STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2015
v	No. 322270 Wayne Circuit Court
EARVIN EMMANUEL PORTIS, JR., Defendant-Appellant.	LC No. 13-011400-FH

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced, as a third habitual offender, to 57 to 240 months' imprisonment, and ordered to pay court costs in the amount of $400. We affirm.

Defendant and an unknown accomplice attacked attorney Alvin Keel with metal baseball bats outside of his home. Defendant told him repeatedly, "You know who sent me." The attackers then drove away in a silver Chevrolet Impala. Keel employed a woman named Maya Jones, and had also previously represented her in a legal matter. Jones had recently been involved in a contentious divorce from her husband, Quaviaus Rodriques, and Rodriques had reportedly threatened Keel when the three were together in court. Defendant worked for Rodriques, and Jones had frequently seen defendant driving a silver Impala.

I. MOTION FOR MISTRIAL

Defendant contends that the trial court erred in denying his motion for a mistrial because the prosecutor improperly elicited and pursued inadmissible testimony from Jones and because Jones's comments irreparably prejudiced the jury against him. We disagree.

We review for an abuse of discretion a trial court's decision to deny a defendant's motion for a mistrial. *People v Lane*, 308 Mich App 38, 60; 862 NW2d 446 (2014). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id*.

"A mistrial is warranted only when an error or irregularity in the proceedings prejudices the defendant and impairs his ability to get a fair trial." *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009) (citations and quotation marks omitted). Furthermore, "[a] mistrial

should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Reversal of a trial court's decision on a motion for a mistrial "is not warranted unless the defendant makes an affirmative showing of prejudice resulting from the abuse of discretion." *People v Vettese*, 195 Mich App 235, 246; 489 NW2d 514 (1992).

Generally speaking, "an unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial[,]" *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), unless the answer is "egregious or not amenable to a curative instruction[,]" *People v Mahone*, 294 Mich App 208, 213; 816 NW2d 436 (2011). A curative instruction typically "alleviate[s] any possible prejudice to [a] defendant." *Waclawski*, 286 Mich App at 710.

During defendant's trial, the prosecutor asked Jones how she knew defendant. Jones replied that defendant worked for Rodriques and did "illegal things" for him. Defense counsel then raised a foundation objection. Shortly after, defense counsel moved for a mistrial. The judge denied the motion, but cautioned the jury that it was to disregard Jones's inadmissible comment. After closing arguments, the court again instructed the jurors that they were to disregard Jones's inadmissible remark because it was not evidence.

Jones's statement that defendant did "illegal things" for Rodriques constituted an unresponsive, volunteered answer to a proper question. See *Haywood*, 209 Mich App at 228. The prosecutor did not elicit the testimony, but simply asked how Jones knew defendant through Rodriques, a proper foundational question. Jones went far beyond the prosecutor's original question in asserting that she knew defendant because of his illegal activities with Rodriques. We also agree with the prosecution that, to the extent that the prosecutor discussed defendant's potential illegal activities at all, she did so only after defense counsel objected on foundational—rather than character evidence—grounds. Thus, the statement was not grounds for a mistrial unless it was egregious or nonamenable to a curative instruction. See *Mahone*, 294 Mich App at 213.

The statement, however, was not egregious and was amenable to a curative instruction. Jones asserted that defendant engaged in vague "illegal things" with Rodrigues, not that he had been convicted of a specific offense or that he had assaulted Keel or anyone else. The statement was brief, unsupported, and quickly dealt with by the trial court. In addition, there was no evidence to suggest that Jones knew her comment was inadmissible. See *Haywood*, 209 Mich App at 228 (noting that a comment from a witness who "was not in a position to know that his testimony was improper" provides less ground for a mistrial).

Contrary to defendant's contention on appeal, there was also a significant amount of evidence against defendant without considering Jones's imprecise assertion regarding illegal activities: Keel picked defendant out of a photographic lineup, Rodriques's sister owned a silver Impala matching the vehicle that Keel described to Jones, and Jones had seen defendant driving the Impala on at least 10 occasions. Thus, defendant fails to establish that Jones's statements prejudiced him. See *Vettese*, 195 Mich App at 246.

Moreover, the trial court issued a curative instruction directly after the challenged testimony, and the jurors were instructed a second time, at the close of the trial, that they were to

disregard Jones's statement about defendant's and Rodriques's illegal activities. Defendant fails to rebut the presumptions that these instructions cured any potential prejudice, see *Waclawski*, 286 Mich App at 710, and that the jurors followed their instructions, see *Mahone*, 294 Mich App at 212. Therefore, defendant has not established that the trial court abused its discretion when it denied defendant's motion for a mistrial. See *Lane*, 308 Mich App at 60.

II. COURT COSTS

Defendant next argues that the "trial court's imposition of $400.00 in 'costs' was without statutory authority and must be reversed." After review for plain error affecting substantial rights, we disagree. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Konopka (On Remand)*, 309 Mich App 345, 356; ___ NW2d ___ (2015).

As defendant argues, in *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2014), our Supreme Court held: "MCL 769.1k(1)(b)(*ii*) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Id*. at 147. However, since defendant's sentencing, the Legislature amended MCL 769.1k to retroactively authorize such assessments. 2014 PA 352. The amended version of MCL 769.1k(1)(b)(*iii*) allows a trial court to impose "any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case." See also *Konopka*, 309 Mich App at 356-357.

Defendant was sentenced on May 21, 2014. The amended version of MCL 769.1k "applies to all fines, costs, and assessments ordered or assessed before June 18, 2014." 2014 PA 352, enacting § 1. Therefore, the amended statute applies retroactively in this case. And defendant has not challenged the reasonableness of the court costs. Accordingly, defendant has not established that the trial court's assessment of court costs constituted plain error warranting relief. See *Carines*, 460 Mich at 763.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly