STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2004
v	No. 246881 Wayne Circuit Court
VAUGHN L WATTS, Defendant-Appellant.	LC No. 02-002089

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant appeals by right his conviction after jury trial of perjury in a court proceeding. MCL 750.422. He argues that the trial court committed plain error requiring reversal by removing the element of materiality from the jury's consideration. We agree that plain error occurred, but the forfeited non-structural constitutional error does not merit reversal because it did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity or public reputation of judicial proceedings, independent of defendant's guilt or innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *Johnson v United States*, 520 US 461, 467-468; 117 S Ct 1544; 137 L Ed 2d 718 (1997). We find that defendant's remaining claims of error, that the evidence was insufficient to sustain his conviction, and that he was denied a fair trial by prosecutorial misconduct, lack merit. Therefore, deciding this appeal without oral argument pursuant to MCR 7.214(E), we affirm.

Defendant was a city of Detroit police officer assigned to a drug-law enforcement unit. On May 25, 2000, defendant was part of a police "crew" led by Sergeant Terrence Randolph that executed a search warrant at a residence on Ferguson Street in the city of Detroit. The police seized over 400 grams of cocaine in the raid. Defendant interrogated the suspect, Terrell Simmons, alone in a closed-door room of the residence, producing a confession written by defendant but signed by Simmons (that Simmons sold drugs and the cocaine the police found belonged to him). The police also seized an automobile owned by Tanya Simmons, the suspect's wife, but returned it later after payment of a forfeiture fee.

The prosecutor filed criminal charges against Simmons, and he was bound over to circuit court to stand trial on them. Simmons' counsel filed two motions to suppress: one as to the physical evidence seized and one as to the confession obtained by defendant. In regard to the confession, Simmons alleged that he was coerced by physical and mental abuse into signing the

statement and didn't even realize what he was signing. He was simply told by defendant that he had to sign. In October 2000, the circuit court began taking testimony on the motion to suppress evidence and the *Walker*[1] hearing to determine the admissibility of Simmons' confession. Because of problems scheduling witnesses' testimony, the hearings stretched over several days from October to January 5, 2001.

At one of the October hearings, Simmons' son observed defendant wearing expensive designer sunglasses he believed belonged to his mother, Tanya. Defendant continued to wear the sunglasses to the circuit court hearings, and on January 5, 2001, Simmons' counsel cross-examined him about them. Defendant testified that a female friend named Monet Pruitt purchased the sunglasses and gave them to him. While on the witness stand, defendant produced the sunglasses, which bore a serial number matching a receipt that Tanya Simmons had produced. Tanya Simmons testified that the sunglasses belonged to her and were in her automobile when it was seized on May 25, 2000. The glasses were missing when the automobile was returned. Simmons also testified that defendant and Sergeant Randolph drove her automobile away on May 25. The circuit court granted Simmons' motions, suppressing both the seized physical evidence and Simmons' confession.

Defendant was subsequently charged with committing "perjury on a material matter by testifying as follows: that he owned a pair of Cortier [sic] glasses, serial #2152596, that were given by [sic] him by Monet Pruitt . . . ." On November 9, 2001, testimony was taken at a preliminary examination but the hearing was adjourned to permit the parties to submit briefs and allow time to prepare a complete transcript of the *Walker* hearing. On January 31, 2002, the magistrate bound the case over to circuit court. On the issue of materiality, he reasoned that

> . . . at a *Walker* hearing, the credibility of the witness is a significant consideration on the ultimate issue which would have been before the Court, which was the voluntariness of the defendant's confession. Now, while the question regarding the Cartier glasses, on it face, did not appear to have a bearing on the question of voluntariness of Mr. Simmons' confession, in reviewing [*People v Hoag*, 89 Mich App 611, 619; 281 NW2d 137 (1979)] . . . the Court held that at the very least, questions that go to the credibility of the witness was [sic] material.
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> Now, at a *Walker* hearing, credibility of a witness is a crucial factor in the Court's ability to asses whether or not a defendant's statement is voluntary. If the witness were to have made untruthful statements, in this case, [defendant's] statements regarding the glasses, then it called into question his credibility and veracity as a witness regarding that *Walker* hearing.

Accordingly, the magistrate found defendant's alleged false testimony was material to the issues before the circuit court in the *Walker* hearing and bound defendant over to circuit court.

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

The circuit court trial commenced on October 1, 2002. After a jury was empanelled, the trial court entertained an oral motion to quash the information. Defense counsel did not contest that defendant testified falsely regarding the sunglasses, but argued that there was insufficient evidence at the preliminary examination to support a finding that defendant did so knowingly, and that the testimony was not material to the issue of whether Simmons' statement was voluntary. The trial court denied the motion finding the magistrate did not abuse her discretion. Regarding materiality, the trial court ruled that "is an issue of law for the judge [and the magistrate] was clearly aware of that fact and made specific findings that are supported by the record." After proofs were closed and arguments of counsel, the trial court instructed the jury that the elements of the offense of perjury that it must find proved beyond a reasonable doubt were:

> First, that the defendant was legally required to take an oath in a proceeding in a court of justice.
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> Second, that the defendant took that oath.
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> Third, that while under that oath the defendant made a false statement. That statement that is alleged to have been made in this case is that he, defendant, owned a pair of Cartier glasses, serial number 2152596 that were given to him by Monet Pruitt.
>
> Fourth, that the defendant knew that the statement was false when he made it.

The prosecutor and defense counsel both expressed satisfaction with the trial court's instructions. The jury convicted defendant as charged. On November 6, 2002, the trial court sentenced defendant to five months in jail and 24 months probation. He appeals by right.

At the time of the instant trial, the elements of perjury were well-settled: "(1) the administration to the defendant of an oath authorized by law, by competent authority; (2) an issue or cause to which the facts sworn are material; and (3) wilfully false statements or testimony regarding those facts." *People v Kozyra*, 219 Mich App 422, 428-429; 556 NW2d 512 (1996). But the element of materiality was long recognized as one for the trial court to decide. See *People v Hoag*, 113 Mich App 789, 798; 318 NW2d 579 (1982). "Under Michigan law, the trial court, not the jury, is responsible for deciding the issue of materiality." *Id.*

But on December 3, 2002, this Court released its decision in *People v Lively*, 254 Mich App 249; 656 NW2d 850 (2002), lv gtd 468 Mich 945 (2003). The *Lively* panel, on facts similar but not identical to the case at bar, held that non-structural constitutional error occurred when the trial court removed the issue of materiality in a perjury prosecution from the jury's determination of all of the elements of the charged offense. *Id*. at 251-252. The Court relied primarily on *United States v Gaudin*, 515 US 506, 511, 518-519, 522-523; 115 S Ct 2310; 132 L Ed 2d 444 (1995), which held the district court's refusal to submit the question of materiality to the jury in a prosecution for making false statements in a matter within the jurisdiction of a federal agency, 18 USC 1001, violated the defendant's Fifth and Sixth Amendment right to have the jury determine guilt beyond a reasonable doubt of every element of crime charged.

Subsequently, in *Johnson, supra*, the Supreme Court applied the federal plain error rule, FR Crim P 52(b),[2] to unpreserved *Gaudin* error where at the time of the trial "near-uniform precedent" held that materiality in a perjury prosecution was for the trial court to decide. *Johnson, supra* at 467-468, n 1. The federal plain error rule requires that to obtain appellate relief "an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affects substantial rights,' [and if] all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson, supra* at 467, quoting *United States* v *Olano*, 507 US 725, 732; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (in turn quoting *United States* v *Young*, 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985), quoting *United States* v *Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936)). The *Johnson* Court noted that under *Olano*, the word "plain" is "synonymous with 'clear' or, equivalently, 'obvious,'" and the *Gaudin* error was "by no means clear at the time of trial." *Johnson, supra* at 467, citing *Olano, supra* at 734. Indeed, "at the time of trial it was settled that the issue of materiality was to be decided by the court, not the jury; by the time of appellate consideration, the law had changed, and it is now settled that materiality is an issue for the jury." *Johnson, supra* at 468. Nevertheless, the Court held, "[t]he second part of the *Olano* test is therefore satisfied." *Id.*

But the *Johnson* Court did not decide whether the forfeited error met the third plain error criterion because "even assuming that the failure to submit materiality to the jury 'affected substantial rights,' it does not meet the final requirement of [obtaining appellate relief under the plain error rule] . . . whether the forfeited error "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 469, quoting *Olano, supra* at 736. The Court reached this conclusion because the evidence at trial overwhelmingly supported a finding that the testimony at issue was material. *Johnson, supra* at 470.

Our Supreme Court relied upon *Johnson* in holding that the plain error rule applies to unpreserved non-structural constitutional error. *Carines, supra* at 765-766. Thus, where non-structural constitutional error is preserved, it may be "harmless," but only if the reviewing court determines "the beneficiary of the error has established that it is harmless beyond a reasonable doubt." *Id.* at 774, citing *People v Anderson (After Remand)*, 446 Mich 392, 521 NW2d 538 (1994). But where the non-structural constitutional error is unpreserved, the defendant must show that plain error affected substantial rights and "the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 774. Thus, although *Lively* establishes plain non-structural constitutional error occurred in the instant case, we apply the *Carines*/*Johnson* standard of review for unpreserved "forfeited" error.

The prosecutor argues that *Lively* is not controlling on the issue of whether the statutory offense of perjury includes the element of materiality because that premise was assumed and not

[2] FR Crim P 52(b) provides: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court." See *United States* v *Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

decided.[3] The prosecutor contends that the Legislature did not codify the common-law offense of perjury, which requires that the oath and the false testimony must be material to the proceeding for which it was taken. See, e.g., *People v Fox*, 25 Mich 492, 496-497 (1872). The prosecutor further notes that when the Legislature uses a term of art with an understood common-law meaning it is presumed to have adopted that understood common-law meaning absent clearly expressed contrary intent. See *People v Riddle*, 467 Mich 116, 125-126; 649 NW2d 30 (2002), quoting *Morissette v United States*, 342 US 246, 263; 72 S Ct 240; 96 L Ed 288 (1952). But, the prosecutor's argument continues, the Legislature did not merely adopt common-law "perjury," but defined the offense as follows:

> Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury, a felony, punishable by imprisonment in the state prison not more than 15 years. [MCL 750.423.]

The prosecutor reads this statute as plainly not including a requirement of materiality and the judiciary may not alter the statute. *Riddle, supra* at 126, citing *In Re Lamphere*, 61 Mich 105, 109; 27 NW 882 (1886). Instead, the prosecutor points to the Supreme Court's analysis in *United States v Wells*, 519 US 482; 117 S Ct 921; 137 L Ed 2d 107 (1997), holding that the materiality of the falsehood is not an element of the crime of knowingly making false statement to a federally insured bank under 18 USC 1014, and the prosecutor argues the same analysis should apply to Michigan's perjury statute.

But, we are bound by prior published decisions of this Court issued after November 1, 1990, that have not been reversed or modified by our Supreme Court or by a special panel of this Court. MCR 7.215(I). We are also bound by decisions of our Supreme Court. See *Boyd v WG Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993) and *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). Therefore, we are bound by *Lively, supra*, and by decisions of our Supreme Court, which hold that materiality is an element of the statutory crime of perjury. See, e.g., *People v Kert*, 304 Mich 148, 154-155; 7 NW2d 251 (1943): "While perjury under [the statute] . . . is defined as a wilful false swearing in regard to any matter or in respect to which such oath is authorized or required, it is always necessary to show that the perjury was in regard to a material fact."

Our review of the record here convinces us that, like *Johnson*, the evidence was overwhelming that the false testimony was material to the issues the circuit court was determining in deciding whether to suppress Simmons' statement. Defendant's argument to the contrary appears to be that asserted by counsel in the trial court: that false testimony concerning sunglasses was not directly relevant to whether Simmons' statement was voluntary and no direct

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[3] For this proposition the prosecutor cites: *People v Williams*, 422 Mich 381, 396-397; 337 NW2d 567 (1985)(Cavanaugh, J, dissenting), quoting *People v Allen*, 39 Mich App 483, 499; 197 NW2d 874 (1972)(Levin, J, dissenting), quoting *Chapman v Buder*, 14 Mich App 13, 20; 165 NW2d 436 (1968), quoting *Allen v Duffie*, 43 Mich 1, 11; 4 NW 427 (1880).

proof was presented regarding the reasoning of the circuit court in granting Simmons' motion to suppress. But the trial court correctly adopted the magistrate's reasoning that the credibility of witnesses at a *Walker* hearing is crucial, and that false testimony going to the credibility of a witness is sufficient to establish the element of materiality. *Hoag*, *supra*, 113 Mich App at 799, quoting *Hoag*, *supra*, 89 Mich App at 619, citing 60 Am Jur 2d, Perjury, § 11, p 973. Moreover, materiality requires only that the "false statement is one that could have affected the course or outcome of the proceeding." *Lively*, *supra* at 250-251, citing *Kozyra*, *supra* at 432.

At trial, in addition to evidence of the background of the false testimony already summarized, the prosecutor presented as a witness Kenneth Simon, the assistant prosecutor who represented the government at the hearings on the charges brought against Simmons. Assistant prosecutor Simons testified as follows concerning the *Walker* hearing:

> *Q.* . . . Now, Terrell Simmons, I think, in the motion claimed that there was both physical and emotional or mental abuse heaped on him to extract this statement?
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> *A.* Yes. In fact, he said that Officer Watts wrote the statement and basically coerced him into signing it, that he didn't even realize what he was signing because Officer Watts had told him he had to sign it.
>
> *Q.* All right. Now, was there any other witness to the taking of this confession besides Terrell Simmons and Vaughn Watts?
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> *A.* No, not directly because Officer Watts testified, and the Defendant even agreed on that point, that the confession was taken in a room of the house where the door was closed, and they were the only two in there.
>
> *Q.* How important is witness credibility in this particular case in resolving that issue?
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> *A.* Oh, very important. In *Walker* hearings where confessions are challenged, the Judge has to believe the officer's word over the defendant's word as to how the confession was taken.
>
> *Q.* In this particular case, did it turn on who you were going to believe in terms of what went on in that closed back bedroom?
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> *A.* Yes, especially since Officer Watts was the only one there with the Defendant when the confession was taken.

Simons also testified that Tanya Simmons' testimony with the receipt for the serial-numbered sunglasses was so compelling that the police returned them to Simmons on the spot. Defendant in a break in the *Walker* hearing sought to explain his testimony to APA Simons in the hallway of the courthouse. He told Simons that Monet Pruitt had given him a similar pair of sunglasses and he must have picked up Simmons' sunglasses by mistake while using the Simmons' automobile as an "undercover vehicle" believing them to be the glasses Pruitt had given him. Simons testified that he did not recall defendant to testify to this explanation at the

Walker hearing because defendant's "credibility had been destroyed." Finally, Simons testified that the circuit court suppressed both Simmons' confession, and evidence seized pursuant to the search warrant. As a result, criminal charges against Simmons were dismissed.

Defendant presented no evidence to contradict Simon's testimony. Indeed, when the prosecutor moved to admit a transcript excerpt containing defendant's testimony at issue, defense counsel moved that the entire transcript of the suppression hearings be admitted. The prosecutor did not object, so the trial ruled the remaining transcripts would be admitted at trial as an exhibit. The record, however, indicates that counsel never pursued the issue again.

In sum, the evidence at trial established not only that the false testimony could have affected the outcome of the Walker hearing, *Lively, supra* at 253, but also that the only logical conclusion that reasonable jurors could reach from the evidence presented here was that the false testimony did affect the outcome. The forfeited error here did not seriously affect the fairness, integrity or public reputation of judicial proceedings, *Johnson, supra* at 469-470, nor did it result, as more fully discussed *infra*, in the conviction of a likely innocent man, *Carines, supra* at 774.

Defendant also argues that the evidence at trial was insufficient to sustain his conviction. We review de novo such a claim, *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001), viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could have found all of the elements of the offense were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992); *Kozyra, supra* at 428. This deferential review requires us to make all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

At trial, defendant did not contest that he gave false testimony under oath; he only contested he did so knowingly, arguing through counsel that the version of events given to APA Simons in the hallway of the courthouse was the true version of events. But the prosecutor presented the testimony of Jacqueline Pritchett, an intimate police officer friend of defendant, that defendant told her, when she saw defendant with the sunglasses in September or October 2000, that Sergeant Randolph had given him the sunglasses. According to Pritchett, defendant told her Randolph gave him the sunglasses to use in his undercover work to affect the look of a drug dealer. Pritchett also testified that after a report of defendant's testimony was published in a newspaper on January 16, 2001, defendant told her there was no other girlfriend as reported. Further, defendant told Pritchett he was in a state of panic when he testified.

Another assistant prosecutor acquainted with defendant from being assigned to the prosecutor's major drug unit, Todd Lanctott, testified that defendant came to his office wanting to talk about ten days after defendant testified regarding the sunglasses. Defendant told Lanctott that he was not a thief; he had not stolen Simmons' sunglasses. Lanctott testified that defendant said that Sergeant Randolph had given him the sunglasses to wear in a police "push-off operation" so that he would "look like a baller, or a drug dealer." Further, defendant told Lanctott that he did not know where Randolph obtained the sunglasses. As to his testimony at the *Walker* hearing, defendant told Lanctott that it just came out. Defendant also told Lanctott that he was upset that Randolph would not admit responsibility for the sunglasses.

The prosecutor also presented the testimony of Shawn Wesley, a Detroit police officer assigned to the department's public corruption unit. Wesley testified that he attempted to locate a Monet Pruitt through several public agencies such as the Secretary of State's office, the Department of Corrections, and the Internet. Wesley testified that he was unsuccessful but acknowledged he did not actually check with the Postal Service, public utilities or the Register of Deeds office.

Defendant chose not to testify. In defense, he presented Officer Gordon Hamilton, who testified that defendant introduced him to a good-looking female with the first name of Monet. According to Hamilton, he twice met Monet, whose last name he did not recall, between the end of March and the beginning of May 2000.

Applying the deferential standard of review that we must, we conclude that a rational trier of fact could find that all of the elements of perjury had been established beyond a reasonable doubt. We must draw all reasonable inferences and resolve credibility choices in support of the jury verdict. *Nowack, supra* at 400. Further, the prosecution need not disprove all theories consistent with innocence, but rather need only prove its own theory guilt beyond a reasonable doubt. *Id*. The prosecutor did so here.

Next, defendant argues that he was denied a fair trial by arguments the prosecutor made that suggested it was the jury's civic duty to convict. Again, we disagree.

We review claims of prosecutorial misconduct de novo, *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001), to determine whether the defendant was denied a fair and impartial trial, *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Because the alleged error here was not preserved, our review is for plain error affecting substantial rights. *Carines*, supra at 763-764; *Pfaffle, supra*. We conclude the alleged prosecutorial misconduct was not plain error (i.e., clear or obvious). We do not read the prosecutor's comments as a prohibited call to convict as a matter of civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Rather, the prosecutor merely noted the brevity of the case belied the importance of crime charged to our system of justice. Prosecutors are accorded wide latitude and may argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id*.

Moreover, even if error occurred, reversal is not warranted. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003), citing *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, the jury was instructed to decide the case solely on the evidence and that counsels' arguments and statements were not evidence. Thus, any possible unfair prejudice was eliminated by the trial court's instructions. *Bahoda*, supra at 281; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Finally, as we have discussed already, the record does not reveal the conviction of an innocent defendant nor can we conclude that the prosecutor's argument seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Carines, supra* 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder