STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2001
v	No. 218207 Wayne Circuit Court
DANNY NORWOOD, Defendant-Appellant.	Criminal Division LC No. 98-008082

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, kidnapping, MCL 750.349; MSA 28.581, assault with intent to commit murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.277b; MSA 28.424(2). He was sentenced to concurrent terms of forty to sixty years' imprisonment for the murder conviction and twenty-five to sixty years each for the assault with intent to murder and kidnapping convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erroneously allowed the prosecution to solicit, on cross-examination, testimony from defendant's wife that she was aware of defendant's prior involvement with firearms and the fact that defendant had previously been convicted of felonious assault and felony-firearm.[1] Defendant claims that this evidence was inadmissible under both MRE 609 and MRE 405(b). We find no merit to this issue.

[1] On direct examination by defense counsel, defendant's wife testified that, while she knew the decedent to always carry a gun, she had never seen him threaten anyone with it. On cross examination, the following exchange occurred:

> *Q.* Okay. Now, counsel asked you whether you knew [decedent] to carry a gun. Is that correct?
>
> *A.* Yes.

(continued…)

(…continued)

Q. Okay. And, you indicated that you'd seen him with a gun every day.

A. He carried it every day, yes, he did.

* * *

Q. Okay. Now what about Mr. Norwood? Did he ever have anything to do with guns?

A. Not that I know of. Not that I know of.

Q. You don't know of him ever having a weapon or being involved with a weapon?

A. Not with me. No, not with me.

Q. Well, I'm not asking with you.

A. Not that I have seen, no.

Q. Okay. Do you have any knowledge, though, that he has ever had a weapon?

A. No.

Following a bench conference, the prosecutor continued his cross-examination as follows:

Q. Ms. Norwood, isn't it true that during the course of your marriage with Mr. Norwood, specifically in nineteen ninety-six, he was charged with felonious assault and felony firearm? Are you aware of that?

A. I'm aware of that.

Q. Are you aware that he was convicted of felonious assault and felony firearm?

A. No, not with a firearm, no. I didn't see a firearm.

Q. I'm not asking you whether you've seen it, ma'am.

A. Okay.

Q. I'm asking you this, are you aware that he was convicted?

A. Yes I am.

(continued…)

At trial, defendant objected to the challenged testimony only on the basis that it was hearsay. An objection on one ground is insufficient to preserve an appellate attack on a different ground. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Thus, appellate relief is precluded absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999).

There is no plain error in the trial court's determination that the testimony regarding defendant's prior criminal record was not inadmissible hearsay. Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." MRE 801(c). In the instant case, the witness' personal knowledge concerning defendant's prior criminal record does not involve a statement offered to prove the truth of the matter asserted. Moreover, the prosecution was not trying to prove that defendant had a prior criminal record, it was trying to impeach Mrs. Norwood's testimony with this information. Furthermore, contrary to what defendant argues, the testimony was not offered under MRE 609, nor is that rule applicable. As the Court observed in *People v Taylor*, 422 Mich 407, 417; 373 NW2d 579 (1985), "MRE 609 is not applicable where evidence of prior convictions is offered to rebut specific testimony rather than to attack credibility in general." Defendant's reference to MRE 405(b) likewise is misplaced. Part of the prosecution's theory of the case was that defendant possessed the weapon used to kill the victim, while defendant's theory of the case was that the decedent killed himself using his own weapon. Thus, the question of who actually owned the weapon in question was a material issue in the case. Contrary to defendant's position, the questioning that led to the challenged testimony was not designed to uncover a character trait of defendant, but to refute the defense suggestion that the gun used in the shooting belonged to the victim rather than defendant. We therefore conclude that MRE 405(b) is not applicable under these facts. Accordingly, defendant has failed to show that the admission of the challenged testimony constituted plain error.

Defendant also argues that the trial court erred in denying his request for an instruction on assault with intent to commit great bodily harm less than murder as a lesser offense to assault with intent to commit murder with respect to defendant's actions toward the decedent's girlfriend. We disagree.

A trial court must instruct on a lesser included offense upon request if it is supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). There are two

(…continued)

Q. Okay. So then, you did have knowledge of Mr. Norwood having interaction in involvement with firearms in the past, aren't you (sic)?

A. Yes, not to my knowledge having seen a gun. For saying that he had it, yes. With me seeing it, no.

Q. All right. My question is not wether (sic) you'd seen it or not, but whether you had any knowledge that he had been involved with a firearm?

A. Yes. Yes.

types of lesser included felony offenses, necessarily included offenses and cognate lesser offenses. *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975). A cognate lesser offense is one which shares some common elements with and is of the same "class or category" as the greater offense, but also has elements not found in the greater. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999); *Jones, supra* at 387. Thus, the offenses must protect the same societal interests or be closely related, a concept also described as an "inherent relationship." *People v Hendricks*, 446 Mich 435, 445, 447; 521 NW2d 546 (1994); *Jones, supra* at 388.

Assault with intent to do great bodily harm is a cognate lesser offense of assault with intent to murder. *Jones, supra* at 387. A requested instruction on a cognate offense must be consistent "with the evidence and defendant's theory of the case." *People v Lemons* 454 Mich 234, 254; 562 NW2d 447 (1997). In the instant case, defendant's theory of the case did not support the requested instruction. Upon examining defendant's testimony and defense counsel's cross-examination of decedent's girlfriend, it is apparent that the defense position was that the girlfriend's statements were false and that any actual injuries she suffered resulted from a combination of accident and an attempt by defendant to "calm her down." We agree with the trial court that defendant's position was that he did not intend to harm the victim at all. Therefore, the trial court did not err in refusing to instruct on the lesser offense of assault with intent to do great bodily harm less than murder. *Id.*

Defendant also raises a number of other unpreserved issues on appeal. Because defendant failed to preserve these issues with appropriate objections at trial, appellate relief is precluded absent a showing of plain error (i.e., error that was clear or obvious) that was prejudicial (i.e., that affected the outcome of the proceedings). *Carines, supra* at 752-753, 763; *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). Moreover, even if defendant demonstrates outcome-determinative plain error, reversal is warranted only when the plain error results in the conviction of an innocent defendant or the error "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Carines, supra* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

After considering defendant's numerous unpreserved issues on appeal, we conclude that defendant has failed to show any outcome-determinative error. Viewed in context, the trial court's comments to the seven-year-old child witness do not plainly reflect an improper taint of bias or statement concerning credibility. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996); *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992). Also, the jury's oath was substantially in the form prescribed by law and, therefore, this issue does not merit relief. MCL 768.14; MSA 28.1037; MCR 2.511(G); *People v Clemons*, 177 Mich App 523, 528-529; 442 NW2d 717 (1989); *People v Pribble*, 72 Mich App 219, 225; 249 NW2d 363 (1977). The challenged remarks by the prosecutor, viewed in context, do not plainly appear improper. Indeed, the prosecutor expressly told the jury that he did not want sympathy to play any part in the jury's decision, and he also told the jury that "[t]he lawyers do not make evidence. We tell you what we think the evidence is." The prosecutor's remarks did not deny defendant his right to a fair trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Next, because the photographs that defendant challenges on appeal were probative of the manner in which the decedent was shot, a central issue in the case, and because

defendant himself moved to admit one of the photographs, plain error is not apparent from the admission of the photographs at trial. *People v Eddington*, 387 Mich 551, 562; 198 NW2d 297 (1972); *People v Zeitler*, 183 Mich App 68, 69, 454 NW2d 192 (1990); see also *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). We also reject defendant's claim that he was denied a fair trial because several jurors revealed, during voir dire, that they or family members had been victims of crime. The record indicates that several of the jurors in question were removed for cause and none of the remaining jurors indicated that they could not act fairly and impartially when deciding defendant's case. Thus, it is not plainly apparent from the record that any of the jurors were unable to act fairly and impartially. *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996). Lastly, the trial court's instruction on reasonable doubt, which was consistent with CJI2d 3.2(3), adequately conveyed the concept of reasonable doubt. *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991).

Because defendant did not move for an evidentiary hearing or a new trial based on ineffective assistance of counsel, our review of this issue is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (1999); *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). To establish ineffective assistance of counsel, defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 311; 613 NW2d 694 (2000).

Defendant has not shown that he was prejudiced by counsel's failure to object to the prosecutor's redirect examination of Richard Ivy. While the questioning led to the admission of defendant's purported police statement, that statement was consistent with defendant's trial testimony that the decedent allegedly shot himself when defendant tried to stop him. There is no reasonable probability that the outcome of the trial would have been different had that statement not been received. Next, it is not apparent from the record that defendant's wife testified about information that was privileged under MCL 600.2162(2); MSA 27A.2162. Further, because the 911 call placed by the decedent's girlfriend's son was admissible under MRE 803(1), counsel was not ineffective in failing to object to this evidence. Lastly, defendant has not shown that he is entitled to relief due to ineffective assistance of counsel based on the remaining alleged claims of error.

Finally, while it is possible that the cumulative effect of a number of errors may sometimes warrant reversal if they deprive a defendant of a fair trial, *People v Dilling* 222 Mich App 44, 56; 564 NW2d 56 (1997), we are satisfied that such is not the case here.

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Jessica R. Cooper