

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY HUNTLEY,

Defendant-Appellant.

UNPUBLISHED

September 24, 2002

No. 231520

Saginaw Circuit Court

LC No. 00-018419-FJ

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of assault with intent to commit murder, MCL 750.83, five counts of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of fifteen to thirty years' imprisonment for the assault with intent to murder conviction, two to four years for each felonious assault conviction, and two to five years for the CCW conviction. Those sentences are to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals his convictions as of right. We affirm.

This case arises from an argument between several men on a street corner in Saginaw. Defendant left the scene of the argument, but returned soon thereafter as a passenger in a car. According to the victims, the car drove by their group twice. The victims specified that as the car passed, defendant made a gesture that they interpreted as a "gang sign." Thereafter, according to the victims, defendant exited the car, stated: "What's up now?", and reached inside his coat or waistband. The victims fled. Victim Jamar Williams testified that he attempted to hide near a house, but was discovered by defendant. According to Williams, defendant shot at him three times. Williams was struck once in the chest and then again in the side as he attempted to escape over a fence.

I

Defendant first argues that the trial court erred in admitting evidence regarding defendant's gang sign gesture. This issue was not properly preserved. Defendant did not timely object to the challenged testimony below on the same basis now asserted on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Therefore, we review

this issue for plain error. *People v Carines*, 460 Mich 750, 773-774; 597 NW2d 130 (1999). To avoid forfeiture, defendant must show a plain error that affected his substantial rights, i.e., that the alleged error affected the outcome of the proceeding. *Id.* This Court should reverse only if defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

Defendant has not shown that the gang sign testimony resulted in plain error affecting his substantial rights. Defendant was charged, in part, with five counts of felonious assault. The elements of felonious assault are: (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Several victims testified that they perceived the gang sign as a threat. One victim specified that he interpreted the gang sign to mean: “we’re going to get you.” The gesture was made just prior to defendant exiting the car and shooting Williams. Under these circumstances, defendant’s conduct in making the gesture was relevant to explain the circumstances of the alleged assaults and to rebut defendant’s claim of self-defense. See MRE 401. Such evidence was probative of whether defendant intended to assault the victims and, in fact, engaged in assaultive behavior. See *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995).

Also, the evidence of the gang sign gesture was not unfairly prejudicial. “Prejudice” means more than simply “damaging” to a defendant’s case. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Evidence presents the danger of unfair prejudice when it threatens accuracy and fairness. *Id.* Defendant claims that the evidence caused the jury to judge him on his association with gangs rather than the evidence.¹ As explained, the testimony regarding the gang sign was relevant to the res gestae of the crimes and rebutted defendant’s claim of self-defense. Under these circumstances, the evidence did not threaten the accuracy or fairness of the trial. This is especially true given that there was substantial other evidence supporting defendant’s guilt. The prosecution presented the testimony of the six victims who gave consistent accounts of the crimes and identified defendant as the perpetrator, the testimony of a witness who claimed defendant admitted to the shooting, as well as the testimony of medical personnel and police who responded to the scene and investigated the crimes.

For these same reasons, defendant’s prosecutorial misconduct argument also lacks merit. Defendant claims that the prosecutor unfairly injected gang bias into the trial by focusing on the gang sign evidence. Again, defendant failed to properly preserve this issue below by way of a timely objection. MRE 103(a)(1); *Griffin, supra*. The gang sign evidence was relevant and was not unfairly prejudicial, and defendant has not shown that the prosecutor’s conduct of questioning witnesses on the subject or referencing the evidence in closing argument constituted plain error affecting his substantial rights. *Carines, supra*. A prosecutor is free to argue the evidence and all reasonable inferences there from and need not use the least prejudicial evidence

¹ Although defendant referred to the issue of character evidence in his brief on appeal, he failed to develop any argument in this regard. Regardless, the challenged evidence was not character evidence under MRE 608, but instead was part of the res gestae of the crimes.

available or state the inferences in the blandest terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

II

Defendant also argues that he was denied his right to confront a witness whose testimony was introduced through hearsay testimony of another witness. Again, defendant failed to properly preserve this issue below by way of a timely objection. MRE 103(a)(1); *Griffin, supra*. Therefore, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra*.

On direct examination, Terry Johnson testified that he spoke with defendant at a store soon after the shooting. According to Johnson, defendant admitted to the shooting. Defendant claims he was prejudiced by a portion of Johnson's testimony in which Johnson referred to facts told to him by a third-party. A review of the record indicates that immediately after the challenged testimony, the trial judge sua sponte instructed the jury that Johnson's testimony regarding what he was told by a third-party must be disregarded. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). After the instruction was given to the jury, the prosecution elicited testimony from Johnson confirming that defendant actually admitted to Johnson that he shot Williams. Given the court's instruction, the follow-up testimony by Johnson, and the substantial other evidence supporting defendant's guilt, the introduction of the hearsay testimony was not plain error affecting defendant's substantial rights.²

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens

² We reject defendant's assertion that this issue must be analyzed in the context of admission of a statement by a co-defendant. Nothing in the record suggests that the third-party to whom Terry Johnson referred during his testimony was an accomplice or co-defendant in these crimes.