

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 16, 2013

v

STANLEY LAJAN SMITH, JR.,

Defendant-Appellant.

No. 308549
Genesee Circuit Court
LC No. 11-028115-FC

Before: M. J. KELLY, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant Stanley Lajan Smith, Jr. appeals by right his jury convictions of assault with the intent to murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and carrying or possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Smith as a fourth habitual offender, see MCL 769.12, to serve 62 years to 100 years in prison for his assault with the intent to murder conviction, to serve 25 to 50 years in prison for his felon-in-possession conviction, and to serve 2 years in prison for his felony-firearm conviction. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

Marcus Fowlkes testified that he was at a friend's house late at night in August 2010. He decided to get some cigarettes at about one in the morning and walked to a nearby store, but it was closed. Fowlkes saw Smith at the house next to the store and stopped to talk to him.

Fowlkes said he knew Smith generally from the neighborhood and because Smith had cut his hair a couple of times. They began to have "small talk" and eventually discussed splitting the cost on a bottle of liquor. Fowlkes agreed to get the liquor and got a "lift" to a different store from "Toya", who was a girl from the neighborhood. After getting the liquor, they drove back to Wolcott Street. There were people just hanging around in front of some houses, which was not uncommon in the summer. He passed the bottle around as people socialized. No one was arguing at that time.

After about 45 minutes, Fowlkes said he heard Smith say, "I'm going to shoot this motherfucker." Fowlkes said he turned: "And I heard it coming from right next to me. So, uh, that automatically told me to turn around and look. When I turned around and looked, at the same time he [Smith] had his hand right here with a gun by his right side." Smith had the gun

gripped by his side and held it like he was “preparing to raise” it. Fowlkes recalled that he told Smith to “chill out and put the gun away.” At that, Smith “blew up”; “And he was like—like ‘Fuck you, you don’t tell me what to do. I’m a grown-ass man.’” Fowlkes said Smith began to move “the gun around” as he was getting “more animated.”

Fowlkes backed up and then walked away while looking over his shoulder. He got to a driveway and turned to walk down the driveway when Smith shot him in the hip: “So it kind of swung me around and I was facing shoulder-to-shoulder with him. And he was on the sidewalk. I’m about halfway down the driveway.” Fowlkes testified that he looked straight at Smith and asked him “why he shot me.” At that point, Smith shot him twice more:

I remember as soon as I [lay down] I was kinda—I just kinda gave up because I couldn’t run or anything. And I felt like I was about to pass out and I heard him say, “Somebody get this motherfucker before I empty all the rounds” or “empty the whole rounds”, like he was just going to continue to shoot me while I was on the ground.

Steven Tripodi testified that he lived a few houses down from the house where the shooting occurred. It was about 3 a.m. and he was watching TV with the windows open when he heard shots:

. . . I stood up and I could see the house across the street. I grabbed my phone, dialed 9-1-1, approached the window, I saw the victim standing there and then heard him yell, “Why’d you shoot me, Stanbo?” And I saw [Smith]—I saw the shooter get in the car when they got in. And they—as they put it in gear to take off, the taillights had illuminated and I saw the victim drop to the ground at that time.

Officers Arthur Coffee and Harlon Green both separately responded to the scene of the shooting and both testified that, at some point, Fowlkes indicated that “Stan” was the person who shot him.

Sergeant Jeff Collins similarly testified that he responded to the shooting and was told that they were looking for someone named “Stanley.” He “received information” that led him to believe that this Stanley was Stanley Smith and so he prepared a photo lineup of six photos that included one of Smith. He showed the photos to Fowlkes a few days after the shooting and warned him that “the person that did this to you may or may not be in there.” Fowlkes, however, immediately identified Smith’s photo from the lineup.

Dr. Mark Dalton testified that Fowlkes had two gunshot injuries when he came into the emergency department: one to his upper thigh area and one to his abdomen just beneath his sternum. The thigh injury left multiple bullet fragments in the groin area, but there was good blood flow and no signs of nerve damage. The injury to the abdomen was more concerning because there were signs that he had internal bleeding. Fowlkes testified that he had at least four surgeries to correct the damage; he also had a quarter of his liver removed, had a tube put into his side to drain the fluid from his lungs, and he could not eat solids for a month.

At trial, Smith's lawyer argued that the evidence did not establish beyond a reasonable doubt that Smith was the person who shot Fowlkes. She maintained that Fowlkes' testimony was inconsistent and unreliable, as was the testimony from the remaining witnesses who corroborated Fowlkes' identification of Smith as the shooter.

The jury rejected Smith's defense and found him guilty on all three counts. He now appeals to this Court.

II. UNDISCLOSED WITNESS

Smith first argues that the trial court abused its discretion and deprived him of a fair trial when it permitted Officer Green to testify at trial. Specifically, he contends that the prosecutor gave him no notice that Green would be testifying and did not disclose that Green would testify that Fowlkes identified Smith as the shooter at the scene. Smith maintains that the trial court should have excluded Green from testifying as a discovery sanction. Because Smith's lawyer did not object to Green's testimony at trial, we shall review this claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

To begin with, we note that the prosecutor listed Green as a witness that he intended to produce at trial on the information dated January 2011. Hence, the prosecutor complied with the minimum mandatory disclosure requirements. See MCR 6.201(A)(1). In addition, during the voir dire for Smith's first trial—which ended in a mistrial—the court informed the jury that Green was a potential witness and asked if any of the jurors in the pool knew Green. And, although the prosecutor elected not to call Green at the first trial, the trial court again stated that Green was a potential witness during voir dire before Smith's second trial and asked the jurors whether they knew Green. Likewise, the record clearly showed that Green was one of the responding officers. As such, Smith's lawyer could have requested further discovery about Green's observations on the day at issue, had he so desired. Because the prosecutor listed Green as a potential witness and Smith's lawyer had sufficient time and information with which to investigate Green's potential testimony, we conclude that there was no error.

Even if we were to conclude that Smith's lawyer did not have adequate notice of Green's testimony and were to conclude that the trial court should have sua sponte precluded the prosecutor from calling Green, any error would not warrant relief. At trial, Fowlkes unequivocally identified Smith as the man who shot him on the day at issue. There was also testimony that Fowlkes had identified Smith as the shooter on the day of the incident and in the days thereafter. For example, Officer Coffee testified that Fowlkes told him at the scene that someone named "Stan" shot him and Sergeant Collins corroborated the testimony that the responding officers were told that they were looking for someone named "Stanley." Likewise, there was testimony that Fowlkes immediately identified Smith as the shooter from a photo lineup. Tripodi also identified Smith as a person that he saw leave the scene of the shooting and testified that Fowlkes said, "Why did you shoot me, Stanbo?" during the incident. Tripodi's testimony was consistent with Fowlkes testimony that he asked Smith why he shot him during the incident. Accordingly, Green's testimony was merely cumulative and any error in its admission was harmless. *Carines*, 460 Mich at 763.

III. INEFFECTIVE ASSISTANCE

Smith next argues that he did not receive the effective assistance of counsel at trial. Namely, he contends that his trial lawyer's decision to elicit testimony from Sergeant Sharon Dunbar that Smith was a suspect in some homicides fell below an objective standard of reasonableness under prevailing professional norms and prejudiced his trial. Because the trial court did not hold an evidentiary hearing on this claim of error, our review is limited to errors that are apparent on the record. *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated not in relevant part 493 Mich 864.

At trial, Smith's lawyer called Dunbar in an effort to impeach Tripodi's testimony by eliciting testimony that Tripodi never told the police officers that he had heard Fowlkes identify "Stanbo" as the shooter. During her direct examination, Smith's lawyer asked Dunbar if she recalled interviewing Tripodi and Dunbar responded that she did. Smith's lawyer then asked Dunbar "what stands out in your mind that makes you remember it?" Dunbar responded that it was "Stanley Smith" that made her remember the interview:

Uh, well, one thing is Stanley Smith. Um, I don't know how much you want me to say, but I knew he was a suspect in some homicides. And when they said "Stanley", that reminded me, uh, that. Also, uh, I remembered that he—that the witness said he heard some gunshots and looked out and saw a gray car taking off and.

After Dunbar's answer, Smith's lawyer redirected Dunbar to the facts of the interview.

Although this question was not artfully worded, we do not agree that the decision to ask it fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 22-23 (stating that, in order to establish an ineffective assistance claim, the defendant must establish that his trial lawyer's act or omission fell below an objective standard of reasonableness under prevailing professional norms). The question was relevant to determining whether Dunbar specifically recalled the interview or was merely relying on her report. Moreover, Smith's lawyer did not ask Dunbar about Smith—she asked why Dunbar recalled the interview with Tripodi. Thus, the answer that Dunbar gave was not suggested by the question and was in some respects unresponsive. See, e.g., *People v Measles*, 59 Mich App 641, 643; 230 NW2d 10 (1975) ("An unresponsive answer to a proper question is not usually error."). Moreover, even if we were to agree with Smith that it was unreasonable for his lawyer to ask that question without knowing how Dunbar would answer, we would nevertheless conclude that any error did not prejudice Smith. Consequently, Smith has not established that he is entitled to any relief. *Gioglio*, 296 Mich App at 22-23.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly

/s/ Mark J. Cavanagh

/s/ Christopher M. Murray