

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELANDRICK SHERARD CLARK,

Defendant-Appellant.

UNPUBLISHED

October 20, 2009

No. 286020

Genesee Circuit Court

LC No. 07-021560-FC

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant Delandrick Clark appeals as of right his jury convictions of two counts of first-degree felony murder,¹ two counts of assault with intent to rob while armed,² carrying a concealed weapon (“CCW”),³ being a felon in possession of a firearm,⁴ and possession of a firearm during the commission of a felony.⁵ The trial court sentenced Clark as a habitual offender, fourth offense,⁶ to concurrent prison terms of life imprisonment for each murder conviction, 792 months to 100 years’ imprisonment for each assault with intent to rob conviction, and 120 to 240 months’ imprisonment each for the felon in possession and CCW convictions. The trial court also sentenced Clark to a two-year term of imprisonment for the felony-firearm conviction, to be served consecutive to all sentences except the CCW sentence. We affirm Clark’s convictions, but remand for resentencing.

I. Basic Facts And Procedural History

Clark’s convictions arise from the shooting deaths of Tyrus Branch and Tracie Sanders. At trial, Jaquais Wilson and Jeffery Kirkland both testified that they were in a car with Clark and

¹ MCL 750.316(1)(b).

² MCL 750.89.

³ MCL 750.227.

⁴ MCL 750.224f.

⁵ MCL 750.227b.

⁶ MCL 769.12.

codefendant Dean Thomas when the four of them saw a parked Cadillac with two occupants. According to Wilson and Kirkland, Clark and Dean Thomas decided to rob the occupants of the Cadillac. Clark obtained a .380 caliber gun from Wilson, and then he and Dean Thomas left the car to commit the robbery. Kirkland and Wilson decided not to participate, so they left the area.

Several shots were fired into the Cadillac, and Branch and Sanders were both killed. The police recovered spent shell casings from both a .380 caliber firearm and a nine-millimeter firearm at the scene. Witness Adrian Thomas testified that Clark told him after the offense that he and Dean Thomas had “tried to rob a guy,” that Clark had a .380 caliber firearm that he fired during the offense, and that Clark had killed Branch and Sanders. Clark also gave a statement to the police in which he admitted his involvement in the offense.

II. Prosecutorial Misconduct

A. Standard Of Review

Clark argues that the prosecutor improperly vouched for the credibility of Kirkland, Wilson, and Adrian Thomas at trial, and that the prosecutor’s conduct denied him a fair trial. Clark did not object to the prosecutor’s conduct at trial, however. Therefore, we will only review Clark’s claims for plain error.⁷

B. Analysis

A prosecutor may not vouch for the credibility of a witness by suggesting that she has some special knowledge that a witness is testifying truthfully.⁸ But a prosecutor may argue from the facts that the defendant or another witness is worthy or not worthy of belief.⁹

This case is distinguishable from the cases cited by Clark: *People v Smith*,¹⁰ *People v Erb*,¹¹ and *People v Humphreys*.¹² Unlike those cases, the challenged conduct here did not involve unsupported assurances by the prosecutor or the police that witnesses or evidence was reliable; nor did the prosecutor suggest that she had some special knowledge, not presented at trial, that the witnesses were truthful or that Clark was guilty. Rather, the challenged comments here were made in reference to the evidence at trial. In particular, the prosecutor’s characterization of Wilson as the “least culpable” person involved was not based on some unspecified personal knowledge, as opposed to the objective evidence. Further, it was not plain error for the prosecutor to elicit Officer Angus’s explanation for why Kirkland was not charged,

⁷ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

⁸ *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

⁹ *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

¹⁰ *People v Smith*, 158 Mich App 220; 405 NW2d 156 (1987).

¹¹ *People v Erb*, 48 Mich App 622; 211 NW2d 51 (1973).

¹² *People v Humphreys*, 24 Mich App 411; 180 NW2d 328 (1970).

given that Clark had previously suggested, in his cross-examination of Kirkland, that Kirkland was not charged only because he agreed to testify against Clark. The prosecutor had a right to respond to that testimony by eliciting testimony from Officer Angus that Kirkland was not charged because the police investigation did not reveal evidence that he was involved in the crime. Officer Angus's explanation was based on facts in evidence at trial, not on some unspecified personal belief. Thus, there was no error.

To the extent that it was improper for the prosecutor to elicit from Officer Angus that Wilson later told "the truth," this isolated occurrence did not affect Clark's substantial rights. There was objective evidence to support Wilson's version of the offense, including recovery of the guns involved in the crime and Clark's own statement that he used a .380 caliber firearm that he fired into the car. Further, the trial court later instructed the jury that it was the sole judge of credibility, that it was to decide the case on the basis of the evidence at trial, and that the lawyers' questions, remarks, and statements were not evidence. These instructions were sufficient to protect Clark's substantial rights.¹³

Moreover, the prosecutor's statements in closing argument that the prosecution's witnesses were credible were based on the evidence at trial and, therefore, were not improper.

III. Effective Assistance of Counsel

A. Standard Of Review

Clark argues that his defense counsel was ineffective for failing to request the cautionary instruction regarding accomplice testimony.¹⁴ Because Clark did not raise an ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing, our review of this issue is limited to mistakes apparent from the record.¹⁵

B. Analysis

To establish ineffective assistance of counsel, the burden is on Clark to show that counsel made an error so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and that the deficient performance so prejudiced the defense as to deprive Clark of a fair trial.¹⁶

Although we agree that a CJI2d 5.6 instruction would have been appropriate in this case, we conclude that Clark was not prejudiced by the absence of the instruction. The instruction would have advised the jury to view an accomplice's testimony with caution, and to consider

¹³ See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

¹⁴ CJI2d 5.6.

¹⁵ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

¹⁶ *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

whether it may have been motivated by any promises or consideration the accomplice may have received, or whether the testimony may have been influenced because of the accomplice's own interests or biases. Apart from CJI2d 5.6, the trial court instructed the jury that when evaluating the credibility of witness testimony generally, it should consider whether the witness had a personal interest in the outcome of the case, whether any promises had been made that could affect the testimony, and whether the witness had any special reason to tell the truth or a special reason to tell a lie. The trial court's instruction covered the basic points mentioned in CJI2d 5.6 and sufficiently advised the jury of the salient factors it should consider when evaluating the witnesses' testimony. Therefore, Clark has not established the requisite prejudice to prevail on a claim of ineffective assistance of counsel.

IV. Prior Consistent Statements

A. Standard Of Review

At trial, the prosecutor introduced Wilson's prior police statements implicating Clark in the offense, which were consistent with Wilson's trial testimony. Clark argues that reversal is required because Wilson's prior statements were inadmissible hearsay under MRE 801(c). Because Clark did not object to the challenged testimony at trial, this issue is unpreserved. Unpreserved claims of evidentiary error are reviewed for plain error affecting substantial rights.¹⁷ Clark also argues that defense counsel was ineffective for failing to object to Wilson's prior statements. Our review of this argument is limited to mistakes apparent from the record.¹⁸

B. Analysis

We disagree with the prosecutor's position that the prior statements were admissible under MRE 801(d)(1)(B). That rule of evidence provides that a statement is not hearsay if the declarant is subject to cross-examination concerning the statement and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." Prior consistent statements have "limited admissibility to support the credibility of a witness who has allegedly been influenced to show that the witness told the same story before the influence was brought to bear or to rebut evidence that a prior inconsistent statement was made."¹⁹ Statements made after the motive for fabrication arose are not admissible under the hearsay exception in MRE 801(d)(1)(B).²⁰ In this case, none of Wilson's prior consistent statements were made until after he was charged with murder, the event that gave rise to a possible motive for him to fabricate his testimony. Nevertheless, admission of the statements did not affect Clark's substantial rights.

¹⁷ *Carines, supra* at 763.

¹⁸ *Ginther, supra* at 443-444; *Williams, supra* at 414.

¹⁹ *Smith, supra* at 227.

²⁰ *People v McCray*, 245 Mich App 631, 642; 630 NW2d 633 (2001).

Further, Clark has not overcome the presumption that defense counsel did not object to the statements as a matter of trial strategy. The defense position at trial was that Wilson fabricated his testimony implicating Clark in the offense in exchange for leniency against himself. The evidence that Wilson gave a prior statement, consistent with his trial testimony, only after he was promised leniency and the prosecution agreed not to prosecute him as an adult, tended to support the defense theory that Wilson's trial testimony was not credible because it was influenced by improper considerations. Therefore, Clark has not established that the evidence affected his substantial rights or that defense counsel was ineffective for not objecting to the evidence.

V. Cumulative Error

Clark argues that the cumulative effect of the many errors in this case deprived him of a fair trial. Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal.²¹ In making this determination, only actual errors are aggregated to determine their cumulative effect.²²

As discussed previously, any errors that did occur were not prejudicial. The prosecutor's statements and questioning were based on the evidence and, therefore, were not improper. Although a cautionary instruction regarding accomplice testimony would have been appropriate, the substance of that instruction was covered by the trial court's remaining jury instructions. And although Wilson's prior consistent statements did not qualify for admission under MRE 801(d)(1)(b), they tended to underscore the defense theory that Wilson's trial testimony should be rejected as noncredible. Thus, the cumulative effect of the alleged errors did not deny Clark a fair trial.

VI. Sentencing

Plaintiff concedes that Clark is entitled to be resentenced because he was improperly sentenced as a fourth habitual offender, given that his habitual offender status was improperly based on a conviction for an offense that occurred after the offense of which he was convicted in this case. The subsequent conviction could not be used for enhancement under MCL 769.12. Accordingly, we vacate Clark's sentences and remand this case for Clark to be resentenced as a third habitual offender. Further, as plaintiff also concedes, because the first-degree murder charge was the only listed underlying felony for the felony-firearm charge in the information, Clark's felony-firearm sentence can be consecutive only to his sentences for the murder convictions.²³

²¹ *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984).

²² *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002).

²³ *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000).

We affirm Clark's convictions, but we vacate his sentences and remand the case for the trial court to resentence Clark in accordance with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ William C. Whitbeck

/s/ Douglas B. Shapiro