STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2012
v	No. 304339 Kalamazoo Circuit Court
KENNETH ARTIST PALMORE, Defendant-Appellant.	LC No. 2010-001816-FC

Before: BECKERING, P.J., and OWENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant Kenneth Artist Palmore appeals as of right his convictions for assault with intent to do great bodily harm less than murder, MCL 750.84; possession of a firearm by a felon, MCL 750.224f; carrying a concealed weapon, MCL 750.227; assaulting, resisting, or obstructing a police officer in the course of his duty, MCL 750.81d(1); and two counts of possession of a firearm during the commission of a felony, MCL 750.227b(1). On May 10, 2011, the trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 151 to 900 months' imprisonment for the following convictions: assault with intent to do great bodily harm less than murder, felon in possession of a firearm, and carrying a concealed weapon. The trial court also sentenced defendant to 120 to 180 months' imprisonment for assaulting, resisting, and obstructing a police officer and to two years' imprisonment for each felony-firearm conviction. We affirm.

This case arose from a shooting on October 4, 2010, near Butler Court and Church Street in Kalamazoo. Officer Jeff Koch of the Kalamazoo Department of Public Safety and two construction workers in the vicinity heard three gunshots. The construction workers saw a man with a gun wearing an orange "hoodie" or sweatshirt; the man fired shots at the victim in this case and then ran away. Officer Koch saw an individual wearing an orange long-sleeved garment quickly get into a car and drive away. Additional police officers responded to the scene to assist the victim, and the victim stated, "Jeter shot me." Officer Anthony Morgan responded to the area of the shooting and saw a maroon car driving north on Church Street. Officer Morgan saw two people in the car: London Jones, the driver, and defendant—who goes by the name "Jeter"—in the passenger seat. After Officer Morgan turned his vehicle to follow the maroon car, the car came to a stop, and defendant exited the car and ran away. Officer Morgan pursued defendant by car and on foot and ultimately took defendant into custody. After securing

defendant, Officer Morgan searched the route of the chase for evidence and, within two minutes, located a handgun and a magazine containing bullets.

Defendant first asserts that the prosecutor committed misconduct by calling London Jones to testify to use Jones's invocation of her right against self-incrimination to create an inference of defendant's guilt. We disagree.

Generally, we review prosecutorial misconduct claims on a case-by-case basis to determine whether a defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). However, we review this unpreserved issue for plain error affecting defendant's substantial rights. See *id.* A prosecutor's good-faith effort to admit evidence legitimately believed to be admissible does not constitute prosecutorial misconduct. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). However, we have recognized that "it is inherently prejudicial to place a witness on the stand who is intimately related to the criminal episode at issue, when the judge and prosecutor know that he will assert the Fifth Amendment privilege." *People v Poma*, 96 Mich App 726, 733; 294 NW2d 221 (1980). An "intimate witness" is "a person (co-defendant, accomplice, associate, etc.) likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose." *People v Gearns*, 457 Mich 170, 196-197; 577 NW2d 422 (1998), overruled on other grounds *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). To deprive defendant of a fair trial by the introduction of such a witness, the prosecutor must have made a "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." *Id.* at 188, quoting *Namet v United States*, 373 US 179, 186; 83 S Ct 1151; 10 L Ed 2d 278 (1963).

We agree with defendant's argument that London Jones was an "intimate witness." Although not a codefendant, Jones drove defendant to and from the scene of the shooting. See *id.* at 196-197. However, we disagree with defendant's argument that the prosecutor committed misconduct by calling Jones to testify. It is only misconduct for a prosecutor to call a witness whom the prosecutor *knows* will plead the Fifth Amendment. See *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977) ("A lawyer may not . . . call a witness knowing that he will claim a valid privilege not to testify."); *Poma*, 96 Mich App at 733 ("We hold that it is inherently prejudicial to place a witness on the stand who is intimately related to the criminal episode at issue, when the judge and prosecutor know that he will assert the Fifth Amendment privilege."); *People v Paasche*, 207 Mich App 698, 709; 525 NW2d 914 (1994) (finding a lawyer may not call a witness "knowing" that he will claim a privilege not to testify); *Gearns*, 457 Mich at 198-199 (noting that in an evidentiary analysis of prosecutorial misconduct good faith or knowledge of the prosecutor is the key inquiry). Nothing in the record demonstrates that the prosecutor knew that Jones intended to plead the Fifth Amendment. And defendant offers no evidence on appeal to suggest that the prosecutor had actual knowledge of Jones's intention to do so. Defendant's argument that the prosecutor *should have known* that Jones would plead the Fifth is unpersuasive. Review of the record shows that both the prosecutor and defense counsel were taken by surprise when Jones attempted to invoke her right against self-incrimination. From their perspective, Jones had no reason to invoke her right against self-incrimination because she had not been charged and was not considered a suspect.

Furthermore, the prosecutor's conduct was not a "conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." See *Gearns*, 457 Mich at 188, citing *Namet*, 373 US at 186. To the contrary, Jones stated one time that she wished to plead the Fifth Amendment; the trial court swiftly dealt with the issue outside the jury's presence; Jones then willingly testified without further incident or reference to the right against self-incrimination; and the prosecutor neither mentioned Jones's invocation of her rights nor argued that Jones's invocation gave rise to an inference of defendant's guilt. See *Namet*, 379 US at 188-189 (finding the few invocations of privilege by witnesses in the scope of the entire trial did not represent efforts by the prosecution to capitalize on witnesses' refusals to testify). Accordingly, there is no plain error.

Even assuming that plain error exists, defendant cannot establish that it affected his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because Jones ultimately testified, the jury was not left to infer defendant's guilt from her refusal to testify despite her knowledge of the facts. See *People v McNary*, 43 Mich App 134, 140; 203 NW2d 919 (1973), rev'd in part on other grounds 388 Mich 799 (1972). Rather, the jury heard Jones's complete testimony, and defendant had an opportunity to cross-examine Jones. See *Giacalone*, 399 Mich at 645 ("When an alleged accomplice invokes the privilege in the presence of the jury, prejudice arises from the human tendency to treat the claim of privilege as a confession of crime, creating an adverse inference which an accused is powerless to combat by cross-examination."). Moreover, there was substantial evidence of defendant's guilt. In particular, there was testimony that defendant went by the name "Jeter"; police responding to the scene found the victim bleeding on the street as he immediately told them "Jeter shot me." The construction workers testified that they saw a man wearing an orange sweatshirt shoot the victim; Officer Koch saw defendant wearing an orange garment. Furthermore, defendant fled the scene and the police. After defendant was apprehended, Officer Morgan recovered a gun and a magazine clip on the route where defendant fled. The gun matched a casing found at the scene of the shooting. Finally, the prosecution offered evidence for the jury to reasonably infer that defendant attempted to remove potential gunshot residue from his hand after the police apprehended him. Jones's isolated effort to assert her Fifth Amendment privilege against self-incrimination did not affect the outcome of the proceedings. See *Carines*, 460 Mich at 763.

Defendant next argues that trial counsel's failure to either object to the prosecutor's alleged misconduct or request a mistrial deprived him of the effective assistance of counsel. We disagree. For defendant to succeed on his claim of ineffective assistance of counsel, he must meet the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. Second, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Here, the prosecutor did not commit misconduct by calling Jones to testify when she had no knowledge that Jones would assert the privilege against self-incrimination. Thus, any objection by defense counsel would have been futile. "Trial counsel is not required to advocate a meritless position," *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), or "make a futile objection," *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Accordingly, defense counsel did not act in an objectively unreasonable

manner by not objecting on grounds of prosecutorial misconduct or moving for a mistrial. Defendant has not established that he was denied the effective assistance of counsel.

Affirmed.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Amy Ronayne Krause