

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE ROGERS,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 234461

Ottawa Circuit Court

LC No. 00-024024-FC

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of safe breaking, MCL 750.531, and breaking and entering with intent to commit larceny, MCL 750.110. He was sentenced, as an habitual fourth offender, MCL 769.12, to concurrent terms of 114 to 360 months on the safe breaking conviction and 46 to 240 months on the breaking and entering conviction. Defendant appeal as of right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the prosecutor committed misconduct by deliberately eliciting inadmissible other acts testimony that the trial court refused to admit in a pretrial decision and by failing to instruct prosecution witnesses to avoid such testimony. We disagree. Contrary to defendant's arguments, the questions asked by the prosecutor were proper and were not directed at eliciting inadmissible other acts evidence. Accordingly, there is no basis for relief merely because answers to these questions arguably touched on other acts by defendant. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999) (unresponsive, volunteered answer to a proper question is not grounds for a mistrial). We also note that there is simply no evidentiary basis in the record for defendant's argument that the prosecutor failed to instruct prosecution witnesses to avoid improper other acts testimony.¹

Defendant next argues that the trial court improperly admitted testimony from Margaret MacLean that Corey Traxler told her about breaking into the Pizza Hut in Ferrysburg with Clayton Sparkes and "Tyrone." We disagree. We review a trial court's decision to admit

¹ Defendant also refers to an answer given by a witness on cross-examination by defense counsel, but obviously there is no basis for finding prosecutorial misconduct in questioning by defense counsel.

evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). However, in doing so, we consider the meaning of the Michigan Rules of Evidence “in the same manner as the examination of the meaning of a court rule or a statute, which are questions of law that we review de novo.” *Id.* Contrary to defendant’s argument, the trial court properly admitted the testimony at issue as a prior statement under MRE 801(d)(1)(B) because: (1) Traxler testified at trial and was subject to cross-examination; (2) defense counsel at least impliedly, and arguably expressly, charged in opening statement that Traxler fabricated his testimony indicating that defendant was involved in the break-in due to a plea agreement he made; (3) the prior statement testified to by MacLean was consistent with Traxler’s challenged testimony; and (4) MacLean testified that the statement to her was made in January of 2000 which was before the plea agreement was made and, thus, before the alleged motive to falsify arose. *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).

Finally, defendant advances unpreserved claims of improper remarks by the prosecutor during closing argument. We conclude that defendant is not entitled to relief based on these claims. Review of unpreserved allegations of improper remarks by a prosecutor during closing argument is only for plain error. *People v Schultz*, 246 Mich App 695, 709; 635 NW2d 491 (2001). To avoid forfeiture of such unpreserved claims, “defendant must establish that errors occurred, these errors were clear or obvious, and the errors affected the outcome of the trial court proceedings.” *Id.* We conclude that there was no clear or obvious error in the challenged remarks by the prosecutor regarding the credibility of Sparkes and Traxler. In particular, it is not clear or obvious from the cold record whether Sparkes’ demeanor while testifying may have supported the remarks regarding him. With regard to Traxler, the prosecutor’s remarks indicating that it took some courage for Traxler to testify are not clearly or obviously erroneous because it is general knowledge that a prison inmate may face some danger if it becomes known that the inmate was actively cooperating with prosecuting authorities. Similarly, we find no error based on defendant’s claim that the prosecutor improperly argued that the testimony from MacLean admitted under MRE 801(d)(1)(B) should be considered as substantive evidence of guilt. Contrary to defendant’s argument, nothing in MRE 801 indicates that such evidence may not be used as substantive evidence.

The prosecutor’s rhetorical question suggesting that “pressure” or threats may have been used against Bobbie Glover to induce her to provide alibi testimony was improper given that a prosecutor “cannot make statements of fact unsupported by the evidence.” *Schultz, supra* at 710. However, we conclude that defendant has not established that any error in this regard affected the outcome of the trial in light of the other reasons for the jury to question Glover’s credibility. Glover indicated on cross-examination that she was first contacted about testifying by defense counsel the day before her testimony. It is difficult to imagine why she was not contacted until such a late time if defendant was truly aware that she could offer truthful alibi testimony. Also, Glover said that she previously had a relationship with defendant and that they had a child together. Further, Glover claimed on cross-examination that she had not talked to defendant about her trial testimony which the prosecutor quite plausibly attacked in closing argument as an “absurd” claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood