. *Because I was convinced in my mind that [defendant] was the one that was involved by two independent witnesses and I see no reason for such. [Emphasis added].*

Thereafter, during redirect examination, the prosecutor asked the detective why he did not have the tape enhanced and DNA testing conducted and the detective responded as follows:

Both because I saw no need to. I was convinced in my mind, by talking to Detective Thull, as well as the information received from Theresa Singleton and by looking at the video from the graininess of it, it did appear to be [defendant] and I was just convinced that [defendant] was the one involved and that's why I

submitted the information of the Oakland County Prosecutor's Office for the warrant request.

We conclude that defendant is not entitled to relief on this basis. A defendant cannot complain of testimony that he invited or instigated in an effort to support his defense. See *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), and *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988). Here, defense counsel asked the detective if there were only two people who identified defendant. The detective's reply that another officer had also identified defendant was responsive to defense counsel's question. Further, once defense counsel elicited testimony concerning the detective's failure to enhance the store videotape or obtain DNA testing on the hat, the circumstances and explanation regarding his motivation for failing to do so became relevant. See MRE 401. We also note that, contrary to defendant's suggestion, evidence is not inadmissible simply because the very nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Accordingly, because defendant has failed to demonstrate a plain error, this issue does not warrant reversal.

IV

Defendant next argues that the prosecutor's questioning of police witnesses denied him a fair trial because the elicited testimony indicated that the green station wagon was stolen, and that he was identified from a "booking picture." We disagree.

Because defendant failed to raise this claim below, this Court reviews this unpreserved claim for plain error affecting defendant's substantial rights. *Carines, supra*.

During the prosecutor's direct examination of Officer Ture, the following exchange occurred:

Q. Do you recall whether or not you were given a license plate from the dispatch or learned of a license plate?

A. I believe they eventually gave a license plate out and *that confirmed stolen* out of Roseville. (emphasis added).

Subsequently, during the prosecutor's direct examination of Officer Lemke, the following exchange occurred:

Q. And do you recall whether or not you received a license plate?

A. I did. I ran the license plate on the computers that we have in the patrol cars and *it came back as stolen* from Roseville.

* * *

Q. Once you received this information in the parking lot, what did you do?

A. When they put out the license plate, I ran it on the computer in the car and *it came back as stolen*. Dispatch hadn't put out that it was a stolen car. *Over the radio, I asked if they had confirmed it was a stolen vehicle*.

Q. Without telling me what they said, after that what did you do? [Emphasis added].

The record demonstrates that the witnesses' responses were unsolicited answers to properly asked questions. The prosecutor merely asked the witnesses if they had received a license plate number from dispatch, a question that required an affirmative or negative response. Generally, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Further, when the testimony is reviewed in context, it appears that the prosecutor was not seeking to establish that the car was stolen, but that the license plate number of the car that the officers chased matched the number that had been provided by dispatch. In addition, when questioning the second officer, the prosecutor cautioned the witness not to repeat what dispatch had indicated, but to only state what he did in response to the information. Finally, the prosecutor did not ask any questions regarding the car being stolen, or discuss the matter during closing argument. Accordingly, defendant has failed to demonstrate plain error and, thus, this claim does not warrant reversal.

Defendant also claims that the prosecutor improperly elicited testimony that a police officer identified him from a "booking picture," which resulted in the admission of "bad acts" evidence.

Defendant correctly notes that a prosecutor may not indiscriminately introduce prior bad acts of a defendant. See MRE 404(b)(1). Here, however, although there was testimony that defendant was identified through the use of a booking picture, there was no indication that he had any prior criminal convictions. See, e.g., *People v Drew*, 83 Mich App 57, 61; 268 NW2d 284 (1978), and *People v Heller*, 47 Mich App 408, 411; 209 NW2d 439 (1973). Consequently, we do not believe that the brief reference to his "booking picture" was plainly erroneous or affected defendant's substantial rights, so as to avoid forfeiture of this issue. *Id.*

Defendant also claims that defense counsel was ineffective for failing to object to the testimony that the car was stolen and that he was identified from a "booking picture." However, given the brief references, defense counsel reasonably may have determined that an objection would have called more attention to the allegedly improper testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, even if counsel was ultimately mistaken, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Further, in light of the evidence introduced at trial, it is unlikely that the brief reference to defendant's "booking picture," with no indication regarding the circumstances under which the photograph was taken, affected the outcome of the case. Accordingly, defendant has failed to demonstrate that there is a reasonable probability that, but for counsel's alleged failure to object, the outcome would have been different. *Effinger, supra*. Therefore, defendant is not entitled to a new trial on this basis.

Defendant's final claim is that he was denied a fair trial by several instances of prosecutorial misconduct. We disagree.

This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *Bahoda, supra* at 266-267; *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). When a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error affecting the defendant's substantial rights. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant claims that the prosecutor improperly vouched for Detective Thull's credibility during the following remarks made during closing argument:

What motive would Detective Thull have to come in here and make up an identification of the Defendant? He has no motive. He indicated that he looked at the person, went back, pulled up a photograph and said, yeah, that's the guy. He has no motive to say anything other than that. *Think about it, is he going to put his job, 16 years, on the line.* I mean make up an identification of an individual? It doesn't make sense. [Emphasis added].

Because defendant did not object to the remark, it is reviewed for plain error affecting his substantial rights. *Id.* A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt. *Bahoda, supra* at 276; *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, viewed in context, this argument did not improperly vouch for the detective's credibility, but rather permissibly advanced a rational argument in support of his credibility on the ground that he had no motivation to falsely identify defendant. The detective testified that he had been an officer for sixteen years, and a prosecutor may argue from the evidence that a witness is credible. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Moreover, the remark was responsive to issues raised by defense counsel during his cross-examination of the detective, wherein he attacked the detective's identification of defendant and his credibility. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

Defendant also argues that the prosecutor misstated the law during rebuttal argument when he stated the following:

I agree that you shouldn't convict an innocent man . . . *Some doubt is okay.* If you go back and you deliberate and you think in your gut, in your stomach, yeah he did it [Emphasis added].⁹

⁹ During closing argument, the prosecutor had stated the following:

(continued...)

Immediately following the remark, defense counsel objected. In response to the objection, the court instructed the jury that it would instruct on the law and reasonable doubt, and that the jury was to apply the law as instructed by the court. The trial court's subsequent instructions that the lawyers' comments are not evidence, that the case should be decided on the basis of the evidence, and that the jury should follow the law as instructed by the court were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001), citing *Bahoda, supra* at 281. Moreover, in its instructions, the court instructed the jury on reasonable doubt consistent with CJI2d 3.2(3). This Court has held that CJI2d 3.2(3) adequately defines the concept of reasonable doubt in the context of the jury's role as factfinder. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *People v Hubbard (After Remand)*, 217 Mich App 459, 488; 552 NW2d 593 (1996). Accordingly, reversal is not warranted on this basis.

Defendant next argues that, during rebuttal argument, the prosecutor misstated the law with regard to the jury's acceptance of Singleton's identification of defendant:

Defense counsel wants to bring up all this about Theresa Singleton and about how we don't know much about her. He can ask any question he wanted to. Okay? And he didn't . . . Under the law, and you heard some comments throughout trial, some objections on the word hearsay. I'm not going to go into what that is. But under the law and with hearsay, there are some exceptions. Some of those exceptions are allowed, because the truth or veracity and the truthfulness of the statement itself is deemed appropriate and so it's allowed not evidence. One of those would be like what's called an excited utterance. Something that's made during the incident or what's called a present sense impression, where you make a statement about something right after you see it or while it's happening and under the law, it's deemed so reliable that it's truthful and it's allowed in as a hearsay--

Defense counsel objected, and the trial court ruled that the remarks were not incorrect. However, the court also immediately instructed the jury that it had to decide if the witness' testimony was truthful and had to follow the law as instructed by the court. Further, in its opening and final instructions, the trial court instructed the jury regarding credibility, including the evaluation of identification testimony, and that it was to determine the facts and the credibility of the witnesses. To the extent that the challenged remarks could be viewed as improper, the trial court's instructions were sufficient to cure any prejudice. *Long, supra*; *Graves, supra*. Accordingly, because the prosecutor's comments did not deny defendant a fair

(...continued)

I don't have to prove this case beyond all doubt. I do not have to prove it to you to a 100 percent certainty. Because there's only one way I could do that and that's if all of you were inside the Rite Aid and watched the Defendant steal the property . . . My burden to you is beyond a reasonable doubt, not all doubt. Apply your common sense.

trial, reversal is not warranted.

Affirmed.

/s/ Kurtis T. Wilder
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra