

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ANTHONY RYAN III,

Defendant-Appellant.

UNPUBLISHED

January 25, 2002

No. 225808

Genesee Circuit Court

LC No. 99-005113-FC

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction for possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, discharge of a firearm into a building MCL 750.234b(1), felon in possession of a firearm, MCL 750.224f, and carrying a weapon with unlawful intent, MCL 750.226. The jury acquitted defendant of the charge of assault with intent to murder, MCL 750.83. Defendant was sentenced as a fourth habitual offender to serve the mandatory two-year sentence for felony-firearm, 8 to 15 years for the discharge of a weapon into a building, and 15 to 30 years each for the felon in possession conviction and the carrying a weapon with unlawful intent convictions. Defendant now appeals his convictions and sentences. We affirm.

Defendant first asserts that the prosecutor committed misconduct requiring reversal of defendant's convictions. Defendant claims that comments made by the prosecutor during rebuttal improperly implied that because defendant had a prior conviction for home invasion, he was more likely to have committed the instant offense. Because defendant did not object to the prosecution's comments, the issue is not properly preserved, and we review defendant's claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* Reversal is warranted only when the plain error resulted in the conviction of an actually innocent person or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

Reviewing the prosecutor's comments in context, it appears that the prosecutor meant to create a motive for defendant by claiming that defendant intended to rob Cade on December 22, 1998. Referring to the prior conviction, the prosecutor stated that "[t]he defendant is a man who has stolen before, broken into a home before to steal for things that he wants. The defendant has a reason to be on [the victim's] porch by his own testimony." This argument does not argue defendant's credibility, the only proper use of the prior conviction under MRE 609. Instead, the argument is directed at the fact that because defendant had thieved in the past he was likely to thief in the instant case. This type of argument is specifically precluded by MRE 404(b) and MRE 609, and the argument was clear error.

Although we agree that the prosecutor's comments constituted error, we conclude that reversal is not required. It is apparent that the comments were responsive to an argument made by defense counsel in his closing argument. Defense counsel argued during closing argument that "there's absolutely no reason for [defendant] to shoot [the victim]," that the victim "had no idea why he was shot," and "[said] nothing about a robbery," and that "if anyone would know why this happened, it's [the victim]." In response, the prosecution attempted to show that defendant did have a reason to be at Cade's home on that evening. An otherwise improper remark does not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001).

Furthermore, defendant failed to establish the requisite prejudice by showing that the error affected the outcome of the lower court proceedings. *Carines, supra* at 763. The evidence in this case clearly established defendant as the shooter regardless of the impermissible inference argued by the prosecutor. Defendant's theory was alibi and thus, misidentification of him as the person who did the shooting. However, the identification of defendant as the shooter was by the victim himself who identified defendant as the shooter both immediately after the shooting and at trial. The victim knew defendant well enough to sell him marijuana and to hug him and shake his hand when he encountered him on the street. Therefore, we cannot say that this error resulted in the conviction of an actually innocent defendant or that it seriously affected the fairness, integrity or public reputation of [the] judicial proceeding. *Id.* Therefore, defendant is not entitled to relief.

Defendant next argues that the trial court erred when it allowed the prosecution to question Kaprice Brown regarding an unrelated incident during which Brown had been armed. We agree. The evidence was not properly admitted pursuant to either MRE 404(b) or MRE 609. Nevertheless, any error in this case was harmless. An error is harmless if, in light of the weight and strength of the untainted evidence, it is highly probable that the tainted evidence did not contribute to the verdict. *People v Bone*, 230 Mich App 699, 703; 584 NW2d 760 (1998). Further, as stated above, the evidence against defendant was substantial and, because this error did not affect the outcome of the proceedings, reversal is not required. *Carines, supra*.

Defendant also claims that he is entitled to resentencing because the trial court improperly concluded, during his sentencing hearing, that defendant was actually guilty of the assault charge for which he was acquitted. We disagree. Although a trial court may not make an independent finding of guilt regarding a crime for which a defendant has been acquitted, and then sentence the defendant on the basis of that finding, the court in fashioning an appropriate sentence may consider the evidence offered at trial, including other criminal activities

established even though the defendant was acquitted of the charges. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

In this case, the comments by the court were not expressions of the reasons for the sentence imposed. Rather, they were a direct response to defendant's claim that he was not the person who committed the crime. The court opined that defendant was acquitted of the assault with intent to murder charge because the jury did not believe defendant intended to shoot Cade or that defendant had shot through the window. Nevertheless, the trial court did not state that it found that defendant had committed the assault regardless of his acquittal, and more important, the court did not indicate that it believed defendant had the intent to kill when he shot. Instead the court said it thought defendant was trying to commit a robbery. In addition, the trial court stressed that it was dismayed by defendant's prior criminal history and by "the way in which [defendant] shot through this man's door in his own home at 12:00 at night." Nothing in these statements indicates that the trial court relied upon any independent finding of guilt on the assault charge. As noted in *Compagnari*, *supra*, taking the evidence presented at trial into account when sentencing a defendant is not an abuse of discretion. *Id.* at 236-237. Therefore, defendant is not entitled to resentencing.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Martin M. Doctoroff