

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP DEMETRIUS REYNOLDS,

Defendant-Appellant.

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UNPUBLISHED

September 28, 1999

No. 201838

Livingston Circuit Court

LC No. 96-009309 FH

Before: Murphy, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305. He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to 13-1/2 to 22-1/2 years' imprisonment. Defendant's motion for a new trial was denied. He now appeals as of right. We affirm defendant's conviction and sentence, but remand for correction of the judgment of sentence.<sup>1</sup>

First, the trial court did not err in denying defendant's motion to dismiss based on prearrest delay. The prosecutor presented a valid explanation for the delay and there was no evidence of a prosecutorial intent to gain a tactical advantage. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). Moreover, defendant failed to demonstrate that the delay resulted in "actual and substantial" prejudice to his right to a fair trial. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998).

Next, the trial court did not abuse its discretion in its determination that the prosecution demonstrated due diligence and good faith in its efforts to locate defendant's accomplice, Jamie LaFave. *People v Welford*, 189 Mich App 478, 484; 473 NW2d 767 (1991); *People v James (After Remand)*, 192 Mich App 568, 571; 481 NW2d 715 (1992). Further, the record demonstrates that defendant had an adequate opportunity and did cross-examine LaFave at defendant's first trial.<sup>2</sup> Therefore, defendant was not denied his right of confrontation when the prosecutor was permitted to use LaFave's video-taped testimony from the first trial. *People v Dye*, 431 Mich 58, 64-67; 427 NW2d 501 (1988); *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

Next, we conclude that the trial court did not abuse its discretion in ruling that the jury was not to be informed that LaFave had absconded from parole and that a warrant had been issued for his arrest. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997); *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). The fact that LaFave had absconded was not relevant to the facts and circumstances surrounding this case. We likewise reject defendant's ineffective assistance of counsel argument based on this same issue, *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994), given that trial counsel did request that this information be disclosed. Moreover, in light of the trial court's ruling, any further attempt to elicit this information at trial would have been futile. Counsel is not required to argue a meritless motion or make a groundless objection. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant further argues that error requiring reversal occurred when the prosecutor elicited testimony from LaFave establishing his plea-based conviction and sentence for the same crime for which defendant was on trial. *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982). Defendant did not object to the admission of this evidence. The plain error rule applies to unpreserved claims of error. *People v Carines* \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (No. 110218, issued 7/27/99), slip op at 15; *People v Grant*, 445 Mich 535, 548-550; 520 NW2d 123 (1994). Under the plain error rule, the defendant bears the burden of demonstrating prejudice, i.e., that the error affected the outcome of the proceedings. *Carines*, *supra*, slip op at 14. Even then, reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or when an error "seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.*

Assuming that the interjection of evidence of the accomplice's conviction and prison term was plain error, *Lytal*, *supra*; *People v Standifer*, 425 Mich 543, 552-553, 555; 390 NW2d 632 (1986), we conclude that reversal is not warranted in this case because we are satisfied that any error did not affect the outcome of the trial. Moreover, because there is no reasonable probability that the outcome of the proceeding would have been different had defense counsel successfully objected to the introduction of this evidence, defendant's ineffective assistance of counsel claim based on this same issue likewise must fail. *Pickens*, *supra*.

Defendant also claims that the prosecutor improperly bolstered or vouched for LaFave's credibility. Defendant did not preserve this issue for appeal with an appropriate objection to the challenged remarks at trial and we find that a miscarriage of justice will not result from our failure to consider this issue. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The mere statement of the prosecutor's belief in the honesty of the accomplice's testimony does not constitute error requiring reversal where, as here, the remarks as a whole were fair. Any error could have been cured by a prompt admonishment to the jury regarding its role as factfinder. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996).

Although not preserved for appeal, we do, however, find that it was error for the prosecutor to admit LaFave's prior consistent statements. *People v Hallaway*, 389 Mich 265, 276; 205 NW2d 451 (1973); *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). Nonetheless, upon

review of the record, we are again satisfied that any error did not affect the outcome of the trial and, therefore, reversal is not warranted. *Carines, supra*; slip op at 14; *Grant, supra* at 553.

Also, the prosecutor did not improperly shift the burden of proof when he commented on defendant's failure to support his alibi defense. *People v Fields*, 450 Mich 94, 111, n 21, 112-113; 538 NW2d 356 (1995); *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

Defendant also claims that the prosecutor knowingly permitted LaFave to present false testimony. Defendant did not raise this issue in the trial court and, therefore, it is not preserved for appeal. *Ali v Detroit*, 218 Mich App 581, 587; 554 NW2d 384 (1996). The prosecutor has a duty to correct perjured testimony, including that related to a witness' credibility, when the false testimony appears. *People v Lester*, 232 Mich App 262, 277, 279; 591 NW2d 267 (1998). A prosecutor's knowing presentation of false testimony may constitute grounds for reversal. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). The record here does not indicate that LaFave committed perjury, or that the prosecutor knowingly presented false testimony. Although LaFave had given conflicting statements, it was just as likely that any contradictions in the statements were due to the fact that he had been involved in several different breakings and enterings, had given several different statements to the police, and the passage of time. In any event, the conflicting statements were disclosed to the jury and it was up to it, as the trier of fact, to evaluate the credibility of LaFave's testimony in light of the conflicting statements.

Next, defendant claims he was denied the effective assistance of counsel due to the failure to present potential alibi witnesses. We disagree. This issue was not addressed at the hearing on defendant's motion for a new trial based on ineffective assistance of counsel. Limiting our review to the available record, *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), we find no basis for concluding that defendant is entitled to relief due to alleged ineffective assistance of counsel. *Pickens, supra*. Defendant requested the presence of the witnesses in question during trial but, following a discussion with the court concerning their absence, their proposed testimony, and alternative means by which the substance of their testimony could be presented to the jury, defendant agreed to waive their presence. Moreover, the record shows that the substance of their proposed testimony was either entered into evidence through other witnesses, or would have been cumulative to evidence already admitted.

We also conclude that defendant was not denied the effective assistance of counsel when trial counsel failed to object to the prosecutor's reference to O. J. Simpson. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). While the remarks may have been "improper and probably irrelevant," they did not prejudice defendant by causing the jury to convict because of prejudice rather than the evidence. The brief reference did not rise to the level of error requiring reversal. *Id.* at 271-272.

In light of the foregoing discussion, we also conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Fink*, 456 Mich 449, 458; 524 NW2d 32 (1998).

We likewise conclude that the cumulative effect of any minor errors did not deny defendant a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998); *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997). Defendant is entitled only to a fair trial, not a perfect trial. *People v Kelly*, 231 Mich App 627, 646; 588 NW2d 480 (1998).

We next find that defendant's habitual offender sentence is proportionate to the circumstances of the offense and defendant's criminal background. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); see also *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Cervantes*, 448 Mich 620, 626-627; 532 NW2d 831 (1995). Defendant's contention that this Court should consider the sentencing guidelines in evaluating his sentence is without merit. *Cervantes, supra*; *People v Edgett*, 220 Mich App 686, 694-695; 560 NW2d 360 (1996).

Finally, although it is clear from the record that defendant was sentenced as a second habitual offender, the judgment of sentence erroneously indicates that defendant was sentenced as a fourth habitual offender. Accordingly, we remand for the limited purpose of correcting the judgment of sentence to conform with the sentence imposed. MCR 7.208(C); MCR 6.435(A).

Remanded for correction of the judgment of sentence. Defendant's conviction and sentence is affirmed in all other respects. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

<sup>1</sup> The judgment of sentence inaccurately indicates that defendant was sentenced as a fourth habitual offender, rather than a second habitual offender.

<sup>2</sup> Defendant's first trial on this charge ended in a hung jury.