

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON HARDEN,

Defendant-Appellant.

UNPUBLISHED

October 16, 2001

No. 223060

Oakland Circuit Court

LC No. 99-164659-FC

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529. The written judgment of sentence indicates that the trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to a term of five to twenty years' imprisonment.¹ Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting a detective's testimony that the mother of a woman that defendant dated (the witness) told police that defendant had stated to her that during the robbery he had placed his hand on the victim's car window, leaving his fingerprints. In essence, defendant contends that the trial court impermissibly allowed a detective to relate the substance of that witness' statement wherein the witness allegedly related to the detective a statement that defendant made directly to her. However, while on the stand, the witness denied making the statement to the detective, instead revealing to the jury that she heard defendant's statement second-hand, through her daughter. Although defendant raised no timely objection to the detective's testimony, which presumably was offered to impeach the witness by introducing a prior inconsistent statement, defendant now argues that this was not proper impeachment, but simply amounted to the improper admission of hearsay. Because defendant failed to preserve this issue by objecting at trial, defendant can only avoid forfeiting this claim of

¹ During the sentencing hearing, the trial court stated on the record that it was imposing a sentence of *six* to twenty years' imprisonment. Although on appeal the prosecutor points out the inconsistency between the record statement and the written judgment of *five* to twenty years' imprisonment, this issue is not properly before us because the prosecutor has not filed a cross-appeal. *People v Stout*, 116 Mich App 726, 736; 323 NW2d 532 (1982).

error by establishing plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The situation presented here is nearly identical to that presented in *People v Stanaway*, 446 Mich 643, 692-693; 521 NW2d 557 (1994), wherein our Supreme Court stated:

While prior inconsistent statements may be used in some circumstances to impeach credibility, MRE 613, this was improper impeachment. The substance of the statement, purportedly used to impeach the credibility of the witness, went to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. MRE 801. [Footnote omitted.]

In the present case, had defendant made a timely objection to the detective's testimony, exclusion would have been proper. Nonetheless, any unfair prejudice from this testimony, which went to whether defendant had implicated himself as the robber, was immaterial, because other uncontroverted testimony clearly established that the robber is the one who left the fingerprints on the victim's freshly washed car window, and the fingerprints were those of defendant. Under these circumstances, defendant cannot establish outcome-determinative plain error. *Carines, supra*.

For this same reason, defendant is not entitled to a reversal of his conviction on the basis of his argument that the trial court, sua sponte, should have instructed the jury that it could not consider the witness' prior inconsistent statement as substantive evidence. Had defendant requested such an instruction, he would have been entitled to have it read to the jury. See *People v Durkee*, 369 Mich 618, 626-627; 120 NW2d 729 (1963); *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997); CJI2d 4.5. However, our review of the record reveals that defendant did not ask for this instruction, which leaves this error unpreserved and subject to forfeiture, absent a showing of plain error affecting defendant's substantial rights. *Carines, supra*; *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). As already discussed, the unfair prejudice from the jury's potential use of this testimony as substantive evidence was immaterial in light of the untainted evidence.

Next, defendant claims that he requested a mistrial on the basis of the prosecutor's failure to disclose before trial that the witness had made the prior inconsistent statement previously discussed, and that the trial court erred in not granting that motion. We review for an abuse of discretion a trial court's decision to grant or deny a mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 513; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* at 514.

Our review of the record reveals that defendant did not advance his motion for a mistrial on the basis of a discovery violation, but rather on the argument that the witness had intentionally told the police one story, told defense counsel a different story, and testified at trial to yet a third version of events, and that this story-changing resulted in the inadvertent exposure of the jury to hearsay. Moreover, the record clearly suggests that defense counsel had been made aware before trial of the prior inconsistent statement and never expressed an objection to the timing of the

prosecutor's disclosure. Because the unfair prejudice resulting from jury's inadvertent exposure to hearsay was not material, the trial court did not abuse its discretion in denying a mistrial on the grounds presented at trial. *Ortiz-Kehoe, supra*. Moreover, the unpreserved allegation that there was a violation of defendant's right to discovery pursuant to MCR 6.201, is simply not supported by the record, and defendant has not demonstrated that he is entitled to relief on this basis. *Carines, supra*.

Finally, defendant contends the trial court abused its discretion and committed error requiring reversal in sentencing defendant to five to twenty years' imprisonment on the habitual offender second supplement. Defendant argues that the imposed sentence violates the principle of proportionality articulated in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), because the minimum sentence was near the high end of the sentencing guidelines' recommendation. However, the sentencing guidelines are inapplicable to defendant, an habitual offender, *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996); *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000), and the trial court's sentence does not violate the principle of proportionality, *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra