STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 2, 2002
v	No. 224955 Wayne Circuit Court
JESUS GARCIA, Defendant-Appellant.	Criminal Division LC No. 97-000921

Before: Owens, P.J., and Holbrook, Jr., and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second degree murder, MCL 750.317, and conspiracy to commit first degree murder, MCL 750.157a and MCL 750.316. He was acquitted of an additional charge of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of thirty to sixty years for the second-degree murder conviction and life imprisonment for the conspiracy conviction. We affirm.

Defendant's convictions stem from the shooting death of sixteen-year-old Joane Georgescu. Testimony at trial established that defendant was the leader of a gang known as the Insane Spanish Cobras. Defendant's gang name was "King Chuii," and he sat atop a hierarchy of gang membership. Georgescu was killed when a bullet fired at the car in which she was riding struck her in the heart and right lung. The bullet entered through the trunk and passed through the back seat before striking Georgescu, who was not the intended target of the shooting. The prosecution's theory of the case was that defendant ordered the drive-by shooting that resulted in the death of Georgescu.

Defendant first argues that he was denied a fair trial when the prosecutor allegedly elicited false testimony from a witness. We disagree. In the testimony in issue, the witness, Ricky O'Neal, stated that he agreed to testify against defendant as part of a plea agreement in another case. O'Neal testified that because he had already been sentenced in the other case, it was his belief that the prosecutor no longer had a hold on him and that he was now testifying of his own free will. Defendant maintains that this was false, because the prosecutor could have sought to void the plea agreement if O'Neal refused to testify.

As defendant concedes, this issue was not preserved with an appropriate objection at trial and, therefore, is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice . . . ." *Id*. at 763. Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

Although a prosecutor's knowing presentation of, or failure to correct, false testimony may be grounds for reversal, see *People v Canter*, 197 Mich App 550, 558-559, 568; 496 NW2d 336 (1992), defendant here has not plainly shown that the witness provided false testimony. First, O'Neal was testifying as to his own personal understanding of the situation as it related to his interest in testifying, and defendant has not shown that O'Neal falsely represented that understanding.

Second, defendant has not shown that O'Neal's testimony is at odds with Michigan's rules of criminal procedure and case law. There is nothing in Michigan's courts rules that provides for withdrawal of a plea agreement by a prosecutor after sentencing. Pursuant to MCR 6.310(C), a prosecutor can move to "vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of a plea agreement."[1] This language "suggests that withdrawal after the sentence on this ground may not be permissible." 1A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 16.33, p 119.

Further, we have been unable to find, and defendant has not cited, any Michigan case law holding that a prosecutor can move to vacate a plea agreement after sentencing. Defendant's reliance on *People v Abrams*, 204 Mich App 667; 516 NW2d 80 (1994), is misplaced. The plea agreement in *Abrams* specifically "provided that if defendant violated any part of the agreement, the entire agreement would be null and void, and the prosecutor's office would be free to prosecute defendant for the instant offense or any other offense." *Id.* at 669. Thus, the prosecutor in *Abrams* merely sought to enforce the terms of the plea agreement, not set it aside. *Id.* There is no indication that the plea agreement in the case at hand had similar terms.[2]

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[1] Other jurisdictions allow a *defendant* to withdraw a guilty plea after sentence has been imposed to correct "manifest injustice." See, e.g., OH ST RCRP Rule 32.1 ("A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.").

[2] The plea agreement was entered into evidence at trial. Although it is not included in the record on appeal, the prosecution read over the terms in open court and asked if they represented the bargain struck, as O'Neal understood it. From the trial transcript, it appears the agreement contained only the following terms: (1) that O'Neal would testify truthfully in defendant's case; (2) that O'Neal "acknowledges his prior statements to Sergeant Paul Arreola are and were

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Defendant's reliance on *People v Hannold*, 217 Mich App 382; 551 NW2d 710 (1996), is likewise misplaced. In *Hannold*, the plea bargain was revoked before sentencing. *Id*. at 384. Lastly, *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995), is also inapposite because it involves a prosecutor's right to withdraw from a plea bargain where the trial court declines to accept a sentencing agreement. *Id.* at 504.

In sum, it is not plainly apparent that a prosecutor in Michigan can revoke a plea bargain after sentencing, where the defendant subsequently fails to comply with his part of the agreement. Accordingly, because defendant has failed to establish that a plain error occurred, defendant has forfeited his claim of error. In a related argument, defendant asserts that defense counsel was ineffective because he failed to object to this false testimony. Having not shown that the testimony was in error, defendant cannot establish that counsel was ineffective for failing to object to its introduction or the prosecution's reference to it in its closing argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that the trial court erred in finding that a threatening letter allegedly written by defendant was sufficiently authenticated. We disagree. Whether a proper foundation has been established to admit evidence is to be determined by the trial court under MRE 901. *People v Berkey*, 437 Mich 40, 49-50, 52; 467 NW2d 6 (1991). The MRE 901(a) standard applies even if the evidence is critical to the prosecution's case. *People v Hack*, 219 Mich App 299, 308-309; 556 NW2d 187 (1996).

O'Neal testified that he was familiar with defendant's handwriting based on his prior correspondence. O'Neal testified that the letter in question appeared to be in defendant's handwriting, and also contained internal characteristics indicating that defendant was the author. This was sufficient to support a finding that the letter was what it was purported to be. MRE 901(b)(2) and (4). The weight of the evidence was a question for the trier of fact. *Berkey*, *supra* at 52. The trial court did not abuse its discretion in finding that the letter was sufficiently authenticated. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Defendant next argues that he was deprived of a fair trial because of several references to his prior imprisonment, testimony that he allegedly killed a fellow gang member, and testimony suggesting his involvement in other drive-by shootings, contrary to an order in limine. We disagree.

The testimony referring to defendant's prior imprisonment was necessary to provide context for O'Neal's testimony. Although somewhat prejudicial, the probative value of the

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truthful statements regarding" defendant's case; (3) that O'Neal "agrees to debrief Sergeant Arreola further regarding" defendant's case; (4) that O'Neal "agrees to testify in any legal proceeding arising out of" defendant's case; (5) that O'Neal would plead guilty to reduced charges in the case pending; (6) that whatever sentence was imposed by the trial court "would be consecutive to [O'Neal's] parole"; and (7) that the prosecution would dismiss the pending habitual offender charge. Neither on cross-examination of O'Neal, nor on appeal, does defendant cite to any language in the agreement indicting that the prosecutor could withdraw or vacate the agreement if O'Neal did not abide by its terms.

testimony was not substantially outweighed by the danger of unfair prejudice, MRE 403, and the trial court did not abuse its discretion in allowing it. *Lukity*, *supra*.

The accusation that defendant allegedly killed a fellow gang member was initially received as an unsolicited, volunteered response by a witness. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Subsequent references by the witness were made in the heat of vigorous cross-examination by defense counsel. Under the circumstances, a mistrial was not warranted, particularly considering that any prejudice was diminished by a stipulation that defendant was never charged with the alleged killing. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999); *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW2d 458 (1992).

With regard to testimony concerning defendant's alleged role in other drive-by shootings, we agree that the prosecutor violated the order in limine by asking one witness whether a member could do "a mission" without defendant's permission and whether a member could refuse defendant's order to do a mission, and by asking another witness whether defendant had the last word in deciding whether to do a mission. In the context of this case, however, we cannot agree that the prosecutor acted in bad faith. See *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). Rather, the prosecutor was attempting to show the extreme ultimate control exercised by defendant over the gang membership, which was relevant to convincing the jury that defendant was legally responsible for a shooting committed by someone else. Further, given the weight of the untainted evidence, defendant has failed to show that "it is more probable than not that a different outcome would have resulted without the error." *Lukity*, *supra* at 495.

Finally, defendant argues that the trial court erred in denying his requests for instructions on felonious assault, MCL 750.82, and conspiracy to commit felonious assault. We disagree. MCL 750.82 reads in pertinent part: "a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony . . . ." Because defendant was charged as an aider and abettor, the prosecution had to prove that

> the crime was committed by the defendant or another, that the defendant performed acts or gave encouragement that aided or assisted the commission of the crime, and that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time the defendant gave the aid or assistance. [*People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).]

"Conspiracy is a specific intent crime because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001).

After reviewing the record, we agree that the evidence did not support instructions on felonious assault and conspiracy to commit felonious assault. There was no evidence suggesting that the goal of the mission was merely to scare rival gang members. Indeed, the evidence indicated that a car was sent to follow the shooter to make sure he did not just fire shots into the air. Thus, the trial court did not err in denying defendant's requests for instructions on felonious

assault or conspiracy to commit felonious assault. *People v Hendricks*, 446 Mich 435, 442, 444; 521 NW2d 546 (1994).

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage