

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH GREEN,

Defendant-Appellant.

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UNPUBLISHED

July 8, 2003

No. 235045

Wayne Circuit Court

LC No. 00-010919

Before: Owens, P.J., and Bandstra and Murray, JJ.

MURRAY, J. (*dissenting*).

The majority, the prosecutor, and defense counsel all agree that the pivotal issue on appeal is whether the admittedly plain error committed by the prosecutor during trial was of such a nature that it affected defendant's substantial rights under *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Because I disagree with the majority's conclusion that the plain error affected defendant's substantial rights, I respectfully dissent.<sup>1</sup>

In discussing the plain error doctrine, the *Carines* Court, citing *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994) reiterated that "[t]his state encourages litigants 'to seek a fair and accurate trial the first time around . . .'", and therefore our Supreme Court "disfavors consideration of unpreserved claims of error." *Carines, supra* at 761-762. Accordingly, and in light of *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993), the *Carines* Court held that to constitute the plain error affecting substantial rights, defendant must make a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Carines, supra* at 763. Moreover, "once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 763, citing *Olano, supra* at 736-737.

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<sup>1</sup> The prosecution concedes on appeal that both the trial prosecutor's questioning of Sergeant Wilson with respect to the district court's binding over of defendant in the face of Mr. Jackson's testimony, as well as the trial prosecutor's closing argument referencing the district court being the one who makes a decision on the "believability and credibility in deciding the case of *People v Keith Green* at the district court level" were plain error.

We have also previously held that there can be no error requiring reversal “if the prejudicial affect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), citing *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

In the instant case, there were two witnesses who identified defendant as the perpetrator of the crime. The main witness was Williams, who was also one of the victims shot in the van. During the preliminary examination and trial in this case, Williams was unequivocal that it was defendant who was speaking with the driver of the van<sup>2</sup> and then walked in front of the van in order to enter the back passenger side door of the van, and who then entered the van. Williams had also previously identified defendant as the perpetrator at a photo line-up. In my view, this is unequivocal eyewitness testimony that established defendant as the perpetrator of the crime. The majority opinion characterizes Williams’ testimony as equivocal, since Williams had previously identified another individual as the perpetrator at a photo line-up. However, I do not believe (and apparently neither did the jury) that this detracts from Williams’ testimony in this case. Indeed, as the prosecutor argued, the fact that Williams cleared the prior identified individual immediately after he first saw him at the preliminary exam arguably added to the veracity of Williams and the accuracy of his memory. Although defendant argued to the contrary to the jury, it was certainly reasonable for the jury to conclude that Williams’ account was more credible.

It is well settled that the eyewitness testimony is sufficient to prove the commission of a crime beyond a reasonable doubt. See *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988); *People v Thomas*, 7 Mich App 103, 104; 151 NW2d 186 (1967). Hence, Williams’ unequivocal testimony throughout the course of this proceeding was sufficient to allow the jury to conclude that defendant committed these crimes beyond a reasonable doubt.<sup>3</sup> Therefore, reversal is not warranted because the plain, forfeited error did not result in the conviction of an actually innocent defendant. *Carines, supra*.

Furthermore, I cannot conclude from review of the record that the plain, forfeited error seriously affected the fairness, integrity or public reputation of the judicial proceedings independent of defendant’s innocence. Although it was error for the prosecutor to have elicited the testimony and to have made the argument she made, the jury was repeatedly instructed that they were the sole determiners of the credibility of the witnesses and of the facts of the case, that lawyer arguments and judge’s remarks are not evidence, and that whether the prosecutor had proven during trial that defendant was guilty beyond a reasonable doubt was their decision alone. For instance, before trial, the judge instructed the jurors that the opening statements and closing arguments are not evidence and that the jurors should base their decisions only on the evidence presented:

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<sup>2</sup> The driver of the van, Quan Bell, was shot to death.

<sup>3</sup> I realize that there is no additional independent evidence supporting defendant’s conviction, as there was in the recent case of *People v Jones*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_ (Dkt. No. 119818, issued June 11, 2003). However, the eyewitness testimony, coupled with the jury instructions provided by the court (discussed in *infra*), are sufficient to conclude that there is no prejudice to defendant.

After all the evidence has been presented, the prosecutor and the defendant's lawyer will make their closing arguments. Like the opening statements, these are not evidence. They are only meant to help you understand the evidence and the way each side sees the case. You must base your verdict only on the evidence.

Additionally, immediately after that instruction, the trial court instructed the jurors that whatever the judge says during the course of the proceedings does not reflect his opinion about the facts of the case, and that the jurors are the ones who will decide the case based on the evidence and testimony:

My responsibilities as the judge in this trial are to make sure that the trial is run fairly and efficiently, to make decisions about evidence, and to instruct you about the law that applies to this case. You must take the law as I give it to you. Nothing I say is meant to reflect my own opinions about the facts of the case. As jurors, you are the ones who will decide this case. Your responsibility as jurors is to decide what the facts of the case are. This is your job and no one else's. You must think about all the evidence and all the testimony, and then decide what each piece of evidence means and how important you think it is. This includes how much you believe what each of the witnesses said. What you decide about any fact in this case is final.

The trial court also instructed the jurors about the different factors they may utilize in determining the credibility of witnesses, and that they can accept all, part or none of the witnesses' testimony. Importantly, the trial court instructed the jurors that the questions asked by lawyers are not evidence, and that only the answers are evidence:

The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something that is true just because one of the lawyers asked questions, or assume or suggest that it is.

Finally, the trial court again instructed the jurors prior to the commencement of testimony that neither the court's questions, nor any rulings made by the court reflect its opinions about the facts of the case.

After closing arguments, the trial court completed the jury instructions. Among those were the trial court's admonishment to the jury that "the fact that defendant is charged with a crime and is on trial is not evidence. . . [and] the fact that he is charged with more than one crime is not evidence." The trial court then repeated the instructions that the courts' "comments, rulings, questions and instructions are also not evidence." Continuing, the court noted that "when I make a comment or give an instruction, I am not trying to influence your vote or express a personal opinion about the case. If you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion. You are the only judges of the facts, and you should decide this case from the evidence." After the conclusion of these instructions, both the prosecutor and defense counsel expressed satisfaction with the instructions and charge as given.

In my view, the jury instructions made it quite clear that the jurors could only base their verdict on the evidence presented, i.e., the testimony and exhibits presented to them, and could not base their decision on arguments of counsel, questions of counsel, or any other extraneous factor. Additionally, the court repeatedly instructed the jurors that any comments, statements or rulings by the court were not to be considered evidence and were not to be considered the judge's view on any of the evidence presented. This is important for several reasons. First, since jurors are presumed to follow their instructions, see *People v Abraham*, 256 Mich App 265, 279; \_\_\_ NW2d \_\_\_ (2003), the jurors presumably did not base their decision on the prosecutor's closing argument. Thus, that only leaves the brief question and answers given by Sergeant Wilson for the jury to have improperly considered. However, the admission of that brief testimony, albeit in error, did not turn this otherwise proper trial into one that seriously affected the fairness, integrity or public reputation of this proceeding. Second, defense counsel never requested a curative instruction with respect to the testimony *or argument* by the prosecutor. Clearly, if it had done so, any prejudice from the prosecutor's comments would have been cured prior to the jury deliberations. *Schutte, supra; Grant, supra*. For these reasons, I would conclude that reversal is not warranted because the plain, forfeited error did not result in the conviction of an innocent defendant, nor did the error seriously affect the fairness, integrity or public reputation of the judicial proceedings independent of defendant's innocence. *Carines, supra*.

## II

Defendant's remaining issues, which I will review *seriatim*, also do not warrant relief.

Defendant alleges five other instances of improper closing arguments by the prosecutor. Because there was no objection to the challenged remarks at trial, review is limited to plain error affecting defendant's substantial rights. *Carines, supra*. I would conclude that the challenged arguments were fair comment upon the evidence and reasonable inferences drawn therefrom. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Initially it should be noted that, contrary to defendant's argument, the portion of the preliminary examination transcript that defendant asserts was improperly read to the jury during closing arguments, was actually read into the record during the testimony. Therefore, there was no error in the prosecutor's reading the testimony to the jury.

There was also no plain error in the manner in which the court allowed evidence of Ricky Jackson's prior inconsistent statement. Defendant did not seek a limiting instruction at the time the evidence was presented, but the court gave a proper limiting instruction on the impeachment use of prior unsworn statements during final instructions. Since the jury is presumed to follow its instructions, see *Abraham, supra*, there was no plain error affecting defendant's substantial rights. *Carines, supra*.

Although the prosecutor violated the trial court's prior order limiting testimony about other court proceedings against defendant and references to "mug shots" used in the photographic identification process, the court did not abuse its discretion when it denied defendant's motion for mistrial on the basis of these violations. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). A mistrial should be granted only for an irregularity that was prejudicial to the rights of the defendant and impaired his ability to receive a fair trial. *People v*

*Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001). Here, the court sustained two objections and ordered answers stricken, which was sufficient to protect defendant's rights.<sup>4</sup>

Next, the trial court did not abuse its discretion in denying defendant's motion for a mistrial due to alleged discovery violations. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997); *Dennis, supra*. Defendant asserts that his constitutional rights were violated when the prosecutor failed to disclose Jackson's oral statement to the officer in charge after the preliminary examination, in which Jackson allegedly stated that he lied to protect himself, or because three photographs used to identify defendant were not disclosed. However, the constitutional duty to produce discovery, absent a request, is very limited. The prosecutor is under a constitutional duty to disclose material *exculpatory* evidence. *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998); *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Jackson's alleged statement to Sergeant Wilson was not exculpatory evidence. Instead, by negating his exculpatory preliminary examination testimony, the statement to Wilson served an inculpatory purpose. Similarly, the photographs are not exculpatory because they were used to identify defendant as the perpetrator, not to exclude him.

Defendant also argues that the prosecutor improperly asked questions she "knew she could not prove." Because defendant did not object to the questions at trial, this unpreserved issue is reviewed under the "plain error" rule. *Carines, supra*. Defendant has not cited any authority in support of his position that the questions amounted to "misconduct." This situation is akin to a prosecutor's statement during opening statement that certain evidence will be produced. If that evidence is not eventually produced, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997); *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Here, there has been no showing that the prosecutor acted in bad faith. Further, the questions were answered in the negative, so defendant was not prejudiced. Accordingly, this unpreserved issue does not warrant appellate relief.<sup>5</sup>

Finally, defendant argues that he was denied the effective assistance of counsel when his trial attorney failed to object to certain points raised in this appeal. Limiting our review to the existing record, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), defendant has failed to overcome the presumption of effective assistance of counsel. *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

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<sup>4</sup> Moreover, contrary to defendant's arguments, evidence of a separate shooting in the vicinity did not prejudice defendant because he was never linked to that other incident. Likewise, defendant was not prejudiced by the challenged references to drug dealing by other persons. Indeed, the possibility of a drug-related shooting was prevalent throughout this trial, and defendant contributed to that theme in his opening statements and examination of witnesses.

<sup>5</sup> I would also conclude that Jackie Anderson's testimony about Williams' identification of defendant was admissible under MRE 801(d)(1)(C). Consequently, the court did not abuse its discretion by overruling defendant's hearsay objection.

For all these reasons, I would affirm defendant's convictions.

/s/ Christopher M. Murray