STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2006
v	No. 259722 Isabella Circuit Court
BRANDEN RAYMOND MURDOCK, Defendant-Appellant.	LC No. 03-001556-FC

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of three counts of armed robbery, MCL 750.529, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

This prosecution arose from the early morning robbery of a Burger King restaurant. The three victims testified that two men forced their way into the restaurant at gunpoint, but they were unable to identify the robbers because their faces were covered by bandanas. Testifying at trial for the prosecution was defendant's cousin, who confessed to his involvement in the crime.[1] Prior to trial, defendant's cousin also implicated defendant in the crime in a taped police statement. At trial, however, the cousin denied defendant's involvement. Thereafter, the prosecutor questioned the cousin at length about his prior statement, reading extended excerpts from the statement into the record.

On appeal, defendant first claims that the questioning of defendant's cousin about his prior police statement was improper and was done for the purpose of introducing the statement as substantive evidence of defendant's guilt. We disagree. Because defendant did not raise this objection at trial, our review is for plain error affecting substantial rights. See *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Prosecutorial misconduct claims are reviewed on a case-by-case basis. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[1] Other witnesses testified that defendant had previously spoken of robbing the same Burger King, where he had been employed until about a month prior to the robbery.

The trial court specifically allowed the prosecutor to impeach defendant's cousin with his prior police statement. This is permitted under MRE 613(b), which allows the use of prior statements for the impeachment of a witness where that witness has the opportunity to explain or deny those prior statements and the other party has the opportunity to cross-examine that witness. Defendant's cousin testified at trial regarding those statements and was subject to cross-examination.

However, a prosecutor may not use a statement that directly inculpates the defendant under the guise of impeachment unless other testimony from the witness makes his credibility a relevant issue. See *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). In this case, defendant's cousin offered testimony that no other witness could supply—he identified himself as one of the robbers, something no other witness could do because of the bandanas worn by the robbers. Thus, he had direct knowledge of the robbery so his credibility was a relevant issue. Additionally, given the context in which the cousin's plea deal to testify truthfully was mentioned, it is clear that the prosecutor was not implying any special knowledge but was merely reminding defendant's cousin of his plea agreement responsibilities.

Further, defendant's claim that the cousin's testimony violated his Sixth Amendment[2] right of confrontation is without merit. Such rights are implicated when there are prior statements as to a defendant's involvement from a codefendant who is not available to testify at trial, usually because of invocation of the Fifth Amendment[3] right to avoid self-incrimination. See *People v Banks*, 438 Mich 408, 411; 475 NW2d 769 (1991). Here, the cousin did testify and was available for a full cross-examination by defendant. Further, his testimony was that defendant was not involved in the robbery. And while the cousin refused to identify his accomplices, he never invoked his Fifth Amendment rights. Instead, he freely admitted his involvement in the robbery. Accordingly, we see no error in the court's handling of the cousin's prior police statement.

Defendant next claims it was reversible error for the trial court to fail to sua sponte give a cautionary instruction to the jury that evidence of the cousin's prior police statement was to be used only for impeachment purposes, and not as evidence that defendant participated in the robbery. However, the record clearly shows that the court did instruct the jury on the proper use of impeachment evidence. To the extent that defendant is also arguing that the court should have sua sponte instructed on accomplice testimony, we find the argument to be without merit. We note that both defendant and his cousin denied that defendant was involved in the robbery. In any event, the problems with the cousin's credibility were thoroughly explored at trial. See *People v Reed*, 453 Mich 685, 692; 556 NW2d 858 (1996).

Finally, defendant claims his trial counsel provided ineffective assistance when she failed to object to the prosecutor's reading into evidence excerpts from the prior police statement made by defendant's cousin, as well as when she failed to move for a cautionary jury instruction

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[2] US Const, Am VI.

[3] US Const, Am V.

regarding this testimony. We disagree. Because a *Ginther*[4] hearing was not conducted, this Court's review is limited to mistakes that are apparent from the lower court record. See *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To prove an ineffective assistance of counsel claim, a defendant must establish that his counsel's performance fell below an objective standard of reasonableness and that, but for his errors, there is a reasonable probability that the outcome of the proceedings would have been different. See *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Here, as discussed above, the purported errors now alleged by defendant were not errors. There is no obligation for counsel to advocate a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).