

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENDRICK SCOTT,

Defendant-Appellant.

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UNPUBLISHED

March 26, 2002

No. 228548

Wayne Circuit Court

Criminal Division

LC No. 99-005393

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(b), assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and twenty to thirty years' imprisonment for the assault with intent to rob while armed conviction, consecutive to the mandatory two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We vacate defendant's conviction for assault with intent to rob while armed and remand for amendment of the judgment of sentence. We affirm in all other respects.

I. Admission of Evidence

Defendant first argues that the trial court abused its discretion when it permitted the prosecutor to admit a statement allegedly made by codefendant Justly Johnson. During trial, Raymond Jackson testified that on May 9, 1999, codefendant Johnson told him that he "hit a lick" with defendant and had to shoot.<sup>1</sup> The trial court found that the statement satisfied the requirements of both MRE 804(b) and *People v Poole*, 444 Mich 151; 506 NW2d 505 (1993). However, defendant maintains that the statement lacked sufficient reliability to be admitted as substantive evidence because of the circumstances surrounding the statement. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 248 Mich App 282, 289; \_\_\_ NW2d \_\_\_ (2001). However, if the decision involves a question of law this Court will review the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d

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<sup>1</sup> There was testimony during trial that "hitting a lick" meant to rob somebody.

607 (1999). Unpreserved errors are reviewed for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

MRE 804(b) provides exceptions to the hearsay rule if the declarant is unavailable to testify. The pertinent subsection of MRE 804(b) states:

(3) *Statement Against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

The part of a statement that implicates an accomplice is referred to as the "carry-over" portion. *People v Richardson*, 204 Mich App 71, 76-77; 514 NW2d 503 (1994). While not directly referred to in MRE 804(b), our Supreme Court in *Poole*, *supra* at 161, concluded that "carry-over" statements are admissible:

where . . . the declarant's inculcation of an accomplice is made in the context of a narrative of events, at the declarant's initiative without any prompting or inquiry, that as a whole is clearly against the declarant's penal interest and as such is reliable, the whole statement — including portions that inculcate another — is admissible as substantive evidence at trial pursuant to MRE 804(b)(3).

Once a court determines that the "carry-over" portion of a statement is admissible under MRE 804(b)(3), it must decide whether admission of the statement would violate the defendant's Sixth Amendment right of confrontation. *Poole*, *supra* at 162. To satisfy the Confrontation Clause, US Const, Am VI; Const 1963, art 1, § 20, there must be a showing that the declarant is unavailable and that the statement bears a reasonable "indicia of reliability." *Poole*, *supra* at 163. The reliability of the statement is based the totality of the circumstances. *Id.* at 165. In *Poole*, the Court discussed several factors that favor either the admissibility or inadmissibility of a statement.<sup>2</sup> *Id.*; see also *People v Schutte*, 240 Mich App 713, 715-717; 613 NW2d 370 (2000).

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<sup>2</sup> *Poole*, *supra* at 165, presented the following circumstances to consider:

The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates--that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.

On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

In the case at bar, we conclude that the trial court plainly erred in failing to establish that codefendant Johnson was unavailable to testify. Indeed, both MRE 804(b)(3) and the Confrontation Clause require a showing that the declarant is unavailable to testify. It cannot necessarily be assumed that codefendant Johnson would assert his Fifth Amendment privilege, especially when he testified at his own trial.<sup>3</sup>

Nonetheless, defendant failed to preserve this issue for appeal by objecting to the admission of this statement on the grounds of codefendant Johnson's availability.<sup>4</sup> See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). As such, defendant must prove that his substantial rights were affected by the trial court's error. *Carines, supra* at 763-764. After carefully reviewing the record, we conclude that the error did not impact the outcome of the trial. Indeed, Antonio Burnette testified to a similar statement made by defendant. Burnette claimed that defendant informed him that defendant and codefendant Johnson had shot a woman because she would not give them her money. Thus, the jury would have heard the same evidence despite the erroneous admission of Jackson's hearsay statements.

## II. Insufficiency of the Evidence

Defendant next contends that there was insufficient evidence of his intent to rob to support his conviction for assault with intent to rob while armed. We disagree. In reviewing a sufficiency of the evidence claim, this Court views the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). Because intent may be inferred from all the facts and circumstances, an intent to rob may be reasonably inferred from the circumstance of the crime and the words used. *People v Whitehead*, 238 Mich App 1, 14; 604 NW2d 737 (1999).

There was evidence presented in this case that defendant told Burnette that he and codefendant Johnson were “going to hit a lick.” According to Burnette, defendant later informed him that defendant and codefendant Johnson had to shoot a lady because “she wouldn’t come out the money.” Viewed in the light most favorable to the prosecution, this evidence was sufficient to enable a rationale trier of fact to find beyond a reasonable doubt that defendant possessed the requisite intent to rob someone while armed. Defendant disputes the weight and credibility of Burnette’s testimony. However, such issues are for the trier of fact to resolve. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992).

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<sup>3</sup> We note that it appears defendant may have conceded the fact that Johnson was unavailable to testify in his appellate brief. Specifically, defendant states that “[a]pplying the criteria to the facts in the instant case, the declarant, Mr. Johnson, was unavailable to testify.” However, defendant’s supplemental brief contests codefendant Johnson’s availability.

<sup>4</sup> Rather, defendant objected to the admission of Jackson’s hearsay testimony because defendant disagreed with the Supreme Court’s holding in *Poole, supra*. We note that this Court is required to follow the holdings of our Supreme Court. *Fletcher v Fletcher*, 200 Mich App 505, 511; 504 NW2d 684 (1993).

### III. Antonio Burnette's Testimony

Defendant further alleges that the prosecutor knowingly permitted Burnette to give perjured testimony. According to defendant, Burnette's trial testimony was inconsistent with the testimony that he gave during the preliminary examination and at codefendant Johnson's trial. Defendant contends that the prosecution failed to question Burnette about these inconsistencies and that this reluctance proves the prosecution's awareness that the testimony was false. Specifically, defendant cites to Burnette's testimony concerning weapons and a conversation he allegedly had with defendant after the shooting. We disagree. We review questions of law de novo on appeal. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). However, unpreserved claims of constitutional error are reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

The prosecution has a constitutional duty to report the false testimony of its witnesses to the defense and the trial court. *Lester, supra* at 276. If a prosecutor deliberately and knowingly allows a government witness to lie under oath there may be grounds for a new trial when there is a reasonable probability that the testimony affected the jury's judgment. *Id.* at 280; *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). However, absent proof that the prosecution knew that the trial testimony was false, reversal is unwarranted. *People v Herdon*, 246 Mich App 371, 417-418; 633 NW2d 376 (2001); *People v Knight*, 122 Mich App 584, 592-593; 333 NW2d 94 (1983). Knowledge of falsity is not imputed to the prosecutor merely because a key government witness' testimony conflicts with another's statement. *Lester, supra* at 278, citing *United States v Lopez*, 985 F2d 520, 524 (CA 11, 1993).

After a careful review of the record, we find nothing to support a conclusion that the prosecution knowingly presented false or perjured testimony. Indeed, the record does not reveal that the prosecutor solicited or permitted Burnette to change his testimony. The fact that the prosecution failed to present Burnette with the same questions he was asked at Johnson's trial does not constitute proof that the prosecutor knew Burnette's testimony was false. Moreover, evidence that defendant was taken into police custody for questioning does not necessarily refute Burnette's testimony regarding a conversation he had with defendant or prove that the prosecution was aware that Burnette's testimony was false.<sup>5</sup> There is no evidence that the prosecution attempted to conceal any conflicts and defendant was afforded ample opportunity to impeach Burnette's testimony at trial. See *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

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<sup>5</sup> The record fails to specify the exact time that defendant was taken into police custody. Indeed, the police officer could not remember the time. Furthermore, while witness Jackson testified that the police took him and defendant for questioning at 1:15 a.m., he also stated that he was not sure of the time. The record also reflects that the victim was shot sometime between 12:30 a.m. and 1:00 a.m. Given this time frame, it is unclear how the police officer could have arrived at the gas station to help preserve the scene, been reassigned to the scene of the shooting, and have picked up defendant and Jackson for questioning by 1:15 a.m. Moreover, the fact that Burnette's version of events may have conflicted with the time frame of events that Jackson related does not impute knowledge of falsity to the prosecution. *Lester, supra* at 278.

#### IV. Prosecutorial Misconduct

Defendant also maintains that he was denied a fair trial because of misconduct by the prosecutor. We disagree. “This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.” *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, if a defendant fails to object to the alleged misconduct below, this Court reviews the allegations for plain error affecting the defendant’s substantial rights. *People v Schultz*, 246 Mich App 695, 709; 635 NW2d 491 (2001).

It was not improper for the prosecutor to elicit from Burnette that he had been threatened for testifying in this case. “Evidence of a defendant’s threat against a witness is generally admissible as conduct that can demonstrate consciousness of guilt.” *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). The trial court gave the prosecution an opportunity to link any threats to defendant and when the prosecution failed to do so the objection was sustained.

The remainder of defendant’s claims of prosecutorial misconduct were not properly preserved for appeal with an appropriate objection at trial. Specifically, defendant contends that the prosecutor misconstrued facts and argued facts not in evidence. However, our review of those claims fails to reveal plain error affecting defendant’s substantial rights and therefore appellate relief is unwarranted. *Carines, supra* at 763-764. Furthermore, the jury was instructed that the attorneys’ statements were not evidence and that the jury was the ultimate factfinder. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (jury presumed to follow the trial court’s instructions).

#### V. Ineffective Assistance of Counsel

Next, defendant argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue before the trial court, this Court’s review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error only warrants reversal when it is a plain error that affects a defendant’s substantial rights. *Carines, supra* at 763-764.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel’s performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel’s performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel’s error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant alleges that his counsel was deficient for failing to impeach Burnette with prior inconsistent testimony about seeing defendant and Johnson with guns. We disagree. The record is silent on whether defense counsel reviewed the transcripts from codefendant Johnson’s

trial. As such, defendant has failed to show plain error. Furthermore, a decision to elicit prior testimony from a witness is presumed to be a matter of trial strategy because of its potential prejudicial and inculpatory effect. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). We further note that defense counsel did attempt to impeach Burnette’s credibility with the fact that Burnette was drunk and doing drugs during defendant’s alleged confession. Defense counsel further questioned Burnette about whether he was an original suspect in the crime.

We also find that defendant’s claim that his counsel was ineffective for not objecting to the prosecutor’s allegedly improper closing argument must fail. We have already determined that defendant failed to show plain error affecting his substantial rights arising from these remarks. Moreover, we do not find that counsel was ineffective for eliciting testimony that codefendant Johnson had already been convicted of murder in connection with the charged crime. This was a matter of trial strategy in which counsel was attempting to show that the responsible party had already been convicted. See *Garza, supra* at 255. While trial counsel’s strategy may have failed, it does not amount to ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that defense counsel improperly interfered with his right to testify. Because it is not apparent from the record what advice counsel gave defendant concerning his right to testify, defendant has failed to meet his burden of showing that defense counsel was ineffective. Further, contrary to defendant’s position on appeal, the trial court does not have a duty to advise defendant of his right to testify or obtain an on-the-record waiver of that right. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991).

Finally, defendant purports that his counsel was ineffective for failing to subpoena codefendant Johnson to testify. Defendant claims that codefendant Johnson “could have testified whether he made the statement, whether the statement was true, or whether a different statement had been made.” However, we have already concluded that the admission of Jackson’s hearsay testimony failed to impact the trial’s outcome. Thus, defendant cannot show that defense counsel’s failure to subpoena codefendant Johnson to testify about those statements amounted to ineffective assistance of counsel. *Carbin, supra* at 599-600. We further note that the decision to call a witness is considered trial strategy. *Garza, supra* at 255-256.

## VI. Double Jeopardy

Defendant also claims that his conviction and sentence for assault with intent to rob while armed must be vacated as violative of double jeopardy. We agree. “A double jeopardy challenge constitutes a question of law that this Court reviews de novo on appeal.” *People v Kulpinski*, 243 Mich App 8, 12; 620 NW2d 537 (2000). However, defendant failed to raise the double jeopardy issue at trial and therefore our review is limited to plain error affecting defendant’s substantial rights. *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000).

We find that defendant’s constitutional protection against double jeopardy was violated when he was convicted and sentenced for both felony murder and the underlying felony of assault with intent to rob while armed. See *People v Coomer*, 245 Mich App 206, 224; 627

NW2d 612 (2001). Accordingly, we vacate defendant's conviction and sentence for assault with intent to rob while armed and remand to the trial court to amend the judgment of sentence. *People v Adams*, 245 Mich App 226, 242; 627 NW2d 623 (2001).

Affirmed in part, vacated in part, and remanded for amendment of the judgment of sentence. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Helene N. White

/s/ Jessica R. Cooper