

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 29, 2011

v

SHAKITA TANISHA CARR,
Defendant-Appellant.

No. 298226
Wayne Circuit Court
LC No. 09-023576-FH

Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial convictions of assault with a dangerous weapon (felonious assault), MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two years' probation for the felonious assault conviction, and two years' imprisonment for the felony-firearm conviction. Because the trial court did not err in its admission of evidence and defendant was not denied the effective assistance of counsel, we affirm.

Defendant's convictions arise out of an incident that occurred on September 7, 2009. On that date, defendant went to her girlfriend's upstairs flat and discovered the electricity off. Apparently upset, and having had previous issues with her girlfriend's niece, defendant pointed a gun at the window of the downstairs flat where her girlfriend's niece, Nesa King, and King's children resided. King called the police and when they arrived some time later, they ordered defendant and her then present girlfriend out of the upstairs flat. The police found a rifle hidden in the upstairs flat.

Defendant first argues that the trial court plainly erred in admitting hearsay evidence. Specifically, defendant challenges the admission of King's testimony that another adult present in the downstairs flat at the time of the incident, Donte Scott, said "She got a gun." We find that the challenged testimony, when read in context, does not amount to hearsay.

Generally, a trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). However, because defendant failed to preserve this issue for appeal, this Court reviews the issue for plain error affecting her substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). In order to avoid forfeiture under the plain error rule, the following three elements must be met: "1) error must have occurred; 2) the error was plain, i.e., clear or obvious; 3) and the

plain error affected substantial rights.” *Id.* at 763. The third element generally requires proof of prejudice; and even after all three requirements are satisfied, reversal is warranted only if the error resulted in the conviction of an actually innocent defendant or if the error seriously compromised the fairness and integrity of the proceedings independent of whether the defendant was innocent. *Id.*

Hearsay is “a statement, other than the 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). Hearsay is not admissible unless it falls into an exception provided by the rules of evidence. MRE 802.

Here, King’s testimony regarding Donte Scott’s statement that defendant had a gun was not hearsay because it was not elicited to prove the truth of the matter asserted. Rather, the evidence was presented to explain why King went to the window of her home to observe what was taking place outside:

Q: And then Donte went to the window. And that’s when Donte made some observation that causes you –

A: To go to the window and see it.

Q: And you then go to the window yourself?

A: And what do you see outside the window?

Q: Shakita Carr with a gun, pointed towards the window.

Q: All right. Let me clarify this. You are in the dining room when Mr. Scott was at the window; correct?

A: I sent Donte Scott to the window when she made the comment, “I’m about to light this bitch up.” He thereon went to the window, looked out the window, stated, “She has a gun.” I said, “You’ve got to be kidding me.” I thereon go to the window to confirm[] this, and I see it, and I immediately went away from the window after I seen the transaction of everything about to go down.

The testimony in regards to Scott’s statement was entwined with the events of the charged offense. Scott’s statement was simply used to show King’s reason for walking to the window and observing defendant holding the gun, and was not hearsay. The testimony was used merely to provide context to King’s testimony, as opposed to being used as evidence to prove the truth of the matter asserted, i.e., that defendant had a gun. See e.g., *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007) (a statement admitted to show the effect on the hearer is not hearsay). And, even if the testimony was improperly admitted there would be no prejudice to defendant since King herself testified that she looked out the window and saw defendant with a gun pointed in her direction and was able to describe the gun and provide details concerning the incident.

Defendant also argues that her trial counsel was ineffective for failing to object to the admission of King's testimony regarding Scott's hearsay statement. Because defendant did not move for a new trial or *Ginther*¹ hearing, our review is limited to mistakes apparent on the record. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

Defendant bears the burden of proving ineffective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Here, defendant has failed to meet her burden. First, as indicated above, the challenged statements were not hearsay and thus not objectionable. Defense counsel was not ineffective for failing to make a meritless objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Second, even if defense counsel had objected to the admission of testimony concerning Scott's statement and it was somehow excluded as evidence, it cannot be concluded that there is a reasonable probability that the outcome of the trial would have been different. Again, King testified that she personally saw defendant pointing a gun at her window. She described the gun in detail as well as what could be perceived as a threatening statement made by defendant just prior to the incident. Given the above, had an objection been made and sustained the result of the proceedings would likely have been no different. Thus, defendant's claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly

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