STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 4, 2014
v	No. 313482 Macomb Circuit Court
HOWARD JAMAL SANDERS, Defendant-Appellant.	LC No. 2012-000892-FH

Before: HOEKSTRA, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of larceny, MCL 750.360. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 1 to 15 years and was ordered to pay a $130 crime victim rights fee. We affirm.

I. FACTUAL BACKGROUND

The victim worked at a Toys "R" Us store in Sterling Heights, Michigan. While at work, she used a locker in the break room to store her personal possessions. On the day of the theft, she placed her purse and tote bag in her locker and used a combination lock to secure it. When she went to lunch at noon, her purse was still in the locker, and she again locked it inside. However, when she returned to her locker at approximately 4:00 p.m., she discovered that her locker was open, and her purse was missing. She noticed that the lock had blood on it, which was not there before.

The victim's coworker had been cleaning the men's bathroom earlier in the afternoon and had discovered a purse with the contents strewn all over, which he reported to his manager. After the victim notified her manager that her purse was missing, the purse from the bathroom was retrieved, which the victim recognized as hers. There was blood all over the purse. Her checkbook, bank cards, credit cards, gift cards, and stamps were missing. She called her credit card company and discovered that one of her cards had been used at a gas station and McDonalds. She reported the theft to the police.

An evidence technician arrived at the scene and collected blood samples from the lock and from receipts from the victim's purse. The technician sealed the samples in an envelope and placed them in a secured evidence locker. The detective in charge of the case collected the evidence from the secured locker in the property room, signed it out, and took it to the state

laboratory for forensic analysis. The samples were sealed when he retrieved them and when he delivered them.

A forensic scientist testified that she received the samples of blood from the lock and receipt and found that they matched defendant's DNA, which was present in the state's database. She further explained that there was no indication of a mixture or any additional DNA present in the samples. When the officer in charge was informed that the blood samples matched defendant's DNA, he obtained a warrant to obtain a blood sample from defendant for a confirmation test. The detective was in the room when defendant's blood was drawn and collected the samples, then personally delivered them to the state crime laboratory.

The forensic scientist confirmed that the sample drawn from defendant matched the samples taken from the receipt and locker. She testified that the probability that this DNA was from a third party was 1 in 1.947 sextillion in the Caucasian population, 1 in 145.2 quintillion in the African American population, and 1 in 3.876 sextillion in the Hispanic population. Thus, defendant was convicted of larceny, MCL 750.360, and sentenced to 1 to 15 years. Defendant now appeals.

II. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

Defendant first contends that during closing arguments, the prosecution improperly advanced an incorrect burden of proof. Because defendant did not contemporaneously object to these comments, this issue is not preserved for appeal. *People v Unger*, 278 Mich App 210, 234; 749 NW2d 272 (2008). We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. ANALYSIS

"[I]t is the prosecution's burden in a criminal case to prove beyond a reasonable doubt the essential elements of a crime." *People v Jolly*, 442 Mich 458, 465; 502 NW2d 177 (1993). In closing argument, defense counsel informed the jury that "defendant is presumed innocent until proven guilty and that guilt ought to be proven beyond a reasonable doubt." In rebuttal, however, the prosecution stated as follows:

> You're never going to get the how, the why. We can't get into [defendant's] brain and figure out all the how, why, what as the defense attorney is trying to put on us. I don't have to prove that. I have to prove the elements of the crime. And we did. He's arguing that there is reasonable doubt, I'm suggesting that there is no doubt. I don't even need to prove it beyond a reasonable doubt, just a reasonable doubt. But I tell you there is no doubt. . . .

These comments do appear to misstate the prosecution's burden of proof. However, not only did defense counsel correctly inform the jury of the prosecution's burden, the trial court also instructed the jury that defendant was entitled to a verdict of not guilty unless the jury was "satisfied beyond a reasonable doubt" that he was guilty. The court further instructed that the "prosecutor must prove each element of the crime beyond a reasonable doubt." The court also

instructed the jury that if "[t]he lawyers say something different about the law, follow what I say . . . it is your job . . . to apply the law as I give it to you and in that way to decide this case."

Thus, the jurors were correctly instructed, and they are presumed to follow their instructions. *Unger*, 278 Mich App at 235; see also *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995) ("In any event, the jury was properly instructed by the court regarding what constitutes a reasonable doubt."). "Further, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements[.]" *Unger*, 278 Mich App at 235 (quotation marks and citation omitted); see also *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002) ("if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured.") Also significant is the evidence at trial supporting the jury's finding of guilt beyond a reasonable doubt, including testimony that only defendant's blood was found on the lock and receipt. In light of such evidence, it cannot be said that any plain error affected defendant's substantial rights.

Therefore, we decline to find error requiring reversal in the prosecutor's statements.

III. CRIME VICTIM'S RIGHTS ASSESSMENT

A. STANDARD OF REVIEW

Defendant next argues that the trial court violated the ex post facto clauses of the Michigan and United States constitutions in assessing a $130 Crime Victim's Rights Assessment (CVRA) against him because at the date of his offense, the law required a $60 fee. "Because defendant failed to raise this issue below, it is unpreserved and our review is limited to plain error affecting defendant's substantial rights." *People v Earl*, 297 Mich App 104, 111; 822 NW2d 271 (2012).

B. ANALYSIS

We already addressed this issue in *Earl*, *supra*. This Court recognized that the imposition of the increased CVRA fee for offenses committed before the law's effective date "is not a violation of the ex post facto constitutional clauses." *Earl*, 297 Mich App at 114. Thus, the trial court's order that defendant pay $130 pursuant to the CVRA was not a violation of the ex post facto clauses. Furthermore, defendant has not filed a motion to hold this appeal in abeyance, and while the Michigan Supreme Court has granted leave to appeal in *Earl*, "a Supreme Court order granting leave to appeal does not diminish the precedential effect of a published opinion of the Court of Appeals." MCR 7.215(C)(2). Therefore, *Earl* is binding precedent, which precludes defendant's requested relief.

IV. EXCULPATORY EVIDENCE

A. STANDARD OF REVIEW

Defendant next contends in his Standard 4 brief that the prosecution failed to respond to a discovery request to disclose evidence that could have diminished the veracity of DNA evidence, which violated *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Because

defendant did not raise this issue below, our review is limited to plain error affecting substantial rights. *Carines*, 460 Mich at 763.

B. ANALYSIS

While defendant alleges that the prosecution failed to disclose exculpatory evidence relating to the DNA evidence, he fails to identify what, if any, exculpatory evidence existed. Instead, he merely claims that he sent a discovery request to the prosecution for exculpatory evidence and the prosecution never turned "this" evidence over.[1] Furthermore, even assuming that a discovery request was sent, nothing in the record establishes that any exculpatory DNA evidence existed, that defendant did not possess such evidence nor could he have with reasonable diligence, or that the prosecution suppressed such evidence. Therefore, defendant has not established a *Brady* violation.[2]

V. MRE 403

A. STANDARD OF REVIEW

Defendant also argues in his Standard 4 brief that the trial court abused its discretion in admitting the DNA evidence in violation of MRE 403. We review "for an abuse of discretion a circuit court's decision to admit or exclude evidence." *People v Kowalski*, 492 Mich 106, 119; 821 NW2d 14 (2012). "An abuse of discretion results when a circuit court selects an outcome falling outside the range of principled outcomes." *Id.*

B. ANALYSIS

Generally, all relevant evidence is admissible. MRE 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. However, pursuant to MRE 403, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

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[1] Also significant is that this discovery request does not appear in the lower court record. See *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999) ("it is impermissible to expand the record on appeal."). Thus, based on the record before us, there is no reason to credit defendant's argument.

[2] To establish a *Brady* violation, the defendant must prove: "(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009) (quotation marks and citation omitted).

In the instant case, the DNA evidence was highly relevant, and not inadmissible under MRE 403. This evidence was probative of defendant's identity, as his DNA matched the DNA from the blood samples taken from the Toys "R" Us store. The forensic scientist also testified regarding the extreme unlikelihood that the DNA sample came from a third party. See *People v Coy*, 243 Mich App 283, 294-295; 620 NW2d 888 (2000) ("The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case.").

Moreover, defendant has not established any unfair prejudice. While "[a]ll relevant evidence is prejudicial . . . it is only unfairly prejudicial evidence that should be excluded." *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). "Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury." *Id.* at 614. In other words, unfair prejudice occurs when the disputed evidence injects considerations extraneous to the merits of the case, such as the jury's bias, sympathy, anger, or shock. *Id.* As noted above, the DNA evidence in this case was highly probative of a material issue in the case, namely, the identity of the perpetrator. Defendant also fails to demonstrate that such evidence was unfairly prejudicial or that it invoked the jury's bias, sympathy, anger, or shock. *McGhee*, 268 Mich App at 614. Therefore, defendant has not shown, nor does the record reflect, that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403.

Defendant, however, contends that reversal is required because of the lack of evidence pertaining to the proper protocols. This argument is likewise meritless. As we have recognized, "a break in the chain of custody is not a fatal flaw." *People v Herndon*, 246 Mich App 371, 405; 633 NW2d 376 (2001). Instead, "once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims," then "any deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility[.]" *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994). Thus, "[t]he threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of each individual case." *Id.* at 133.

Here, there was a "reasonable degree of certainty" that the DNA samples tested were those collected from the locker, receipt, and from defendant. See *White*, 208 Mich App at 130. Significantly, the evidence technician testified that he obtained blood samples from the lock and receipt, sealed them in an envelope, and placed them in a secured property locker. The detective in charge of the investigation retrieved the samples and delivered them to the state crime lab. He testified that the samples were sealed when he retrieved and delivered them. The detective also was personally present when defendant's blood was drawn at a hospital. He left the hospital with the blood sample, sealed it, and delivered it to the state lab. A forensic specialist testified that she received the samples from the state lab, confirmed defendant's DNA match, and that there was "no indication of a mixture or any additional DNA present at all."

Therefore, the chain of custody was at least "substantially complete." *White*, 208 Mich App at 133. Moreover, the testimony that there was no mixture or additional DNA in the sample establishes "the absence of a mistaken exchange, contamination, or tampering . . . to a reasonable degree of probability or certainty." *Id.* Also significant is that defendant has not identified any alleged error, or put forth any evidence that there was a mistake in the testing of the DNA

samples. Therefore, we find that the trial court did not abuse its discretion in admitting the evidence. *Kowalski*, 492 Mich at 119.

VI. CONCLUSION

The prosecution's statements during rebuttal argument did not constitute error requiring reversal, nor did the imposition of a $130 CVRA. Defendant also failed to establish that the prosecution did not disclose exculpatory evidence. Lastly, he has failed to demonstrate that the trial court abused its discretion in declining to exclude the DNA evidence under MRE 403. We affirm.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Riordan