STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 29, 2009
V	No. 284888 Wayne Circuit Court
GREGORY ALLAN JONES, Defendant-Appellant.	LC No. 06-002878-FC

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

The trial court convicted defendant of second-degree murder, MCL 750.317, possession of a firearm by a person who has been convicted of a felony, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced, as a third habitual offender, MCL 769.11, to 33 to 50 years in prison for the murder, three to five years in prison for possession of a firearm by a felon, and two years in prison for possessing a firearm while committing a felony. Defendant appeals by right. We affirm.

Defendant shot Recarro Chappell (the victim), allegedly because he thought that the victim was trying to steal his vehicle. The victim died of multiple gunshot wounds. The medical examiner determined that the manner of death was homicide. There were no eyewitnesses to the killing. Therefore, most of the evidence was circumstantial, and included statements defendant made after the shooting.

Three prosecution witnesses testified that they heard shooting in their neighborhood, and that shortly thereafter, defendant asked them to come and look at a dead body in a neighborhood alley, to see if they could identify the deceased. Defendant said alternatively that he shot at the victim because he thought the victim was stealing his car, and that he shot near where he thought the victim had been and accidentally shot the victim. Several witnesses testified that defendant apologized when the defendant learned that some of them had been friends with the victim. Several witnesses also testified that defendant told them not to say anything about the shooting, and the witnesses acknowledged being afraid to tell the authorities, because they feared that the defendant might retaliate against them. One of these witnesses told another witness that a person admitted to him that he shot the victim, but this witness denied that defendant had made that statement to him.

Defendant's first argument on appeal is that the trial court committed error requiring reversal by giving the jury a coercive instruction. We disagree. As defendant failed to properly preserve this issue for appeal by making an objection to the questioned jury instruction, *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000), we review his claim for plain error affecting a his substantial rights, meriting reversal only if he is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, *People v Newton*, 257 Mich App 61, 65; 665 NW2d 504 (2003).

The jury wrote a note to the trial court inquiring what it should do a juror refuses to make a decision either way. The trial court responded by instructing the jury:

> You took an oath, ladies and gentlemen, as jurors to make a decision one way or the other. If someone is refusing to deliberate, then they are not following their oath. They are required to deliberate. And as far as deliberations are concerned, you will be deliberating as long as the trial took, and so that will be about another five days.

Defendant argues that the instruction was unduly coercive because it (1) deviated from the standard deadlocked jury instruction, (2) called for the jury to render a decision as part of their civic duty, and (3) threatened to require the jury to deliberate for an unreasonable length of time.

A jury instruction that deviates substantially from a standard instruction is improper if it is unduly coercive. *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984). A jury instruction is unduly coercive if it (1) can "cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement," (2) "required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals," and/or (3) "calls for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure of purpose." *Id*. at 314, 316. Jury instructions are viewed as a whole, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant, and fairly represented to the jury the issues tried. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994).

First, the jury never informed the trial court that it was deadlocked. Therefore, the trial court was not required to give a deadlocked-jury instruction. Further, we conclude that the questioned instruction did not call for the jury, as part of its civic duty, *to reach a unanimous verdict*, as the instruction merely stated that the jury was "required to deliberate" and that each juror took "an oath . . . to make a decision *one way or the other*." Finally, where the trial court instructed the jury that it "will be deliberating as long as the trial took, and so that will be about another five days," we conclude that the trial court's instruction did not amount to a threat to the jury that it would have to deliberate for five days, but instead, was an effort to point out the need for the jury to engage in full-fledged deliberations, which might not yet have occurred in the three and a half hours they had then deliberated. Accordingly, the instruction did not constitute plain error. *Holt, supra* at 116.

Defendant's next argument on appeal is that the trial court committed error requiring reversal when it admitted Marvin Wilburn's[1] prior inconsistent statements into evidence. We disagree. As regards Wilburn's prior inconsistent statements *to the police*, defendant properly preserved this argument, by objecting to their admission, *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004), but defendant failed to properly preserve his argument regarding the admission of Wilburn's prior inconsistent statements to Henry Nash, the victim's brother, *id*. We review defendant's preserved argument for an abuse of discretion, *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998), and his unpreserved argument for plain error affecting his substantial rights, and will reverse, on the latter, only if defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999). In addition, the harmless error statute, MCL 769.26, presumes that a preserved, nonconstitutional error is not a ground for reversal unless, after an examination of the entire cause, it affirmatively appears that it was more probable than not that the error was outcome-determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

Prior inconsistent statements, admissible to impeach the credibility of a witness, are not admissible as substantive evidence (i.e., to prove the truth of the statements), unless they are admissible under MRE 801(d)(1). *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Hearsay is an out-of-court statement, offered in evidence, to prove the truth of the assertion. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997).

Jamond Jones (the victim's best friend) testified that defendant approached him and Wilburn the day after the killing, and told them that he had shot the victim. Wilburn testified that he was never approached by defendant, but by someone named "Labron," the day after the shooting, and that "Labron" asked him if he would go look at the body, because he, Labron, thought that he might have shot the victim. Wilburn added that after he returned from looking at the body, this person, allegedly named "Labron," was gone, and he never saw him again. In relevant part, Wilburn further testified that although he had spoken with Nash a couple of days after the homicide, he never mentioned defendant to Nash, insisting that he only told Nash that "*somebody*" approached him the day after the shooting, and told him that he had shot the victim.

In response to Wilburn's testimony, the prosecution introduced prior inconsistent statements by Wilburn, made to the police, indicating that Wilburn spoke to "Labron" *after* Wilburn looked at the dead body, and "Labron" informed him that he shot the victim, because he thought the victim was trying to steal his vehicle. Also, Wilburn's prior statements to the police implied that the man who informed him that he shot the victim might have been defendant, because he told the police that both defendant and "Labron" looked like the man who had spoken to him.

The prosecution also called Nash as a rebuttal witness. Nash testified to prior inconsistent statements made by Wilburn, a few days after the killing, in which Wilburn informed Nash that *defendant* approached him the day after the incident, and asked him

[1] Marvin Wilburn is the friend of Jammon Jones, who was the victim's best friend.

(Wilburn) if he would look at the dead body in the alley, and that after Wilburn returned from looking at the body, defendant informed Wilburn that he had shot the victim.

"The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculpate the defendant," so long as the statement is not used "under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case." *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997). Here, although the questioned statements certainly inculpated defendant,[2] the statements were nonetheless properly admitted to impeach Wilburn's credibility, *Kilbourn, supra* at 682, and their admission was neither an abuse of discretion nor plain error.

Defendant also argues that he was denied his right to a fair trial by misconduct of the prosecutor. We disagree. Since defendant failed properly to preserve this argument for appeal by objecting, *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999), we review defendant's argument for plain error affecting his substantial rights, and we will reverse only if the plain error caused the conviction of an innocent defendant, or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the defendant's innocence, *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

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). "Prosecutors cannot make statements of fact unsupported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

Defendant challenges the prosecutor's opening statement and closing argument remarks that defendant was bragging about committing the charged crime, as well as the prosecutor's closing argument remarks that defendant was threatening witnesses. Defendant argues that the evidence did not support these remarks.

There was testimony that defendant approached Wilburn and Jamond, telling them that he killed the victim, and asking them if they would go look at the victim's dead body to see if they could identify it. At a later point in time, defendant approached Jamond again, in the presence of Jamond's mother and sister, and again openly discussed the fact that he had killed the victim. This evidence could lead a reasonable factfinder to infer that defendant was bragging about committing the crime, and the prosecutor's opening statement remarks were legitimate comments about what the evidence might show.

There was also testimony that Jamond did not immediately tell the police about what defendant had told him, until he moved to another residence, because he was scared of

[2] This is especially true of Wilburn's statements to Nash, given that (1) Wilburn had testified inconsistently with the questioned statements, (2) his credibility was at issue, and (3) he had provided other relevant testimony for which his credibility was at issue, namely his testimony that corroborated parts of Jamond Jones's testimony.

defendant, who had told him not to tell anyone what he (defendant) had said to him. Jamond's mother and sister also testified that they had heard defendant tell Jamond not to say anything to anyone. Further, Wilburn initially refused to tell the police the name of the person who approached him and asked him to look at the dead body, stating that he was scared. Furthermore, when Wilburn told Nash about the man who approached him, Wilburn told Nash not to say anything to anyone, because he was scared of what the shooter might do to him if word got out that he was talking.

Even if this evidence was not sufficient to reasonably lead an individual to infer that defendant threatened witnesses not to say anything about what he had told them, the remaining evidence was sufficient to support the guilty verdict such that the remarks did not deny defendant of his right to a fair and impartial trial, nor amount to plain error affecting his substantial rights. *Thomas, supra* at 453-454; *Schultz, supra* at 710.

Defendant also challenges his sentence, arguing that the trial court abused its discretion when it scored ten points under prior record variable (PRV) 6. We disagree. We review a sentencing court's scoring of a defendant's guidelines to determine whether the sentencing court properly exercised its discretion, and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

PRV 6 is properly scored at ten points if, at the time of the crime, the offender is on parole, probation, or delayed sentence status, or on bond awaiting adjudication or sentencing for a felony. MCL 777.56(1)(c). On appeal, defendant claims, for the first time, that he was not on probation at the time he committed these crimes. Defendant's presentence investigative report (PSIR) indicated that, at the time of these crimes, the court computer and a database containing information about parolees, probationers and past prisoners indicated that defendant was on probation supervision, stating the docket number from another felony case. Although, as noted by defendant, his PSIR also indicates that defendant's probation file could not be located, nor, at the time the report was completed, could it be determined who was supervising defendant's probation, the report further indicates that "[*t]here is no indication of discharge or closure*" of the probation for the prior felony. Based on this information, which was before the trial court and part of the official court database, we conclude that the trial court did not abuse its discretion when it scored PRV 6 at ten points.

Defendant's final argument on appeal is that he was denied his constitutional right to counsel, because he did not receive effective assistance of counsel. Defendant asserts that his trial attorney was ineffective because he (1) failed to object to the trial court's jury instruction regarding deliberation, (2) failed to object to the prosecutor's allegedly improper remarks, and (3) failed to object to the scoring of ten points for PRV 6. Again, we disagree. When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing was not previously held, we conduct a de novo review of the existing record. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

As previously discussed, the trial court's jury deliberation instruction was proper, as were the prosecutor's remarks, and the trial court properly scored PRV 6 at ten points. Accordingly, any objections to these actions would have been futile. Therefore, defendant's constitutional right to the counsel was not infringed. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder