

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 28, 2012

v

FLETCHER DARNELL DEAN,
Defendant-Appellant.

No. 305168
Kent Circuit Court
LC No. 10-010068-FC

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). We affirm.

Defendant was arrested after his children’s mother, Tia Booth, notified police that, a couple weeks before, she had overheard defendant with two of his friends plan a robbery and then she saw them leave defendant’s house with two handguns and a shotgun. She also overheard them discuss the details of the robbery after they returned, including that no money was acquired but an Xbox controller was taken, and the male victim was “pistol-whipped” with a pistol-gripped shotgun. A search warrant later executed at defendant’s house recovered a shotgun shell in a bedroom closet, a shotgun shell and pistol-gripped shotgun in the basement, and an Xbox controller. Defendant’s friend, who allegedly participated in the robbery, was also located hiding in the basement, a basement which could only be accessed through a hidden door located on the floor of a utility closet.

On appeal, defendant first argues that he did not receive a fair trial because the prosecution elicited hearsay testimony from the investigating police officer which impermissibly bolstered Booth’s credibility. We disagree.

Generally, a trial court’s decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Where the determination “involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo.” *McDaniel*, 469 Mich at 412.

During the prosecution's direct examination of the investigating officer, the officer explained his first contact with Booth as follows:

Q. Okay. So you have contact with Ms. Booth?

A. Correct.

Q. You were in court during her testimony?

A. Yes.

Q. Okay. How detailed was her account of the planning of the robbery, the circumstances surrounding the robbery, and the suspect's return?

A. It was pretty detailed, like she had been there and she had heard the communication going on between the three people.

Q. Okay. So all the details that she testified to today, she had informed you?

A. Yes.

Defendant did not object during this testimony; thus, any claim of error is unpreserved and reviewed on appeal for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 764-765; 597 NW2d 130 (1999).

Contrary to defendant's claim, this testimony did not constitute impermissible hearsay. Hearsay is an out-of-court statement that is offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). A "statement" is an assertion. MRE 801(a). The investigating officer did not testify about any "statement" made by Booth to him; rather, he merely indicated that her account of the planned robbery was detailed and included details she provided in her court testimony. Further, the prosecutor did not engage in improper bolstering of Booth's testimony through this questioning by implying special knowledge not known to the jury. "[T]he prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 273, 276; 531 NW2d 659 (1995). However, even if such implication was made here, defendant did not establish that reversal was warranted by plain error considering the strength of the evidence, including that shotgun shells and a pistol-gripped shotgun matching the description of the one used in the robbery were recovered in defendant's house, as well as an Xbox controller. See *Carines*, 460 Mich at 763.

Later in the direct examination of the investigating officer, the prosecutor returned to Booth's statements to him and the following exchange occurred:

Q. Okay. Now, she, when you first met with her, and at each subsequent contact with her over the phone, or in person, how many people did she identify by name as involved in this, these crimes?

A. Walter Sanders and Mr. Dean.

Q. Okay. Did she ever identify the third person?

A. She never did.

Q. Did she ever waffle on her identification of Walter Sanders or Fletcher Dean?

A. No, sir.

Defense counsel: Your honor, I'm going to object. I think this is all hearsay.

The prosecutor: It's already been testified to, Your Honor. It's to corroborate or to confirm.

The officer's response to the prosecutor's initial question as to "how many people" Booth identified as involved in these crimes was unresponsive because the officer did not respond with a number, but with the names of the people Booth identified. Defense counsel did not object to this volunteered hearsay testimony and the prosecutor followed up by asking whether Booth had ever "waffle[d]" in her identification of Sanders and defendant. After the officer replied in the negative, defense counsel objected arguing that the testimony was hearsay. The trial court admitted the challenged testimony under MRE 801(d)(1)(B), as a prior consistent statement, and instructed the jury that the testimony was not admitted to establish the truth of the matter asserted.

To the extent that defendant argues on appeal that the officer's identification of the alleged perpetrators constituted hearsay, that claim is unpreserved and reviewed for plain error. And plain error has not been established here because Booth had already testified at length about her identification of Sanders and defendant as the alleged perpetrators and one of the victims had also testified that Booth identified Sanders and defendant as the perpetrators. Thus, the officer's testimony was merely cumulative to the evidence the jury already heard. See *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). Further, to the extent that defendant argues on appeal that the prosecutor's "waffle" question constituted improper bolstering of Booth's credibility, we disagree. Again, the prosecutor did not imply special knowledge concerning Booth's truthfulness. See *Bahoda*, 448 Mich at 276. However, even if such an implication was made, in light of the untainted evidence against defendant, he cannot demonstrate that it is more probable than not that the admission of the brief comment was outcome determinative. See *People v Elston*, 462 Mich 751, 766; 614 NW2d 595 (2000). Accordingly, although the trial court's decision to admit the challenged testimony as a prior consistent statement under MRE 801(d)(1)(B) was erroneous, defendant's claim that he did not receive a fair trial on the asserted grounds fails. See *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

Next, defendant argues that the prosecutor's closing argument denied him a fair and impartial trial and his counsel was ineffective for failing to object to the misconduct. We disagree.

We review defendant's unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). And our review of defendant's unpreserved claim of ineffective assistance of counsel is

limited to errors apparent on the record. See *People v Seals*, 285 Mich App 1, 19-20; 776 NW2d 314 (2009).

First, defendant argues that the prosecutor impermissibly vouched for the credibility of the investigating officer in an attempt to refute the trial testimony of a defense witness who testified that Booth had told him that she made up the robbery allegations. This testimony was contrary to the investigating officer's trial testimony which included that during an investigative interview, this same witness had denied that Booth "made the story up." In particular, the prosecutor queried the jury as to whether it is reasonable to conclude that the officer would "get up, lie, under oath, jeopardize his 25-year career with the Grand Rapids Police Department, his own liberty, and commit perjury" with regard to his testimony about this investigative interview. This challenged statement did not constitute improper vouching because the prosecutor did not imply that he had special knowledge that the officer was testifying truthfully. See *Bahoda*, 448 Mich at 276. Rather, the prosecutor argued that his witness, the officer, was credible and worthy of belief. See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). A prosecutor may comment on the credibility of witnesses during closing argument and may argue from the facts that a witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); *People v Lodge*, 157 Mich App 544, 550; 403 NW2d 591 (1987). Similarly, a prosecutor is free to argue the evidence and all reasonable inferences arising from it. *Bahoda*, 448 Mich at 282.

In *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), we addressed a similar argument. In that case, the prosecutor argued that the police officer had no reason to lie and that if the police officer was lying, it "would cost the officer his career." *Id.* We held that, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* Similarly, here, there was conflicting evidence regarding the interaction between the officer and the defense witness. The prosecutor made a similar argument as that addressed in *Thomas*, i.e., that the officer had no reason to lie and to do so would jeopardize his career, which are statements that do not purport to come from some special knowledge. *Id.* Thus, there was no prosecutorial misconduct and, moreover, plain error affecting defendant's substantial rights was not established. See *Unger*, 278 Mich App at 235.

Next, defendant argues the prosecutor erred in stating that defendant's shotgun was a "combat" shotgun and had a heat shield that allowed multiple rounds to be fired. While prosecutors may not argue facts not in evidence, *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), they may argue "any reasonable inferences arising from the evidence," *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). And prosecutors are generally accorded "great latitude regarding their arguments." *Bahoda*, 448 Mich at 282 (quotation omitted). There was no evidence to support the statement that the shotgun had a heat shield, but the prosecutor's comment that the shotgun was a "combat" shotgun may have been a reasonable inference arising from the evidence that the shotgun had a pistol grip. Even treating the entire challenged comment as error, however, defendant cannot demonstrate prejudice. Whether the shotgun had a heat shield or was a combat shotgun was not pertinent to the prosecutor's case. Where the facts not in evidence referenced by the prosecutor are not "pertinent to a determination of defendant's guilt or innocence," a defendant generally cannot demonstrate prejudice. *People v Howard*, 226 Mich App 528, 548-549; 575 NW2d 16 (1997). Further, the

jury was instructed that the attorneys' arguments were not evidence. This instruction was sufficient to dispel any prejudice. See *Bahoda*, 448 Mich at 281.

Defendant next argues that the prosecution improperly mischaracterized the defense by arguing that the jury would have to believe that one of the victims, who spoke to Booth, was part of a conspiracy against defendant in order to find defendant not guilty. However, a prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995) (quotation omitted). Here, as he admits in his brief on appeal, defendant claimed that Booth falsely accused him of this crime "in a misguided attempt to wrest custody of their two children away from him." Accordingly, the prosecutor was free to argue the evidence and reasonable inferences arising from it that defendant's claim was without merit. See *Unger*, 278 Mich App at 236. And the prosecutor was not required to state the inference in the blandest possible terms. *Dobek*, 274 Mich App at 66. Thus, plain error was not established.

Finally, defendant argues that the prosecutor improperly disparaged his counsel's argument that defendant was too tall to fit the description of one of the robbers by characterizing the argument as a "red herring" and "ridiculous." However, prosecutorial "comments 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 Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). Here, the prosecutor did not personally attack defense counsel or the credibility of defense counsel. See *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). During closing argument, defense counsel argued that defendant was too tall to fit the description given by one of the victims. In rebuttal argument, the prosecutor merely pointed out that this victim's description of the height of one of the robbers was gleaned while she and her terrified children were being robbed at gunpoint by three men who broke into their house while they were sleeping; thus, an exacting height measurement was not likely to occur. See *People v Matuszak*, 263 Mich App 42, 53; 687 NW2d 342 (2004). The prosecutor's designation of defense counsel's argument to the contrary as a "red herring" and "ridiculous" did not give rise to the type of accusatory prejudice that warrants appellate relief. See *Dobek*, 274 Mich App at 67.

Further, because defense counsel is not required to raise meritless or futile objections, defendant's claim of ineffective assistance of counsel is without merit. See *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). To the extent that his counsel should have objected to the improper description of the shotgun, defendant has failed to demonstrate that it is reasonably probable the outcome of the proceeding would have been different if his trial counsel had objected. See *id.*

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Mark J. Cavanagh