

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMARR MONSON,

Defendant-Appellant.

UNPUBLISHED

March 2, 1999

No. 203770

Recorder's Court

LC No. 96-001138

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549. The court sentenced defendant to thirty to fifty years' imprisonment. He now appeals and we affirm.

Defendant first argues that the trial court erred in denying his motion for judgment notwithstanding the verdict because the verdict was against the great weight of the evidence. A trial court's denial of a motion for judgment notwithstanding the verdict is reviewed de novo by this Court. *Hord v Environmental Research Institute of Michigan*, 228 Mich App 638, 641; 579 NW2d 133 (1998). The evidence and all legitimate inferences are viewed in the light most favorable to the nonmoving party. *Phinney v Perlmutter*, 222 Mich App 513, 524; 564 NW2d 532 (1997); *People v Duenaz*, 148 Mich App 60, 65; 384 NW2d 79 (1985). If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Pakideh v Franklin Commercial Mortgage Group, Inc*, 213 Mich App 636, 639; 540 NW2d 777 (1995); *Duenaz, supra* at 65-66. This Court gives substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Phinney, supra* at 525.

Defendant contends that the prosecution failed to rebut beyond a reasonable doubt his claim of self-defense. A defendant may act in lawful self-defense if he honestly and reasonably believes that he is in imminent danger of death or serious bodily harm. *People v Heflin*, 434 Mich 482, 502; 456 NW2d 10 (1990). However, the defendant may not use force beyond that necessary to protect himself and he must not be the initial aggressor. *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

(1993). Once the defendant introduces evidence of self-defense, the burden shifts to the prosecutor, who must disprove that defendant acted in self-defense beyond a reasonable doubt. *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993).

Defendant made two conflicting statements to police. The first one was fully exculpatory. The second one, taken the following morning, indicated that he had come home to the apartment early on the morning of Crystal's death, that she had been smoking marijuana, that she became irate and charged at him with a knife, that he pushed her head through a window, that he hit her when she tried to pick up the knife again, that she somehow did pick up the knife again and came at him with it, and that he pushed her back, which caused the knife to stick her in the neck. He indicated that he did not attempt to cut or stab Crystal, but that he only attempted to "push, hit or grab for her to defend [him]self." He then left the apartment and did not come back for four or five hours because he was intoxicated and he passed out on the freeway.

Defendant's statements do not comport with the evidence presented showing the brutality with which the victim was murdered. The medical examiner testified that the wounds on the victim's hands were "defense wounds" tending to show that she was trying to fend off an attack. She had been stabbed or cut eighteen times. Her lower jaw was broken and teeth were missing. Her left ear was torn, and there were bruises all over her face and body. She had been strangled. There were abrasions on the chest and a puncture wound which penetrated the heart. However, she did not die from any of these injuries. Rather, she died from massive head injury, which, according to the medical examiner, must have been caused by a "great force." In killing another in self-defense, the defendant is not entitled to use any more force than is necessary to defend himself. *Kemp, supra* at 322. The evidence is certainly sufficient to show that defendant used more force than was necessary to defend himself against a twelve-year-old, 113-pound girl.

Defendant also argues that the prosecutor misrepresented the testimony of his neighbor, Linda Woods, by arguing to the jury that Woods saw defendant's car on the morning of the murder. While her testimony regarding what she had seen that morning was conflicting, she had previously told the police that she had, in fact, seen defendant's car leaving the parking lot at 7:30 a.m. It is the province of the jury to determine questions of fact and to resolve all issues of credibility. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Therefore, the jury was free to believe all, part, or none of Woods' testimony, and the prosecutor's comments in this vein were not improper.

Viewing the evidence presented at trial in a light most favorable to the prosecutor, reasonable jurors could have reached different conclusions about the meaning of the evidence, and there was ample evidence to support the jury's verdict. Therefore, we find that the verdict was not against the great weight of the evidence, and the trial court's denial of defendant's motion for judgment notwithstanding the verdict was proper.

Defendant next argues that the improper tactics employed by the prosecutor had the effect of denying him a fair trial. Claims of prosecutorial misconduct are decided on a case-by-case basis. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). This Court must examine the record and evaluate the prosecutor's remarks in context. *People v Green*, 228 Mich App 684, 692-

693; 580 NW2d 444 (1998). Improper prosecutorial comments are grounds for reversal where they deny the defendant a fair and impartial trial. *Id.* at 693.

Defendant contends that the prosecutor's questions to Tawanna Crawford, his alibi witness, improperly implied that Crawford had a duty to report the alibi information to the police prior to trial. This argument is meritless. The credibility of an alibi witness may be attacked with cross-examination and argument showing that the witness failed to come forward with the alibi account before trial. *People v Fuqua*, 146 Mich App 250, 254-255; 379 NW2d 442 (1985). Furthermore, contrary to defendant's assertions, the prosecution is no longer required to lay any special foundation before doing so. *People v Phillips*, 217 Mich App 489, 494; 552 NW2d 487 (1996). The credibility of the alibi witness, regarding both the alibi account and the failure to come forward earlier with that account, is to be determined by the jury. *Id.* at 496. Accordingly, the prosecutor's cross-examination of Crawford was not improper.

Defendant also argues that he was denied a fair trial by the prosecutor's misstatement of the evidence concerning whether Linda Woods saw defendant's car on the morning of the murder. As noted above, we disagree with defendant's contention that the prosecutor mischaracterized Woods' testimony.

Defendant further argues that the prosecutor improperly vouched for the credibility of the prosecution witnesses by stating during closing argument that they had told the jury "what they remember about the events of January the 20th of 1996 as best they can" and that they had been "honest in telling" the jury that "they are admitted drug users." Because no objection was made at trial, nor any cautionary instruction requested, review of these allegedly improper comments is precluded unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant or if failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

A prosecutor may argue from the facts that a witness is credible, as long as there is no implication that the prosecution had any special knowledge of the witness' credibility. *Howard, supra* at 548. The mere statement of the prosecutor's belief in the honesty of a witness' testimony does not constitute error requiring reversal if, as a whole, the remarks are fair. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). In any case, a prompt admonishment to the jury regarding its role as factfinder would have cured any error. *Id.* Therefore, failure to review this issue will not result in a miscarriage of justice.

Defendant next contends that he was denied the effective assistance of counsel. To establish that his right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To find prejudice, a court must conclude that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Pickens, supra* at

312. Furthermore, defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *Stanaway*, *supra* at 687.

Because defendant failed to move in the trial court for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998). Therefore, we are unable to address most of the errors alleged by defendant. Moreover, after carefully reviewing each of defendant's claims, we are satisfied that he has failed to establish that the challenged actions cannot reasonably be attributed to trial strategy or that counsel's actions detrimentally affected the outcome of his trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Finally, defendant argues that his sentence of thirty to fifty years in prison, which exceeded by five years the sentencing guidelines' range, is disproportionate, and therefore the court abused its discretion in sentencing him. We disagree.

Adherence to the sentencing guidelines is not mandatory, and departures are appropriate if the guidelines "do not adequately account for important factors legitimately considered at sentencing." *People v Milbourn*, 435 Mich 630, 656-657; 461 NW2d 1 (1990). The trial court felt that the guidelines were "in gross error," considering the facts of the case. The victim was only twelve years old. Defendant was having sex with her and was using her to sell drugs out of an abandoned apartment building. She suffered an extremely violent death, having been thrown through a window, stabbed and cut eighteen times, strangled, and beaten in the head with great force. Defendant left her to die and did not return for several hours. Given the particular depravity with which this offense was committed, the sentence was not disproportionate to the circumstances of the case. See *People v Parrish*, 216 Mich App 178, 184-185; 549 NW2d 32 (1996).

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Robert B. Burns

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).