

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD DALE STRUBLE,

Defendant-Appellant.

UNPUBLISHED

March 31, 2000

No. 215816

St. Joseph Circuit Court

LC No. 97-008816-FH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

A circuit court jury convicted defendant of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant received consecutive terms of imprisonment of two years on the felony-firearm conviction and two to ten years on the assault conviction. Defendant appeals as of right. We affirm defendant's assault conviction, but vacate defendant's felony-firearm conviction and remand for retrial on the felony-firearm charge.

Defendant argues that his felony-firearm conviction must be reversed because the trial court failed to instruct the jury with the elements of the offense. Because this issue is an unpreserved, nonconstitutional issue, defendant must show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999); *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). This Court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, *supra*.

A review of the record confirms that the trial court failed to charge the jury with the elements of the felony-firearm offense. This failure undermines the integrity of the proceedings and requires reversal. *People v Lewis*, 91 Mich App 542, 544-545; 283 NW2d 790 (1979); see also *People v Harvey*, 167 Mich App 734, 748; 423 NW2d 335 (1988) (a miscarriage of justice occurs when omitted instructions pertain to a basic and controlling issue in the case). Accordingly, we vacated the felony-firearm conviction and remand for retrial, limited solely to the felony-firearm charge.

Defendant next argues that the trial court deprived him of a fair trial when it commented on the testimony of a prosecution witness. A criminal conviction should be reversed when the comments of the trial court may well have unjustifiably aroused suspicion in the mind of the jury with regard to the credibility of a witness and when partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). Our review of the record reveals that the challenged comment cannot be said to have influenced the jury to the detriment of defendant's case. Accordingly, reversal is unwarranted.

Defendant also argues that trial court abused its discretion when it prohibited defense counsel from cross-examining defendant's former spouse concerning allegations of sexual abuse that she made regarding defendant and their daughter. Our review of the record reveals that the question had been asked and answered three times before the objection. Under such circumstances, the trial court's action amounted to an appropriate exercise of its control over the mode of witness interrogation to prevent the needless consumption of time and witness harassment and thus we find no abuse of discretion. MRE 611(a); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992). Moreover, defendant sustained no prejudice where the action of the trial court did not deprive defense counsel from eliciting an admission from the former spouse that she had played a role in conveying allegations of sexual abuse that have not been sustained in a court of law.

We likewise reject defendant's argument that the trial court abused its discretion when it denied defendant's motion to impeach the victim with a prior pending criminal charge. The Confrontation Clause guarantees a criminal defendant the right to confront his accusers by cross-examination. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The credibility of a witness is of the utmost importance in every case and defendants are guaranteed the reasonable opportunity to test the truth of a witness' testimony. *Id.*; *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). Evidence of a witness' bias or interest in a case is highly relevant of credibility, *People v Lester*, 232 Mich App 262, 273; 591 NW2d 267 (1998), as is evidence of the witness' motivation for testifying, *Mumford*, *supra*.

Here, the trial court correctly denied defendant's motion. The offense, charge and plea agreement all predate the instant offense by approximately two years. The testimony of the victim indicates that the prior plea agreement was not conditioned upon his testimony in this case. Moreover, his testimony indicates that his testimony in the instant case would have no favorable impact on his sentence in the other case. On such a record, the existence of the pending charge and the plea agreement does not constitute evidence of bias, interest or prejudice and, hence, does not constitute evidence admissible to attack the victim's credibility.

Defendant advances several grounds in support of his claim that evidence concerning an altercation between defendant and the victim two days before the instant shooting was erroneously admitted. Defendant has waived appellate review of these claims by his consent to the admission of the evidence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Nevertheless, the evidence was admissible on the issues of motive and intent. MRE 404(b).

Defendant next argues that he received ineffective assistance of trial counsel. However, defendant failed to preserve this issue for appellate review by moving in the trial court for a new trial or an evidentiary hearing. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Accordingly, review may be granted if the record contains sufficient detail to support the defendant's position; if so, review is limited to the record. *Id.*

Here, the record fails to demonstrate that counsel committed an error so serious that he was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment, *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997), and that but for counsel's error a reasonable probability exists that the result of the proceeding would have been different and the result of the proceeding was fundamentally unfair or unreliable, *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant also failed to preserve for appeal his numerous claims of prosecutorial misconduct. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), overruled in part on other grounds *People v Fields*, 450 Mich 94, 115, n 24; 538 NW2d 356 (1995). Accordingly, defendant must show a plain error that affected his substantial rights. *Carines, supra*. Defendant has not done so. With one exception, the instances defendant offers in support of this claim reflect proper questions asked by the prosecutor to which witnesses provided volunteered, nonresponsive answers, proper argument of the evidence and the inferences drawn therefrom and proper comment on the weakness of a defense theory. *Fields, supra* at 109, 112; *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

With regard to defendant's remaining claim of prosecutorial misconduct, defendant correctly points out that a prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276. Here, the prosecutor's use of the phrase "I know" was an unfortunate word choice, but it does not rise to the level of suggesting that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. See e.g., *People v Enos*, 168 Mich App 490, 494-495; 425 NW2d 104 (1988) (the prosecutor used the terms of a plea agreement to suggest to the jury that she had special knowledge that the witness testified truthfully). Instead, when read in context, the statement was intended only to convey to the jury that the evidence indicated that defendant admitted to the shooting. Under such circumstances, reversal is unwarranted.

Finally, defendant argues that the fact that the jury saw prosecution witness and court security officer Larry Vaughn working the metal detector bolstered Vaughn's credibility and deprived defendant of a fair trial. Although the trial court and the prosecutor should have taken measures to guarantee that Vaughn was not assigned any activity that would have resulted in him having contact with the jury during the course of trial, the fact that the jurors saw Vaughn working the metal detector on the second day of trial cannot be said to have bolstered Vaughn's credibility where the jury knew that he sometimes manned the metal detector given that he testified to the same.

Affirmed in part; vacated in part. Remanded for a new trial on the felony-firearm charge. We do not retain jurisdiction.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jeffrey G. Collins