STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2004
v	No. 249237 Newaygo Circuit Court
DAVID ANTHONY WHEETLEY, Defendant-Appellant.	LC No. 02-007676-FC

Before: Neff, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's armed robbery conviction, MCL 750.529, was vacated as the predicate offense for his felony-murder conviction. We affirm.

I. FACTS

This case arises from the shooting death of Paul Afton. Afton was shot and killed sometime after leaving a bar in the early morning hours of March 5, 2000. At trial, five witnesses testified that defendant made several incriminating statements to them, including an account of how he and two others robbed and killed Afton. Further, Detective Richard Miller of the Michigan State Police testified that defendant had knowledge about the condition of the victim's pants that was not released to the general public. Additional evidence adduced at trial included tire tread patterns found at the murder scene that matched two of the tires from defendant's car, testimony that defendant had been seen with a .25 caliber handgun before the shooting and that .25 caliber bullet casings and slug were found at the scene, and DNA evidence linking defendant to a cigarette butt found at the scene. Defendant acted as his own counsel at trial.

II. CHARACTER EVIDENCE

Defendant first contends that he was deprived of his right to a fair trial by the prosecution's use of unfairly prejudicial character evidence. We disagree.

A. Standard of Review

"The decision to admit evidence is reviewed for an abuse of discretion." *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003).

B. Analysis

During cross-examination of Namoi Willette, defendant's former girlfriend, defendant asked her, "Have you ever seen me with any kind of weapon?" Willette replied, "I've not seen you with any guns." On re-direct, the prosecutor asked Willette if she had ever seen defendant with any weapons other than guns. Over defendant's objection, the trial court allowed the question and Willette replied that she had once seen defendant with a grenade. Defendant now contends that the trial court abused its discretion by allowing the question and response. We disagree. Defendant opened the door to the prosecutor's question when he asked if Willette had ever seen him with "any kind of weapon." Under these circumstances, it was proper for the prosecutor to determine if Willette had seen defendant with "any kind of weapon" other than a gun. Further, to the extent that defendant was using the question in an attempt to place his character before the jury, the follow-up question was permissible. "Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). See also MRE 404(a)(1). Therefore, the trial court did not abuse its discretion by admitting this testimony.

III. TESTIMONY OF DETECTIVE MILLER

Defendant next argues that Detective Miller's unsolicited testimony regarding other criminal matters in defendant's history deprived him of a fair trial. Specifically, defendant challenges Miller's testimony about: (1) having information about "some activity" involving defendant prior to the his identification as a suspect in this case; (2) defendant being on probation at the time of the shooting; and (3) defendant's accusation that Miller was causing defendant "difficulty in another matter." Again, we disagree.

A. Standard of Review

These statements were not objected to below. Consequently, they "are thus forfeited unless they amount to plain error affecting defendant's substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id*.

B. Analysis

"It is well settled that evidence of a prior conviction may be prejudicial to the accused, the danger being that the jury 'will misuse prior conviction evidence by focusing on the defendant's general bad character . . . .'" *People v Griffin*, 235 Mich App 27, 36; 597 NW2d

176 (1999), quoting *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). "However, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial. Specifically, 'an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial.'" *Id*., quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

In this case, Detective Miller's statements had minimal prejudicial value. He did not make reference to any specific type of crime or conviction. The vague references to "some activity" and "another matter" are not inherently prejudicial, and we do not believe they could have diverted the jury's attention from the relevant evidence. *People v Eaton*, 114 Mich App 330, 337; 319 NW2d 344 (1982). While the reference to probation does infer conviction for some criminal behavior, we do not believe that when viewed in the context of the evidence presented that defendant's substantial rights were affected. *Jones, supra* at 355.

IV. TESTIMONY OF ERICA DARKNELL

Defendant has also failed to establish that plain error requiring reversal occurred during the testimony of his friend, Erica Darknell.

A. Standard of Review

Defendant did not raise timely and specific objections to the challenged testimony of Darknell. Therefore, these evidentiary matters are forfeited unless they amount to plain error affecting defendant's substantial rights. *Jones, supra* at 355.

B. Analysis

The challenged testimony came in response to a question submitted by the jury. Darknell had testified that she had heard street talk about defendant's involvement in some criminal activity. In response to a jury question about the substance of those rumors, Darknell testified, "There was [sic] many different rumors of him beating a man by a dumpster, about him shooting a man." Defendant argues that this response constituted inadmissible hearsay. We disagree.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Out-of-court statements not offered for the truth of the matter asserted do not constitute inadmissible hearsay under MRE 801(c). *People v Byrd*, 207 Mich App 599, 603; 525 NW2d 507 (1994). In context, it is clear that the testimony was not offered to establish that defendant had beaten a man and shot a man, but as clarification on why Darknell suspected that defendant had disposed of a gun in a river. Thus, no error occurred, plain or otherwise. Furthermore, defendant has not been able to establish that his substantial rights were affected in light of the overwhelming evidence of guilt presented at trial.

V. PROSECUTORIAL CONDUCT

Defendant next argues that the prosecutor committed misconduct when she misrepresented the testimony of a defense witness. We disagree.

A. Standard of Review

This Court reviews "de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003), lv den 469 Mich 1005 (2004). "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), lv den 465 Mich 952 (2002). "Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Id*.

B. Analysis

The witness, Tommy Hollifield, had testified that he thought he had sold a gun to Noel Duffing, the proprietor of a barbershop frequented by defendant. When asked if the gun was a .25 caliber, Hollifield responded, "I'm not sure." During her closing argument, the prosecutor recounted that Hollifield had testified that he had sold a .25 caliber gun to Duffing. While this was a mischaracterization of the testimony, we do not believe that defendant's substantial rights were affected by this plain error. *Jones*, *supra* at 355. Other evidence adduced at trial established defendant's possession of a .25 caliber handgun prior to the murder. The fact that a link cannot be established between Duffing and Hollifield does not undermine the reliability of that evidence. Further, as previously noted, the weight of the evidence presented establishing defendant's involvement in the murder was overwhelming.

VI. JUROR QUESTIONS

Defendant also argues that he was deprived of his right to a fair trial by the questions posed by jurors during the trial. We disagree.

A. Standard of Review

"The practice of permitting questions to witnesses propounded by jurors is within the sound discretion of the trial court." *People v Wesley*, 148 Mich App 758, 761; 384 NW2d 783 (1985), aff'd 428 Mich 708 (1987), cert den 484 US 967; 108 SCt 459; 98 L Ed 2d 399. Because this issue was not properly preserved, it must be reviewed for plain error affecting the outcome of the trial. *Aldrich*, *supra* at 110.

B. Analysis

In support of this argument, defendant urges this Court to abandon the holding in *People v Heard*, 388 Mich 182; 200 NW2d 73 (1972), in which our Supreme Court indicated that the issue of posing juror questions was within the sound discretion of a trial court. *Id.* at 187. This Court is not invested with the authority to reject or change the holdings of this state's highest court. Even if we possessed such authority, we are not persuaded by defendant's argument. We also are not persuaded that the questions cited by defendant were either improper or evidenced that the jury had decided issues of import prior to the close of proofs. Rather, the questions seem designed to probe the credibility of the witnesses. This is in keeping with the jury's essential role as trier-of-fact. Further, the record also reveals that the trial court properly screened the

questions, posing only those questions that were proper. Accordingly, defendant has failed to establish plain error with respect to the jury questions. See *Jones*, *supra* at 355.

VII. ADMISSION OF PRIOR STATEMENTS

Defendant next contends that he was deprived of his constitutional right to present a defense and cross-examine witnesses when he was not allowed to impeach Duffing with two prior inconsistent statements made to the police. We disagree.

A. Standard of Review

"The decision to admit evidence is reviewed for an abuse of discretion." *Washington*, *supra* at 670. "When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, the issue is reviewed de novo." *Id*., 670-671. "[V]iolations of the right to adequate cross-examination are subject to harmless-error analysis." *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715, lv den 452 Mich 865 (1996). "Although a defendant normally bears the burden of establishing error requiring reversal, where an error is of constitutional dimension, the burden of demonstrating its harmlessness rests with the prosecutor." *Id*.

B. Analysis

Contrary to defendant's assertion on appeal, the lower court record establishes that defendant attempted to admit the evidence in order to refresh Duffing's recollection, not to impeach him. However, as the court concluded, defendant failed to lay the proper foundation for the admission of the statements. *People v Hawkins*, 114 Mich App 714, 725; 319 NW2d 644 (1982).

VIII. POLICE BIAS

Similarly, defendant's argument that the court abused its discretion by refusing him to explore the bias on the part of one of the investigating officers is without merit. Though bias is almost always relevant, *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001), defendant provided no offer of proof that the officer was biased against defendant.

IX. CUMULATIVE ERROR

Next, defendant argues that the cumulative effect of the errors alleged above deprived him of a fair trial. Again, we disagree.

A. Standard of Review

Defendant argues that he was deprived of his right to due process by the cumulative effect of the errors. "Questions of constitutional law are reviewed by this Court de novo." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002) (citations omitted).

B. Analysis

"[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). However, in calculating the cumulative effect of the errors, only actual errors are considered. *Id.* at 592 n 12. Considering the two minor errors identified in light of the overwhelming evidence of guilt adduced, we conclude that defendant fails to show that the cumulative effect of the errors altered the outcome of the trial. *Id*. at 591.

X. POLICE REPORT

Defendant also argues that he was denied due process when the prosecution failed to turn over a page in a police report that contained a notation by Detective Miller that defendant had shown knowledge of the condition of the victim's pants that was not released to the general public. We disagree.

A. Standard of Review

This Court reviews a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie (On Remand)*, 225 Mich App 592, 598; 571 NW2d 229 (1997), lv den 456 Mich 930 (1998). "The exercise of that discretion involves a balancing of the interests of the courts, the public, and the parties." *Id.* (citation omitted). "It requires inquiry into all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'" *Id*., quoting *People v Taylor*, 159 Mich App 468, 482; 406 NW2d 859 (1987).

B. Analysis

We note that there is no evidence that the prosecution suppressed the page in issue. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). In any event, assuming that defendant was not given a copy of the page before trial, defendant is unable to show that he was denied due process because he cannot show how the outcome of the trial would have been different had he been given this unfavorable evidence sooner. *Id.*

XI. SUFFICIENCY OF THE EVIDENCE

We also reject defendant's assertion that insufficient evidence was presented to support his first-degree felony murder conviction.

A. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether the prosecutor introduced evidence sufficient to justify a rational trier of fact in finding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

B. Analysis

Here, the evidence adduced by the prosecution was overwhelming. In addition to the evidence regarding the victim's pants, evidence regarding defendant's own incriminating

statements, the tire tread analysis, the DNA analysis, and concerning the weapon used to kill Afton all pointed to defendant's guilt.

XII. AUTOPSY PHOTOGRAPHS

Next, defendant argues that the trial court abused its discretion in admitting twenty-six autopsy photographs of Afton. Again, we disagree.

A. Standard of Review

The admission of autopsy photographs into evidence is reviewed for an abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod on other grounds 450 Mich 1212; 539 NW2d 504 (1995).

B. Analysis

"Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. . . . Gruesomeness alone need not cause exclusion. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice." *Id.* (citations omitted).

Here, the photographs were referred to during the testimony of the medical examiner who performed the autopsy and are illustrative of the nature and extent of the victim's injuries. *Id*. The photographs are relevant to the issue of whether Afton was assaulted with a dangerous weapon. See *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993). Further, although some of the photographs showed the victim's face, see *People v Howard*, 226 Mich App 528, 550; 575 NW2d (1998), we do not believe that their probative value was substantially outweighed by the danger of unfair prejudice. *Mills, supra* at 77.

XIII. JURY INSTRUCTION

Finally, we reject defendant's assertion that the trial court erred in failing to sua sponte instruct on second-degree murder. MCL 768.29 ("The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused."). In light of the overwhelming evidence of defendant's guilt, we see no error requiring reversal.

Affirmed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Bill Schuette