

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 25, 2014

v

CLINTON ALLEN CRAWFORD, JR.,

Defendant-Appellant.

No. 315576
Muskegon Circuit Court
LC No. 11-060268-FC

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals following his convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

Jerry Huck and Scott Cooper, the victim, drove to meet defendant to buy cocaine. During the drive, Huck gave Cooper \$6, and Cooper put it in his hat. Once the two arrived at the meeting location, defendant walked up to Cooper and handed Cooper cocaine. Huck saw Cooper take something out of his hat to give to defendant. Cooper immediately said, “let’s go,” and Huck drove away. As Huck was driving away, he heard two gunshots hit his vehicle. He looked over and saw that Cooper had been shot in the head. Huck looked into his rearview mirror and saw defendant in the street. Huck did not see defendant fire a gun nor did he see defendant holding a gun. Huck originally denied driving to Muskegon to buy cocaine and originally told the police that a black male ran by his vehicle, pulled out a gun, and started shooting. At trial, nearby security footage related to the incident showed an unidentifiable person walk up to Huck’s vehicle. The vehicle then drove away and the man seen in the street walked away from the scene. No gun or gunfire was present in the video. One of defendant’s friends, Deasyia Wyrick, testified that she had only seen defendant with a gun once in the past three years. The prosecution asked Wyrick about her interview with Steve Winston, a police detective. The prosecution asked Wyrick if she told Winston that defendant had a gun on him “all the time.” Wyrick denied making that statement. Winston subsequently testified that Wyrick, in fact, indicated that defendant had a gun on him “all the time.” During its closing rebuttal argument, the prosecutor used Wyrick’s prior inconsistent statement to argue that defendant possessed a gun at the time of the shooting because he had a gun on him “all the time.” The trial court thereafter instructed the jury that the witnesses’ “previously made statements inconsistent with their testimony” could be used to determine the “facts of the case.”

Defendant first argues that the prosecutor improperly elicited and used Wyrick's prior inconsistent statement as substantive evidence. Defendant's argument, however, is unpreserved because he failed to object. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To establish plain error, three requirements must be met: (1) there must have been error, (2) which is plain and (3) the error affected substantial rights. *Id.* To establish the third prong, the defendant must show prejudice; that is, that the outcome of the proceedings was affected by the error. *Id.* Even when these requirements are met, reversal still is not warranted unless the defendant establishes that the plain error resulted in the conviction of an actually innocent defendant or that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 (1936).

We agree that it was error to admit Wyrick's prior inconsistent statement as substantive evidence. However, defendant in this case is unable to show either actual innocence or that the claimed error seriously affected the fairness, integrity or public reputation of the proceedings. Even in the absence of the testimony describing Wyrick's inconsistent statement or with a proper instruction limiting its use to impeachment, the jury would have heard substantive testimony from Wyrick and from Huck that each had seen defendant with a gun before. Moreover, defendant's theory of the case, that some other drug dealer happened upon the scene and shot the victim because of a prior drug deal gone bad, while plausible in the abstract, was wholly without evidentiary support. The case against defendant, on the other hand, was proven beyond a reasonable doubt by admissible and compelling evidence even without the challenged testimony. It was established that defendant was at the scene and engaged in a drug deal with the victim and that the victim left without paying for the drugs. An independent witness saw only one person standing outside the victim's vehicle both before and after hearing several gunshots. Both this witness and defendant's cohort, Huck, immediately called 911 after the shooting. Huck identified defendant as the shooter to the dispatch operator and later picked him out of a line-up. And defendant made a threatening phone call to Huck as they were fleeing the scene. Moreover, while being interviewed by the police, defendant admitted to being involved in the drug deal with the victim and not being paid for the drugs, but only after attempting to give a false alibi to the police. Furthermore, video surveillance of the scene fails to show any signs of a mysterious "second drug dealer" at the scene who defendant claims shot the victim. Accordingly, defendant cannot meet his burden of showing actual innocence nor, for that matter, that the error affected the outcome of the proceedings. For the same reasons, we conclude that the error did not seriously affect the fairness, integrity or reputation of the proceedings. Moreover, the prosecutor did not blatantly engage in an improper argument in defiance of the trial court's ruling—it was actually consistent with the trial court's instruction and with defense counsel's affirmative agreement to the instruction.¹

¹ This, of course, also waives any argument that the instruction was erroneous. *People v Kowalski*, 489 Mich 488, 504; 803 NW2d 200 (2011).

Defendant also argues that he was denied effective assistance of counsel by counsel's failure to object to the prosecutor's use of the prior inconsistent statement as substantive evidence. To prevail on this issue, defendant must show "the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). As discussed above, we are not persuaded that, even without the argument by the prosecutor, that a different result would have occurred.

Defendant also argues that counsel was ineffective for not objecting when the trial court failed to instruct the jury that the prior statement could not be used as substantive evidence of guilt. Again, however, given the strength of the case against defendant and the lack of evidence to support his version of events, we are not persuaded that, even had the trial court corrected its instruction, it is likely that a different result would have occurred.

Defendant also argues that the trial court erred in assessing 25 points under Offense Variable 3. Defendant, however, also concedes that this issue is controlled by *People v Houston*, 473 Mich 399, 401; 702 NW2d 530 (2005), which held that OV 3 must be scored at 25 points.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Douglas B. Shapiro