

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES STANTON,

Defendant-Appellant.

UNPUBLISHED

September 27, 2002

No. 233779

Wayne Circuit Court

LC No. 00-010793-01

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction for second-degree murder, MCL 750.317, and felony firearm, MCL 750.227b. The trial court sentenced defendant to consecutive terms of eighteen to thirty years in prison for the second-degree murder conviction and two years in prison for the felony firearm conviction. We affirm.

This case arises out of the shooting death of Anthony Adams in the City of Detroit. Witnesses testified that, during an argument on a sidewalk, defendant walked to the side of a house, picked up a pistol, and fired three or four shots at Adams, who was pronounced dead on arrival at Henry Ford Hospital.

I. Prosecutorial Misconduct

Defendant contends that, during his examination of witnesses and closing argument, the prosecutor committed misconduct by implying that certain witnesses were pressured or intimidated to change their testimony. Defense counsel failed to object to the prosecutor's alleged misconduct. As this Court set forth in *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001):

We review 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 Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, a defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750,

763; 597 NW2d 130 (1999). “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *Schutte, supra* at 721.

Furthermore, “[t]o avoid forfeiture of her unpreserved claims of prosecutorial misconduct, defendant must establish that errors occurred, these errors were clear or obvious, and the errors affected the outcome of the trial court proceedings.” *People v Schultz*, 246 Mich App 695, 709; 635 NW2d 491 (2001).

Our review of the record reveals no error. The record reflects that, notwithstanding testimony from several witnesses that Jeffrey Boyd was an eyewitness to the shooting, Boyd testified that he was not present when the shooting occurred and did not know anyone involved in the incident. Another eyewitness, Anthony Hayes, failed to appear to testify at defendant’s trial and, when he finally arrived in the courtroom, he contradicted much of his prior testimony regarding defendant’s culpability. Testimony established that Boyd, along with Hayes, remained residents of the neighborhood where the shooting occurred and that Hayes ran away from home shortly before the trial began.

The prosecutor properly questioned Hayes’ relatives about his whereabouts. Further, the prosecutor was free to ask Hayes and Boyd why their testimony changed or was contrary to the testimony of several other witnesses. Indeed, it was defense counsel who asked Boyd whether his testimony was influenced by threats or fear. Moreover, it was not improper for the prosecutor to emphasize during closing argument that Boyd and Hayes both continue to live in the neighborhood and that other witnesses have moved out. While defendant correctly asserts that, in a criminal trial, a prosecutor may not inject issues broader than a defendant’s guilt or innocence, *People v Rice (On Remand)*, 235 Mich App 429, 438; 497 NW2d 843 (1999), during closing argument, a prosecutor “has wide latitude and may argue the evidence and all reasonable inferences from it.” *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Further, the prosecutor is free to “argue from the facts that a witness is not worthy of belief.” *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999).

In context, it is clear that the prosecutor made permissible credibility arguments on the basis of facts elicited at trial. Therefore, defendant has failed to show that a plain error occurred.¹ Moreover, were we to find error in the prosecutor’s examination or closing remarks, defendant has failed to demonstrate that any error affected the outcome of the proceedings.²

¹ Furthermore, and contrary to defendant’s assertion, we find no evidence in the record that the prosecutor suggested that the testimony elicited from Hayes “was only the tip of the iceberg.” Rather, the record clearly shows that the testimony Hayes gave at trial was dramatically different than his statement to police and his preliminary examination testimony and the prosecutor properly examined him about those differences.

² Defendant is not entitled to relief absent a showing that he “is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *People v Pasha*, 466 Mich 378, 384; 645 NW2d 275 (2002), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In light of the ample evidence that defendant perpetrated this crime, defendant has failed to show his actual innocence or that the integrity of the proceedings was in any way compromised.

Accordingly, we also reject defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's examination or remarks.³

II. Ineffective Assistance of Counsel

Defendant also argues, erroneously, that he received the ineffective assistance of counsel because his lawyer failed to object when the prosecutor elicited testimony from Detroit Police Officer James Fleming that defendant's father lied about defendant's name and whereabouts. Defendant incorrectly contends that the evidence was inadmissible under MRE 404(b) and because it involved the bad acts of a third party.

The disputed testimony arose when Officer Stanton testified about his process of tracking down defendant, after witnesses identified defendant as the person who shot and killed Adams. Officer Stanton explained that he went to defendant's last known address and spoke to a man later identified as defendant's father. According to Officer Stanton, defendant's father said that defendant did not live at that address or did not visit that address very often. Officer Stanton further testified that, when he asked for defendant's full name, his father gave him a false name. Officer Stanton obtained a warrant for defendant's arrest and defendant's father later accompanied defendant when he turned himself into the police.

Defendant correctly observes that MRE 404(b)(1) "applies to the admissibility of evidence of other acts of any person, such as a defendant, a victim, or a witness." *People v Catanzarite*, 211 Mich App 573, 578; 536 NW2d 570 (1995); *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). However, defendant's father was not a witness in the case and there is no indication that the prosecutor elicited this testimony from Officer Stanton as prohibited character evidence. Accordingly, we find no error to which defense counsel should have objected and defendant's claim is without merit.

III. Jury Instruction

We also reject defendant's claim that the trial court's reasonable doubt instruction was insufficient.

Not only did defendant fail to object to the jury instructions, he expressed satisfaction with the instructions given by the trial court. "With regard to unpreserved claims of instructional error, this Court reviews such claims for plain error that affected substantial rights." *Aldrich, supra* at 124-125. As the prosecutor correctly notes, the trial court recited the reasonable doubt instruction directly from CJI2d 3.2. "[T]his Court has already determined that CJI2d 3.2 presents an adequate instruction regarding the concept of reasonable doubt." *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999), citing *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Accordingly, we conclude that no instructional error occurred.

³ "A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002), citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad