

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HENRY LOUIS CARR,

Defendant-Appellant.

UNPUBLISHED

December 15, 2009

No. 286086

Saginaw Circuit Court

LC No. 07-028528-FC

Before: Beckering, P.J., and Cavanagh and M.J. Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree premeditated murder, MCL 750.157a and MCL 750.316(1)(a), unlawful discharge of a firearm from a motor vehicle, MCL 750.234a, carrying a weapon with unlawful intent, MCL 750.226, delivery of cocaine, MCL 333.7401(2)(a)(iv), felon in possession of a firearm, MCL 750.224f, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to two years in prison for the felony-firearm convictions, life in prison for the first-degree murder conviction and conspiracy conviction, 10 to 15 years in prison for the unlawful discharge conviction, and 12 to 75 years in prison for the convictions of carrying a weapon with unlawful intent, felon in possession, and delivery of cocaine. The sentences imposed for the felony-firearm convictions were to be served concurrently to each other and to the sentence for the conviction of carrying a weapon with unlawful intent, but consecutively to the remaining sentences. The remaining sentences were to be served concurrently to each other. The sentences imposed in this case were to be served consecutively to defendant's sentence in an unrelated matter. This case arises out of a drive-by shooting that left 15-year-old Deandre Stewart dead. Defendant appeals as of right and we affirm.

Defendant first argues that the trial court erred in denying his motion for a mistrial. A trial court should grant a mistrial "only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). This Court reviews a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). An abuse of discretion occurs when the trial court selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

At trial, Isiahia Davis refused to testify regarding certain threats he may have received and an incident involving his girlfriend. Later, during the lead investigator's testimony, the following exchange occurred:

Q [Prosecutor]. [W]ell, first off, let me ask you this. The—Isiahia Davis complained that he had been threatened and threats had been made against him and potentially his family.

Later on the same day, as you took this interview, was his girlfriend shot over in [Buena Vista]?

A. Yes, she was.

Q. Now, going on now, after this date, what did you do, then, following up on this information?

A. I tried to see if I could get it tied back to the defendant, so I asked around. I had some guys from [Buena Vista] and Safe Streets, who kind of work out to see if they could pinpoint a suspect who was involved in that.

Defendant raised a hearsay objection to this line of questioning and asked that the testimony be stricken. The court sustained the objection and granted the motion, ordering that the above questions and answers be stricken from the record. However, the court denied defendant's subsequent motion for a mistrial predicated on the argument that the prosecutor was "trying to make [defendant] look bad." When the jury returned, the court instructed as follows: "I would ask that you disregard the last two questions and the answers to those at this time." Subsequently, the court instructed the jurors that it was their "job to decide what the facts of this case are," and that they should not consider testimony that was stricken. "Make your decision only on the evidence that I let in," the court admonished, "and nothing else."

While in some instances a curative instruction is inadequate to effectively remove the prejudicial impact of stricken testimony, see e.g., *People v Robinson*, 417 Mich 661, 665-666; 340 NW2d 631 (1983), the testimony at issue was not so prejudicial that the jury would have been unable to follow the court's clear curative instruction and final jury charge. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.").¹ In *Robinson, supra*, our Supreme Court reversed a conviction based on an MRE 403 analysis where the defendant's prior criminal record was read to the jury in a second-degree criminal sexual conduct (CSC) trial. The defendant's prior record included 32 offenses, many of which involved CSC. *Id.* at 665. Quoting the defendant, the court agreed that "it 'is simply incredible that anyone would hear all

¹ In addition, we note that defense counsel made no argument to the trial court that a curative instruction would be insufficient. In fact, outside the presence of the jury, the trial court advised counsel of its intention to instruct the jury to disregard the above exchange. The trial court then inquired if defense counsel would prefer a slightly different instruction, and counsel declined.

of those prior acts of criminal conduct and then remove them from their mind based upon an instruction by the court when they are then to consider the guilt or innocence of the accused.” *Id.* In this case, there was no testimony that defendant was actually linked to the other shooting, only that the lead detective had suspected and explored a possible link. There is a significant difference between a jury being told to disregard that a person has been adjudged guilty in a court of law following presentation of proofs and a jury being told to disregard that a person is believed to have been possibly involved in another criminal act. Under the circumstances of this case, we find that the trial court did not abuse its discretion in issuing a curative instruction and denying defendant’s motion for a mistrial.²

Defendant next argues that the trial court erred in admitting Davis’s videotaped statement to police as well as Detective Andrew Carlson’s testimony and handwritten notes concerning a conversation he had with witness Napoleon Tinsley because such evidence constituted inadmissible hearsay. Defendant’s trial counsel specifically stated that he had no objection to the admission of Davis’s videotaped statement to the police or Detective Carlson’s notes; thus, defendant waived any error relating to their admission.³ See *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000). As for Detective Carlson’s testimony regarding his conversation with Tinsley, defendant failed to preserve the issue by raising a contemporaneous objection. See *People v Eccles*, 260 Mich App 379, 385; 677 NW2d 76 (2004). Unpreserved evidentiary issues are reviewed for plain error affecting a defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant’s guilt or innocence. *Id.*

Detective Carlson’s testimony regarding Tinsley’s prior statements was not offered for the truth of the matter asserted, but rather, to impeach Tinsley’s trial testimony. See MRE 613(b). The trial court specifically instructed the jury regarding “evidence that a witness made an earlier statement that did not agree with his or her testimony during trial,” stating that these prior statements could only be used to determine the truthfulness of the witness’s testimony at trial. The court was careful to draw a distinction between such evidence and earlier testimony “given under oath subject to the penalty of perjury,” which “may be considered as proof of the

² Defendant also argues that the trial court denied him a fair trial by admitting the evidence in violation of MRE 404(b). This argument is without merit, however, because the testimony was not admitted. The trial court specifically excluded both the questions and answers, and a cautionary instruction was provided.

³ In any event, the videotape was properly admitted as a prior consistent statement under MRE 801(d)(1)(B), as defendant clearly argued in his opening statement that Davis had a motive to lie at trial, i.e., to receive the benefit of a plea bargain, and Davis had not been offered a plea bargain at the time the videotaped statement was made. Moreover, the explicit suggestion was made that Davis had not been sentenced as of trial in order to assure that his testimony was beneficial to the prosecution, i.e., that the prosecution was retaining its influence over Davis and his trial testimony. Detective Carlson’s notes, on which Tinsley had placed his initials next to the statements attributed to him, were also admissible as extrinsic evidence of a prior inconsistent statement under MRE 613(b).

facts in the statement.” As noted above, jurors are presumed to follow their instructions. *Abraham, supra* at 279. Accordingly, because the testimony was not admitted for the truth of the matter asserted, it did not constitute hearsay. See MRE 801(c).

Because there was no error in the admission of the evidence described above, defendant’s assertion of ineffective assistance predicated on trial counsel’s handling of it is without merit. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

We also reject defendant’s assertion that insufficient evidence was adduced to support his murder and conspiracy convictions. To convict a defendant of first-degree premeditated murder, the prosecutor must prove that the killing was intentional and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). In order to convict a defendant of conspiracy, the prosecutor must establish “specific intent to combine with others to accomplish an illegal objective.” *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993).

Defendant’s sufficiency argument is focused on the credibility of the witnesses arrayed against him. Questions of credibility are left to the trier of fact and, when reviewing a claim of insufficient evidence, this Court must resolve credibility choices in favor of the jury’s verdict. See *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Moreover, there was testimony that defendant procured the truck used in the drive-by shooting in exchange for crack cocaine, and then later failed to return the vehicle and told the owner to report it stolen. Davis, who was driving the truck at the time of the murder, testified that defendant was in possession of an assault rifle and fired it at the victim several times. This testimony was sufficient to establish the necessary elements of the charged offenses.

Defendant also argues that the prosecutor engaged in misconduct by failing to disclose certain deals or agreements with two witnesses. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). The prosecutor has a duty to disclose any promises made to secure an accomplice’s testimony. *People v Rosales*, 160 Mich App 304, 310; 408 NW2d 140 (1987). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

Here, the prosecutor informed the jury in his opening statement that Davis had pleaded guilty to second-degree murder. In addition, Davis himself testified that there was an agreement in place that his minimum sentence would not exceed nine years in exchange for his trial testimony. Therefore, the prosecutor satisfied his duty to disclose promises made in exchange for Davis’s testimony.

We are not persuaded by defendant’s allegations that the prosecutor was obligated to disclose two other alleged deals, one involving Davis and another involving the owner of the green truck, as defendant has failed to provide factual support for his claims that such deals existed. There is no indication of what the alleged offers were, whether there was acceptance of the alleged offers, or whether the prosecutor was aware of the possible existence of such offers. In light of these facts, we cannot conclude that defendant was denied a fair and impartial trial. See *Id.*

Defendant finally claims he was denied due process because he was convicted by an all-white jury. We need not address this claim as it was waived when defendant expressed satisfaction with the jury prior to the administration of the oath. See *Carter, supra* at 214-215.

Affirmed.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly