STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 24, 2012
v	No. 296492 Wayne Circuit Court
GAVIN KEITH CULLENS, Defendant-Appellant.	LC No. 08-005721-FC

Before: DONOFRIO, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The jury was unable to reach a verdict on additional charges of first-degree felony murder, MCL 750.316(1)(b), and carrying a concealed weapon (CCW), MCL 750.227.[1] The trial court sentenced defendant to concurrent prison terms of 12 to 20 years for the assault with intent to do great bodily harm conviction, and 5 to 10 years each for the felonious assault and felon-in-possession convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from a shooting incident in Detroit on April 14, 2008, during an apparent failed robbery. The prosecution's theory at trial was that defendant went to an apartment in Detroit, while armed with a handgun, in an attempt to rob Anthony Baker and Raphael Brooks, who were selling drugs out of the apartment. According to Baker, defendant pulled out his gun and pointed it at Baker, prompting Brooks to shoot at defendant. Defendant returned the gunfire, wounding Baker and killing Brooks. Baker heard defendant yell for help and then additional gunfire erupted from outside the apartment, from a person who appeared to be assisting defendant. Defendant was shot several times and then transported by an unidentified person to a hospital. Baker was shot several times. He identified defendant as the person who shot him. The defense theory at trial was that defendant was in the wrong place at the wrong

[1] Defendant was later acquitted of felony murder at a second trial, and the prosecutor agreed to dismiss the additional CCW count.

time. Defendant testified at trial and admitted going to the apartment to purchase marijuana, but denied intending to rob anyone and argued that he was a shooting victim himself when he was caught in crossfire between Brooks and another shooter.

I. BAKER'S INCONSISTENT TESTIMONY

Defendant first argues, through both appellate counsel and in a pro se Standard 4 brief,[2] that the prosecutor engaged in misconduct by knowingly allowing perjured testimony from Anthony Baker at trial. Defendant did not raise this issue in the trial court, leaving the issue unpreserved. This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011).

In *People v Aceval*, 282 Mich App 379, 389-390; 764 NW2d 285 (2009), this Court explained:

> It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935); *Pyle v Kansas*, 317 US 213, 216; 63 S Ct 177; 87 L Ed 214 (1942); *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). If a conviction is obtained through the knowing use of perjured testimony, it "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976); see also *Giglio v United States*, 405 US 150, 154–155; 92 S Ct 763; 31 L Ed 2d 104 (1972); *Napue*, *supra* at 269–272. Stated differently, a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment. *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982); *Giglio*, *supra* at 154–155; *People v Cassell*, 63 Mich App 226, 227–229; 234 NW2d 460 (1975).

In this case, defendant's claim that Baker presented false testimony at trial is based on apparent inconsistencies between his trial testimony and his prior preliminary examination testimony, principally concerning the origin of Baker's lower body wounds. However, perjury consists of a willful false statement made under oath. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). Mere inconsistencies in testimony do not establish perjury. See *People v Arntson*, 10 Mich App 718, 724; 160 NW2d 386 (1968); see also *People v Cash*, 388 Mich 153, 162; 200 NW2d 83 (1972) (perjury is established by showing the truth of the contradiction; it is not enough simply to contradict it).

There are many explanations for Baker's apparently inconsistent testimony. Baker may have given false testimony at the preliminary examination, he may have been mistaken about

[2] See Supreme Court Administrative Order No. 2004-6, Standard 4.

what actually occurred, his memory may have changed between the preliminary examination and trial, or he may have misspoke because he was confused or misunderstood the questioning at either the preliminary examination or at trial, resulting in seemingly inconsistent testimony. Moreover, there is no claim that the defense did not have access to the preliminary examination transcript and, thus, there is no basis to conclude that any inconsistencies were kept hidden from the defense. The mere inconsistencies in Baker's testimony, standing alone, do not establish that his trial testimony was perjured, let alone that the prosecutor knowingly used perjured testimony.

Defendant alternatively argues that defense counsel was ineffective for not cross-examining Baker about the inconsistencies between his preliminary examination testimony and trial testimony. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to errors apparent from the record. *Brown* 294 Mich App 377 at 382. To establish ineffective assistance of counsel, "defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

Decisions regarding how to question witnesses are presumed to be matters of trial strategy that this Court will not second-guess with the benefit of hindsight. *People v Petri*, 279 Mich App 407, 411, 413; 760 NW2d 882 (2008); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The principal issue for the jury to resolve at trial was the credibility of the conflicting accounts of how the episode unfolded, i.e., whether defendant initiated the shooting by producing a gun and threatening Baker and Brooks (as Baker claimed), or whether the shooting was initiated by Baker's production of a gun after another armed man approached the door from the outside (as defendant claimed). According to both versions, however, gunshots were fired in the direction of defendant and Baker from both Brooks and the man outside the apartment. Further, Baker never clearly indicated at trial who was responsible for his lower body wounds. Therefore, defense counsel may have decided that it was not necessary to further cross-examine Baker on that subject, particularly where evidence regarding the origin of his lower body wounds would not necessarily have been probative of which version of events was more credible. Defendant has not overcome the presumption that counsel's actions in this regard were based on sound trial strategy.

Furthermore, defendant has not established a reasonable probability that further cross-examination of Baker concerning the origin of his wounds would have changed the result in this case. *Petri*, 279 Mich App at 411, 413-414. Baker's allegedly inconsistent preliminary examination testimony related only to the origin of his several lower body wounds. That testimony would not have impeached Baker's trial testimony that defendant was responsible for the original gunshot wound to Baker's shoulder. Moreover, the jury's verdict convicting defendant of the lesser offense of assault with intent to do great bodily harm, and rejecting the original higher charge of assault with intent to commit murder, reflects an unwillingness to hold defendant responsible for the multiple gunshot wounds sustained by Baker. Therefore, defendant has not established that he was prejudiced by defense counsel's failure to impeach Baker with the inconsistencies in his preliminary examination testimony.

II. CLOSURE OF THE COURTROOM

Defendant argues that his constitutional right to a public trial was violated when the trial court closed the courtroom to the public during jury voir dire. See *Presley v Georgia*, 558 US ___; 130 S Ct 721, 724; 175 L Ed 2d 675 (2010). There was no objection to any closure at trial, leaving this issue unpreserved. This Court reviews unpreserved claims of constitutional error for plain error affecting defendant's substantial rights. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). There is no indication in the record that the courtroom was ever closed. Further, although defendant filed a motion to remand with respect to this issue, the motion was not supported by a proper offer of proof showing the need for a remand. The motion merely indicated that on information and belief, it was defendant's recollection that the courtroom was closed during voir dire, but no affidavit from defendant was submitted. The motion also indicated that trial counsel had no recollection whether the courtroom was closed. On this record, defendant has not demonstrated either a plain error or shown that remand for further proceedings is warranted.

III. DEFENDANT'S PREARREST SILENCE

Next, defendant argues that the prosecutor violated his right to due process by offering, as substantive evidence, testimony regarding his refusal to speak to a police officer who attempted to interview him while he was a patient at the hospital. Defendant concedes that he did not preserve this issue by objecting to the officer's testimony at trial, therefore this Court's review is limited to plain error affecting defendant's substantial rights. *Bonilla-Machado*, 489 Mich App 412 at 417. Defendant alternatively argues, however, that trial counsel was ineffective for not objecting to the officer's testimony.

Relying on *Combs v Coyle*, 205 F3d 269 (CA 6, 2000), defendant argues that evidence of his prearrest refusal to speak to the officer was not admissible. In *Combs*, the Sixth Circuit Court of Appeals held that the prosecutor violated a defendant's Fifth Amendment right against self-incrimination by commenting on the defendant's pre-*Miranda*[3] silence as substantive evidence of guilt. However, the various federal circuit courts are divided over the issue whether custodial pre-*Miranda* silence may be used as substantive evidence of guilt. See *People v Shafier*, 483 Mich 205, 213 n 8; 768 NW2d 305 (2009). Accordingly, this Court is not bound by either line of authority. This Court has otherwise held that a defendant's silence or nonresponsive conduct is not constitutionally protected where, as in this case, it did not occur during custodial interrogation and was not in reliance on *Miranda* warnings. *People v Schollaert*, 194 Mich App 158, 164-167; 486 NW2d 312 (1992). Therefore, defendant has failed to show that the officer's testimony was clearly improper and, accordingly, has not established a plain error. Thus, defense counsel was not ineffective for failing to object to the testimony.

IV. ADMISSIBILITY OF DEFENDANT'S STATEMENT

Defendant lastly argues that defense counsel was ineffective for not moving to suppress his statement to Sergeant Hanus that was made at the hospital on the ground that it was

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

involuntary. Defendant's failure to raise this claim in the trial court limits our review to mistakes apparent from the record. *Brown*, 294 Mich App 377 at 382.

Statements of an accused made while in custody are not admissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). Whether the defendant's waiver was voluntary is determined by examining the conduct of the police. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). "[T]he voluntariness prong cannot be resolved in defendant's favor absent evidence of police coercion or misconduct." *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). In determining voluntariness, a court should consider whether the totality of the circumstances surrounding the statement indicates that it was freely and voluntarily made. *Tierney*, 266 Mich App at 708.

Contrary to what defendant argues, the record discloses that defense counsel challenged the admissibility of defendant's police statement on the ground that it was the product of police coercion and, thus, involuntary. Although defense counsel did not raise that ground in his written motion, he raised it at the suppression hearing and in a supplemental brief, and the trial court decided the issue, finding that the circumstances did not indicate that the statement was coerced. We review the trial court's decision de novo, but we will not disturb the trial court's findings of fact unless they are clearly erroneous. *People v Kowalski*, 230 Mich App 464, 471-472; 584 NW2d 613 (1998).

Defendant has not shown that the trial court erred in ruling that his statement was not coerced. Although there was evidence that defendant recently had surgery and was receiving treatment through an IV, there was no evidence of any threatening or coercive conduct by the police and no evidence at the *Walker*[4] hearing that defendant's medical condition rendered him incapable of understanding or voluntarily responding to the officer's questions. The evidence that defendant signed a consent form for a DNA sample supports the trial court's determination that defendant's statement was not coerced. Defendant told Sgt. Hanus that a woman gave him a ride to buy marijuana, and at that location he was caught in crossfire between two other people. The trial court correctly noted that "the statement in question really wasn't all that incriminating," which further weighed against a finding that the statement was coerced. We are not left with a definite and firm conviction that the trial court erred in denying defendant's motion to suppress.

Defendant also argues that his counsel was ineffective for failing to argue or present this issue differently at the *Walker* hearing. Defendant has the burden to overcome the presumption of sound strategy or show through a reasonable probability that the suppression issue would have been decided differently.

At trial, Darlene Johnson testified that defendant appeared to be in extreme pain and was in and out of consciousness when the police arrived to interview defendant at the hospital. Johnson was not called to testify at the *Walker* hearing. The decision whether to call Johnson at

[4] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

the *Walker* hearing was a matter of strategy. Defense counsel may have decided not to call Johnson because she admittedly was not present during all of the police questioning, or because he did not believe her testimony would have supported suppression. At trial, Johnson testified that defendant was "really kind of in and out" and "really couldn't talk to them much," but she also testified that defendant was able to tell the officers that he did not want to talk to them, thereby indicating that defendant was capable of responding to the officers questions. She also admitted that defendant agreed to give a DNA sample. Further, she did not offer any significant evidence of police misconduct in the manner in which the police questioned defendant, and she stated that the police were present in defendant's hospital room for only about 30 minutes, which was significantly less than the one- or two-hour period estimated by Sergeant Hanus.

At the *Walker* hearing, defense counsel may have decided to focus on the undisputed evidence of defendant's physical condition (i.e., his recent surgery, his IV treatment, and his inability to leave the hospital room because of his condition) to support the motion to suppress, rather than present likely conflicting and equivocal evidence of defendant's mental alertness and ability to comprehend and respond to the officers' questions, particularly in the absence of any strong evidence of police misconduct and the existence of defendant's written consent to a DNA sample. Defendant has not overcome the presumption of sound strategy, or shown a reasonable probability that the suppression issue would have been decided differently if defense counsel had argued and presented the issue differently at the *Walker* hearing. Thus, we reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra