STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

DEVANTE JENNINGS,

Defendant-Appellant.

Court of Appeals
No. 359837
MSC No. 165764
Macomb Circuit
No. 19-1800-FH

PLAINTIFF-APPELLEE'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

PETER LUCIDO (P41237)
Macomb County Prosecuting Attorney

JOSHUA D. ABBOTT (P53528)
Chief Appellate Attorney

By: JOSHUA ABBOTT (P53528)
Chief Appellate Attorney

Macomb County Prosecutor's Office
1 South Main Street – 3rd Floor
Mount Clemens, Michigan 48043
(586) 469-5350

Adrienne Young (P77803)
Assistant Defender
3031 W. Grand Blvd. Suite 450
Detroit, MI 48202
(313) 256-9833

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To: Adrienne Young (P77803)
Assistant Defender
3031 W. Grand Blvd. Suite 450
Detroit, MI 48202
(313) 256-9833

Joshua Abbott
Joshua Abbott (P30169)
Chief Appellate Attorney
Macomb County Prosecutor's Office

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Defendant-Appellant's Answer: "Yes".

Plaintiff-Appellee's Answer: "No".

ISSUE II

DID THE TRIAL COURT'S ADMISSION OF DETECTIVE SIMON'S TESTIMONY REGARDING THE CHARGES HE SOUGHT AGAINST THE DEFENDANT AMOUNT TO OUTCOME-DETERMINATIVE PLAIN ERROR?

Defendant-Appellant's Answer: "Yes".

Plaintiff-Appellee's Answer: "No".

ISSUE III

DID THE TRIAL COURT'S DECISION TO REFER TO JURORS BY NUMBER RATHER THAN BY NAME CONSTITUTE PLAIN ERROR AFFECTING THE DEFENDANT'S SUBSTANTIAL RIGHTS?

Defendant-Appellant's Answer: "Yes".

Plaintiff-Appellee's Answer: "No".

COUNTER-STATEMENT OF FACTS

On the morning of April 30, 2019, Alexandria McCorkle ("McCorkle") was at her residence at the Washington Square Apartments in Clinton Township, located off Garfield Road just north of 15 Mile Road. (Tr. 2-11-20, 119-120). She, along with her fiancé, awakened to "some screaming and arguing outside [her] apartment." (Tr. 2-11-20, 119-120, 129). McCorkle and her fiancé looked outside their apartment window and observed "[f]ive males and one woman" on the side of the building. (Tr. 2-11-20, 120). Soon, this group of individuals "moved from that side of the building over to the parking lot." (Tr. 2-11-20, 120).

The group of individuals "were screaming, [and] yelling over each other." (Tr. 2-11-20, 120-121). One of these individuals "was trying to get the attention of everybody else in the group" but they weren't noticing him. (Tr. 2-11-20, 121). Ultimately, this individual fired a gun into the air several times. (Tr. 2-11-20, 121). The individual wore a black hoodie with "white and red writing" on it. (Tr. 2-11-20, 121). The shooting occurred by the edge of the grass by some parking spots. (Tr. 2-11-20, 121-122). McCorkle saw two vehicles parked in these spots. (Tr. 2-11-20, 121). The individual who fired the gun got into one of these vehicles, a white Charger with a stripe down the side. (Tr. 2-11-20, 122). Others in the group also climbed into the white Charger. (Tr. 2-11-20, 123). About a minute after the gun had been fired, the white Charger fled out of the apartment complex, turning onto southbound Garfield. (Tr. 2-11-20, 123-124).

McCorkle called 9-1-1. (Tr. 2-11-20, 124). Minutes later, Officer Todd Penick ("Officer Penick") from the Clinton Township Police Department ("CTPD"), along with his partner, arrived at the apartment building. (Tr. 2-11-20, 124-125; Tr. 2-13-20, 5-7). McCorkle spoke with Officer Penick regarding what she had witnessed. (Tr. 2-11-20, 125; Tr. 2-13-20, 7-8). The CTPD officers located and seized spent shell casings in the parking lot of the apartment complex. (Tr. 2-13-20, 9-12). The caliber of the spent shell casings was "45 auto" from both Federal and Hornify. (Tr. 2-13-20, 12).

CTPD Officer Thomas Hill ("Officer Hill") was on patrol early that morning with his partner, Officer Gino Bolone ("Officer Bolone"). (Tr. 2-11-20, 132, 163). Just after 4:00 a.m., CTPD dispatch received "several calls for shots fired in the area of Washington Square Apartment[s]." (Tr. 2-11-20, 132, 163-164). The CTPD officers learned though dispatch that "a witness reportedly seen a black male described as wearing a black hooded sweatshirt with possible red and white lettering firing a hand[]gun." (Tr. 2-11-20, 133). The suspect, along with two other individuals, fled in "a white Dodge Charger with [a] black racing stripe down the front of the hood" and were last seen "leaving southbound from the location." (Tr. 2-11-20, 133, 164).

The CTPD officers headed towards the Washington Square Apartments. (Tr. 2-11-20, 133). In route, however, at the intersection of Grosebeck Highway and 14 Mile Road, Officer Hill viewed "a white Dodge Charger traveling through the intersection at a high rate of speed." (Tr. 2-11-20, 133-134, 164). He broadcast to dispatch that they "possibly had the suspect vehicle heading

southbound on Groesbeck crossing 14" and the CTPD officers followed the white Dodge Charger. (Tr. 2-11-20, 134). The CTPD officers caught up to the white Dodge Charger at Grosebeck Highway and 13 Mile Road. (Tr. 2-11-20, 134). Pulling alongside the white Dodge Charger, Officer Hill "looked to see if there was a black racing stripe down the front." (Tr. 2-11-20, 134). As he did so, the white Dodge Charger "kind of slow-rolled" and came to a stop. (Tr. 2-11-20, 134-135). At this point, the driver's side window rolled down and "a black male stuck his head out of the window with a hooded sweatshirt, [with] what appeared to be red and white lettering on it." (Tr. 2-11-20, 135. 148). Officer Hill "immediately stopped and pulled behind the vehicle, [and] radioed dispatch." (Tr. 2-11-20, 135).

Officer Hill "initiate[d] a traffic stop" on the white Dodge Charger at a location about two miles from the Washington Square Apartments. (Tr. 2-11-20, 135, 164; Tr. 2-13-20, 18). The license plate was DGR 3983 and "came back registered to" Devante Jennings ("Jennings"). (Tr. 2-11-20, 136). The CTPD officers ordered "each occupant in the vehicle out of the vehicle one at a time for officer safety purposes." (Tr. 2-11-20, 136-143, 167). The CTPD officers handcuffed the driver of the white Dodge Charger and searched him for weapons. (Tr. 2-11-20, 139-140). The CTPD officers removed the passengers in the front seat and the backseat on the driver's side, also handcuffing and searching them. (Tr. 2-11-20, 139-143). The front seat passenger wore "a white T, -shirt blue jeans and white gym shoes." (Tr. 2-11-20, 139, 147). The

backseat passenger wore a black hooded sweatshirt with white lettering. (Tr. 2-11-20, 142-143, 147-148).

At this point, Officer Hill searched the white Dodge Charger, locating a "45 caliber Glock . . . in the glove box of the vehicle." (Tr. 2-11-20, 143-144, 170). The glove box was located on the passenger's side of the front seat. (Tr. 2-11-20, 144-146). Officer Hill observed that "the serial number appeared to be obliterated." (Tr. 2-11-20, 146-147). CTPD Sergeant Michael Marker ("Sergeant Marker") arrived at the scene of the traffic stop on Groesbeck. (Tr. 2-13-20, 15-18). The other CTPD officers made Sergeant Marker "aware that a Glock pistol handgun was found in the glove box in front of the passenger seat." (Tr. 2-13-20, 18-19). Sergeant Marker seized the "weapon from the glove box." (Tr. 2-13-20, 19-20). The weapon "contained bullets," including on the chamber—.45 auto from Federal and Hornify. (Tr. 2-13-20, 21-26, 43-45).

