STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2010
v	No. 286105 Wayne Circuit Court
LOVELL FINLEY, Defendant-Appellant.	LC No. 07-015104-FC

Before: FORT HOOD, P.J., and SAWYER and DONOFRIO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of felonious assault, MCL 750.82, one count of possession of a firearm during the commission of a felony, MCL 750.227b, one count of assault (domestic), MCL 750.81(2), and one count of reckless discharge of a firearm, MCL 752.863a. Additionally, defendant was acquitted on two counts of assault with intent to commit murder, MCL 750. 83. He was sentenced to 90 days in jail on the assault and reckless discharge convictions, 158 days in jail on the felonious assault convictions and to the mandatory two years in prison on the felony-firearm conviction. He now appeals and we affirm.

Defendant's convictions arise out of a domestic dispute with his live-in girlfriend, Leslie Smith. On the evening in question, an argument ensued between the couple. Although the couple apparently resolved the argument, Smith went outside to "get some air." Meanwhile, the second victim, Cpl. Doulette arrived at the scene, responding to a disturbance call. He made contact with Smith, who reported an argument with her boyfriend, but indicated that there was no violence. While that conversation was winding down, they heard several gunshots from the general direction of defendant's house, one of which whizzed by the officer's head.

Before considering whether there was sufficient evidence to support the felonious assault conviction as to Cpl. Doulette, we turn first to whether there was sufficient evidence to support the felonious assault conviction as to Smith. We review this issue de novo and determine whether, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find each element of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Defendant argues that there was insufficient evidence to establish that he intended to assault Smith. That is, that he shot at Smith rather than merely shooting in the air. But the facts produced at trial was that Smith and defendant had recently had an argument, that the police were responding to a disturbance call, that Smith was emotionally upset when speaking with the

officer, and that the shots struck branches and leaves on trees within several feet of Smith and the officer. A rational trier of fact could reasonably conclude that defendant did, in fact, intentionally shoot in Smith's direction, either intending to hit her or, at a minimum, put her in fear of being shot.

As to Cpl. Doulette, defendant presents an interesting argument that the evidence was insufficient to support a conviction of felonious assault as to Doulette. He argues that the evidence presented at trial does not support a conclusion that he was aware of the presence of Doulette. Therefore, it cannot be established that he intended to assault Doulette. Accordingly, any conviction with respect to Doulette would have to be based upon a theory of transferred intent. Defendant argues that there can be no transferred intent if the unintended victim was not injured as a result of the assault.

The question whether the doctrine of transferred intent can be applied where the unintended victim was not injured, that is, whether it requires a battery, is an interesting one, but it is one that we need not answer in this case. A careful review of the jury instructions in this case reveals that, while the jury was instructed on the theory of transferred intent as to Cpl. Doulette and the assault with intent to murder charge (of which defendant was acquitted), the jury was not so instructed on the felonious assault charge. Furthermore, we are not convinced that the jury could not have concluded that defendant did not know of Cpl. Doulette's presence. As discussed above with respect to the assault on Smith, we are satisfied that there was sufficient evidence to conclude that defendant fired his weapon at Smith. It necessarily follows that if the jury concluded that defendant knew where Smith was standing and fired at her, the jury could also conclude that defendant was aware that Doulette was standing next to her.

Defendant next argues that the trial court erred in allowing the prosecutor to play for the jury portions of tape-recorded telephone conversations defendant made from the jail. We review evidentiary rulings for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996).

Defendant specifically objects to a portion of a conversation he had with an individual identified as "Champ" and a later conversation with Smith regarding Champ. Both conversations dealt with the possibility of Champ testifying on defendant's behalf that he (Champ) was present and could corroborate defendant's claim that he had fired the gun in the air in celebration rather than at Smith and Doulette. Defendant's argument that the statements made by Champ and Smith are hearsay fail because they were not offered to prove the truth of the matter asserted. MRE 801(c). The prosecution was not attempting to prove that Champ was present or, for that matter, that defendant merely fired the gun in the air rather than at Smith and Doulette. Rather, the prosecution argues, the collective purpose of use of the conversation excerpts was to establish that defendant was coaching potential witnesses to support defendant's proffered theory of the case. Accordingly, we are not persuaded that the trial court abused its discretion in admitting the conversation excerpts.

Defendant also raises a hearsay objection to the testimony of Sgt. Mann that he responded to the scene on a radio run based on a report from Cpl. Doulette that "there had been shots fired at him" and testimony by Cpl. Nicklowitz that he was responding to a report from Cpl. Doulette that there were "shots fired in his direction." This was a relatively minor point of testimony and was not stressed by the prosecution in closing argument. Furthermore, Doulette

testified as to the events that gave rise to his report over the radio, thus supplying the same information to the jury. Accordingly, we conclude that even if admission of the testimony was erroneous, any error was harmless beyond a reasonable doubt. *People v Van Tassel*, 197 Mich App 653, 655; 496 NW2d 388 (1992).

Defendant raises a third hearsay argument, this time regarding testimony by Sgt. Mann as to a statement made in his presence by Smith. Specifically, Mann testified that, while talking with Smith, Smith was on her cell phone to defendant and Smith stated, "I was talking to a police officer and somebody shot at us." A statement qualifies as an excited utterance under the hearsay rule if there was a startling event and the resulting statement was made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The statement arose out of the gunshots and Mann testified that Smith was "terrified" at the time she made the statement. We are not persuaded that the trial court abused its discretion in admitting the statement.

Defendant next argues that the trial court impermissibly allowed the prosecution to treat Smith as a hostile witness and ask leading questions because Smith was not demonstrating any hostility during her testimony. This argument overlooks the fact that MRE 611(d)(3) permits leading questions when a witness is "identified with an adverse party." Given that Smith was engaged to defendant at the time of her testimony, it is reasonable to have classified her as a witness "identified with an adverse party." The mode of interrogation is within the control of the trial court and is reviewed for an abuse of discretion. See *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995). We are not persuaded that the trial court abused its discretion.

Returning to the issue of the excerpts from the recorded jail telephone conversations, defendant now argues that the trial court erred in refusing to allow him to offer an additional snippet of a conversation between defendant and Smith. In support of his position, defendant cites the Rule of Completeness under MRE 106, which provides that where a party introduces a part of a written or recorded statement, the other party "may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

The additional excerpt that defendant wanted played for the jury was fairly brief and rather self-serving, the primary aspect of it that appears helpful to defendant being his statement to the victim that "to be honest, you know, I didn't see you or him [the other victim]. You know, I really didn't." This issue consumed a fair amount of time at trial, with defendant having raised it towards the end of trial. The problem defendant faces on appeal is two-fold. First, defendant admitted in the trial court that the snippet was inadmissible hearsay if offered by him. And, second, his primary argument in the trial court was that he did not want the jury left with the impression that the snippet introduced by the prosecutor was the entirety of the recorded conversations. The trial court addressed the issue by instructing the jury that there were 17 or 18 hours of conversations and that they had only heard "snippets of conversation." From the transcript, it appears that defendant was satisfied at trial with this resolution.

Defendant not only appears to have waived this issue by getting the relief that he requested in the trial court (that the jury be informed that what they heard was a small part of a much larger set of conversations), but more importantly we believe that the trial court properly exercised its discretion in ruling on this evidentiary matter. To have played the "snippet"

requested by defendant would not have provided completeness under MRE 106, but would merely have allowed defendant to testify as to his knowledge on the night of the crime without actually having to take the stand and be subject to cross-examination.

Defendant next argues that he was denied a fair trial by various instances of prosecutorial misconduct. Specifically, defendant argues that the prosecutor made improper comments on his failure to testify, improperly vouched for the credibility of the police, improperly argued facts not in evidence, and improperly compared the burden of proof to producing enough evidence to earn a grade of "C." Because defendant did not object to any of these matters, we review this issue for plain error. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Under the plain error standard, reversal is required "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, independent of defendant's innocence." *Id.* at 448-449. Moreover, we will not reverse where a curative instruction could have alleviated any prejudice. *Id.* at 449. In this case, we are satisfied that any error presented in this issue could easily have been alleviated by an appropriate curative instruction. Therefore, we conclude that there is no plain error requiring reversal.

Next, defendant argues that he was deprived of a fair trial by the omission of certain standard criminal jury instructions. But not only did defendant not object at trial, he affirmatively stated his approval of the instructions. Accordingly, the issue is waived. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004).

Defendant next offers various arguments that the prosecution improperly introduced evidence that marijuana had been found in defendant's bedroom. Defendant failed to preserve this issue for review by objecting in the trial court. Accordingly, we review the matter for plain error. Plain error requires a showing of prejudice, which requires a showing that the error affected the outcome of the proceedings. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Given the relatively minor nature of this testimony, we are not persuaded that it affected the outcome of the trial.

Finally, defendant argues that the cumulative effect of the errors require reversal. There is no accumulation of harmless errors in this case that aggregate into sufficient prejudice to warrant a new trial. *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002).

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio