STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 17, 2014
v	No. 315737 Wayne Circuit Court
GESON LAMONT JACKSON, Defendant-Appellant.	LC No. 12-010097-FC

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant, Geson Lamont Jackson, appeals as of right from his jury trial convictions of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. The trial court sentenced defendant to a mandatory term of life in prison without parole for the first-degree felony murder conviction, a concurrent term of 15 to 30 years in prison for the assault with intent to rob while armed conviction, and a consecutive term of two years in prison for the felony firearm conviction. We affirm.

I. BASIC FACTS

The prosecution presented evidence at trial to establish that on September 19, 2012, at approximately 8:45 p.m., defendant attempted to rob two high school students, Darius Smith and Dvante Roberts, while they were walking on West Grand Boulevard. Roberts testified that he and Smith were attending evening classes, and after class they went to a gas station to make some purchases. Roberts had "Carties," expensive Cartier eyeglasses, tucked in his shirt, partially visible, and Smith was wearing "Carties" on his face. When they left the gas station, they went to a Family Dollar store and bought something to eat. The clerk at the Family Dollar store told them that the area was dangerous and that they should not be wearing "Carties." Roberts and Smith went back to the gas station and recognized three of the people in the gas station as having been in the gas station earlier. There were three to five other "guys" outside the gas station. They bought a sandwich and then left the gas station and walked toward a bus stop. When they left the gas station, Roberts saw two "guys" walking on the opposite side of the street. Roberts noticed two boys "speed walking" behind them. Smith called his brother and asked his brother to pick them up because Smith felt like they were going to be robbed. When Smith hung up the phone, Roberts saw three to four boys running up to them. One of the boys

was pointing a gun at them that "looked like a rifle." Roberts heard someone say, "[d]on't run or we gonna shoot." Roberts could not see the face of the shooter because it was dark outside. Smith told Roberts not to run, but Roberts ran up Grand Boulevard and heard seven or eight shots as he was running.

Witnesses Antonio Miller and Deavonta Johnson, both of whom knew defendant as "G," testified to their observations of the circumstances leading up to and including the shooting. They were in the same gas station as defendant prior to the shooting when Smith and Roberts entered. Johnson testified that after the boys left, defendant asked him and Miller what kind of glasses one of the boys had been wearing. Miller and Johnson told him they were "Carties." Defendant then left the gas station with Johnson and Miller. Johnson and Miller intended to purchase marijuana and defendant gave them money to purchase a bag of marijuana for him. While defendant turned down the first block, Johnson and Miller walked further to Miller's house to get some money to buy cigarettes, cigarillos, and marijuana.

When Johnson and Miller then returned to the gas station to buy the cigarettes and cigarillos, they saw defendant standing in front of the gas station. Johnson and Miller entered the gas station to buy the cigarettes and cigarillos and saw that the two boys were in the gas station again. Defendant entered the gas station after Johnson and Miller. Defendant did not mention the glasses. After approximately three or four minutes, the boys left the gas station, followed by Johnson, Miller, and defendant.

Defendant and Johnson crossed Grand Boulevard and then stopped and waited for Miller, who went to buy the marijuana at a nearby house. Johnson testified that the boys from the gas station crossed the street a little in front of him and defendant. Defendant then ran across the street toward the boys, saying, "I want those glasses." Johnson testified that defendant's hands were moving as he was running toward the boys. Johnson heard defendant yell, "don't move," and saw the boys start to run. Johnson testified that, when the boys were in the middle of Grand Boulevard, "I hear a bang, and I see a flash, and I see another flash. And I got down. And then I hear more gunshots." Johnson testified that defendant was the shooter, but that he never saw a gun, and that no one else was around. Johnson got up and ran back toward the gas station, where he met up with Miller. Neither Johnson nor Miller knew if anyone had been shot. Johnson and Miller went home, but went to the police station with their mothers the next morning after seeing a story on the news about the shooting. The story showed videotaped security footage from the gas station and indicated that Johnson and Miller were wanted for questioning.

Antonio Miller testified similarly to Johnson regarding their encounter with defendant in the gas station. When defendant saw the boys, he said, "I want them glasses," to no one in particular. In response, Miller "shook [his] head, like, no." No one said anything to the boys, and the boys then left the gas station. Miller and Johnson left the gas station after the boys, walked about two blocks to Miller's house to get money, and then walked back to the gas station. After Miller and Johnson left the gas station, they saw defendant exit the gas station and stop to talk to someone in a car. When Miller and Johnson returned to the gas station, they saw defendant outside the station. Miller and Johnson entered the gas station and defendant entered after them. Miller saw the two boys purchasing something at the counter, but the boy was no longer wearing the Cartier glasses. The two boys then left the gas station, and Miller and Johnson purchased cigarettes and cigarillos. While Miller went to a nearby house to buy

marijuana, Johnson and defendant waited on the street. Before Miller went into the marijuana house, he saw Johnson and defendant walking on the other side of the street. The two boys were walking about a block ahead of Miller in the street between the island and the sidewalk. After Miller purchased the marijuana and was coming out of the house, he heard gunshots coming from the same side of the street that he was on, but one block over. Miller testified that, before the shooting began, he heard someone say, "don't run," and then he heard gunshots and saw two boys run across the street at an angle. Miller testified that defendant was the shooter and that defendant used a black and silver rifle that was approximately 12 inches long. He then explained that "it wasn't no big rifle," but was more like a semi-automatic. Although Miller did not see defendant with a gun at the gas station before the shooting, he was "positive" that defendant and the two boys were the only people on the street when defendant ran across the street toward the two boys.

Police were summoned to the scene and Smith was found dead, having been fatally shot in the back of the neck.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant first argues that the verdict was against the great weight of the evidence because the prosecution's main witnesses, Miller and Johnson, were not credible. In evaluating whether a verdict is against the great weight of the evidence, a court must determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. *Id.* at 643; *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

Defendant argues that Miller was not a credible witness because he gave implausible testimony regarding the gun used in the shooting. Miller testified that defendant shot Smith with a black and silver rifle that was approximately 12 inches long. He explained that "it wasn't no big rifle" but was more like a semi-automatic, and that it was the size of an "AK" but was not an "AK." Miller and Johnson both testified that they did not see defendant with a gun in the gas station or before the shooting. Defendant argues that it was implausible that defendant had a 12-inch gun that was not seen by Miller or Johnson before the shooting. That neither Miller nor Johnson saw a gun before the shooting did not deprive their testimony of all probative value or make it so implausible that the jury could not have believed it. See *Lemmon*, 456 Mich at 643. Rather, as pointed out by the prosecutor during her closing argument, defendant could have had a gun concealed on his body, could have gotten the gun while Miller and Johnson went home to get money, or could have gotten the gun from the person in the car outside the gas station, to whom he was speaking when Miller and Johnson returned to the gas station. The prosecutor's arguments were reasonable inferences from the evidence. Defendant has not shown the existence of an "exceptional circumstance[ ]" that warrants interfering with the jury's role of determining credibility. *Unger*, 278 Mich App at 232.

Defendant also argues that the testimony of Miller and Johnson was not credible because it conflicted with Roberts' testimony regarding the number of people involved in the shooting. Roberts testified that, immediately before the shooting, he saw three or four people, in addition

to the shooter, running across the street toward him. Miller testified that defendant was the only person who ran across the street toward Roberts and Smith. Johnson testified that no one was around the area immediately before the shooting other than himself, Miller, defendant, and Roberts and Smith, and only defendant ran across the street toward Roberts and Smith.

While Roberts's testimony regarding the number of people out on the street immediately before the shooting conflicted with that of Miller and Johnson, that conflict was not sufficient to render the rest of Miller's and Johnson's testimony incredible. Indeed, although the record reveals conflicting testimony about the number of individuals who might have been on the street, there was no conflicting testimony with regard to the most important aspect of Miller and Johnson's testimony—that defendant was the shooter. The conflict regarding the number of people on the street immediately before the shooting does not lead us to conclude "that the evidence preponderated so heavily against the jury's verdict that it would be a miscarriage of justice to allow the verdict to stand." See *Unger*, 278 Mich App at 232.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed misconduct during her closing arguments by arguing facts not in evidence and by comparing defendant to Baby Face Nelson. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Because defendant did not preserve this issue by objecting to the alleged misconduct at trial, our review is for plain error that affected defendant's substantial rights. *Id.* Under this standard, reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 384. Reversal is not required where a curative instruction could have alleviated any prejudicial effect. *Unger*, 278 Mich App at 235.

Defendant contends that the prosecutor argued facts not in evidence when she made the following statements during her closing arguments:

> And then a week later or eight days after that on the 12th of September, 12th of October rather, now they get a court ordered subpoena that said you've got to give some testimony under oath. *Now, you've got to go down to the prosecutor's office and you've got to talk to the prosecutor about what happened. And I'm under oath, subject to penalty of perjury. Perjury in a homicide is a life offense. So, if I lie or I'm misrepresenting, my rear end is going to be sitting at the defense table.* And all these two kids did was go buy a bag of weed. [Emphasis added.]

The prosecutor's statement that Miller and Johnson were interviewed by the prosecutor was supported by the evidence because both Miller and Johnson testified that they gave testimony under oath at the prosecutor's office on October 12, 2012. Furthermore, while there was no evidence that perjury was a "life offense" and that a person may be prosecuted for perjury, such facts were within the jurors' common knowledge. See *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991) ("It is well known that factfinders may and should use their own common sense and everyday experience in evaluating evidence.") Any error by the

prosecutor in this regard could have been cured by a curative instruction and did not deny defendant a fair trial. Therefore, any error did not amount to prosecutorial misconduct. *Brown*, 294 Mich App at 382; *Unger*, 278 Mich App at 235. Defendant has not shown plain error affecting his substantial rights. *Brown*, 294 Mich App at 382.

Defendant next argues that the prosecutor argued facts not in evidence during her rebuttal argument when she attempted to explain the confusion regarding the type of gun used in the shooting:

> Now, ladies and gentlemen, unless you're in the military or going to the military or have some experience with firearms — Yeah. We see stuff on TV, AK 47. It's a sad comment. I mean, and this is all about Second Amendment issues. *But shotguns are one thing. In our media today, in our media, television, video games, film, you have shotguns. You have AK 47s. You have different types of revolvers, semi-automatic, a revolver versus a semi-automatic. So, I think if you watch TV enough you get exposed to some of that.*
>
> *But unless you are a little bit more versed with firearms, how do you know a Tac 9 from a revolver with a six-inch barrel. First time I saw, first time I fired, ever fired a gun, it was a Smith & Wesson police gun. And I swear to God, the barrel was like this long, I mean, six, seven — It just was huge.* Is that a rifle? I don't know ladies and gentlemen. [Emphasis added.]

While Miller testified that the gun used in the shooting was a rifle, Sergeant Steven Ford opined that the weapon must have been a revolver because no bullet casings were found at the scene. During defense counsel's closing argument, defense counsel argued that Johnson testified that he did not see defendant with a gun before the shooting and defendant could not have concealed a rifle on his body. The prosecutor's argument that Miller could have been mistaken regarding the type of gun used in the shooting was made in response Sergeant Ford's testimony that the murder weapon was most likely not a rifle and to defense counsel's argument that it would have been impossible for defendant to conceal a rifle on his body. A prosecutor may argue reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Furthermore, the prosecutor's argument that the general public has some knowledge of guns from the media, but that most people would not know a "Tac 9 from a revolver with a six-inch barrel," was not supported by evidence at trial, but was a matter within the jury's common knowledge. *Simon*, 189 Mich App at 567. Similarly, while the prosecutor's statement that she once fired a police gun with a six-inch barrel may have been improper because it was not supported by the evidence, defendant has not shown that the comment denied him a fair trial. *Brown*, 294 Mich App at 382. Defendant has not shown plain error that affected his substantial rights. *Id.*

Finally, defendant argues that the prosecutor committed misconduct by comparing defendant to Baby Face Nelson during her closing arguments:

> Ladies and gentlemen, about two things I have to address. During jury selection, one of your fellow jurors, who's not part of the panel here, said, well, I don't think he could do it. He looks too young. His baby face.

> Ladies and gentlemen, you don't use sympathy for what he looks like. And you don't use sympathy with the fact that a fifteen year old kid is dead. You base it on the facts and the verdict [sic].
>
> You want to talk about baby face? *Think about Baby Face Nelson from the Al Capone days. How do you think he got that name? Baby Face Nelson. He was a stone cold killer, baby, stone cold killer.* [Emphasis added.]

A reference to a well-known criminal should be avoided, but it does not necessarily require reversal of a conviction. See *People v Ullah*, 216 Mich App 669, 681-683; 550 NW2d 568 (1996); *People v Rowen*, 111 Mich App 76, 82-83; 314 NW2d 526 (1981). Here, the prosecutor did not directly compare defendant or his crimes to Baby Face Nelson but merely argued that defendant's guilt or innocence must be based on the evidence and not on juror sympathies or biases about defendant's appearance or the age of the victim. The court instructed the jury that the statements and arguments of counsel were not evidence. Moreover, had defendant requested further curative instruction, any prejudice that resulted from the prosecutor's comments could have been cured. Under these circumstances, defendant has not shown that the reference to Baby Face Nelson resulted in plain error that affected his substantial rights. *Brown*, 294 Mich App at 382.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that defense counsel's failure to object to the alleged instances of prosecutorial misconduct during the prosecutor's closing and rebuttal arguments constituted ineffective assistance of counsel. We disagree. Because defendant did not move for a new trial or a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To demonstrate prejudice, a defendant must show a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 600.

As already discussed, defendant has not shown that the prosecutor committed misconduct during her closing or rebuttal arguments. Furthermore, to the extent the prosecutor's comments were improper, defendant has not shown, in light of the evidence against him, that, but for defense counsel's failure to object, there is a reasonable probability that the result of the proceedings would have been different. *Carbin*, 463 Mich at 600. Defendant has not shown that defense counsel's failure to object constituted ineffective assistance of counsel.

---

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

V. JURY INSTRUCTION

Finally, defendant contends that there was at least a dispute with respect to whether Miller and Johnson were accomplices and that the jury should have been instructed to view their testimony with caution. We first note that defendant waived any claim of error in the jury instructions by expressly approving the instructions given by the court. *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). Defendant's waiver extinguished any error. *Id.* Even if defendant had not waived any error, defendant failed to preserve this issue for review because he neither requested an accomplice instruction nor objected to the trial court's failure to give one. MCL 768.29; MCR 2.512(C); *People v Young*, 472 Mich 130, 140; 693 NW2d 801 (2005). An unpreserved claim that a trial court failed to give a cautionary accomplice instruction is reviewed for plain error that affected the defendant's substantial rights. *Young*, 472 Mich at 140. "[I]n considering whether a plain error exists, a reviewing court should be mindful of the discretion historically accorded to trial courts in deciding whether to give a cautionary accomplice instruction." *Id.* at 143.

A disputed accomplice instruction should be given only when there is evidence that the witness in question was involved in the charged crime. *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998). Whether a disputed accomplice instruction should be given is within the trial court's discretion. *Young*, 472 Mich at 143. Here, there was no direct evidence that Miller or Johnson was involved in the charged offenses, and there was testimony that the police never considered them to be suspects. Further, the only evidence presented at trial suggested that rather than acting as accomplices, Miller and Johnson attempted to dissuade defendant from committing the offenses. For instance, when defendant stated that he wanted the glasses, Miller shook his head "no" in response, implying that he did not agree with any plan defendant had to take the glasses. Johnson testified that he, too, attempted to dissuade defendant from taking action to steal the glasses by yelling, "don't" as defendant ran across the street immediately before the shooting. Under these circumstances, the trial court would not have abused its discretion in declining to give the instruction even if it had been requested by the defense.

Furthermore, the jury heard defense counsel's argument that Miller's and Johnson's testimony should not be believed because they were testifying against defendant to deflect their own involvement in the crimes as well as the trial court's instruction that, when evaluating a witness's testimony, the jury should consider whether a witness has a personal bias or interest in the outcome of the case. Defendant has not shown a reasonable probability that the result of the proceedings would have been different had defense counsel requested a cautionary instruction regarding accomplice testimony. *Carbin*, 463 Mich at 600. Therefore, he has not shown that he was denied the effective assistance of counsel because counsel failed to request the cautionary instruction.

Affirmed.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher