STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 21, 2013
v	No. 304724 Calhoun Circuit Court
ELLIOTT LAVONE PATTERSON, Defendant-Appellant.	LC No. 2010-003670-FC

Before: BORRELLO, P.J., and M.J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for two counts of first-degree premeditated murder, MCL 750.316(1)(a); one count of assault with intent to murder, MCL 750.83; and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. For the reasons set forth in this opinion, we affirm.

In the early morning hours of March 13, 2004, Eric Wanzer drove a car to an empty parking lot. Defendant was in the passenger seat of the car, and Antwain Carmouche and Clova Keyes were in the rear seat of the car. Defendant had arranged for Carmouche to purchase drugs in the parking lot from a person defendant referred to as "Red." Sometime after arriving at the parking lot, Carmouche and Keyes were shot and killed and Wanzer was shot and seriously injured. Later that morning, the police observed Wanzer, still alive, in the car with Carmouche's and Keyes' bodies in the rear seat. Defendant was not in the car. When the police later interviewed defendant, he stated that "Red" was Hasheem Bell and that Bell was the shooter. After initially stating that he did not observe the shootings, defendant told the police that he witnessed the shootings from the passenger seat of the car. The police investigated Bell and ruled him out as a suspect. Autopsies on the deceased victims indicated that the shooter shot the victims from inside the car. At trial, Wanzer testified that he did not know if the shooter was defendant or another person, but stated that he did not see Bell or any other person in the parking lot at the time of the shooting.

I. PROSECUTORIAL MISCONDUCT.

Defendant first argues that the prosecutor committed misconduct during opening statement when he referred to a letter purportedly written by defendant, the letter was never subsequently offered into evidence during the trial. The prosecutor and defendant disagree on the proper standard of review for this issue; however, our case law makes clear that: "The test of

prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). "[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). "A defendant pressing an unpreserved claim of error must show a plain error that 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." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"Opening statement is the appropriate time to state the facts that will be proved at trial." *People v Ericksen*, 288 Mich App 192, 199; 793 NW2d 120 (2010). A prosecutor may not refer to facts that are not subsequently supported by the evidence. See *People v Meissner*, 294 Mich App 438, 456-457; 812 NW2d 37 (2011). Nevertheless, "[w]hen a prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

In this case, during the assistant prosecutor's opening statement, he stated that the police received a letter that defendant allegedly wrote to his grandmother: "So the police continue to investigate and they are getting nowhere until a letter is received. A letter is received by [defendant's] grandmother. Why? Because he [defendant] wrote it. And addressed it to her and sent it to her. And in this letter what he says is basically 'Grandma, I'm sorry. I am responsible for death of [Keyes] and [Carmouche] and I'm responsible for shooting of Eric.'" The prosecution argues on appeal that the remark was merely intended as background information to alert the jury as to why police focused on defendant. However, the intent or meaning of the remark is irrelevant. Rather, our initial inquiry into this issue centers on whether the prosecutor acted in good faith when the remark was made. *Johnson*, 187 Mich App at 626. Here, the prosecution did not endorse defendant's grandmother, leaving the record devoid of any basis on which the letter may have been introduced during trial. Additionally, review of the record reveals that the assistant prosecutor never sought introduction of the purported letter at any time during the trial. Hence, we are left to conclude that at the time the assistant prosecutor made the remarks, he had no intention of introducing the letter. Based on the record before us, we conclude that the prosecutor's statements quoting the alleged letter sent by defendant were not made in good faith. Consequently, we find that the assistant prosecutor committed prosecutorial misconduct by purposefully introducing evidence in his opening statement that he never intended to introduce at trial. Under the plain error rule, we therefore conclude that error has occurred in this case, and that the error was obvious.

Having found the assistant prosecutor did not act in good faith when making statements about evidence he had no intention of introducing, we next turn to the issue of whether the prosecutor's misconduct affected defendant's substantial rights by prejudicing defendant or affecting the outcome of his trial. Reversal is not proper unless defendant shows that the error affected his substantial rights, i.e., that the error affected the outcome of the trial. *Parker*, 288 Mich App at 509; *Carines*, 460 Mich at 763. Furthermore, "[e]rror requiring reversal will not be found if a curative instruction could have alleviated any prejudicial effect, given that jurors are

presumed to follow their instructions." *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010), rev'd on other grounds 492 Mich 367 (2012).

In this case, defense counsel failed to object, therefore, review is generally precluded unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In cases involving prosecutorial misconduct of the nature found here, our Courts have often found a curative instruction in the trial court's instructions that the lawyers' comments are not evidence. Such an instruction has previously been held by our Court as sufficient to cure any prejudice arising from the misconduct of a prosecutor. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), quoting *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Our review of the record reveals that at the beginning and the close of the this trial, the trial court informed the jury that it must decide the facts of the case solely on the basis of the evidence presented at trial and instructed the jury that it "cannot make any decision on the facts of this case from the opening statement of the lawyers." Hence, based on our prior decision in *Long*, a curative instruction was read to the jury that was presumed to cure any prejudice caused by the prosecutor. *Id.* Even assuming that the trial court's instructions did not cure the prejudice caused by the prosecutor in this case, we cannot find, given the amount and type of admissible evidence that was presented in this trial that defendant was denied a fair trial. Nor does the record evidence presented persuade us to conclude that the prosecutorial misconduct resulted in the conviction of an otherwise innocent defendant.

Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor's reference to the letter during opening statements. This Court denied defendant's motion to remand for an evidentiary hearing and, thus, our review of defendant's claim is limited to errors apparent in the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). "[T]his Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

In his affidavit, defendant's trial counsel asserted that he did not object to the statements at issue here and provides no basis for his failure to object. Given that the statements could be construed to infer a confession by defendant, we conclude that trial counsel's failure to object fell below an objective standard of reasonableness. Thus, we conclude that trial counsel was ineffective for failing to object to the statements made by the assistant prosecutor during opening statements. However, this does not end this Court's inquiry of the issue. In order to prevail, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Yost*, 278 Mich App at 387.

Again, we turn to the entire record of the trial and conclude that in this case, there was considerable evidence of defendant's guilt. As a consequence, defendant has not shown that this error affected the outcome of his trial. *Yost*, 278 Mich App at 387. Additionally, as previously noted, the trial court's jury instructions were sufficient to cure any prejudice created by the

assistant prosecutor's misconduct. *Long*, 246 Mich App at 588 (citation omitted); see also *Carines*, 460 Mich at 763.

II. ALLEGED CLOSURE OF COURTROOM DURING VOIR DIRE.

Finally, defendant argues that the trial court violated his constitutional right to a public trial when it closed the courtroom during voir dire without "mak[ing] any findings to support the closure." Defendant did not object regarding the openness of the voir dire proceedings and, thus, forfeited his claim of constitutional error. *People v Vaughn*, 491 Mich 642, 674; 821 NW2d 288 (2012).

> [I]n order to receive relief on his forfeited claim of constitutional error, [a] defendant must establish (1) that the error occurred, (2) that the error was "plain," (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. [*Id*. at 664-665, citing *Carines*, 460 Mich at 763.]

"The Sixth Amendment of the United States Constitution expressly enumerates" a criminal defendant's right to a public trial. *Vaughn*, 491 Mich at 650; see also *Presley v Georgia*, 558 US 209, ___; 130 S Ct 721; 175 L Ed 2d 675 (2010). "Additionally, article 1, § 20 of the 1963 Michigan Constitution guarantees that a criminal defendant 'shall have the right to a . . . public trial . . . .' That the right to a public trial also encompasses the right to public voir dire proceedings is 'well settled.'" *Vaughn*, 491 Mich at 650-652, quoting *Presley*, 558 US at ___ (footnote omitted).

As defendant acknowledges in his brief on appeal, the record provides no indication that the trial court closed the courtroom during voir dire.[1] On May 30, 2012, defendant moved to remand, seeking an evidentiary hearing, in part to develop the record regarding whether the courtroom was closed during voir dire. We denied defendant's motion on July 5, 2012, but instructed defendant that he could refile his motion following the Michigan Supreme Court's pending decision in *People v Vaughn*. *People v Patterson*, unpublished order of the Court of Appeals, entered July 5, 2012 (Docket No. 304724). On July 9, 2012, the Supreme Court decided *People v Vaughn*, 491 Mich 642. However, as of the time of this appeal, defendant has not refiled a motion seeking an evidentiary hearing. Accordingly, defendant has declined his invitation to develop the record regarding whether the trial court closed the courtroom during voir dire. Therefore, on the record properly before us, defendant has not met his burden of establishing a plain error. *Carines*, 460 Mich at 763; Cf. *Vaughn*, 491 Mich at 665 (finding that the first two prongs of *Carines* were satisfied where it was "readily apparent from the record that the circuit court closed the courtroom during voir dire" without making findings adequate to support such closure).

[1] The only evidence offered by defendant on this issue comes from his trial counsel's affidavit wherein he asserts that he is "95% sure" the trial court closed the courtroom during voir dire.

Moreover, even assuming *arguendo* that defendant established the existence of a plain error, relief would still be unwarranted under *Vaughn*, 491 Mich 642. In the present case, as in *Vaughn*, neither party objected to the other party's peremptory challenges of potential jurors, and "each party expressed satisfaction with the ultimate jury chosen." *Id*. at 668. Accordingly, this Court should not find that any closure of the courtroom during voir dire seriously affected the fairness, integrity, or public reputation of judicial proceedings.[2] *Id*. at 668-669, quoting *Carines*, 460 Mich at 774 ("Because the closure of the courtroom was limited to a vigorous voir dire process that ultimately yielded a jury that satisfied both parties, we cannot conclude that the closure 'seriously affected the fairness, integrity, or public reputation of judicial proceedings.' Defendant is not entitled to a new trial on the basis of his forfeited claim of error.").

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Kelly
/s/ Mark T. Boonstra

[2] Because defendant did not argue that he was actually innocent, "we review his claim of error only with regard to whether his conviction seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id*. at 666 n 92.