

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS OMAR MCGEE,

Defendant-Appellant.

UNPUBLISHED

January 11, 2007

No. 263591

Saginaw Circuit Court

LC No. 04-024634-FC

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, discharge of a firearm at an occupied structure, MCL 750.234b, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 95 months to 15 years for the assault conviction, three to six years for the discharge of a firearm conviction, and 47 to 90 months for the felon-in-possession and carrying a concealed weapon convictions, to be served consecutively to three concurrent two-year terms of imprisonment for the felony-firearm convictions. He appeals by right. We affirm.

Defendant's convictions arose from an allegedly gang-related shooting at Captain's Cove, a Saginaw nightclub. One person died and several were injured. Defendant was present at the nightclub. He drove away in a Dodge Durango, but was stopped by the police a short distance from the scene. An ammunition magazine and a nine-millimeter Ruger firearm, which was identified as one of the guns involved in the shooting, was recovered from the side of the road along the path that defendant drove as he left the nightclub. A second magazine fell to the ground as defendant exited the vehicle when he was stopped by the police. A witness, Alonzo Taylor, testified that he sold the nine-millimeter Ruger firearm to defendant approximately one month before the shooting.

I

On appeal, defendant first argues that the admission of inadmissible, testimonial hearsay from unavailable and unidentified declarants violated his constitutional right of confrontation and denied him a fair trial. Defendant acknowledges that he did not object to the challenged

testimony. Therefore, this issue is unpreserved. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). When hearsay evidence is admitted and the declarant cannot be cross-examined, the evidentiary ruling may implicate constitutional error under the Confrontation Clause. *People v Stanaway*, 446 Mich 643, 694 n 53; 521 NW2d 557 (1994). “In *Crawford* [*v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004)], the United States Supreme Court held that, under the Confrontation Clause of the Sixth Amendment, testimonial statements of witnesses absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.” *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Defendant first challenges the testimony of Ryan Larrison, a firearms expert. Larrison testified that he reviewed the firearms evidence and prepared the report in this case. Larrison also testified, however, that it is procedure at the Michigan State Police Crime Lab to have two examiners review the evidence and agree on a conclusion before a report is authored. Larrison explained that Ronald Crichton, a senior firearms expert, reviewed the same evidence and agreed with Larrison's conclusions. To the extent that Larrison's testimony regarding Crichton's conclusions involved hearsay, it did not affect defendant's substantial rights. Larrison testified that he was the person who prepared the report and that he reached the conclusions that were the subject of his testimony. Evidence that Crichton agreed with those conclusions was cumulative of Larrison's testimony. Thus, this unpreserved issue does not warrant appellate relief.

Defendant also argues that Detective Robert Ruth improperly testified about information he received from confidential and unidentified sources. At trial, Ruth explained that when investigating gang activity, witnesses often are uncooperative or reluctant to testify, and that gang members do not normally reveal their gang affiliation. Accordingly, Ruth explained, the police routinely gather information from confidential informants. In the challenged testimony, however, Ruth did not refer to specific statements from other sources. In the one instance when Ruth was asked, “Did anybody indicate to seeing who the shooters were?,” he responded, “No. Nobody in the bar that evening would indicate who was doing the shooting. *They're all afraid.*” Although defendant argues that the statement “They're all afraid” was inadmissible hearsay, this testimony was Ruth's conclusion and did not involve another's statement. Thus, this statement was not hearsay and did not implicate defendant's right of confrontation. Even if the testimony could be interpreted to suggest that a declarant articulated a statement expressing fear, the statement was made in the context of explaining that nobody would identify who was involved in the shooting. Because defendant was not implicated in this testimony, his substantial rights were not affected.

Defendant further argues that Ruth was permitted to testify that the shooting was gang-related, that there were predominantly north-side gang members at the nightclub and that the people who were shot were from the south side, that the south-side people did not have guns, that people from the north side have since died in gang-related deaths, and that defendant was a north-side gang member. Although defendant asserts that this information was based on information garnered from confidential informants, he does not identify a single out-of-court

statement that he believes was improperly admitted at trial. Thus, he has not established that the admission of this testimony constituted plain error.

Defendant also argues that Ruth improperly testified that alleged gang memberships were listed on jail inmate logs under the category of “special information” to separate members of rival gangs in jail, and that defendant’s log indicated that he was affiliated with a gang called “The Projects.” Yet defendant admitted at trial that he was “affiliated” with “The Projects” and that he was a friend of members of that group. Defendant also acknowledged that he was in a cell with people from the north end and that it was probably not a good idea for him to be placed in a south-end cell at the jail. Because defendant provided the same information at trial as that provided by Ruth in the disputed statements, Ruth’s testimony did not affect defendant’s substantial rights.

Defendant further argues that Ruth’s testimony that individuals depicted in photographs with defendant were gang members was improperly based on information gathered from unavailable confidential informants. Again, however, defendant does not identify out-of-court statements that were admitted at trial. Moreover, Ruth testified at trial that the photos depicted people throwing their gang signs, and defendant confirmed on direct examination that the hand gestures he was making in the photos were gang signs indicating an affiliation with “The Projects.” In light of this record, defendant failed to show that Ruth’s statements about the photographs constituted testimonial hearsay. Further, because defendant admitted that the photos depicted him making gang signs indicating an affiliation with “The Projects,” Ruth’s testimony did not affect defendant’s substantial rights.

Defendant also challenges Ruth’s testimony that Sherice Byrd, owner of the Dodge Durango that defendant was driving, reported a few hours after the shooting that she was carjacked and that the Durango was stolen, and that Byrd later pleaded guilty to filing a false police report. Because there was no dispute at trial that defendant was driving the Durango after the shooting and that he had permission to drive the vehicle, the passing reference to Byrd did not affect defendant’s substantial rights.

Further, contrary to defendant’s assertions, the emergency 911 call was not testimonial in nature and, therefore, its admission did not implicate the Confrontation Clause. *Davis v Washington*, ___ US ___, 126 S Ct 2266, 2273-2278; 165 L Ed 2d 224 (2006).

II

Next, defendant argues that the prior statements of Taylor and Antaurean Jones were inadmissible hearsay, and that their admission denied him a fair trial. Because defendant did not object to these statements at trial, our review is again limited to plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764.

Defendant cites *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987), to support his argument that Taylor’s prior consistent statements were inadmissible. In *Rosales*, this Court stated, “[a]s a general rule, neither a prosecutor nor anyone else is permitted to bolster a witness’ testimony by referring to prior consistent statements of that witness.” *Id.* However, *Rosales* preceded the 1991 amendment of MRE 801. As amended, MRE 801(d)(1)(B) provides that the prior consistent statement of a witness is admissible if the declarant testifies at trial and

is subject to cross-examination, there is an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony, the declarant's prior statement is consistent with the declarant's challenged testimony, and the prior consistent statement was made before there was a motive to falsify. See *People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000). In the present case, defendant disputed the veracity of Taylor's trial testimony. Taylor testified at trial, his prior statements were consistent with his trial testimony, and Taylor was subject to cross-examination concerning the prior statements, which were made just days after the shooting. Thus, the admission of Taylor's prior consistent statements did not constitute plain error.

Jones's prior statements were properly admitted for a nonhearsay purpose, namely, to impeach Jones's inconsistent trial testimony. Defendant incorrectly argues that the prior statements were hearsay because Jones did not deny making them. Regardless whether Jones admitted making the prior statements, the statements were inconsistent with his testimony at trial and, therefore, were admissible for impeachment purposes. Because Jones's credibility was at issue, he testified at trial, the prosecutor elicited the time and place of the prior statements and the person to whom they were allegedly made, and Jones was given the opportunity to explain or deny his inconsistent statements, the admission of Jones' prior statements for impeachment purposes was not plain error. MRE 607; MRE 613; *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002).

III

Defendant argues that the prosecutor improperly impeached him with evidence of a prior conviction for fleeing or eluding a police officer. Again, defendant failed to object to the admission of this evidence at trial, so we review this issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

The prosecutor did not use the prior conviction for impeachment purposes under MRE 609. Rather, defense counsel first elicited evidence of this conviction on direct examination of defendant. Because defendant volunteered the evidence on direct examination, it was within the scope of cross-examination, unless otherwise prohibited. MRE 611(b). The prosecutor's cross-examination was limited to eliciting that the prior conviction arose from defendant's use of the same vehicle that he was driving when the police stopped him after the charged shooting incident. Because there was evidence that defendant did not drive the vehicle to the nightclub, and defendant denied knowledge of the magazine clip that fell from the vehicle after the police stopped it, evidence showing that defendant had access to the vehicle was arguably relevant. For these reasons, defendant failed to establish that the prosecutor's cross-examination constituted plain error that affected his substantial rights.

IV

Defendant next argues that the prosecutor's conduct denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, he must show that plain error affected his substantial rights. *Carines, supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We consider the prosecutor's alleged misconduct in context to determine if it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Further, a prosecutor is afforded great latitude in closing argument.

People v Bahoda, 448 Mich 261, 282; 531 NW2d 659 (1995). He is not required to use the “blandest possible terms” to state his inferences and conclusions. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor may use strong and emotional language when making his argument as long as it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Also, reversal is not warranted if defendant could have registered a cautionary instruction that would have cured any perceived prejudice. *Schutte*, *supra* at 721.

The evidence in this case indicated that the nightclub shooting was gang-related. Defendant denied belonging to a gang. The prosecutor’s questions and comments concerning defendant’s drug activity and not having a job were made in the context of establishing his affiliation with a gang. These questions and comments were not plainly improper.

Further, the prosecutor’s questions and comments did not shift the burden of proof. To the extent that any questions or comments could have been construed in this manner, the trial court’s instructions that defendant is presumed to be innocent, that the prosecutor was required to prove each element of the crime charged beyond a reasonable doubt, and that “defendant is not required to prove his innocence or do anything,” were sufficient to cure any prejudice and to protect defendant’s substantial rights. *Schutte*, *supra* at 721.

We also disagree with defendant’s contention that the prosecutor improperly referred to matters lacking evidentiary support. The prosecutor was entitled to argue the evidence and all reasonable inferences from the evidence relating to his theory of the case. *Bahoda*, *supra* at 282. Here, the prosecutor’s remarks involved reasonable inferences from the evidence. Furthermore, the jury was instructed that the questions and arguments made by the attorneys were not evidence, and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The court’s instruction was sufficient to protect defendant’s substantial rights.

Defendant also argues that he was prejudiced because the prosecutor improperly elicited evidence that witnesses Marcel Bogan, Antaurean Jones, and Terrance Moore were incarcerated. However, defense counsel elicited that Moore was incarcerated. Jones testified that authorities were holding him in jail as a material witness, which was relevant to his bias as a witness. The prosecutor merely elicited that Bogan was incarcerated as a result of the incident at the Captain’s Cove nightclub. Further, a cautionary instruction, if requested, would have cured any perceived prejudice. *Schutte*, *supra* at 721. On this record, defendant has not shown plain error affecting his substantial rights.

V

Defendant next argues that the trial court erred by failing to give the cautionary jury instructions on accomplice testimony, CJI2d 5.4 and 5.6, in connection with Alonzo Taylor’s testimony. Defendant did not request these instructions at trial or object to the trial court’s instructions as given. Therefore, this issue is not preserved. “[A]n unpreserved claim that the court failed to give a cautionary accomplice instruction may be reviewed *only* for plain error that affects substantial rights.” *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

Here, it not clear that Taylor was an accomplice or that this instruction was clearly or obviously required in this case. Taylor testified that he sold to defendant a nine-millimeter Ruger firearm that was linked to this offense. But Taylor was also linked to this offense because a different .45-caliber Ruger used in the shooting was found in Taylor's house. Significantly, Taylor testified that he did not possess a gun at the Captain's Cove nightclub, that he did not see defendant with a gun, and that he did not see defendant shoot at anyone at the nightclub. The prosecution presented evidence beyond Taylor's testimony linking defendant to the offense and to the nine-millimeter Ruger firearm, including evidence that the nine-millimeter firearm was found along the road on the same path that defendant traveled before he was stopped, and that an ammunition magazine and the firearm fell from defendant's car when the car was stopped. Also, the jury was instructed that it was to evaluate the credibility of all witnesses and consider any bias, prejudice, or personal interest that a witness might have. For these reasons, defendant fails to establish that the trial court's failure to give cautionary jury instructions constituted plain error affecting his substantial rights.

VI

Next, defendant argues that he was denied effective assistance of counsel. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense. *Id.* at 578. When applying this test, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.*

In this case, defendant has not demonstrated that counsel was ineffective for failing to object to the prior statements of Taylor or Jones, Ruth's testimony regarding Saginaw gangs, booking sheets, Byrd's false police report, and Jones' recantation of his previous statements, Larrison's statements regarding Crichton, the admission of the 911 tape, or the prosecutor's closing arguments. As discussed *supra*, defendant has not shown that evidence was improperly admitted or that the prosecutor's remarks were improper. Similarly, counsel was not ineffective for failing to request a cautionary accomplice testimony instruction, because defendant has not shown that the instruction was required. Further, because the prosecutor did not shift the burden of proof, defense counsel did not commit an act of misconduct when he failed to object to the prosecutor's questions and comments for this reason.

Defendant also contests the effectiveness of his counsel's cross-examination of Taylor, Bogan, and Moore. Decisions about calling and questioning witnesses are matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. Defense counsel presented

plausible reasons for his trial decisions, and defendant has not overcome the presumption that his decisions constituted sound trial strategy. Defendant's counsel was not ineffective merely because the strategy may not have worked. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that his counsel was ineffective for failing to impeach Jeff Reynolds with evidence of his prior conviction for filing a false police report. However, Reynolds' testimony was largely cumulative, and we do not believe that defense counsel's failure to impeach Reynolds' credibility with evidence of his prior conviction prejudiced the defense.

Defendant also argues that his counsel was ineffective for questioning defendant concerning his history of selling drugs and his prior conviction for fleeing and eluding the police. Counsel explained that he pursued this line of questioning to show that, while defendant had a troubled background, his background did not involve assaultive behavior, and to present defendant as someone who was trustworthy, not a liar, even if his testimony did not always portray him in a favorable light. Again, counsel's direct examination of defendant was a matter of trial strategy, and this Court will not second-guess that strategy with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Accordingly, defendant fails to establish that he was denied effective assistance of counsel.

VII

Finally, defendant argues that the cumulative effective of these errors denied him a fair trial. Because we have rejected defendant's claims of error, reversal under this theory is unwarranted. *LeBlanc, supra* at 591; *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens