STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2011
v	No. 296527 Kalamazoo Circuit Court
WAYNE JUNIOR WILLIAMS, Defendant-Appellant.	LC No. 2008-001257-FC

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for felony murder, MCL 750.316; assault with intent to rob while armed, MCL 750.89; armed robbery, MCL 750.529; felon in possession of firearm, MCL 750.224f; and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Defendant argues that the admission of codefendant Amsie Wright's hearsay statement denied him his right of confrontation. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Crawford v Washington*, 541 US 36, 51; 124 S Ct 1354; 158 L Ed 2d 177 (2004). In this case, Wright's statements were made to his friend, John Bowman, and not to a governmental official. In addition, "there is nothing to indicate that the statement[] [was] made with the intent to preserve evidence for later possible use in court." *People v Bauder*, 269 Mich App 174, 182; 712 NW2d 506 (2005). Accordingly, Wright's statement to Bowman was nontestimonial; thus, no Confrontation Clause violation occurred. *Id.*; *Crawford*, 541 US at 50-52, 59, 61, 68.

Defendant further argues that Wright was not unavailable for trial and Wright's incriminatory statements were not sufficiently self-inculpatory and trustworthy. Thus, defendant argues that the statements should not have been admitted as statements against Wright's penal interest. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "[T]he determination whether a 'statement was against the declarant's penal interest presented a question of law.' Therefore, appellate review is de novo." *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996) (citations omitted). "[T]he determination whether a reasonable person in the declarant's shoes would have believed the statement to be true and the determination whether circumstances sufficiently indicated the trustworthiness of the statement depend in part on the trial court's

findings of fact and in part on its application of the legal standard to those facts." *Id*. at 268-269. The clearly erroneous standard is appropriate when reviewing a trial court's findings of fact. *Id*. at 269.

In the case at bar, defendant waived the issue of Wright's unavailability. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Simon*, 174 Mich App 649, 657; 436 NW2d 695 (1989). Specifically, defense counsel answered in the negative when questioned whether she had any comment about "that," meaning the trial court's decision to conclude that Wright was an unavailable witness. *Carter*, 462 Mich at 215; *Simon*, 174 Mich App at 657. Accordingly, because defendant waived this issue, he extinguished any error, and thus cannot now argue on appeal that it was error when Wright was declared unavailable. *Carter*, 462 Mich at 215; *Simon*, 174 Mich App at 657.

MRE 804(b)(3) "does not allow admission of non-self-inculpatory statements . . . ." *People v Beasley*, 239 Mich App 548, 554; 609 NW2d 581 (2000). "[W]hether a statement is truly self-inculpatory, and thus clearly admissible, can be determined only by viewing it in light of all the surrounding circumstances." *Id*. In this case, the record reflects that Wright made the incriminating statements to Bowman before Wright was acquitted of the crimes. Thus, at the time that Wright made the incriminating statements, those statements tended to subject him to criminal liability. MRE 804(b)(3). In addition, Wright's statement to Bowman inculpated both defendant and Wright in the crimes. Moreover, although Wright indicated that defendant shot Danny Primer, because Wright and defendant were participating in the robbery together, Wright's statement made him equally culpable for the murder which was committed. See *People v Shafou*, 416 Mich 113, 133; 330 NW2d 647 (1982) ("Accomplices generally are punished as severely as the principal, on the premise that when a crime has been committed, those who aid in its commission should be punished like the principal.") Therefore, Wright's statement to Bowman about the crimes was self-inculpatory and thus admissible. *Beasley*, 239 Mich App at 555.

In *Barrera*, 451 Mich at 274, the Court indicated:

> In evaluating whether a statement against penal interest that inculpates a person in addition to the declarant bears sufficient indicia of reliability to allow it to be admitted as substantive evidence against the other person, courts must evaluate the circumstances surrounding the making of the statement as well as its content.
>
> The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates---that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener. [Citation omitted.]

In this case, Wright voluntarily told Bowman about his involvement and that of defendant in the crimes. Although Wright's statement was not made contemporaneously with the crimes, Bowman did not hear about the instant crimes sooner because he was incarcerated until 2004.

Further, the statement was made to Bowman because he, Wright, and defendant were all good friends who confided in each other and discussed the crimes that each committed. Thus, the record supports that Wright would likely speak the truth to Bowman. Moreover, although Bowman did not testify whether he initiated the conversation about the crimes, Bowman indicated that it was their common practice to discuss their crimes. Based on the foregoing, Wright's statement bore sufficient indicia of reliability to be admitted as substantive evidence against defendant. *Id*. at 274. Moreover, the incriminating statement so far tended to subject Wright to criminal liability "that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." MRE 804(b)(3). "[T]he statement's reliability flows from the postulate that a reasonable person will not incriminate himself by admitting a damaging fact unless he believes that fact to be true." *Barrera*, 451 Mich at 271-272. Based on the foregoing, the trial court did not abuse its discretion when it admitted Wright's statement. *Lukity*, 460 Mich at 488; *Barrera*, 451 Mich at 268-269.

Defendant also argues that the prosecutor was not permitted to attack defendant's character because defendant did not put his character in issue, and the challenged testimony implied that defendant had threatened Sandra Mattox. Moreover, defendant argues that although the trial court sustained defendant's objection to Mattox's testimony about defendant's reputation for treachery and dangerousness, the damage was done and the jury already heard unfairly prejudicial testimony. Accordingly, defendant argues that there was prosecutorial misconduct as a result of the testimony and the trial court erred in admitting the testimony. We review defendant's unpreserved claim of prosecutorial misconduct for plain error that affected his substantial rights, *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004), and a trial court's decision to admit or exclude evidence for an abuse of discretion. *Lukity*, 460 Mich at 488.

The record shows that the prosecutor was questioning Mattox as to why she did not provide the information she knew about the crimes to the police sooner. "As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). In this case, when Mattox indicated that she did not know the defendant, the prosecutor simply asked, "[W]hat would that mean?" Mattox then responded by indicating that defendant was treacherous and had a reputation in Grand Rapids, which was not responsive to the prosecutor's question. *Id*. In addition, there is no indication that the prosecutor knew that Mattox would make these statements about defendant. *Id*. We conclude that the prosecutor did not engage in misconduct.

Further, although "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith," MRE 404(b)(1), the simple fact is that the prosecutor did not deny defendant a fair and impartial trial because inadmissible propensity evidence under MRE 404(b) was not referenced by the prosecutor. Accordingly, there was no plain error affecting defendant's substantial rights, *Thomas*, 260 Mich

App at 453-454, and there is no indication that the fairness, integrity, or public reputation of the judicial proceedings were affected, *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).[1]

Defendant next argues that the prosecutor improperly vouched for its "critical" witness, Bowman, arguing that he was testifying truthfully because if he lied at defendant's trial, the federal authorities would know and he would have to serve life in prison. Accordingly, defendant argues that reversal is warranted because a curative instruction could not have alleviated the prejudicial effect. We review unpreserved issues of prosecutorial misconduct for plain error that affected defendant's substantial rights. *Thomas*, 260 Mich App at 453-454.

A prosecutor is not allowed to vouch for the credibility of his witness by implying that he has special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence . . . ." *Id*. at 282. A prosecutor may also argue from the facts that a witness is credible. *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). And, "a prosecutor may comment on his own witnesses' credibility during closing argument." *Thomas*, 260 Mich App at 454. Further, "[t]he credibility of a witness is always an appropriate subject for the jury's consideration" and "[e]vidence of a witness' bias or interest in a case is highly relevant to credibility." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995).

We conclude that the prosecutor's comments about Bowman's credibility did not constitute improper vouching because the prosecutor did not assert special knowledge that Bowman was testifying truthfully. *Thomas*, 260 Mich App 455. In context, the prosecutor was arguing that the jury had to judge credibility and should base its judgment on the facts and circumstances. *Unger*, 278 Mich App at 240; *Thomas*, 260 Mich App at 454; *Coleman*, 210 Mich App at 8. Bowman testified that the only reason he was testifying against defendant was because Bowman had "caught a federal case," and that by testifying against defendant, Bowman was avoiding a life sentence. Consequently, the facts on which the prosecutor's argument was based are in the record, and the prosecutor was not implying that he had special knowledge. *Bahoda*, 448 Mich at 276, 282. Thus, there was no plain error, *Thomas*, Mich App at 453-454, and just as importantly, defendant's substantial rights were not affected because there was ample evidence of his guilt. *Id*. Further, any prejudice flowing from the prosecutor's remarks was mitigated by the jury instructions. *Bahoda*, 448 Mich at 281.

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[1] We also note that after defendant objected to Mattox's statement, the trial court quickly indicated that the statement was hearsay and sustained defendant's objection. The prosecutor did not return to the challenged area, and defendant did not request a curative instruction at the time the statements were made and does not argue on appeal that a curative instruction should have been given. Moreover, the trial court instructed the jury that they "may only consider the evidence that has been properly admitted in this case" and, clearly, this evidence was not properly admitted. There was no abuse of discretion. *Ackerman*, 257 Mich App at 448-449; *Lukity*, 460 Mich at 488.

Affirmed.

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