STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2007
v	No. 268771 Wayne Circuit Court
SHANE MICHAEL HANKE, Defendant-Appellant.	LC No. 05-009677-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering a building with intent to commit larceny, MCL 750.110, and was sentenced to three to ten years in prison. He appeals as of right. We affirm defendant's conviction and sentence, but remand for correction of the presentence report. This appeal is being decided without oral argument. MCR 7.214(E).

I

Defendant's conviction arises from a break-in at a grocery store in Lincoln Park on July 1, 2005. After the store closed, entry was gained by breaking out a window. Approximately $50 was taken. Rubin Cavazos,[1] who lived near the store, heard the glass break at about 11:30 p.m. Cavazos saw two men exit the store and run to a parked sport utility vehicle (SUV). The men drove to a nearby house, and then eventually drove away after a third individual got into the SUV.

Tawny Johnson and her fiancé, Thomas Orcutt, testified that defendant drove them from his sister's home to a house near the grocery store at approximately 10:00 or 10:30 p.m. They stated that defendant drove them in his sister's SUV. Johnson and Orcutt claimed to have heard glass breaking while they were at the house. After returning to the SUV, they saw that defendant had a cut on his hand and plastic containers containing money. While en route to defendant's sister's house, defendant, Johnson, and Orcutt were stopped by the police for a traffic infraction. Johnson was apparently driving the SUV at the time they were stopped.

[1] It is unclear from the record whether Mr. Cavazos's first name is spelled "Rubin" or "Ruben."

Defendant's sister, Tracey Walton, testified that defendant resided with her at the time of the incident underlying this case. She testified that defendant was home when she returned from work at about 11:25 p.m. on the day in question. Defendant's fiancée, Jessica Webb, similarly testified that defendant was home that night, except for a short period at about 10:00 p.m., when he left with Johnson and Orcutt to go to a store. However, according to Webb, Orcutt and Johnson did not return to the house until after midnight. Webb stated that defendant told her something about being "pulled over" with Johnson and Orcutt, but she did not know whether he was referring to an incident that had occurred on the night of July 1, 2005, or at some other time.

II

On appeal, defendant argues that he was denied due process and should be granted a new trial because the prosecutor improperly used Orcutt's testimony to obtain the conviction when he knew or should have known that the testimony was false. This issue is not properly before us because it lacks citation to the specific page references in the transcripts or other papers that support the argument, as required by MCR 7.212(C)(7). This Court will not search the record to find factual support for an appellant's claim. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Nevertheless, even overlooking this deficiency, we decline to reverse. Although defendant moved for a directed verdict at trial on the ground that the prosecutor did not have credible evidence that defendant committed the break-in, there is no indication in the record that defendant ever argued below that the prosecutor had used perjured testimony to obtain a conviction. Therefore, we consider defendant's claim unpreserved and limit our review to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Prosecutors have a constitutional duty not to knowingly use false testimony to obtain a conviction, and must correct false evidence when it appears. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). A prosecutor's deliberate deception at trial, by knowingly presenting false evidence, is incompatible with the rudimentary demands of justice. *Banks v Dretke*, 540 US 668, 694; 124 S Ct 1256; 157 L Ed 2d 1166 (2004). But the mere fact that a witness's testimony conflicts with earlier statements does not establish that a prosecutor knowingly presented perjured testimony. *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998). In *Parker*, *supra* at 690, this Court rejected a defendant's claim that a prosecutor knowingly presented perjured testimony where witnesses gave testimony that conflicted with earlier statements, but there was no evidence that the prosecutor attempted to keep the earlier statements from the defendant.

In this case, there is no indication in the record that the prosecutor concealed any prior contradictory statements made by Orcutt. With regard to Orcutt's preliminary examination testimony that he saw defendant throw a pallet through the window at the store, the record indicates that defense counsel, and not the prosecutor, elicited Orcutt's initial testimony at trial that he lied at the preliminary examination. Defense counsel also elicited Orcutt's testimony that the police had told him to write a statement indicating that he saw defendant throw the pallet through the window. Counsel cross-examined Orcutt regarding his statement to the police regarding the pallet, as well as other prior statements that were inconsistent with his trial testimony.

Nor do we find any indication in the record that the prosecutor offered either Orcutt's prior statements or his trial testimony as an entirely accurate version of what occurred. The prosecutor admitted that Orcutt had given inconsistent statements, and suggested in closing argument that Orcutt had given these inconsistent statements because he was a suspect and was afraid of what could happen to him. The prosecutor also admitted that the jury might even believe that Orcutt was involved in the break-in, and told the jury that the "Judge will tell you that it is up to you as to the jurors to judge the credibility of the witnesses."

The record indicates that defense counsel was afforded an opportunity to impeach Orcutt's credibility at trial with his prior statements and that the prosecutor was willing to concede certain inconsistencies in Orcutt's version of events. Indeed, because the prosecutor specifically asked the jury to determine Orcutt's credibility in light of all the evidence, we cannot conclude that the prosecutor knowingly presented false testimony to obtain a conviction. *Parker*, *supra* at 690; see also *People v Knight*, 122 Mich App 584, 592-593; 333 NW2d 94 (1983) (prosecutor did not knowingly present false testimony where a witness recanted preliminary examination testimony before trial, the prosecutor could not know which version was true, and both versions were presented to the jury). No plain error occurred in this regard. *Carines*, *supra* at 763.

III

Defendant next argues that the prosecutor improperly shifted the burden of proof and abrogated his Fifth Amendment right to remain silent when remarking in rebuttal argument, "There is no alibi, ladies and gentlemen. The defendant's sister, the defendant's fiancée testified he was home with them in order to protect him from being convicted in this case, ladies and gentlemen. It's as simple as that." Because defendant did not object to these comments by the prosecutor, we review defendant's claim for plain error affecting his substantial rights. *Id.*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

"[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Here, examined in context, it is apparent that the prosecutor used the defense witnesses' relationship with defendant to challenge the credibility of their testimony that defendant was home at the time of the break-in. The relationship of a witness and a party may induce a witness to slant or fabricate testimony in favor of a party, and proof of such witness bias is nearly always relevant. *People v Layher*, 464 Mich 756, 762-763; 631 NW2d 281 (2001). The prosecutor may argue from the evidence that a witness is not worthy of belief. *Schutte*, *supra* at 722. We find no plain error arising from the prosecutor's argument that certain defense alibi witnesses were not credible. The prosecutor's suggestion that there was no believable alibi, based on the perceived lack of credibility of certain defense witnesses, neither shifted the burden of proof nor impinged on defendant's right to remain silent. As indicated in *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), a prosecutor may comment on the weakness of a defendant's alibi, and such comments do not impermissibly shift the burden of proof.

IV

Finally, defendant seeks a remand to correct the presentence report to strike information that he admitted his guilt. We agree with the prosecution that defendant is not entitled to resentencing because the trial court stated that it was disregarding the challenged information contained in the presentence report, i.e. that defendant admitted his guilt. However, "[w]hen a sentencing court states that it will disregard information in a presentence report challenged as inaccurate, the defendant is entitled to have the information stricken from the report." *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993); see also MCL 771.14(6); *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003) (inaccurate or irrelevant information must be stricken from the presentence report). Therefore, although we affirm defendant's sentence, we remand this case to the trial court for appropriate corrections to the presentence report striking the information regarding defendant's admission of guilt. The trial court shall forward the corrected report to the department of corrections. *Id*.

Affirmed, but remanded for correction of the presentence report. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello