

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQURICE L. JACKSON,

Defendant-Appellant.

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UNPUBLISHED

March 30, 2001

No. 219820

Genesee Circuit Court

LC No. 98-003139-FC

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, carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a second habitual offender to life imprisonment for the murder conviction and 5 to 7-1/2 years' imprisonment for the CCW conviction. MCL 769.10; MSA 28.1082. Both of these sentences were to be served consecutive to the two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

Defendant first claims that he was denied a fair trial when the prosecutor improperly questioned Cherkeetha Love, the last trial witness, about whether she had ever seen defendant with the gun prior to the actual shooting. The prosecutor essentially asked this same question of several prior witnesses, with no defense objection, and did not elicit any positive responses until Ms. Love. However, after Ms. Love's affirmative response, defense counsel objected to the prosecution's line of questioning and later moved for a mistrial. The trial court denied the motion on the grounds that any prejudice could be cured with a precautionary instruction to the jury. During jury instructions the trial court in fact provided said cautionary instruction. After the jury instructions, defense counsel renewed his request for a mistrial but this request was also denied.

Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). "When reviewing allegations of prosecutorial misconduct, we examine the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial." *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). A prosecutor may attempt to introduce evidence that he or she legitimately believes

will be accepted by the court if that attempt does not prejudice the defendant. *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). However, the defendant bears the burden of demonstrating that any error was outcome determinative and that it most likely resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999); *People v Lukity*, 460 Mich 484, 493-494, 496; 596 NW2d 607 (1999).

While we agree with defense counsel that the prosecutor should have limited his questioning to a relevant time frame, we do not think that this error was outcome determinative under the circumstances. Defense counsel did not object when the prosecutor questioned previous witnesses about defendant's prior possession of the gun used in the shooting but waited until the prosecution's questioning elicited an affirmative response from Ms. Love. Moreover, the goal of a defense objection to prosecutorial misconduct is a curative instruction to the jury, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995), which the trial court provided.

Regardless of any prosecutorial misconduct, the court found that Ms. Love's responses were spontaneous and that both the prosecutor and defense counsel were surprised by the testimony. The trial court further noted that the testimony in this case was consistent, regarding defendant's possession of a firearm during the incident, and that the disputed testimony was harmless because of the other evidence in the case. Most notably, the record indicates several witnesses testified, without objection, that defendant possessed and pointed a gun at the victim. Additionally, we find that the prosecution legitimately questioned witnesses about whether they had seen defendant with the gun prior to the incident because that evidence may have been relevant and admissible under MRE 401, independent of MRE 404(b). *People v Hall*, 433 Mich 573, 580; 447 NW2d 580 (1989). See also *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Emery*, 150 Mich App 657, 669-670; 389 NW2d 472 (1986). Viewing the contested testimony in context, we find no error in the trial court's determination that the testimony was unplanned and ultimately cured by the jury instruction.

Furthermore, defendant failed to show that the trial court abused its discretion in denying his request for a mistrial. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Moreover, even if error existed we are satisfied that the trial court's instruction to the jury, to disregard the testimony as irrelevant, was sufficient to dispel any prejudice because jurors are generally presumed to follow the court's instructions. *People v Messenger*, 221 Mich App 171, 179 n 3; 561 NW2d 463 (1997). Examined in the context of untainted evidence, we conclude that any error in the prosecution's questioning of Ms. Love was harmless beyond a reasonable doubt. See *Toma*, *supra* at 301-302.

Defendant further claims that the prosecutor made remarks during his closing argument that were unsupported by the record evidence. Defendant also purports that the prosecutor improperly attacked defense counsel during rebuttal argument. Because defendant did not object below to the challenged remarks, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). Thus, a reviewing court should not reverse unless it concludes that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* After considering defendant's unpreserved claims of misconduct, based on the prosecutor's

closing and rebuttal arguments, we find no plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We also reject defendant's claim that he was denied a fair trial based on the cumulative effect of several errors. This issue is reviewed to determine if defendant was denied a fair trial. *People v Smith*, 363 Mich 157, 164; 108 NW2d 751 (1961); *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). To reverse on the grounds of cumulative error, the errors at issue must be of consequence. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). In other words, the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Defendant did not object to most of the matters that are the subject of this appeal. With regard to those unpreserved matters, we have concluded that defendant failed to demonstrate any plain error affecting his substantial rights. *Carines, supra*. Due to the strong evidence of defendant's guilt and because a curative instruction was provided for the preserved error, we conclude that the complained of errors were inconsequential and did not deny defendant a fair and impartial trial.

Finally, defendant claims that the trial court erred when it ordered his CCW sentence to be served consecutive to his felony-firearm sentence. We agree. As a matter of law, the felony-firearm sentence could only run consecutively to defendant's sentence for second-degree murder, upon which the felony-firearm conviction was based. MCL 750.227b(2); MSA 28.424(2)(2); *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). Hence, we remand this case to the trial court for correction of the judgment of sentence. *Clark, supra* at 465.

We affirm defendant's convictions but remand to the trial court for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

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