The CTPD investigation revealed that the driver of the white Dodge Charger was Jennings. (Tr. 2-13-20, 33-35). CTPD Detective Carl Simon ("Detective Simon) was the officer-in-charge of this investigation. (Tr. 2-13-20, 33-34). The weapon seized from the glove box was not registered to any of the three occupants of the vehicle and none of these occupants had a concealed pistol license. (Tr. 2-13-20, 35-37).

Detective Simon spoke with Jennings at around 8:00 a.m. after Jennings waived his Miranda rights. (Tr. 2-13-20, 37-39). Jennings admitted to driving to the Washington Square Apartments with "the other two gentlemen that were in the car with him." (Tr. 2-13-20, 39-40). He told Detective Simon that "there

was a disturbance there." (Tr. 2-13-20, 40). Jennings indicated that he was driving a white Dodge Charger that was "registered to him and his father." (Tr. 2-13-20, 40).

The prosecution charged Jennings with Carrying a Concealed Weapon (MCL § 750.227). The first trial occurred before Macomb County Circuit Court Judge Michael Servitto ("Judge Servitto") in mid-November of 2019 and ended in a mistrial. (Tr. 11-15-19, 85). The second trial took place in mid-February of 2020. At trial, Officers Hill and Bolone positively identified Jennings as the driver of the white Dodge Charger. (Tr. 2-11-20, 135-137, 165). The jury convicted Jennings as charged. (Tr. 2-13-20, 102). Judge Servitto sentenced Jennings to a term of one to four years' imprisonment. See Judgment of Sentence (Commitment to Michigan Department of Corrections)—Macomb CC No. 19-1800-FH.

Jennings appealed by right. The Michigan Court of Appeals ("Court of Appeals") affirmed. See Opinion (4/20/23)- COA No. 359837. Now, Jennings seeks leave to appeal with this Court.

ISSUE I

THE DEFENDANT'S RETRIAL DID NOT VIOLATE DOUBLE JEOPARDY WHERE THE TRIAL COURT GRANTED A MISTRIAL DUE TO UNINTENTIONAL PROSECUTORIAL MISCONDUCT.

STANDARD OF REVIEW

An appellate reviews questions of law, such as a double jeopardy challenge, de novo. People v. Henry, 248 Mich App 313, 318; 639 NW2d 285 (2001). However, the trial court's "findings [of prosecutorial intent] are subject to appellate review under the clearly erroneous standard." People v. Dawson, 431 Mich 234, 258; 427 NW2d 886 (1988). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made. People v. Mullen, 282 Mich App 14, 22; 762 NW2d 170 (2008).

ARGUMENT

During the first trial, the assistant prosecuting attorney, without objection, elicited brief testimony from Detective Simon regarding the defendant's decision during the post-arrest interrogation to invoke his right to remain silent under Miranda v. Arizona, 384 US 436; 86 SCt 1602; 16 LEd2d 694 (1966). (Tr. 11-15-19, 28). During closing argument, the assistant prosecuting attorney returned to this topic, again without objection from the defense, arguing that the defendant's assertion of his rights "show[ed] a guilty conscience." (Tr. 11-15-19, 57-58).

As the jury began to deliberate, Judge Servitto raised this issue sua sponte, observing that this elicitation of testimony, combined with the closing argument, could "be a violation [of the defendant's right] and potentially prosecutorial misconduct." (Tr. 11-15-19, 81). At the trial court's prompting, the defense asked for a mistrial. (Tr. 11-15-19, 81-82). Ultimately, the trial court "grant[ed] the request for a mistrial." (Tr. 11-15-19, 85). At this point, the defense argued that, because of the egregiousness of the prosecutorial misconduct, "double jeopardy attach[ed]" and retrial was barred. (Tr. 11-15-19, 87-89). In response, the assistant prosecuting attorney denied trying to cause a mistrial and stated that he "was trying . . . to get the jury to find him guilty." (Tr. 11-15-19, 89-90). The trial court concluded that it had observed nothing to indicate that the conduct of the assistant prosecuting attorney was designed to intentionally cause a mistrial and scheduled the case for retrial in February of 2020.

On appeal, the defendant maintains that the trial court reversibly erred in determining that double jeopardy did not preclude retrying him. Both the federal and Michigan constitutions prohibit a defendant from twice being placed in jeopardy for the same offense. US Const, Ams V, XIV; Const 1963, art I, § 15; People v. Echavarria, 233 Mich App 356, 362; 592 NW2d 737 (1999). However, a retrial is not barred on double jeopardy grounds where the defendant requests or consents to a mistrial, unless the prosecutor engaged in conduct that was intended to provoke or goad the defendant into requesting

the mistrial. People v. Lett, 466 Mich 206, 215; 644 NW2d 743 (2002). In Dawson, 431 Mich at 257, this Court explained:

> Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor intended to goad the defendant into moving for a mistrial. [Citations omitted].

"Where a defendant's motion for mistrial is prompted by intentional prosecutorial conduct, however, the defendant may not, by moving for a mistrial, have waived double jeopardy protection." Id. at 253.

Here, the trial court did not clearly err in concluding that the assistant prosecuting attorney did not intend to provoke the defendant into moving for a mistrial. During the discussion, the assistant prosecuting attorney immediately stated that he was not trying to cause a mistrial and stated that he "was trying . . . to get the jury to find him guilty." (Tr. 11-15-19, 89-90). Moreover, the defense did not object to the assistant prosecuting attorney's conduct nor, more notably, did it even request for a mistrial until it had been repeatedly prompted by the trial court. On the basis of the objective evidence in the record, the trial court's determination that the assistant prosecuting attorney did not intend to provoke the defendant into moving for a mistrial was not clearly erroneous and retrial was not barred by double jeopardy principles.

ISSUE II

THE TRIAL COURT'S ADMISSION OF DETECTIVE SIMON'S TESTIMONY REGARDING THE CHARGES HE SOUGHT AGAINST THE DEFENDANT DOES NOT AMOUNT TO OUTCOME-DETERMINATIVE PLAIN ERROR.

STANDARD OF REVIEW

An appellate court reviews for an abuse of discretion the trial court's evidentiary rulings that have been properly preserved. People v. Unger, 278 Mich App 210, 216; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." Id. at 217. Because the defendant did not preserve this claim of error, however, it is reviewable only for plain error affecting his substantial rights. People v. Carines, 460 Mich 750, 763-764; 597 NW2d 130 (1999). An error is plain if it is clear or obvious, and it affects substantial rights if it affected the outcome of the lower court proceedings. Id. Additionally, a defendant must show actual innocence or that the error seriously affected the fairness of the proceedings. Id.

ARGUMENT

Near the end of his testimony on direct examination, the assistant prosecuting attorney asked Detective Simon a question about the charge he sought against the defendant. (Tr. 2-13-20, 43). Detective Simon, without objection, responded:

> The charge of carrying a concealed weapon now is in control of the vehicle, use of the vehicle and knowingly possessing that. I reviewed reports and spoke with the witness indicating that they could hear a gunshot inside a building, knowing that there were 3 occupants reported getting back into the Charger, any one of the occupant[s] was the person with the gun. I believe that Mr. Jennings had knowledge that gun was in there. It has been discharged in the parking lot, recovered shell casings that were consistent with what was found in the gun, in the gun that was recovered in Mr. Jennings car. Based upon that that is the charge I requested. (Tr. 2-13-20, 43).

On appeal, the defendant claims that the trial court committed outcome-determinative plain error in admitting what he characterizes as improper lay opinion testimony.

A witness opinion concerning the guilt or innocence of a criminal defendant is not admissible. People v. Moreno, 112 Mich App 631, 635; 317 NW2d 201 (1981). The issue of an individual's guilt or innocence is a question solely for the jury. People v. Suchy, 143 Mich App 136, 149; 371 NW2d 502 (1985). Here, however, Detective Simon testified regarding his duties as the officer-in-charge of a criminal investigation, including submitting the case to the Prosecutor's Office for potential charges against the suspect. During his testimony, Detective Simon was not opining on the defendant's guilt, but rather "explaining the steps of [the CTPD's] investigation[] from [his] personal perception[]." People v. Heft, 299 Mich App 69, 83; 829 NW2d 256 (2012). Under the circumstances, the assistant prosecuting attorney did not ask the witness to comment on the guilt or innocence of the defendant, and Detective Simon's challenged testimony concerned his involvement in the investigation

and how the charges came about—not whether he believed the defendant to be guilty. Further, the defendant cannot establish that any error was outcome-determinative—Detective Simon's testimony that he believed a crime was committed, pursued the investigation, and sought charges was evidence from all the other evidence and inferences in the case. It does not appear that the evidence had any bearing on the trial's outcome; thus, the defendant has not demonstrated any plain error affecting substantial rights.

ISSUE III

THE TRIAL COURT'S DECISION TO REFER TO JURORS BY NUMBER RATHER THAN BY NAME DOES NOT CONSTITUTE PLAIN ERROR AFFECTING THE DEFENDANT'S SUBSTANTIAL RIGHTS.

STANDARD OF REVIEW

The defendant did not preserve this issue by raising it prior to jury selection before the trial court. When a defendant has failed to object to the trial court's referring to jurors by numbers instead of names, a defendant has not preserved this issue. People v. Hanks, 276 Mich App 91, 92; 740 NW2d 530 (2007). An appellate court reviews unpreserved claims of error, whether constitutional or non-constitutional in nature, for plain error affecting substantial rights. Carines, 460 Mich App at 763-764. An error is plain if it is clear or obvious, and it affects substantial rights if it affected the outcome of the lower court proceedings. Id. Additionally, a defendant must show actual innocence or that the error seriously affected the fairness of the proceedings. Id.

ARGUMENT

The defendant asserts on appeal that the trial court violated his due process rights by impaneling an "anonymous jury." The trial court, however, did not impanel an "anonymous jury." An "anonymous jury" is "one in which certain information is withheld from the parties, presumably for the safety of

the jurors or to prevent harassment by the public." People v. Williams, 241 Mich App 519, 522; 616 NW2d 710 (2000). An "anonymous jury" implicates the following interests: (1) the defendant's interest in being able to conduct a meaningful examination of the jury and (2) the defendant's interest in maintaining the presumption of innocence. Id. at 522-523. A challenge to an "anonymous jury" only will succeed where the record reflects that withholding information precluded meaningful voir dire or that the defendant's presumption of innocence was compromised. Id. at 523.

Here, the appellate record does not support the defendant's contention that an "anonymous jury" was impaneled. As in Williams, 241 Mich App at 523, "jurors were merely referred to at trial by number rather than by name" and "[t]here is nothing in the record to support the conclusion that any information was actually withheld from the parties." Moreover, "[t]here is nothing to indicate that defendant's ability to effectively examine the venire was compromised in any way" or that "the use of numbers undermined the presumption of innocence." Id. at 523-524. Further, the appellate record does not suggest that the defendant's trial "was being handled in a special way, with the resulting implication that he was generally dangerous or guilty as charged." Id. at 524. Given the foregoing, the defendant's due process rights were not violated by using numbers instead of names at trial. Id. at 525; see also Hanks, 276 Mich App at 92-95.

RELIEF REQUESTED

The prosecution respectfully requests that this Honorable Court **DENY** the defendant's application for leave to appeal.

I certify that the number of words in this brief is 3,570 words in 12-font Bookman Old Style.

Respectfully Submitted,

PETER LUCIDO (P41237)
Prosecuting Attorney

JOSHUA D. ABBOTT (P53528)
Chief Appellate Attorney

By: Joshua D. Abbott
Joshua D. Abbott (P53528)
Chief Appellate Attorney

DATED: July 20, 2023