STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 243481 Muskegon Circuit Court
DWAYNE UNDREA JONES, Defendant-Appellant.	LC No. 02-047024-FC

Before: Markey, P.J. and Murphy and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89, first-degree home invasion, MCL 750.110a(2), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 18 to 40 years' imprisonment for the assault conviction, and to a concurrent term of 8 to 30 years' imprisonment for the home invasion conviction, plus two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it admitted into evidence the hearsay statement of a police detective that police records indicated defendant's address was 2509 Lahey. We conclude that, assuming error in admitting the evidence, the error was harmless under *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999), because the weight of the untainted evidence is such that it is not likely that a different outcome would have resulted without the error. The harmless error rule, codified in MCL 769.26, provides:

> No judgment or verdict shall be . . . reversed . . . in any criminal case, on the ground of . . . the improper admission . . . of evidence, . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Here, defendant has failed to establish that it is "more probable than not that a different outcome would have resulted without the error." *Lukity, supra* at 495. The admission of alleged hearsay evidence establishing that defendant's address was 2509 Lahey was of little value because the prosecutor had already presented unchallenged evidence that a police officer went to

2509 Lahey after the crime, found defendant to be present in the house at that address, and spoke to defendant about the crime. Moreover, the prosecutor presented the testimony of defendant's accomplice, Lee Matthews, who testified to defendant's participation in the robbery and testified that he saw defendant shoot one of the victims in the leg. We also question the damaging effect of the evidence admitted at trial where the only evidence found at 2509 Lahey were two .25 caliber bullets in one of the bedrooms, and Matthews testified that defendant used a .380 automatic gun. Because defendant has not established that it is more probable than not that the jury would have reached a different verdict if the alleged hearsay evidence that connected defendant with the 2509 Lahey address had been excluded, we conclude that the error was harmless.

Next, defendant argues that the prosecutor's improper questioning of an alibi witness regarding her drug use deprived him of his right to a fair trial. Reviewing this unpreserved claim of prosecutorial misconduct for plain error that affected defendant's substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), we find no error.

At trial, defendant's mother testified that defendant was at her sister's home during the time that the crimes were committed. During cross-examination, the prosecutor asked her whether she had used cocaine during the time that the offenses were committed. Although defendant contends that the prosecutor deprived him of a fair trial by questioning an alibi witness about her drug use, the questioning was proper. Because the credibility of this alibi witness depended on her ability to perceive and recall events that occurred the night of the offense, the prosecutor's inquiry regarding whether the alibi witness used cocaine around the time of the offense was relevant and proper. MRE 401-403; *People v Duff*, 165 Mich App 530, 537; 419 NW2d 600 (1987).[1] The prosecutor was merely attempting to establish whether the alibi witness was under the influence of drugs that could have affected her perception of the events at the time. Further, because the prosecutor primarily directed his questions regarding drug use to the time that the offenses occurred, he did not act in bad faith. A finding of misconduct may not be based upon a prosecutor's good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), citing *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). We therefore conclude that defendant has failed to establish any error, let alone plain error that affected his substantial rights. Pursuant to the language in *Carines, supra*

[1] In *Duff, supra* at 537, this Court stated:

> On cross-examination, the prosecutor questioned whether Jackson [defense witness] had "smoked any weed" that night and had Jackson show the jury his marijuana belt buckle. While these unobjected-to questions and answers may have been irregular, they did not imply that defendant used drugs, but rather cast doubt on Jackson's ability to perceive and recall and did not rise to the level whereby defendant was deprived of a fair trial.

at 763, we cannot find that, assuming plain forfeited error, the "error resulted in the conviction of an actually innocent defendant or . . . 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." (Citation omitted; alteration in original).

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot