STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 14, 2008
v	No. 278957 Wayne Circuit Court
CHRISTOPHER A. CLARK, Defendant-Appellant.	LC No. 07-004186-01

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, armed assault with intent to rob, MCL 750.89, assault with intent to do great bodily harm, MCL 750.84, and possession of a firearm while committing a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of life without parole for the murder conviction, 15 to 40 years for the armed robbery and armed assault convictions, 2 to 10 years for the assault with intent to do great bodily harm conviction, and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a robbery and the shooting of two people. Evidence presented at trial revealed that the victims were sitting in a parked car when defendant and four of his acquaintances approached. Defendant demanded that the man in the driver seat open the window. Defendant then fired a shot that killed the man in the driver seat and wounded the other man in the vehicle. Defendant and his acquaintances took the dead man's cell phone, along with other items. The police later located one of defendant's accomplices, Dana Minor, through the cell phone usage. Minor implicated defendant and the other three persons involved. When the police interviewed these suspects, each one identified defendant as the gunman. Before trial, all four of defendant's accomplices entered into plea agreements in exchange for testimony. The plea agreements required each of the accomplices to testify against defendant.

At trial, Officer Stevenson testified that each of the accomplices had identified defendant as the gunman. Two of the acquaintances, Minor and Hicks, fulfilled their agreement to testify and confirmed their statements to the police officer that interviewed them. Jones and Etheridge, the other two acquaintances, refused to testify.

Defendant first argues that his constitutional confrontation right was violated when plaintiff presented Officer Stevenson's testimony in light of the fact that Jones and Etheridge

later refused to testify and were therefore not subject to cross-examination. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). .

The United States and the Michigan Constitutions ensure that a defendant in a criminal prosecution has the opportunity to confront witnesses. US Const, Am VI; Const 1963, art 1, §20. The confrontation clause precludes a witness from testifying about the testimonial statement of another witness who is unavailable for trial, unless the defendant has had a prior opportunity to cross-examine the unavailable witness. *Crawford v Washington*, 541 US 36, 53-54, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Statements given during a police interrogation are testimonial statements subject to the *Crawford* rule. See also *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 166 L Ed 2d 224 (2006).

Here, Officer Stevenson testified that Jones, Etheridge, Hicks, and Minor had given statements identifying defendant as the gunman. The statements referenced in Officer Stevenson's testimony were plainly testimonial statements and inadmissible in light of the fact that Jones and Etheridge did not testify and were not subject to cross-examination. However, this is an unpreserved matter for which this Court may grant relief only for plain error that resulted in the conviction of an actually innocent defendant or that seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra*. at 763-764. The prosecutor presented ample eyewitness testimony to identify defendant as the person that robbed and shot the victim. See *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005). The record contains sufficient evidence to uphold the jury's conclusion without reference to the statements of Jones and Etheridge.

Defendant also argues that the trial court erred by requiring Jones to take the witness stand to confirm his refusal to testify as required by the terms of his plea bargain. We review this constitutional issue de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

Before defendant's trial, Jones pleaded guilty to second-degree murder in exchange for an agreement to testify against defendant in the present case. During trial, but outside the jury's presence, Jones's lawyer informed the trial court that Jones had stated that he would not testify. The court questioned Jones about his decision, confirming Jones's understanding that if he refused to testify he would still be bound by his guilty plea, but that the trial court would not be bound by the sentence recommended in the plea agreement. The trial court also confirmed that no one had threatened Jones or otherwise coerced him not to testify.

The prosecutor then asked the court to bring Jones before the jury, stating that she wanted to "make a record . . . and discuss that he has pled guilty, and that he made an agreement to testify and now he's refusing to testify." The trial court responded that Jones had waived his Fifth Amendment right, and that having Jones appear before the jury "gives him the opportunity to either get the benefit of the bargain or not. And if not I don't want [him] to come back later and say, hey, if they had put me in front of the jury I would have." The court further noted that although Jones refused to testify, he had not refused to take the stand. The court concluded, "I can't deprive him of his option to perform. He can perform or not. That's up to him."

Jones then took the stand in the jury's presence. The following colloquy occurred:

Q. Mr. Jones, did you enter into a plea agreement to second degree murder?

A. Yes.

Q. And in exchange for receiving a sentence of ten to twenty years plus two years you had included that would be truthful testimony in any case that involved [defendant], Corey Etheridge, Artis Hicks, or Dana Minor, is that correct?

A. Yes.

Q. Okay. Are you going to testify today?

A. No.

We find no constitutional error in the decision to allow the prosecutor to call Jones to the stand. We acknowledge that it is error for a lawyer to present a witness's testimony if the lawyer knows the witness will assert a Fifth Amendment privilege. *People v Gearns*, 457 Mich 170, 196; 577 NW2d 422 (1988), overruled on other grounds in *People v Lukity*, 460 Mich 484, 596 NW2d 607 (1999). *People v Poma*, 96 Mich App 726, 733; 294 NW2d 221 (1980). The error does not amount to a constitutional violation, however, unless "the prosecution used the witness's assertion of the Fifth Amendment privilege to create an inference that established a critical element of the state's case." *Gearns v Berghuis*, 104 FED App 517, 520 (CA 6, 2004), citing *Douglas v Alabama*, 380 US 415, 419; 85 S Ct 1074; 13 L Ed 2d 934 (1965). Here, Jones did not assert a Fifth Amendment privilege in the jury's presence, and his refusal to testify did not address any particular element of the prosecutor's case. The prosecutor did not question Jones when Jones refused to testify. Accordingly, no constitutional violation occurred.

Affirmed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald