STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 26, 2002
v	No. 232050 Wayne Circuit Court
DEMARIO MITCHELL, Defendant-Appellant.	LC No. 98-011832

Before: Fitzgerald, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals by right from his bench trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was tried on two counts of armed robbery, MCL 750.529, and one count of felony-firearm. Defendant was sentenced to six months to four years imprisonment for the felonious assault conviction, and a consecutive two years' imprisonment for the felony-firearm conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In May 1998, complainants Latonya Cato and Christopher Williams were at home with their approximately nine-month-old daughter when a man named Curtis, who was a friend of Williams, came to their home. After Curtis was let into the house, he produced a handgun. When Williams and Curtis began fighting over the gun, Cato took her child and ran upstairs and called the police. After she got off the phone, Cato went back downstairs with her daughter. At that point, defendant kicked down the front door and entered carrying an AK-47. Williams fled, leaving Cato and her daughter alone in the house with Curtis and defendant. Defendant then grabbed some jewelry and a pager sitting on a table, put the assault weapon to Cato's head and demanded money. When Cato told defendant she did not have any money, defendant and Curtis fled, firing two or three shots outside the home. Several bullet holes in the home were identified at trial by Cato and the police, one in the front hallway of the home, one in the front door, and one in the outside molding of the front door. The police recovered a single spent shell casing on the front porch of the home, which was identified as having come from one of two types of assault weapons, one of which is an AK-47.

Count one of the amended felony information charged defendant with armed robbery of Cato, and count two with armed robbery of Williams. Williams did not show for trial. At the close of the prosecution's case-in-chief, the court granted defendant's motion to dismiss count

two, and denied his motion for a directed verdict of not guilty. Following defendant's proofs, the trial court found that the prosecution had not proved that defendant took the jewelry and pager with the specific intent to permanently deprive Cato of that property. Specifically, the court found as follows:

> Because of the testimony that was put on of a beef, of a problem between the parties . . . .
>
> . . . It is clear because there is consistency, there is marijuana dealing going on, there is a problem between these people, the court cannot find beyond a reasonable doubt that the property was taken, if it was, that it was taken with the intent to permanently deprive, and that this, a felonious assault, was for the purpose of armed robbery and not for some other dispute, in drug dealing.

The court found, however, that the elements of felonious assault and felony-firearm had been established beyond a reasonable doubt.

Defendant filed a post-judgment motion for a new trial, arguing that there was insufficient evidence to support the verdict.[1] However, at the hearing on the motion, defense counsel also argued "that felonious assault not having been previously filed or charged . . . , [defendant's] . . . position is that is not an appropriate offense for him to have been convicted of." The court denied the motion, reasoning as follows:

> The court found that the defendant did point the rifle at [Cato] . . . , and feloniously assaulted her. And, of course, he was convicted of felony firearm; because—given it was a firearm he used.
>
> The court had a question with the original charge being robbery armed, as to whether this felonious assault actually occurred in conjunction with an armed robbery or whether it was a problem with the complainant and the defendant in a disagreement over possible drug money, or some other circumstances other than robbery armed, which caused this felonious assault and felony-firearm.
>
> But the court had no doubt, given the testimony under oath at the trial, that the defendant was guilty of felonious assault, and felony firearm.

On appeal, defendant argues that because he did not receive adequate notice of the need to defend against a charge of felonious assault, the trial court abused its discretion in denying his motion for a new trial.[2] We disagree. Because felonious assault is a lesser included charge of armed robbery, and because the amended felony information gave sufficient notice that

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[1] Defendant's curt, one sentence brief in support of his motion for a new trial cited MCR 6.432(D) as supporting authority. We assume that this is a typographical error, and that defendant actually meant to cite MCR 6.431(D).

[2] Defendant has abandoned the claim that a new trial was warranted because the verdict was based on insufficient evidence.

defendant could face the lesser included charge, we see no abuse of discretion. *People v Quinn*, 136 Mich App 145, 147; 356 NW2d 10 (1984).

Defendant also argues that he was denied due process when the prosecution improperly impeached a non-alibi witnesses by asking the witness why she had not gone to the police with certain information testified to at trial. The witness, defendant's sister, had testified during direct examination that after the attack, Williams had told her in a three-way telephone conversation that included Cato, that he would drop the matter if defendant paid off the debt he owed Williams. On cross-examination, the following exchange took place:

> *Prosecutor*: In October you learned of this conversation with you, Chris and Peanut,[3] right?
>
> *Witness*: Yes.
>
> *Prosecutor*: And you went and told the police right away, right?
>
> *Witness*: No.
>
> *Prosecutor*: You didn't?
>
> *Witness*: I didn't go tell the police.
>
> *Prosecutor*: Did you tell the police that Chris made these statements about this case against your brother?
>
> *Witness*: No, I talked to the lawyer.
>
> *Prosecutor*: Did you tell the police that Peanut made these statements about your brother?
>
> *Witness*: No.
>
> *Prosecutor*: You never talked to anyone other than [defendant's] . . . lawyer about this, correct?
>
> *Witness*: Right. And my family, that's it.

Subsequent questioning established that the witness had told defendant's lawyer about the alleged phone conversation a couple of weeks prior to the bench trial.

Because defendant failed to object to this line of questioning, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich. 750, 763; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice. . . ." *Id.* Further, if the three

[3] Testimony established that "Peanut" is Cato's nickname.

elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

We find no error in the prosecutor's questioning this witness about her failure to come forward with this evidence earlier because the "information is of such a nature that the witness would have a natural tendency to come forward with it prior to trial." *People v Emery*, 150 Mich App 657, 666; 389 NW2d 472 (1986). See also *People v Perkins*, 141 Mich App 186, 196; 366 NW2d 94 (1985). Both the close nature of the relationship between the witness and defendant, and the tendency of this evidence to undermine the credibility of the complainants by implicating them in a scheme to foster an improper prosecution, mitigate in favor of concluding that there would be a natural tendency to go to the police with such information. Further, even if we did not believe this evidence was of such a nature, defendant would not be entitled to reversal because there is no evidence that the questioning was prejudicial. "Unlike a jury, a judge is presumed to possess an understanding of the law, which allows him to understand the difference between" permissible and impermissible questioning. *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin