

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY DUANE FRY,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 213511

Kalamazoo Circuit Court

LC No. 98-000188-FC

Before: Markey, P.J., and Murphy and R.B. Burns*

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, fleeing and eluding a police officer (third degree), MCL 750.479a(3); MSA 28.747(1)(3), possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b(a); MSA 28.424(2)(a). The trial court sentenced defendant to a mandatory two years of imprisonment for the felony-firearm conviction, twenty to thirty years for assault with intent to murder, three to five years for fleeing and eluding a police officer, and ninety days in the county jail for possession of marijuana. Defendant appeals as of right. We affirm.

This case arises from a shooting which took place in Kalamazoo at approximately 12:30 a.m. on January 26, 1998. The victim, Jermaine Venson, testified that he was standing outside his residence, talking to a friend named Damion, when defendant approached them and asked Damion for a light for his cigarette. Defendant then turned his back, took three or four steps, and turned around to face the victim with a shotgun visible. The victim testified that defendant's first shot hit him in the abdomen. When he turned and ran away, defendant shot him three more times from behind.

Officers who responded to the scene of the shooting testified that the victim, when questioned, stated that he was shot by "the guys next door." Testimony established that defendant's grandmother lived next door to the victim's residence and his aunt lived two houses down. Approximately one week

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

after the shooting, the victim picked defendant out of a photo lineup and identified defendant as the individual who shot him.

Immediately following the shooting, a nearby patrol officer, who heard the shots fired, observed a car occupied by three males traveling away from the scene of the shooting. When police officers attempted to stop it, the vehicle sped up and continued for approximately two blocks to a driveway where the occupants abandoned it. A foot pursuit ensued. The police officers apprehended defendant and a second individual, Troy Elliott. A plastic baggie of marijuana was found in defendant's front pocket. The third individual, Darlynzo Brown, was eventually apprehended with the assistance of a police tracking dog. Brown's footprints in the snow led the officers to a dog kennel where a shotgun and four empty shells which had been fired from the shotgun were found.

At trial, defendant testified that when the shooting occurred, he was sitting in his mother's car two houses down from the victim's residence with Elliott, Tawana Fullerton, and his girlfriend Nikiva Spruill. Defendant stated that after the two girls left the car, he heard the gunshots. Brown got into the vehicle and they drove away from the neighborhood. The police began to follow them shortly after they left. Spruill and Elliott testified on defendant's behalf that they heard the gunshots, and Elliott testified that when he saw the victim get shot, defendant was in the car.

On appeal, defendant first contends that he was denied a fair trial and due process because the prosecutor improperly questioned defense witnesses Elliott and Spruill regarding why they had not gone to the police before trial with the information about which they were testifying.

Defendant failed to properly preserve this issue for appeal by an objection to the prosecutor's cross-examination of either witness. However, review may be granted if failure to consider the issue would result in manifest injustice. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994); *People v Nimeth*, 236 Mich App 616, 625; ___ NW2d ___ (1999). A plain unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed or reversal is automatic. *Id.* This Court will only reverse when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*, citing to *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

"On numerous occasions, this Court has held that the credibility of a witness may be attacked by showing that he failed to speak or act when it would have been natural to do so if the facts were in accordance with his testimony." *People v Martinez*, 190 Mich App 442,446; 476 NW2d 641 (1991). "Therefore, a prosecutor may question an alibi witness regarding why he did not come forward with his story before trial after the prosecutor has shown it would have been natural for the witness to come forward." *Id.* Further, this Court has held that a prosecutor may also cross-examine a non-alibi witness regarding why he did not come forward with information about which a witness is testifying at trial, if the information is of such a nature that the witness would have a "natural tendency to come forward with it." *People v Perkins*, 141 Mich App 186, 196; 366 NW2d 94 (1985).

We find that the prosecutor's questions were not improper. Elliott and Spruill testified to information of such a nature that, if true, the witnesses would have had a "natural tendency to come forward" with it before trial. *People v Emery*, 150 Mich App 657, 666-667; 389 NW2d 472 (1986). Applying the factors set forth in *Emery*, we find that both witnesses have a close relationship with defendant. Elliott testified that he was best friends with defendant and Spruill testified as defendant's girlfriend. Both witnesses were present during the time defendant allegedly committed the crime; therefore, they had personal knowledge of the events. Their presence during the shooting tended to implicate them in the wrongdoing. By coming forward, they might exonerate themselves as well as defendant. Finally, both witnesses were given the opportunity to speak to the police without having to take the initiative in seeking the police on their own: Elliott was arrested at the same time as defendant and the police went to Spruill's house to question her about the shooting. Instead of offering the information about which she later testified, Spruill made several statements which she later admitted were lies. *Id.* Defendant has failed to show a plain error that affected his substantial rights. *Grant, supra.*

Next, defendant argues that he was denied a fair trial when the prosecutor introduced testimony that defendant had been or was in jail at the time of trial. Defendant argues that the trial court erroneously denied defendant's motion for a mistrial. We disagree. We review a trial court's denial of a motion for a mistrial for abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

We are not persuaded that questioning by the prosecutor constituted error mandating reversal. A mistrial is warranted only where a defendant would otherwise be denied a fair trial. *Haywood, supra* at 228. The prosecutor's inadvertent use of the words "in jail," when inquiring whether defendant and his witnesses had the opportunity to compare stories in order to present a consistent alibi at trial, did not raise an inference that defendant had served time for prior offenses. The jury already knew that defendant had been arrested, handcuffed, and placed in custody for the specific offenses for which he was on trial because this evidence was admitted through the testimony of the various police officers involved in the case.

Finally, the trial court found that the prosecutor's reference to defendant being in jail was inadvertent. Therefore, this case is distinguishable from those cases where the prosecutor acted in bad faith in a calculated attempt to prejudice the jurors or violated a pretrial order. See *People v Greenway*, 365 Mich 547, 551; 114 NW2d 188 (1962), *People v Spencer*, 130 Mich App 527, 536; 343 NW2d 607 (1983), and *People v Camel*, 11 Mich App 219, 221-222; 160 NW2d 790 (1968). We find that defendant was not denied a fair and impartial trial by the prosecutor's inadvertent remark. The trial court did not abuse its discretion when it denied defendant's motion for a mistrial.

Next, defendant argues that the prosecutor improperly asked defendant on cross-examination why he neglected to express his innocence to officers at the time of his arrest. Defendant did not object at trial to this line of questioning. The standard of review of a constitutional unpreserved issue requires that the defendant must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). This Court will reverse only when the defendant is actually innocent or

the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Olano, supra*, 507 US 725; *Grant, supra*, 535.

After reviewing the record, this Court finds that defendant has not shown a plain error that affected substantial rights. The prosecutor's questions only addressed defendant's silence and nonresponsive conduct before his arrest. The admission of testimony concerning a defendant's silence before custodial interrogation and before the *Miranda*¹ warnings have been given is not a violation of a defendant's constitutional rights. *People v Schollaert*, 194 Mich App 158, 164; 486 NW2d 312 (1992). Accordingly, defendant's silence was not constitutionally protected and defendant's rights were not violated by the prosecutor's questions during cross-examination.

Finally, defendant argues that he is entitled to a new trial because newly discovered evidence not only exculpates defendant, but inculcates another individual. To support his argument, defendant has attached an affidavit to his brief. However, this issue is not properly before this Court for review.

First, defendant did not preserve this issue by moving for a new trial in the lower court. Second, this Court denied defendant's motion for remand on February 23, 1999. Third, the attached affidavit is not part of the lower court record. Thus, it cannot be considered by this Court. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992); *People v Willett*, 110 Mich App 337, 346; 313 NW2d 117 (1981).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns

¹ *Miranda v Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974 (1966).