

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL JAMINSON RICHARDS,

Defendant-Appellant.

UNPUBLISHED

September 30, 2004

No. 247747

Saginaw Circuit Court

LC No. 02-021833-FC

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony, second offense, MCL 750.227b, entered after a jury trial. We affirm.

Defendant, Gary Sloan, and Twannie Gray were involved in an altercation at a club. Shortly thereafter someone fired shots at the vehicle occupied by Sloan and Gray. Sloan testified that, although at the time of the incident he told a police officer that defendant fired the shots, in fact, he did not see the person who shot at the car. Defendant did not object to the admissibility of Sloan's prior inconsistent statement. Gray testified that as he and Sloan drove through the neighborhood in which he thought defendant lived, he saw defendant standing outside a house and saw defendant raise his arm. He heard Sloan remark that defendant had a gun, and then heard several shots. Defendant denied firing shots at the car.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A claim of prosecutorial misconduct is reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless the defendant demonstrates the existence of plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal

is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Defendant argues that the prosecutor committed misconduct by calling Sloan as a witness because the prosecutor's sole reason for doing so was to put Sloan's statement that he fired the shots before the jury. We disagree and affirm defendant's convictions. The prosecution may impeach the testimony of its own witness. MRE 607. A prior inconsistent statement can be admitted to impeach a witness even though the statement tends directly to inculcate the defendant. However, such impeachment should be disallowed when: (1) the substance of the statement purportedly used for impeachment purposes is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant. *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997). Here, the statement used to impeach Sloan was directly relevant to the issue of whether defendant fired shots at the car occupied by Sloan and Gray and tended to inculcate defendant. However, there was other testimony from Sloan for which his credibility was relevant. Sloan denied that he warned defendant against being disrespectful to his family, but Gray testified that Sloan was angry with defendant for socializing with women other than Sloan's sister, whom defendant was dating, and went to speak with defendant about the matter. Gray also testified that he attempted to explain to defendant that Sloan was angry about the situation. The exception to the general rule that prior inconsistent statements may be used to impeach a witness, even though it tended to inculcate the defendant, did not apply in this case. *Id.*

Nothing in the record indicates that defendant requested an instruction on the evaluation of impeachment testimony. Moreover, defendant's failure to object to the instructions as read constitutes forfeiture of the claim of error. MCL 768.29. A forfeited nonconstitutional error cannot be considered by an appellate court unless it was plain and affected the defendant's substantial rights. *Carines, supra*. The jury was entitled to find Gray's testimony that he saw defendant raise his arm toward the car and immediately thereafter heard several gunshots credible, and to infer from it that defendant fired the shots at the car. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002); *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990). Neither the introduction of the impeachment testimony nor the failure of the trial court to instruct on the evaluation of that testimony constituted plain error that affected defendant's substantial rights. *Carines, supra*; *People v Gonzalez*, 468 Mich 636, 643-644; 664 NW2d 159 (2003).

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood