STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORMAN ALLEN,

Defendant-Appellant.

UNPUBLISHED
November 19, 2002

No. 233206
Wayne Circuit Court
LC No. 00-006067

Before: Talbot, P.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of twenty-four to forty-five years for the second-degree murder conviction, two to five years for the felon in possession of a firearm conviction, and to a mandatory two-year consecutive term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial because some witnesses were intimidated by the police during questioning. This issue was not preserved for appeal; therefore, it will be evaluated for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). To avoid forfeiture under the plain error rule, defendant must show that the error was plain, i.e., clear or obvious, and affected his substantial rights by prejudicing the outcome of the proceedings. *Carines*, *supra* at 763-764.

It is improper for a prosecutor or police to intimidate witnesses in or out of court. *People v Layher*, 238 Mich App 573, 587; 607 NW2d 91 (1999). Here, the record reveals that while the police were interrogating a witness they "hollered" in her face and threatened to send her to a juvenile detention center if she did not talk. Another witness testified that she was slapped twice and that the police officers treated her very harshly and called her a "lying bi***." Another witness testified that the police bent his fingers back and pushed on the pressure points behind his ears to get him to talk to the police.

We clearly do not condone the way the witnesses were treated. However, defendant has failed to establish how the outcome of the proceedings was prejudiced by the way the witnesses

were treated. One of the witnesses signed a statement at the police station stating that defendant was renting out the basement of her house and selling drugs, and testified that defendant was renting the basement of her house and selling drugs. The witness also testified that, on the evening in question, she was sitting in the dining room listening to music when she saw defendant walk downstairs and then come back upstairs and walk toward the front door. She then heard gunshots and ran upstairs and lay on the floor. Another of the witnesses testified that, on the evening in question, she was at the house on Lothrup Street when she witnessed a scuffle ensue between two persons and then heard another individual shout, "go get the gun." The witnesses testified that defendant hesitated, went inside the house, and approximately five minutes later came out of the house with a gun and fired it in the air twice. The witness then ran and hid on the side of the house, and heard three more gunshots coming from the house. The third witness gave a three-page statement at the police station; but testified that she did not say any of the information contained in the statement and she just felt threatened.[1] However, all three of these witnesses were able to take the stand and testify to their version of the events that occurred the evening in question. The record does not indicate that any of the witnesses seemed hesitant at trial to testify. Credibility of the witnesses is a matter for the trier of fact to ascertain. *People v Vaughn,* 186 Mich App 376, 380; 465 NW2d 365 (1990).

Moreover, other evidence corroborated the testimony of the witnesses. Defendant admitted to renting the basement and selling drugs out of the house. Two police officers found an empty Winchester .30 carbine box and suspected crack cocaine in the basement of the house. Additionally, two officers observed five spent .30 caliber shell casings on the front porch, and a lab report determined that all five spent shell casings were fired from the same weapon. Another witness testified that he saw defendant come out of the house with a rifle. Perry heard the victim say, "look man, all I – all we wanted was my man's keys back," and then heard a voice that sounded like defendant's voice answer twice, "That's all you want?" The witness then heard three more gunshots come from the house and further testified that the gunshots he heard sounded like the gunshots that defendant fired in the air. Moreover, the witness picked defendant out of a photographic line-up at the police station as the shooter.

Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to establish the elements of second-degree murder. *People v Johnson*, 460 Mich 720, 731; 597 NW2d 73 (1999). Therefore, defendant was not denied his substantial rights because there was overwhelming evidence presented at trial to establish that defendant fired the shots that killed the victim.

Defendant next argues that the trial court abused its discretion in excluding from evidence as a prior consistent statement a letter written by defendant to his defense counsel. We disagree. A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v Brownridge*, 459 Mich 456; 591 NW2d 26 (1999). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say

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[1] Defendant never charged any inappropriate treatment. Defendant told that trial court that he was read his constitutional rights, was never deprived of any food, sleep, or medical attention, and was not physically abused in any way or threatened with abuse.

that there was no excuse for the ruling made. *Aldrich, supra,* 246 Mich App 113; *People v Snider,* 239 Mich App 393, 419; 608 NW2d 502 (2000).

About two weeks prior to defendant's trial, defendant wrote the police a letter explaining that the statement that he gave the police in April 2000 was untrue. The prosecution and defendant had the following interaction during trial:

> *Q.* Why did you choose January, just before your trial, to communicate a new story?
>
> *A.* The reason I waited so long is because I didn't want to go to prison for something I didn't do.

Following this exchange, defense counsel attempted to introduce a letter written by defendant to defense counsel on May 19, 2000, as a prior consistent statement to bolster defendant's credibility. The trial court ruled however, that the letter was irrelevant.

"As a general rule, neither party in a criminal trial is permitted to bolster a witness' testimony by seeking admission of a prior consistent statement made by that witness." *People v Lewis,* 160 Mich App 20, 29; 408 NW2d 94 (1987). "While there are exceptions to this rule, such as to rebut a charge of recent fabrication, the exceptions only apply if the earlier consistent statement was given at a time prior to the existence of any fact which would motivate bias, interest, or corruption on the part of the witness." *Lewis, supra* at 29. The letter that defendant wrote defense counsel on May 19, 2000, was written after defendant was arrested on April 21, 2000. The crime occurred on March 23, 2000. Therefore, two months passed between the crime and the letter that defendant wrote while imprisoned. Clearly, the fact that defendant was arrested for the crime of murder would motivate bias, interest, or corruption on his part. Therefore, the letter was clearly inadmissible and the trial court did not abuse its discretion in excluding this evidence.

Finally, defendant argues that the prosecution erred by injecting evidence into trial of defendant's exercise of his right to remain silent. This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda,* 448 Mich 261, 266-267; 531 NW2d 659 (1995). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Avant,* 235 Mich App 499, 508; 597 NW2d 864 (1999).

The Fifth Amendment, and its application to the states through the Fourteenth Amendment, as well as the Michigan Constitution, provides the accused with a right against self-incrimination. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. Where a defendant's silence is attributed to the invocation of his right to remain silent or in reliance on the *Miranda*[2] warnings, his silence cannot later be used against him at trial. *People v McReavy,*

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[2] In *Miranda,* the Unites States Supreme Court established the rule that the police must advise a suspect, prior to custodial interrogation, of his right to remain silent. *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

436 Mich 197, 201; 462 NW2d 1 (1990); *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992).

However, in the instant case, defendant did not exercise his right to remain silent after being advised of his *Miranda* rights. "Where a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial." *Avant, supra* at 509. Officer Harris testified that he read defendant his constitutional rights before interviewing him. The trial court found that defendant's statement was voluntarily and freely made. According to Officer Harris, defendant told police in a written statement that he was not at the house on Lothrup when the shooting occurred, but rather, had just sold some drugs to a "crack head" around the corner at the Town Motel when he heard gunshots. However, during trial, defendant admitted that he was at the house during the shooting. He claimed to be in the house when he heard gunfire and stated that he then left the house so that he could hide his narcotics before the police arrived at the scene. Defendant also admitted that he wrote the police a letter two weeks before trial to explain what really happened.

During cross-examination, the prosecution asked defendant why it took so long for defendant to communicate what really happened that evening and made a comment regarding the discrepancy between what defendant told the police and his description of events just before trial and at trial. Defendant now challenges these comments. However "[w]here a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial." *Avant, supra* at 509. Therefore, the prosecutor's actions were not improper, and defendant was not denied a fair trial.

Affirmed.

/s/ Michael J. Talbot
/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald