

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC TOBAIS WOODS,

Defendant-Appellant.

UNPUBLISHED

September 28, 2004

No. 247306

Wayne Circuit Court

LC No. 02-012565

Before: Murphy, P.J., and O’Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, a concurrent term of one to five years’ imprisonment for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. We affirm.

I.

Defendant and brothers Antrimone “Terry” Mosley and Surrell “Reddy” Mosley were all friends of the victim. Late on Easter Sunday, April 23, 2000, or after midnight the following morning, the victim was shot thirteen times through the windshield of his car on Fenmore in Detroit. Six of the bullets struck and injured the victim, but did not kill him. The victim was then transported in another vehicle to a location several blocks north, where a woman and her granddaughter saw two vehicles and two men. The victim was pushed out of a white vehicle and shot once by a passenger in a black vehicle. Both vehicles drove away after the shooting, leaving the victim in the street. One of the witnesses attempted to help the victim, who was remarkably still alive. The other witness went to a neighbor’s house to get help. A third witness came out of her house with a telephone and prepared to call 911. The black vehicle returned, and the shooter got out of the vehicle with a gun, threatening the two witnesses, who then went inside a house. The man shot the victim in the head, killing him, and the car drove away.

In 2002, Special Agent Mike Yott of the Bureau of Alcohol, Tobacco, and Firearms was working with Officer George Harris of the Detroit Police Department and Officer Bruce Christnagel from the Wayne County Sheriff’s Department on “Operation Second Shot,” which was organized to investigate unsolved homicides or “cold cases.” Two years after the shooting,

Agent Yott and Officer Harris interviewed the three witnesses. From photograph arrays, two witnesses identified defendant as the shooter, and one identified Terry Mosley the man in the white car. Agent Yott and Officer Christnagel arrested defendant, who gave a statement. Defendant admitted that he killed the victim and explained the Mosley brothers' involvement.

In his statement, defendant asserted that ten or eleven days before the shooting, Reddy Mosley informed defendant of a \$20,000 contract to kill defendant. Defendant did not explain why the contract existed. Reddy Mosley told him that he did not have to "go out" like Rene Hunter, a friend of defendant and the Mosley brothers who had been recently murdered. Defendant understood this to mean that he did not have to be killed as Rene Hunter had been. Defendant claimed that Terry Mosley told him that the victim had some information linking the Mosley brothers to Rene Hunter's murder. Because he believed that the victim was prepared to approach the police with this information, Terry Mosley suggested that the contract on defendant's life could be cancelled in exchange for killing the victim.

Defendant maintained that, on the day of the shootings, Terry Mosley gave him a gun and a man named "Black" picked defendant up in a black Taurus. Defendant explained that they approached the victim's car, blocking it between their car and Terry Mosley's white Cutlass. Defendant got out of the car and shot the victim through the windshield. The victim got out of his own car and into Terry Mosley's car. Both cars drove to the second location, where defendant again shot the victim. They left the victim there, and both cars drove away. After Terry Mosley called defendant and told him that the victim was still alive, defendant returned and shot the victim in the back of the head, killing him. Defendant claimed that the following day Terry Mosley told him to keep his mouth shut and he would be "straight," which defendant understood to mean that the contract to kill him was cancelled.

At trial, defendant testified and denied having shot the victim. Although he admitted signing the statement, he asserted that he had been forced to sign it under psychological duress. Two alibi witnesses testified that they were with defendant at a hair show in Detroit when the victim was killed.

II.

Defendant first argues that the prosecutor committed misconduct by asking his alibi witnesses, Randall Woods and Damon Hicks, whether they had a professional relationship with defense counsel. With regard to Randall Woods, defendant did not preserve the issue by objecting to the prosecutor's questioning at trial. *People v Bulmer*, 256 Mich App 33, 34-35; 662 NW2d 117 (2003). We therefore review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Pursuant to MRE 611(b), a witness may be cross-examined on any matter relevant to any issue in the case, including credibility. *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). Evidence of a witness' bias is almost always relevant. *Id.* Here, Woods admitted having a prior professional relationship with defense counsel, and the prosecutor's cross-examination was intended to elicit evidence of Woods' potential bias, given this prior relationship. Because this is a proper subject of cross-examination, defendant has not shown plain error.

With respect to the prosecutor's cross-examination of Damon Hicks, the trial court sustained defense counsel's objection to the questioning, thus precluding examination in this regard. Furthermore, evidence of Hicks' prior professional relationship with defense counsel would have shown potential bias, which is a proper subject of cross-examination. MRE 611(b); *Layher, supra* at 764. Defendant has not shown that he was denied a fair trial.

III.

Next, defendant argues that the trial court erroneously precluded him from calling his father as a witness. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Even if relevant, evidence may be excluded under MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, . . . or by considerations of undue delay, [or] waste of time[.]"

Defendant's brother testified, providing an alibi for defendant. During cross-examination, defendant denied that his brother visited him in jail while he was awaiting trial, but admitted talking with his brother on the telephone. The prosecutor then attempted to impeach defendant with the fact that a Randall Woods had signed in and visited him in jail. Defendant testified that it was his father, not his brother, who visited him. During redirect examination, defendant again claimed that it was his father, not his brother, who visited him at the jail. Although defendant subsequently sought to call his father to show that it was his father, not his brother, who visited him at the jail, the import of the prosecutor's cross-examination was only to show that defendant had pretrial contact with his brother, who testified in support of defendant's alibi defense. Because defendant admitted speaking to his brother while awaiting trial, whether defendant's father also visited defendant in jail was not a material issue. Accordingly, the trial court did not abuse its discretion by precluding defendant from calling his father as a witness on the basis that to do so would be a waste of judicial time. MRE 403.

IV.

Next, defendant argues that the trial court abused its discretion by permitting testimony of defendant's tattoo, an assault rifle and the inscription, "Real Ni--as Don't Talk." During the prosecutor's case-in-chief, the trial court ruled that evidence of the tattoo could be admitted, but excluded evidence of the inscription because of its offensive nature. Subsequently, during cross-examination of defendant, the prosecutor sought to elicit testimony that defendant killed the victim because he was a "snitch." Defendant denied that it was his "philosophy that real men don't snitch." Following a sidebar conference, the prosecutor questioned defendant about the inscription, "Real Ni--as Don't Talk."

We reject defendant's claim that the prosecutor improperly cross-examined him about the tattoo inscription. Although the trial court had previously ruled that the offensive language was not admissible in the prosecutor's case-in-chief, where a defendant elects to testify, evidence deemed inadmissible in a prosecutor's case-in-chief may become relevant and admissible to the defendant's credibility. *People v Ford*, 59 Mich App 35, 45; 228 NW2d 533 (1975). See also *People v D'Angelo*, 401 Mich 167, 178; 257 NW2d 655 (1977). Relevant evidence is any evidence that has a tendency to make the existence of a fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence. MRE 401.

During cross-examination, defendant denied subscribing to a philosophy that “real men don’t snitch.” The tattoo inscription was relevant to rebut the credibility of defendant’s testimony. Moreover, it was relevant to defendant’s intent and motive in light of evidence that the victim was shot because he had information about the Mosleys’ involvement in the death of Rene Hunter and that he was prepared to go to the police with this information. To the extent the tattoo inscription could be deemed prejudicial because of its offensive nature, in light of the trial court’s cautionary instruction advising the jury on the limited purpose of the evidence, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403.

Furthermore, the trial court did not abuse its discretion when it originally ruled that the tattoo of the assault rifle was admissible under MRE 401 and MRE 403. The prosecutor presented evidence that the victim was shot with an assault-type rifle, and the tattoo was probative of defendant’s familiarity with such a weapon. The trial court’s cautionary instruction reduced the potential for any unfair prejudice under MRE 403.

We also disagree with defendant’s claim that the prosecutor’s references to the tattoo during rebuttal argument were improper because they exceeded the scope of defense counsel’s closing argument. MCR 6.414(E). Although defense counsel did not directly refer to the tattoo or inscription during his closing argument, he characterized Agent Yott as an experienced investigator who was “capable of either threatening, cajoling, promising, or doing whatever is necessary to get this cold case solved,” and of employing “psychological tricks” and threats to extract defendant’s confession. Defense counsel further argued that Agent Yott’s testimony about defendant’s interrogation was not credible. The challenged rebuttal remarks were made in response to defense counsel’s attacks on Agent Yott’s credibility, and to rebut defense counsel’s suggestion that defendant’s version of what occurred during the interrogation was more credible. Considered in this context, we conclude that the trial court did not abuse its discretion in allowing the prosecutor’s argument.

V.

Next, defendant argues that reversal is required because Agent Yott referred to the need for defendant to testify and impermissibly commented on his silence. Because defendant did not object to the challenged testimony at trial, this issue is not preserved, and we review it for plain error affecting defendant’s substantial rights. *Carines, supra* at 764-765; *Schutte, supra* at 720. Agent Yott’s testimony that defendant’s trial testimony would be the “best evidence” of what happened was arguably responsive to defense counsel’s question and, therefore, was not improperly injected. Moreover, defendant ultimately testified in this case, thereby alleviating any concern that the jury might hold it against defendant if he did not testify. Further, the trial court made clear in its final instructions that the burden was on the prosecutor to prove each element of the crime beyond a reasonable doubt and that “defendant is not required to prove his innocence or do anything.” Accordingly, defendant has failed to show plain error affecting his substantial rights with regard to this claim. *Carines, supra* at 764-765; *Schutte, supra* at 720.

VI.

Defendant contends that the trial court abused its discretion when it allowed Agent Yott to testify about two witnesses' identification of defendant from a photograph array that they viewed two years after the shooting. Because both witnesses testified at trial and were subject to cross-examination concerning the identifications, Agent Yott's third-party testimony was admissible under MRE 801(d)(1)(C). *People v Malone*, 445 Mich 369, 371; 518 NW2d 418 (1994).

VII.

The trial court did not abuse its discretion in denying defendant's motion for a mistrial after a witness referred to defendant and his associates as "killers." *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). An unresponsive, volunteered answer to a proper question does not deny a defendant of his right to a fair trial, and it is highly unlikely that one isolated unresponsive comment would result in significant prejudice to defendant. *People v Allen*, 429 Mich 558, 656; 420 NW2d 499 (1988); *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). Moreover, the trial court's statement to the jury that the remark was being stricken from the record and should not be considered was sufficient to cure any prejudice. Furthermore, the prosecutor's remark during rebuttal argument that the witness was fearful because defendant "is a dangerous man" was proper because it was based on properly admitted evidence of how the witness perceived defendant and reasonable inferences drawn from the evidence. Thus, this remark did not constitute prosecutorial misconduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

VIII.

Defendant argues that the trial court abused its discretion when it allowed the prosecutor to elicit testimony from Agent Yott about the theft of a large amount of narcotics and money as an explanation for why a "contract" may have been placed on defendant's life. During cross-examination, defense counsel asked Agent Yott if he had found any information that corroborated whether a contract on defendant's life existed, and Agent Yott answered, "no." During redirect examination, the prosecutor asked Agent Yott whether he had any information that explained why there might be such a contract. Agent Yott explained that a large amount of narcotics and money had been stolen from Reddy Mosley earlier in 2000, before the victim in this case was killed.

In light of the prosecution's theory that defendant killed the victim in order to remove the contract on his life, which was consistent with the explanation that defendant gave the police, Agent Yott's testimony was relevant under MRE 401. Furthermore, the prosecutor's questioning was responsive to defense counsel's cross-examination of Agent Yott on this subject. Moreover, to the extent the prosecutor's questioning could be considered improper, by opening the door to the challenged testimony, defendant invited the error. Under the "invited-error doctrine," appellate review is precluded because, when party invites the error, he waives his right to seek appellate review, and any error is extinguished. *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003).

IX.

The trial court did not abuse its discretion when it allowed Agent Yott to testify that the statements given by two eyewitnesses in 2000 were consistent with their trial testimony. Contrary to what defendant argues, Agent Yott did not express an opinion about whether the witnesses were credible; rather, he acknowledged that their prior statements and their trial testimony were consistent. Thus, defendant's reliance on *People v Suchy*, 143 Mich App 136, 149; 371 NW2d 502 (1985), is misplaced. Moreover, defense counsel had the opportunity to cross-examine both witnesses extensively to reveal any inconsistencies in their testimony. Therefore, we reject this claim of error.

X.

Finally, there is no basis to conclude that defendant was denied a fair trial because of the cumulative effect of several insignificant errors. Cumulative error, properly understood, "actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error. Only the unfair prejudice of several actual errors can be aggregated to satisfy the standards set forth in *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999)." *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002) (emphasis in original). Because we have found no prejudice, "this issue is without merit." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage