STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY JAKE HATCHETT,

Defendant-Appellant.

UNPUBLISHED
July 11, 2006

No. 261132
Wayne Circuit Court
LC No. 04-010419-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 18 to 30 years in prison for his second-degree murder conviction to run consecutive to two years in prison for his felony-firearm conviction. We affirm.

Defendant argues that he was denied his constitutional right to a fair trial[1] because the trial court usurped the jury's function by referencing its pretrial determination that defendant's statement to the police was admissible. Because defendant failed to preserve the issue, our review is for plain error. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). It is reversible error for a trial court to inform a jury of its determination following a *Walker*[2] hearing that a statement that a defendant denies making was voluntary and is therefore admissible. *People v Corbett*, 97 Mich App 438, 442; 296 NW2d 64 (1980). However, when the fact that the defendant made the statement is not disputed, although the trial court should not inform the jury of its *Walker* ruling, such comments are not error requiring reversal. *Id*. at 443.

Here, the trial court determined that defendant's statement was admissible following a *Walker* hearing. At trial, the statement was read into the record. The trial court instructed the jury that, before it could consider the statement against defendant, it had to first find that defendant actually made the statement and, if so, it could give the statement whatever weight it thought the statement deserved. Here, as in *Corbett*, *supra* at 442, defendant admitted that he

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[1] Mich Const 1963, art 1, § 20; US Const, Ams VI and XIV.

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

made the statement but contended that it contained untruths. The jury was properly instructed that its function was to determine the weight and credibility of defendant's statement. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under these circumstances, the trial court did not usurp the function of the jury; the instruction as given did not constitute plain error requiring reversal.

Defendant argues that the prosecutor engaged in misconduct by improperly impeaching witness Paul Harry with prior inconsistent statements he made to the police, and by commenting during closing argument that prior inconsistent statements made by Harry to the police and at his guilty plea proceeding could be used as substantive evidence of defendant's guilt. Defendant failed to preserve this issue by timely and specifically objecting to the allegedly improper conduct. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Accordingly, our review is for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. *Id*. at 448-449.

At trial, Harry testified that he committed the shooting at issue and that defendant was not present when the incident occurred. The prosecutor first impeached Harry with prior inconsistent statements made at his guilty plea proceeding, which implicated defendant as the shooter. Defendant does not contest the prosecutor's use of those statements, for good reason. They are not hearsay, MRE 801(d)(1)(A), and the prosecutor followed MRE 613 in examining Harry about them. Defendant complains because the prosecutor went on to further impeach Harry with similar statements he gave to police shortly after the shooting occurred. However, Harry's prior inconsistent statements to the police were merely cumulative and duplicative of the identical prior inconsistent statements made at his guilty plea proceeding, which were properly admitted. Even assuming there was an error in admitting the statements to the police, that error does not merit reversal because there is no basis to conclude that it resulted in the conviction of an actually innocent defendant or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. See *Ackerman*, *supra* at 449; *People v Crawford*, 187 Mich App 344, 353; 467 NW2d 818 (1991).

The same analysis applies to defendant's complaint about the closing argument. Prior inconsistent statements made under oath and subject to the penalty of perjury are not hearsay and can properly be used as substantive evidence. MRE 801(d)(1)(A); *People v Malone*, 445 Mich 369, 378-379; 518 NW2d 418 (1994). Accordingly, the prosecutor was permitted to comment during closing argument that Harry's sworn prior inconsistent statements from his guilty plea proceeding could be used as substantive evidence of defendant's guilt. But the prosecutor was not permitted to comment during closing argument that Harry's unsworn prior inconsistent statements to the police could be used as substantive evidence of defendant's guilt. Again, however, these statements were merely cumulative and their use against defendant was not plain error affecting his substantial rights.

Defendant argues that the trial court erroneously overruled his objection to the jury instruction regarding flight. A trial court must give a requested instruction when it is supported by the evidence. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod 450 Mich 1212; 539 NW2d 504 (1995). We review for an abuse of discretion a trial court's determination whether a

jury instruction is applicable to the facts of a case. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

"The term 'flight' has been applied to such actions as fleeing the scene of the crime, leaving the jurisdiction, running from the police, resisting arrest, and attempting to escape custody." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Here, defendant admitted to the police that he ran from the scene where the shooting occurred. Accordingly, the trial court did not abuse its discretion in determining that a flight instruction was supported by the evidence and in consequently instructing the jury with CJI2d 4.4.

Defendant argues that the sentence imposed for his second-degree murder conviction violated the principle of proportionality[3] and that the trial court impermissibly imposed a lengthy sentence because he maintained his innocence after trial. However, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Here, the trial court sentenced defendant to a minimum term of 216 months, falling within the appropriate guidelines range of 180 to 300 months. Because defendant does not claim error in the scoring of the guidelines or the use of inaccurate information at sentencing, we must affirm his sentence. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

We affirm.

/s/ Richard A. Bandstra
/s/ Henry William Saad
/s/ Donald S. Owens

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[3] *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).