

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 29, 2014

v

DONOVAN MARZEL MARTIN,
Defendant-Appellant.

No. 315203
Oakland Circuit Court
LC No. 2012-242845-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

DWAYNE CLAY MAJOR,
Defendant-Appellant.

No. 315304
Oakland Circuit Court
LC No. 2012-242846-FC

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM.

In these consolidated appeals, each defendant appeals by right his jury-trial conviction of two counts of armed robbery, MCL 750.529. In Docket No. 315203, defendant Martin was sentenced to concurrent terms of 135 months to 40 years in prison. In Docket No. 315304, defendant Major was sentenced to concurrent terms of 85 months to 40 years in prison. We affirm in both appeals but remand for correction of defendant Major’s judgment of sentence consistent with this opinion.

Defendants were tried together before a single jury. Michael Smith testified that, on July 18, 2012, at about 12:30 a.m., he was standing in the driveway of the home he shared with his grandmother, shooting dice with other people, when he saw a red car drive by slowly and recognized defendants in the car. Shortly thereafter, two masked men came around the side of the house. One of the men had a gun and said, “You already know what it is, don’t nobody move.” Smith recognized the voice of the gunman as defendant Martin. The other robber, who was unarmed, moved from person to person, emptying their pockets into his own. In the process,

the unarmed robber's mask fell down and Smith recognized him as "Wack Wayne," with whom he had gone to school. Smith was later able to pick defendant Major out of a high school year book and establish his real name. Other witnesses at the scene of the robbery testified consistently with Smith but were unable to identify the robbers.

Both defendants argue that the prosecution committed misconduct by repeatedly questioning Smith about threats made to him and family members and by arguing that Smith's testimony was credible because he testified despite witness intimidation. Although both defense attorneys objected to most of the testimony regarding threats, they objected on the ground of hearsay or lack of foundation rather than on the ground of prosecutorial misconduct. Therefore, the issue is not preserved. Unpreserved issues of prosecutorial misconduct are reviewed for plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *Id.* at 234-235 (citation omitted).

We are not convinced that a failure to review this issue would result in a miscarriage of justice. Nonetheless, we note that the prosecutor did not commit misconduct in questioning Smith about threats where the prosecutor had a good-faith basis for doing so and where information regarding the threats was relevant to Smith's credibility. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Further, evidence that assists the trier of fact in evaluating the credibility of a witness is admissible. See MRE 401; *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, modified 450 Mich 1212 (1995). Indeed, it is well-settled that evidence of threats against a witness will be useful to a jury in evaluating the witness's credibility. See CJI2d 3.6(3)(f). Here, the prosecutor questioned Smith about threats that he received and reported to the police. Clearly, the prosecutor had a good-faith basis for inquiring about these threats against the witness. The jury was instructed that Smith's testimony concerning the threats was to be considered only as proof that the threats were made, and not for the truth of the matter asserted in the threats, themselves. As the prosecutor argued, testimony about the threats was relevant to Smith's credibility. Prosecutors are free to argue the evidence and all reasonable inferences arising from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor's reference to the threats in closing was a fair comment on the evidence and was not improper.

Next, defendant Martin argues that there was insufficient evidence to support his conviction. This Court reviews sufficiency of the evidence arguments de novo on appeal. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). The evidence is reviewed in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

Defendant does not argue that the individual elements of armed robbery were not established. Rather, he challenges the sufficiency of the evidence establishing his identification as the armed robber. "[I]dentity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The credibility of identification testimony is a question of fact

for the jury that this Court will not resolve anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

“Vocal identification evidence is competent if the identifying witness demonstrates certainty . . . in the mind . . . by testimony that is positive and unequivocal.” *People v Murphy (On Remand)*, 282 Mich App 571, 584; 766 NW2d 303 (2009). Smith testified that he had known Martin for four or five years. Smith saw defendant Martin regularly at the basketball courts and spoke to him a few weeks before the robbery when Martin confronted him about an unrelated disagreement. Smith testified that he was confident that he would recognize Martin’s voice because of the confrontation a few weeks earlier. There was no question in Smith’s mind that it was Martin who said, “You already know what it is, don’t nobody move.” Smith had also seen Martin with defendant Major shortly before the robbery, and identified Major as the unarmed robber after seeing his face. Smith had ample opportunity to hear and see the robber with the gun. We conclude that the totality of the circumstances, combined with Smith’s certainty regarding his identification of Martin, supplied sufficient reliability of the voice identification. *Id.* Viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to support the identification of defendant Martin as the gunman.

Lastly, we note that the transcript of the sentencing hearing makes clear that the trial court intended to impose two concurrent sentences of 85 months to 40 years in prison for defendant Major. However, defendant Major’s judgment of sentence, filed March 1, 2013, mistakenly states that he received one sentence of 85 months to 40 years in prison and a concurrent sentence of 82 months to 40 years in prison. This is an obvious typographical error. We remand for the limited task of correcting defendant Major’s judgment of sentence to make clear that he was sentenced to two concurrent sentences of 85 months to 40 years in prison.

Affirmed but remanded for correction of defendant Major’s judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Henry William Saad
/s/ Pat M. Donofrio