STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNELL LATRON THOMAS,

Defendant-Appellant.

UNPUBLISHED
November 1, 1996

No. 171264
LC No. 93-07410-FC-3

Before: White, P.J., and Holbrook and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317; MSA 28.549, felony firearm, MCL 750.227b; MSA 28.424(2), and carrying a concealed weapon, MCL 750.227; MSA 28.424, in connection with the death of Curtis Madison. Defendant was convicted following a jury trial of the lesser offense of voluntary manslaughter, MCL 750.321A; MSA 28.553, felony firearm and carrying a concealed weapon. The court departed upward from the minimum guidelines range of two to seven years for voluntary manslaughter and imposed a ten to fifteen year sentence, and sentenced defendant to a concurrent two to five year term for carrying a concealed weapon, consecutive to the mandatory two years for felony-firearm. Defendant argues he was denied a fair trial when the trial court allowed the prosecution to call a witness knowing that the witness would refuse to testify, that the prosecutor impermissibly bolstered the testimony of a former co-defendant, and that the court's upward departure from the sentencing guidelines was error. Finding the first issue dispositive, we reverse.

I

The events at issue occurred during a drive-by shooting around 9:30 p.m. on the evening of February 13, 1993, on South Park Street in Saginaw. A blue Ford truck drove by and shot at cars parked in a vacant lot which adjoined a house where a birthday party was being held. Shots were returned. The victim, Curtis Madison (Curtis), was in the cross-fire area during the shooting, behind the wheel in a car parked in the vacant lot, facing South Park Street. The prosecution's theory was that defendant, one of the men returning fire, was guilty of second-degree murder because he intended to kill

* Circuit judge, sitting on the Court of Appeals by assignment.

one of the drive-by shooters, and even though he did not intend to shoot Curtis, his friend, he was guilty of murder on the basis of transferred intent. The defense's theory was that defendant did not fire the bullet that struck Curtis.

At trial, there was testimony that Kishi Wesby gave a party the evening of February 13, 1993 at her house on South Park Street and invited a number of friends and relatives, including defendant. Defendant, Curtis, Tarkeus Gee, Robert Jamerson, Terry "Purple" King, and Marcus Wesby arrived at the same time but in different cars and parked in the vacant lot. After the party had gone on for several hours, the men left at about the same time along with Wesby's aunt, Rose Wesby, and David Williams. There was testimony that Curtis left before them. The men went to their cars and a blue truck drove by. Bullets were fired from the truck. Jamerson and defendant returned fire. Jamerson used a .38 revolver. Several persons testified that they saw defendant shooting, but only one identified the weapon as a nine millimeter, the other one "assumed" it was a nine millimeter because he had heard defendant talk about owning one. The witness who testified that defendant's weapon was a nine millimeter also testified that defendant shot toward the moving truck and did not shoot in the direction of Curtis' parked car. The shot that killed Curtis came from a nine millimeter weapon and it was determined that that bullet and two others which left bullet holes in Curtis' car came from the same weapon. Spent casings from both types of weapons were found at the scene, fifteen of them from a nine millimeter weapon. There was expert testimony that the bullet that killed Curtis did not come from the direction of South Park Street, but rather entered Curtis' car through the front passenger window.

On the third day of trial, a discussion was held out of the jury's presence regarding Gee testifying. Defense counsel stated that Gee told him he did not want to testify and that counsel was not sure "whether he's talking about exercising the Fifth Amendment or if this is just a refusal." Defense counsel stated that the prosecutor intended to put Gee in front of the jury, and that defense counsel objected, citing *People v Giacalone*, 399 Mich 642; 250 NW2d 492 (1977). Defense counsel stated that the first line of inquiry should be whether Gee was asserting his Fifth Amendment privilege. The prosecutor responded that he had expected Gee to be a cooperative witness, as Gee had indicated in a statement he gave to detectives that he had knowledge of the facts of the case. However, the prosecutor later met with Gee in jail and stated that Gee from the outset indicated he had no intention of testifying and

> at no point during the conversations . . . indicated that his reluctance had anything to do with a claim of privilege. It was simply that he wasn't going to testify because—for reasons that he wouldn't tell us."
>
> I mean there was no indication that his refusal to testify was in any way related to a claim of privilege, simply that it was uncooperative. He said he now saw absolutely no reason that he should cooperate with us because he was in prison serving a sentence, and there wasn't anything that anybody, including this Court, could do to him.
>
> I feel compelled to call him to the stand to show to the jury that he's available as a witness, that his choice—that his not testifying about the facts in this case is his choice.

Witnesses have indicated that he was there at the scene and was in a position to see what happened, and I feel obligated in the eyes of the jury to call him to see that his not testifying about what he might know is his choice and not mine.

[DEFENSE COUNSEL]: Judge, I don't think we should proceed on the basis of the prosecutor's conclusions about what his reasons are for not testifying. I think what should happen here is Mr. Gee should have the opportunity to be advised of his rights, at the very least by this Court, but I think really he should have an opportunity to have the assistance of counsel.

THE COURT: Why?

[DEFENSE COUNSEL]: Because if he's exercising the Fifth Amendment privilege, it would be available to him. He should not be compelled to supply any incriminating testimony against himself without being advised of his rights.

THE COURT: There is an alternative route, however, and that is—first of all, is he a suspect?

[PROSECUTOR]: He is not a suspect. He has never been a suspect. I have never heard anything either from him or from anyone else connected to this case that indicates he could be a suspect. Simply that he was there; that when the shooting started, he got underneath the back of his car, and this is what he told the detective--

THE COURT: Do you want to make a verbal representation to the witness that if there is any concern in his mind that the prosecutor will offer him immunity?

[PROSECUTOR]: I will.

THE COURT: Then if that's the case, … he does not have a right not to testify.

[DEFENSE COUNSEL]: That's true as long as the privilege and the immunity is properly explained to him and he understands it, I would agree with the Court.

THE COURT: All right. With that in mind then, let's assume that he's concerned about that and immunity is granted to him and he still refuses to testify, what do you want to do? Would you agree then that the prosecutor still has a right to call him?

[DEFENSE COUNSEL]: Well, Judge, there's another case here cited subsequent to Giacalone, People v King . . . . [which adds to the Giacalone holding that "it is inherently prejudicial for the prosecutor to put a witness on the stand] even where the privilege is not asserted in the jury's presence and where the witness's testimony does not directly incriminate the defendant."

So I don't know—the defendant—I don't know if it would incriminate himself. I'm not sure. I don't see a case directly dealing with what happens where you have a refusal to testify that's not related to privilege.

THE COURT: Well, what's going to happen to him is he's probably—he's going to sit in jail until that he decides that he wants to testify because he holds the keys to the cell then. So—

* * *

What we're going to do is get Mr. Gee and find out on the record what his intentions are. And then, …, if he is asserting Fifth Amendment, then you can offer him immunity, and that will be done with a written grant of immunity to follow.

* * *

(Witness escorted into courtroom)

* * *

THE COURT: It's my understanding from … the prosecutor, and [defense counsel]—they told the Court that you don't intend to testify, and then there was some question about why you weren't going to testify, and I need to know what those reasons are. Now, counsel, do you want to question Mr. Gee?

[PROSECUTOR]: I think maybe the more appropriate procedure since Your Honor is familiar with the circumstances here would be for the Court to do it.

THE COURT: All right. Is there a problem, Mr. Gee?

MR. GEE: No.

THE COURT: All right. Do you intend to testify?

MR. GEE: No.

THE COURT: All right. What is the reason why?

MR. GEE: Because I don't want to testify, and I don't have a reason.

THE COURT: All right. . .

MR. GEE: I don't want to testify.

THE COURT: All right. There must be a reason why you don't want to, though.

MR. GEE: No, there ain't

THE COURT: There's absolutely no—

MR. GEE: I'm saying why does there have to be a reason because I don't want to testify?

THE COURT: So you're not refusing to testify because of Fifth Amendment rights, is that correct?

MR. GEE: Yeah, I'm refusing on the Fifth Amendment. Is it more simple that way?

THE COURT: Well, I don't care what your reason is, Mr. Gee. I need to know that the reason is, however.

MR. GEE: There you go, Fifth Amendment.

THE COURT: So what is it?

MR. GEE: I don't want to talk.

THE COURT: There's a difference between not wanting to talk and asserting your Fifth Amendment right because you believe that you may be implicating yourself or testifying against yourself.

MR. GEE: I can't testify against myself. I didn't do nothing.

THE COURT: What's the last thing that you said? Get closer to the microphone.

MR. GEE: I cannot testify against myself because I didn't do nothing.

THE COURT: All right. So what you're saying is that you don't – you're not refusing to testify because you may implicate yourself because you didn't do anything, correct?

MR. GEE: Right.

THE COURT: All right. So there is not an assertion, the Court is finding, that there's a Fifth Amendment privilege being invoked here.

[DEFENSE COUNSEL]: Judge, I object. I don't think the man has been properly informed as to the scope of the Fifth Amendment or what his right would be in asserting

THE COURT: I'm going to give you an opportunity to question him, … so while – because you're on your feet, proceed.

[DEFENSE COUNSEL]: Well, I'm not his attorney, Your Honor. I would object to that also. I think that man should have his own counsel to discuss his own facts in a reasonable manner between the two of them to form any conclusion. I'm not his lawyer. I can outline what the rights are, but I don't think that's sufficient either. I would object to that.

THE COURT: All right. First of all, the Court is finding that Mr. Gee is not asserting a Fifth Amendment privilege since he's made the statement he didn't do anything. Do you mean that you didn't do anything in the scope of the activities of February 13, 1993?

MR. GEE: Right. I didn't do nothing.

THE COURT: All right. It's further my understanding, however, so that this record is entirely clear, that the prosecutor would give to Mr. Gee a grant of immunity if there were any question in Mr. Gee's mind about his testimony implicating himself. Is that correct?

[PROSECUTOR]: My understanding of the law is, Your Honor, that it's not entirely within the prosecutor's power to grant immunity. We can petition the Court to grant immunity. We would do so. Because this case is pending before this Court, I expect such a petition would come to Your Honor, and I have at this point no reason to believe that Your Honor would not grant it.

THE COURT: The Court would.

[PROSECUTOR]: But we certainly would petition the Court and do everything within our power to obtain that grant of immunity.

THE COURT: All right. Mr. Gee, the Court is finding that you do not have a right – a legal right not to testify. Now, it's important that I know that you understand what I'm saying. So that you do, the only person who has a legal right not to testify and to invoke the Fifth Amendment is an individual who believes that he or she may implicate themselves, maybe testifying against their own penal interests. So are we connecting? Do you know what I mean?

MR. GEE: Yeah, I understand what you're saying. But I'm just saying –

THE COURT: Listen to me.

MR. GEE: -- anything I say, it won't implicate me as doing nothing. So I'm just saying whatever I say, you know, I couldn't say nothing anyway because I didn't do nothing. I'm just saying I don't want to testify. There it is. The prosecutor came over with this detective. They threatened me the other day. They told me if I didn't testify, they was going to stack my charges. They was going to try to charge me with something else and

try to make my time longer while in the penitentiary. I told them I didn't want to testify. They can charge me and give me some more years, it wouldn't bother me. Do you know that I'm saying?

THE COURT: I hear you. Now, listen to what I'm saying. Under the law, you do not have a right to refuse to testify. So are you refusing to testify?

MR. GEE: Right.

THE COURT: All right. Are there any questions of Mr. Gee then?

[PROSECUTOR]: None of Mr. Gee, no.

[DEFENSE COUNSEL]: Mr. Gee, you're saying that when the prosecutor and the detectives came to talk to you in the Saginaw County Jail, this was just a few days ago?

MR. GEE: It was two days ago exactly.

[DEFENSE COUNSEL]: And are you saying someone – who was there? Was it [this prosecutor]?

MR. GEE: Yes, and Officer Bearss.

[DEFENSE COUNSEL]: All right.

MR. GEE: Or Detective Bearss, whichever one you want to call him.

[DEFENSE COUNSEL]: And you have told the judge that you interpreted some of what they said to be threats directed towards you, is that right?

MR. GEE: It was threats.

[DEFENSE COUNSEL]: What was said?

MR. GEE: He – Officer Bearss got up and said – he said, I guess we're going to have to get him to testify a different route by charging him with obstructing justice. I told him it don't matter. I'll be in prison until 1999 anyway, and a couple years more won't matter. And, you know, I refused to answer their questions. I told him to push the button and call the guard to let me out the conference room.

So when he called – he pushed the button, I stood up. You know, they got in my face and was telling me to sit down, and he grabbed me. I pulled away, and I told him don't touch me. He touched me again, and I pulled away again. Then the guard came and opened the door, and he still was hollering, you know, and yelling at me like, you know, as far as this makes a difference, but it didn't.

[DEFENSE COUNSEL]: So you were informed that you could be charged with obstructing justice if you refused to testify?

MR. GEE: That's what they said.

[DEFENSE COUNSEL]: I have no further questions, Your Honor.

* * *

[PROSECUTOR]: Now, prior to that time during our conversation, you had indicated to us that you were not going to testify, period, had you not?

MR. GEE: Right.

* * *

[PROSECUTOR]: And you also indicated to us that you didn't care what anybody did, you didn't care what the judge did, because you were already in prison and you didn't care – there was nothing she could to do you. Isn't that a fair summary of what you told us?

* * *

MR. GEE: I told him I wasn't going to testify.

* * *

THE COURT: And that's still your feeling; you're not going to testify?

MR. GEE: Well, no, I ain't. I don't want to testify, and you know I ain't –

THE COURT: Well, you know, Mr. Gee, none of the witnesses who come into court want to testify. That isn't the standard. You know, these jurors, they don't want to be here either. So my question to you is are you going to testify? I'm ordering you to testify.

MR. GEE: No, I'm not going to testify.

* * *

THE COURT: Fine. All right. The Court finds you in contempt of court. We will have a hearing later to dispose of your sentence. Get the jury. We are going to place on the record from the defendant's own testimony that he refuses to testify. We are not going into any of this other stuff in front of the jury about the colloquy between Bearss and Mr. Gee. We are not doing that.

[DEFENSE COUNSEL]: That's fine. May I make a statement, Your Honor?

THE COURT: Yes.

[DEFENSE COUNSEL]: I object to anything being done with this witness in front of the jury. The thrust of Giacolone and King is the prejudice to the trial of the defendant when the prosecutor's allowed to introduce this type of situation and the implications that come from it. It doesn't matter from the standpoint of the prejudice to the defendant whether it's a properly asserted privilege or the extent of it. That's what King says. Whatever the man's doing for whatever reasons should not be allowed to go in front of this jury to—

THE COURT: Why should the jury be able to speculate that there is a witness, and you know as well as I do, …, there is an instruction when the People do not produce a witness that is very strong language against the prosecution. So the jury should be able to know why a witness was not produced and what the truth is in that matter.

* * *

[DEFENSE COUNSEL]: . . . Now, this man has not had the opportunity to consult with counsel. He hasn't had anything but the direct questioning from this Court and the prosecutor and myself in this setting as to what his rights are. Nobody's told him. Nobody's taken him back to even talk to the man.

THE COURT: He doesn't have any right not to testify, …. He does not. He has no Fifth Amendment right. I'm bringing the jury in. …

* * *

(Jury returns at 9:40 a.m.)

* * *

BY [PROSECUTOR]:

Q Mr. Gee, would you tell the Court and jury your full name please.

A (Shaking head).

Q Mr. Gee, the court reporter can't record a nod of the head.

A Well, I'm making sure—I want—I'm refusing to say anything until I get a legal representative.

THE COURT: Mr. Gee, we've had a hearing. The Court is ordering you to testify.

THE WITNESS: I'm refusing to say anything.

THE COURT: Are you refusing to testify?

THE WITNESS: I'm refusing to say anything until I get a legal representative.

THE COURT: All right. Deputy, will you take control of Mr. Gee, and the Court has found Mr. Gee in contempt of court. You may call your next witness.[1]

Trial continued and the jury found defendant guilty of the lesser offense of voluntary manslaughter, felony firearm and carrying a concealed weapon. At sentencing, two persons addressed the court, the victim's mother and sister, both of whom urged the court not to impose a harsh sentence on defendant. The trial court concluded that there had been an intentional killing without excuse and that the jury had been sympathetic to defendant because Curtis was his friend. On this basis, the court departed upward from the sentencing guidelines' minimum range of two to seven years, sentencing defendant to ten to fifteen years.

II

Defendant first argues that he was denied a fair trial and his right of confrontation by the court's allowing the prosecutor to call Gee to testify, after Gee had stated outside the jury's presence that he would refuse to testify. We agree.

A lawyer may not knowingly offer inadmissible evidence or call a witness knowing he will claim a valid privilege not to testify because invocation of a privilege in the jury's presence results in prejudice to the defendant, which arises from the human tendency to treat the claim of privilege as a confession of crime, thereby creating an adverse inference which the accused is powerless to combat by cross-examination. *Giacalone*, 399 Mich at 645; *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). In *Giacalone*, the Supreme Court reversed and remanded Giacalone's conviction of armed robbery on the ground of prosecutorial misconduct, the prosecutor having called a codefendant, who had already been convicted and had an appeal pending, knowing that he would invoke the Fifth Amendment. The prosecutor called the co-defendant over defense counsel's objection, and asked the co-defendant his name, to which the co-defendant responded with his name, and then asked if he recalled the date of August 15, 1967, to which the co-defendant responded: "By advice of counsel, I refuse to answer on the ground that it may incriminate me." *Id*. at 644 and n 3. No further questioning occurred. *Id.*

People v Poma, 96 Mich App 726, 733; 294 NW2d 221 (1980), extended the exclusionary rule of *Giacalone* by holding that "it is inherently prejudicial to place a witness on the stand who is intimately related to the criminal episode at issue, when the judge and prosecutor know that the witness will properly or improperly assert the Fifth Amendment privilege against self-incrimination." (*Emphasis added*.) The defendant in *Poma* was convicted of possession with intent to deliver marijuana. The owner of the car from which the marijuana was seized was endorsed as a witness, and at an evidentiary hearing outside the jury's presence, he asserted his Fifth Amendment privilege. The trial court

determined the witness had no valid Fifth Amendment privilege and, even if he did, he had waived it. The witness was questioned at trial without benefit of counsel, and answered many questions with "I don't remember." The *Poma* court sua sponte addressed the issue whether the witness' attempted on-the-stand assertion of the privilege prejudiced the defendant, noting "When a witness who is substantially related to the criminal episode, such as an accomplice, asserts this privilege, critical weight is added to the prosecution's case." *Id.* at 730. Further, the validity of the witness' privilege has no bearing on the prejudice that results to the defendant when that witness repeatedly asserts the Fifth Amendment. *Id*. at 731. The *Poma* court set forth the protective measures to be taken by trial courts in this situation:

> The Court should first hold a hearing outside the jury's presence to determine if the intimate witness has a legitimate privilege, as was done in the instant case. This determination should be prefaced by an adequate explanation of the self-incrimination privilege so the witness can make a knowledgeable choice regarding assertion. This was not done in the instant case. In fact, when asked if he understood the privilege, the witness commented "Nobody's explained it to me, but I can figure it out myself." We do not believe that the burden of comprehending the privilege should rest with witnesses; the responsibility of informing must be the court's.
>
> If the court concludes that the witness has no legitimate privilege, it should consider contempt penalties or other alternate remedies against the witness. Yet, with respect to the defendant, the court must proceed to determine if the witness intends to assert that privilege, whether validly or invalidly, at trial. **If the intimate witness intends to claim the protection of the Fifth Amendment at trial, there really is no way to prevent prejudice to the defendant absent barring the witness. As other jurisdictions have noted, a cautionary instruction that no negative inference is to be drawn from the witness's taciturnity is ineffectual.**
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> * * *
>
> **We hold that it is inherently prejudicial to place a witness on the stand who is intimately related to the criminal episode at issue, when the judge and prosecutor know that he will assert the Fifth Amendment privilege. When a judge determines at the evidentiary hearing that the intimate witness will either properly or improperly claim the protection against self-incrimination, he must not allow this witness to be called to the stand.** *[Id*. at 732-733. Citations omitted.]

Subsequent to *Poma,* the Supreme Court applied the *Giacalone* exclusionary rule to a witness in *Dyer, supra,* who was neither an accomplice or codefendant, nor had charges been brought against him. *Id.* at 578. Holding that the exclusionary rule articulated in *Giacalone*, applied equally to prosecutor and defense counsel, the *Dyer* Court reversed this Court's holding that the trial court erred

by excluding the witness after appointed counsel for the witness disclosed at a hearing outside the jury's presence that the witness would invoke the Fifth Amendment.[2]

The *Poma* protective measures were subsequently applied in *People v Paasche*, 207 Mich App 698, 709; 525 NW2d 914 (1994), which held that the prosecution's questioning of the defendant and her accountant, in response to which both invoked the accountant-client privilege in front of the jury, denied the defendant a fair trial. The *Paasche* court noted that if the assertion of the privilege is not legitimate in the opinion of the trial judge, the court must then consider methods to induce the witness to testify, such as contempt and other proceedings. But if the witness continues to assert the privilege, the court must proceed to trial without the witness, because there is no other way to prevent prejudice to the defendant. *Id*. at 709-710. *See also People v King*, 131 Mich App 542, 548-549; 346 NW2d 51 (1983), which followed *Poma* and held that it is reversible error for the court to allow the prosecution to call an accomplice of the defendant, knowing that the accomplice would validly claim the privilege against self-incrimination, even though the witness did not assert the privilege when called and no incriminating testimony was elicited.

Here, although the trial court conducted an evidentiary hearing outside the jury's presence, it did not adequately explain the Fifth Amendment privilege to Gee. The court's explanation followed its finding that Gee did not have a right to refuse to testify. This error was, however, rendered harmless by the court's later appointment of counsel.[3]

Out of the jury's presence, Gee made it clear beyond peradventure that he would not testify. Under *Giacalone* and *Poma*, it was improper to call him to the stand thereafter. Gee invoked the Fifth Amendment twice during the colloquy with the trial court. Even an improperly invoked assertion of the privilege is sufficient to bar the witness from being called. *Poma*, *supra*.

We reject plaintiff's argument that there was no reversible error because Gee did not assert a Fifth Amendment privilege and he was not an alleged accomplice to the crime. Plaintiff argues that the reasoning of *Giacalone* and *Poma* does not apply because the solicitation of Gee's testimony did not create a logical inference of defendant's guilt. In this regard, the *Poma* Court noted:

> If there is some connection between the defendant and the witness, often a jury will illogically infer guilt of the defendant because of the refusal of the witness, with knowledge of the facts, to testify. [96 Mich App at 731, quoting *People v McNary*, 43 Mich App 134; 203 NW2d 919, aff'd in part and rev'd in part 388 Mich 799 (1972).]

In the instant case, the jury was not told what role Gee had in the incident, and was not told that Gee was not a suspect and was not involved in the incident. In fact, the jury had heard testimony that Gee was present at the shooting, and was parked immediately alongside Curtis' car. Gee's car was also next to Jamerson's passenger side, from where defendant was alleged to have emerged and then to have started shooting. The shot that killed Curtis was alleged to have come from the same general direction as Gee's car was parked. The prosecutor himself argued, albeit outside the jury's presence, in

relation to Gee's being called to testify, that "witnesses have indicated that [Gee] was there at the scene and was in a position to see what happened." Although Gee was not a co-defendant, the jury could have inferred that his refusal to testify until he spoke with a legal representative meant "that the answer if given would have been favorable to the prosecution." *Giacalone*, 399 Mich at 646. Gee was a witness "substantially related to the criminal episode," as stated in *Poma*. Under these circumstances, the jury could have believed that Gee had intimate and important knowledge of the events and could have inferred guilt on defendant's part from Gee's refusal to testify. Further, it was undisputed that the drive-by shooting was related to gang activity. Gee was a member of the same gang as Curtis and defendant.

Further, it is not pertinent that when Gee took the stand he did not use the words "Fifth Amendment." The exclusionary rule was applied in *Poma* when the witness at issue, once called to the stand, invoked no privilege. Here, Gee refused to "say anything until I get a legal representative." This was stated twice in front of the jury. The effect on the jury is the same as if Gee had invoked the privilege. There was a refusal to testify on the basis of an asserted legal right.

Plaintiff urges us to apply *McNary*, *supra*, in which this Court held that it was not reversible error for the trial court to permit the prosecution to call a witness to the stand knowing he would assert the Fifth Amendment because the witness was neither an accomplice nor a co-defendant, and defense counsel had neither objected nor requested a cautionary instruction. *McNary* was decided before *Giacalone*, *Poma* and *King*, *supra*, and, in any case, is distinguishable because defense counsel in the instant case placed repeated objections on the record.

Another case plaintiff cites, *People v Castaneda*, 81 Mich App 453, 458; 265 NW2d 367 (1978), is also distinguishable, as the issues in that case centered on the propriety of using the former testimony of a witness who asserts the Fifth Amendment privilege. The witness at issue in *Castaneda* was a paid police informant who testified at the defendant's preliminary examination that he and the defendant arranged a drug sale to an officer, and that the defendant provided him with a heroin sample, took the heroin and placed it in some bushes. *Id*. at 456-457. Based on the informant's testimony, the defendant was bound over for trial. The defendant pleaded guilty of possession of heroin but later moved to vacate the plea. At the hearing on the motion, the paid informant repudiated his preliminary examination testimony, stated the heroin belonged to him, and claimed that the real drug dealer was another person named Garcia. The defendant's guilty plea was vacated and the trial judge recommended perjury charges against the informant. The defendant was later convicted of the drug charge, and on appeal argued the informant was improperly declared an unavailable witness—thus permitting the introduction of his testimony from the preliminary examination—when he invoked the Fifth Amendment because of pending perjury charges. This Court held that the trial judge properly ruled that in asserting the privilege, the informant had made himself "unavailable" at trial. *Id.* at 458.

The *Castaneda* court also rejected the defendant's argument that the trial judge should have sua sponte instructed the jury not to draw any adverse inferences from the informant's failure to testify, as the defendant had not requested the instruction and on the basis that no manifest injustice resulted because both the preliminary exam testimony and the plea revocation testimony was read to the jury and

the informant had given testimony favorable to and exculpating the defendant. *Id.* at 464. In this regard, and this is the aspect of *Castaneda* plaintiff relies on, the *Castaneda* Court distinguished *Giacalone* as having involved Giacalone's charged accomplice. The point in *Castaneda* is not that a jury is likely to draw adverse inferences only from alleged accomplices' invocations of the Fifth Amendment, but that in *Castaneda*, the informant's plea revocation hearing testimony having been before the jury and being exculpatory of the defendant, the court was able to conclude that "it [was] unlikely any inference adverse to defendant would result from his taking the Fifth Amendment." *Id.* at 464.

Lastly, we note that defendant did not assert that he would be entitled to an instruction that the jury should draw an adverse inference from the prosecutor's failure to present Gee's testimony, and any unfairness the trial court perceived might have resulted from Gee's failure to testify could have been cured by measures far short of having him refuse to testify and be held in contempt in front of the jury.

We conclude that the trial court erred in allowing the prosecution to call Gee so that he could refuse to testify in front of the jury, that the error was inherently prejudicial, *Poma,* 96 Mich App at 733, and was injected into the proceedings by the prosecution. We therefore reverse. *Id.*; *King*, 131 Mich App at 549-550.

Although the evidence tended to show that defendant was the only one of the group returning fire at the drive-by truck with a nine millimeter weapon, there was testimony that shots were also heard from behind Kishi Wesby's house. An officer involved in the investigation testified that Williams told him that Marcus Wesby had a gun at the time of Curtis' shooting, along with defendant and Jamerson, and that Williams said he saw the three men shooting. Williams said he believed that Wesby had a .32 caliber gun. However, the officer testified there was no indication at the scene that a .32 caliber gun had been used. Although it was undisputed that the shot that killed Curtis did not come from the direction of South Park Street, testimony from the sergeant at the Bridgeport Crime Lab admitted as a firearms expert was that the trajectory paths of the bullet holes found in Curtis' car went back to the frame of a window at the rear of Wesby's house, although he was unable to say where along the trajectory path the shots were fired. Further, while the firearms expert testified that the shots that entered Curtis' car were at heights of 32", 34 ¾", and 47" off the ground, the only testimony regarding defendant's height was that he was six feet tall or taller, and the only person who testified as to defendant's stance while he shot testified that defendant was holding his arm out at shoulder level.

Reversed and remanded for a new trial.

/s/ Helene N. White
/s/ Donald E. Holbrook, Jr.
/s/ Philip D. Schaefer

[1] Following this colloquy, three witnesses testified. The jury was then excused and the court stated that, after Mr. Gee's testimony, the court had appointed counsel for him, Mr. Jensen. Mr. Jensen then addressed the court and stated he had discussed the matter with Mr. Gee and "told him he has no legal rights that I'm aware of based upon the facts I have that he would have any legal right not to testify. His only question is how much time he gets for contempt of court." Both counsel stated they did not want to question Mr. Jensen.

[2] *Dyer* was a prosecution for carrying a concealed weapon. The witness at issue, Johnson, was with the defendant when two police officers approached them. The officers testified that the defendant dropped a gun, while the defendant testified the gun was Johnson's. Out of the jury's presence, Johnson's appointed counsel indicated that Johnson would invoke the Fifth Amendment if called to testify. The trial court held neither party could call Johnson, relying on *Giacalone, supra*. *Id.* at 574.

[3] The court later appointed counsel. After conferring with Gee, counsel agreed that Gee could not properly invoke the Fifth Amendment. Apparently, Gee's discussion with counsel did not change his mind. See n 1, *supra*.