STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 18, 1999
v MELVIN DEJESUS, Defendant-Appellant.	No. 209252 Oakland Circuit Court LC No. 97-154863 FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v GEORGE LUIS DEJESUS, Defendant-Appellant.	No. 209388 Oakland Circuit Court LC No. 97-154864 FC

Before: Doctoroff, P.J., and McDonald and Wilder, JJ.

PER CURIAM.

Defendants Melvin DeJesus and George DeJesus were each charged with one count of first-degree felony murder, MCL 750.316(1)(b); MSA 28.548(1)(b); one count of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a); one count of first-degree criminal sexual conduct, MCL 750.520(b); MSA 28.788(2); and three counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for the death of Margaret Midkiff. After a trial before a single jury, defendants were convicted as charged. The trial court vacated the first-degree murder conviction and one felony-firearm conviction with respect to each defendant. Defendants were both sentenced to life in prison without the possibility of parole for the first-degree premeditated murder convictions, life in prison for the first-degree criminal sexual conduct convictions, and two years in prison for each felony-firearm conviction. Defendants appeal as of right.[1] We affirm

defendants' convictions for one count of first-degree murder supported by the two theories of premeditated murder and felony murder, as well as defendants' convictions of one count each of felony-firearm. We vacate defendants' first-degree criminal sexual conduct convictions and one count of felony-firearm with respect to each defendant. We remand for modification of defendants' judgments of conviction and sentence.

Docket No. 209252

Defendant Melvin DeJesus first argues that his right to a fair trial was denied because the trial court erred in admitting into evidence numerous photographs of the victim and the crime scene. We disagree. Generally, this Court reviews a trial court's decision regarding the admission or exclusion of photographs for an abuse of discretion. *People v Mills,* 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). However, where a defendant fails to object at trial to the admission of the photographs, we will review the issue only to determine whether the admission of the photographs constituted plain error affecting defendant's substantial rights. MRE 103(d).

Photographic evidence is admissible if relevant, pertinent, competent, and material to *any* issue in the case. *People v Coddington,* 188 Mich App 584, 598; 470 NW2d 478 (1991). Photographs are not inadmissible merely because they are gruesome or shocking, but the trial court should exclude those photographs that could lead the jury to abdicate its truth-finding function and convict on the basis of passion. *Id.* The proper inquiry is whether the probative value of the photographs is substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra* at 76.

Defendant asserts that the trial court erred in admitting into evidence numerous enlarged color photographs of Midkiff's body taken at the autopsy and crime scene. Defendant objected to the admission of the autopsy and crime scene photographs on the grounds that they lacked probative value, and were inflammatory and cumulative. While the photographs are unpleasant, they were necessary to show the extent of Midkiff's injuries. The autopsy photographs were probative of defendant's intent to kill, as it is clear from the photographs that the majority of Midkiff's injuries were to her head. The crime scene photographs showing Midkiff's bound hands and feet were probative of premeditation. Thus, we conclude that, while the photographs were prejudicial by nature, their probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra* at 75. Furthermore, we reject defendant's argument that the photographs were cumulative because Douglas Ferich, the crime lab specialist at the Oakland County Sheriff's Department, testified regarding the extent of Midkiff's injuries. Photographs should not be excluded simply because a witness can orally testify about the information contained in the photographs. *Mills, supra* at 76. The fact that a photograph is more effective than an oral description and, therefore, likely to cause passion and prejudice, does not render the photograph inadmissible. *People v Eddington,* 387 Mich 551, 562-563; 198 NW2d 297 (1972).

Defendant also challenges the admission of an enlarged color photograph of Midkiff as she normally appeared before her death on the basis that it was irrelevant and inflammatory. However, because defendant failed to object at trial to the admission of the photograph, and because the admission of the photograph was not a plain error affecting substantial rights, we need not further review this issue. MRE 103(d).

Defendant next challenges the admission of a photograph of codefendant George DeJesus looking straight into the camera and holding a handgun in each hand at arms length, pointed at the camera, on the basis that its probative value was substantially outweighed by its prejudicial effect. The prosecutor introduced the photograph during Brandon Gohagen's testimony, and Gohagen identified one of the guns George was holding in the photograph as the gun that Melvin had at Midkiff's house. The photograph had little relevance to Melvin's case because Gohagen testified that he never saw Melvin's gun while they were in Midkiff's house. Nevertheless, in light of the fact that the photograph was not of Melvin, any error in admitting the photograph of George was harmless with respect to Melvin.

Defendant also contends that the trial court erred in allowing the prosecutor to display, during her opening statements, photographs of Midkiff as she normally appeared before her death and photographs of Midkiff's body as it appeared at the crime scene. We find no error in the use of the photographs during opening statements. "Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor's case and the facts the prosecutor intends to prove." MCR 6.414(B). If the prosecutor had used words to describe Midkiff and the condition in which her body was found, her statements would have been proper as statements of facts she intended to prove. The photographs were shown to more clearly present the facts to the jury. Furthermore, before allowing the use of the photographs during opening statements, Douglas Ferich authenticated the crime scene photographs and the trial court determined that the photographs would be admissible during the prosecutor's presentation of her proofs. Any error was harmless in light of the fact that the same or similar photographs were later seen by the jury when they were admitted into evidence during the prosecutor's presentation of her case.

Defendant next argues that this Court should remand for an evidentiary hearing to determine whether defendant was denied the effective assistance of counsel by defense counsel's failure to investigate, and properly raise, an alibi defense. However, defendant previously raised this issue in a motion to remand, which this Court denied. Thus, we will not reconsider this issue.

Defendant next argues that this Court should remand for an evidentiary hearing to determine whether the prosecution violated *Brady v Maryland,* 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by failing to provide videotapes and transcripts of police interviews of himself and Crystal Sauro held in September, 1996. We first note that defendant's request that this Court remand for an evidentiary hearing is not properly before this Court. Defendant's request should have been made in the form of a motion pursuant to MCR 7.211(C)(1). In any event, defendant has not established that an evidentiary hearing would produce facts sufficient to establish a *Brady* violation. While defendant makes general statements that access to the videotapes would have influenced defense counsel's investigation of the alibi defense, he does not explain how the lack of the information actually affected his defense. See *People v Fox (After Remand),* 232 Mich App 541, 549; __ NW2d __ (1998). Furthermore, there is no reasonable probability that the result of the proceedings would have been different had the transcripts and videotapes of the interviews been provided to defendant. *Id.*

Defendant next argues that this Court should remand for an evidentiary hearing to determine whether police intimidation of Crystal Sauro denied him due process of law. Again, defendant should

have raised this issue in a motion to remand pursuant to MCR 7.211(C)(1). Furthermore, there is nothing in the transcript of the interview indicating that the police intimidated Sauro. Thus, an evidentiary hearing is not required.

Next, defendant asserts that he was denied a fair trial by prosecutorial misconduct. We disagree. The test for prosecutorial misconduct is whether the prosecutor's conduct denied the defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The reviewing court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.* Appellate review of allegations of error to which defendant did not object at trial is foreclosed unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first argues that the prosecutor committed misconduct when, during her opening statements, she referred to defendants as "two brutal and savage murderers," told the jurors they would be terrified and haunted by the facts of the case, and told the jurors that when they have left the courtroom they "will have looked square into the face of evil, not once, but twice." Defendant failed to object to the statements at trial. We find no error in the prosecutor's statements. A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as they relate to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor's description of the crime was supported by the evidence she later presented. Furthermore, any prejudice could have been cured by an appropriate instruction had defendant objected to the statements at trial and failure to further review this issue will not result in a miscarriage of justice. *Stanaway*, *supra* at 687.

Next, defendant challenges the prosecutor's questioning of Midkiff's children, Jeremy Wilkes and Angela Rodriguez on the ground that the prosecutor improperly elicited hearsay testimony from them. First, defendant asserts that the prosecutor committed misconduct when she asked Wilkes whether Midkiff had ever banned defendant from her home. While the questioning elicited hearsay testimony, after reviewing the record, we conclude that the testimony did not deny defendant a fair trial. Defendant further argues that the prosecutor erred when she elicited hearsay testimony from Rodriguez with respect to Midkiff's feelings toward defendant. However, the questioning was not improper where the testimony was admissible pursuant to MRE 803(3) as a statement of Midkiff's then-existing state of mind.

Defendant next argues that the prosecutor committed misconduct by eliciting testimony from Crystal Sauro that Midkiff had alerted the police to defendants' sale of drugs because the testimony related to uncharged crimes. However, the testimony was admissible under MRE 404(b) for the purpose of demonstrating a motive for the murder. Contrary to defendant's argument, the admission of the testimony did not violate the court's order granting his motion in limine to exclude evidence of defendants' gang involvement. While that order excluded evidence of defendants' gang involvement, it did not specifically exclude evidence of defendants' drug sales.

Defendant next argues that the prosecutor committed misconduct when she introduced the autopsy and crime scene photographs into evidence. However, as discussed above, the admission of the photographs was proper and, therefore, cannot constitute prosecutorial misconduct.

Next, defendant argues that the prosecutor erred in making repeated references to Gohagen's plea agreement in an attempt to bolster Gohagen's credibility. Defendant did not object at trial to the prosecutor's references to the plea agreement. It is improper for a prosecutor to vouch for the credibility of his witnesses to the effect that he has some special knowledge regarding a witness' truthfulness. *Bahoda, supra* at 276. However,

> the simple reference to a plea agreement containing a promise of truthfulness is in *itself* [not] grounds for reversal. A more accurate statement of the law appears to be that, although such agreements should be admitted with great caution, admissibility of such an agreement is not necessarily error unless it is used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully. [*Id.*]

Here, while the prosecutor questioned Gohagen regarding the provisions in the plea agreement, she did not convey to the jury that she had special knowledge that Gohagen was testifying truthfully. Thus, we find no error in the prosecutor's remarks.

Next, defendant contends that the prosecutor made several improper remarks during her closing arguments that were inflammatory, "equated justice with conviction," and improperly commented on defendant's decision not to testify at trial. We have reviewed the remarks in context and conclude that any prejudice resulting from the remarks could have been cured by an appropriate instruction had defendant objected at trial, and that failure to further review the issue will not result in a miscarriage of justice. *Stanaway, supra* at 687. Furthermore, the prosecutor's statement that certain evidence was uncontested was not improper. While it is improper for a prosecutor to comment on a defendant's failure to testify, the prosecutor may properly argue that certain evidence is uncontroverted. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). Thus, we conclude that defendant is not entitled to reversal on the basis of prosecutorial misconduct.

Defendant next argues that the trial court erred in admitting the testimony of Terrell Gholston and Detective Sergeant Harvey regarding Gohagen's admissions because they did not qualify as prior consistent statements under MRE 801(d)(1)(B). We disagree. This Court reviews a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Howard,* 226 Mich App 528, 551; 575 NW2d 16 (1997).

A statement is not hearsay if "the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." To qualify for admission under MRE 801(d)(1)(B), the statement must have been made before the motive to fabricate arose. *Tome v United States,* 513 US 150; 115 S Ct 696; 130 L Ed 2d 574 (1995); *People v Rodriquez (On Remand),* 216 Mich App 329, 331; 549

NW2d 359 (1996). Throughout the trial, defense counsel repeatedly raised the possibility that Gohagen's testimony was influenced by the plea agreement. Gohagen's prior consistent statements to Gholston and Harvey, which were made before the plea agreement was offered to Gohagen, rebutted defense counsel's charge that Gohagen's testimony was influenced by the plea agreement. Thus, Gohagen's prior consistent statements were properly admitted pursuant to MRE 801(d)(1)(B). Accordingly, we also reject defendant's argument that the prosecutor committed misconduct by eliciting the testimony regarding the prior consistent statements.

Defendant next argues that the trial court erred in denying his motion for a mistrial on the basis of the admission of Jeremy Wilkes' testimony that defendant was involved in a gang. We disagree. This Court reviews a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). Wilkes' brief mention of defendant's gang involvement did not rise to the level of "an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Thus, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Similarly, we reject defendant's argument that the prosecutor committed misconduct by eliciting the challenged testimony from Wilkes where Wilkes' answer was nonresponsive and the brief reference to the gang involvement did not deny defendant a fair trial.

Defendant next argues that he was denied the effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Stanaway*, *supra* at 687-688. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 687. Because defendant did not move for a *Ginther*[2] hearing in the trial court, this Court's review is limited to mistakes apparent on the record.

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to join in a motion to adjourn trial brought by counsel for codefendant George DeJesus to request extra time to prepare for trial. Defendant further asserts that defense counsel appeared confused regarding the dates of certain police interviews of witnesses. Essentially, defendant argues that defense counsel failed to adequately prepare for trial. However, defendant fails to explain how his defense was prejudiced by the alleged errors of defense counsel. Thus, because defendant has not shown prejudice resulting from the alleged lack of preparation, he has failed to demonstrate that he was denied the effective assistance of counsel. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant next argues that he was denied the effective assistance of counsel because defense counsel attempted to impeach defense witness Christina Ortega's testimony that the party on Robinwood Street was held on Saturday night, rather than Friday night. However, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d

378 (1987). Furthermore, defendant has not explained how he was prejudiced by the questioning, and it is unlikely that the result of the proceedings would have been different had the questioning not occurred. Thus, defendant has not shown that he was denied the effective assistance of counsel.

Next, defendant argues that he was denied the effective assistance of counsel because defense counsel erred in calling Denise Model and Jennifer Jones as witnesses. Decisions regarding which witnesses to call are presumed to be matters of trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). The fact that a trial strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). We have reviewed the relevant portions of the record, and conclude that defense counsel's decision to call the witnesses did not constitute ineffective assistance of counsel.

Finally, defendant argues that he was denied the effective assistance of counsel because defense counsel contradicted defendant's police statements and alibi defense and the arguments of counsel for codefendant George DeJesus. Defendant further asserts that defense counsel misstated evidence when, during closing arguments, he stated that defendant did not have an alibi and was not sure where he was on the night of the murder, and acknowledged the uncertainty of the testimony regarding the night of the party. However, contrary to defendant's argument, defense counsel did not compromise a potential alibi defense by acknowledging that there was no clear testimony that the party occurred on the night of the murder. It is clear from the record that there was much confusion regarding the date of the party and that the credibility of testimony that the party was held on Saturday night was questionable. Defense counsel's decision to acknowledge the inconsistencies was trial strategy. Defendant has not demonstrated that he was denied the effective assistance of counsel.

Defendant next argues that he was denied a fair trial by cumulative error. We disagree. The test to determine whether reversal is required for cumulative error is not whether there are some irregularities, but whether defendant was denied a fair trial. *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987). Here, we cannot conclude that the minor irregularities that occurred during trial denied defendant a fair.

Defendant next argues that his convictions for both first-degree premeditated murder and first-degree felony murder violate the prohibition against double jeopardy. We agree. Double jeopardy issues are reviewed de novo on appeal. *Lugo, supra* at 705.

Convictions of first-degree premeditated murder and first-degree felony murder for the death of a single victim violate double jeopardy principles. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). Here, the trial court vacated defendant's sentence for felony murder. However, in *Bigelow*, this Court expressly rejected vacation of the felony murder conviction as the remedy when a defendant is convicted of both premeditated murder and felony murder. *Id.* at 220-221. The appropriate remedy when a defendant has been convicted of both offenses is to modify the judgment of conviction and sentence to indicate that defendant's conviction is for one count of first-degree murder supported by two theories: premeditated murder and felony murder. *Id.* Defendant's judgment of conviction and sentence must be modified accordingly. Furthermore, defendant's convictions for both felony murder and the predicate offense, first-degree criminal sexual conduct, violate double jeopardy

principles. *Id.* at 221; *People v Warren,* 228 Mich App 336, 354; 578 NW2d 692 (1998). Thus, defendant's first-degree criminal sexual conduct conviction and sentence must be vacated. *Bigelow, supra* at 221-222.

We also agree with defendant's contention that the felony-firearm conviction relating to the first-degree criminal sexual conduct conviction must also be vacated. A defendant can be charged, convicted, and sentenced for felony-firearm for each felony committed in a crime spree. *People v Harding,* 443 Mich 693, 716; 506 NW2d 482 (1993) (Brickley, J). "The corollary is: If the substantive crime underlying a felony-firearm conviction must be vacated, then that accompanying felony-firearm conviction also must be vacated. A defendant can be convicted for only one charge of felony-firearm for each convicted felony." *Id.* at 716-717. Thus, in the instant case, because the first-degree criminal sexual conduct conviction must be vacated on the basis of double jeopardy, the related felony-firearm conviction must also be vacated.

Defendant contends that this Court should order that certain information be stricken from defendant's presentence report. We agree that the information regarding the incarceration of defendant's brother, Jesse DeJesus, (i.e. that Jesse was found guilty in Oakland Circuit Court of the reduced charge of second-degree murder and was sentenced to 20 to 60 years in prison) other than the simple fact that he was incarcerated, should be stricken from the report as ordered by the trial court. However, we do not agree that the references to offenses with which defendant was charged, but which were later dismissed, must be stricken from the presentence report. The trial court ordered that the changes requested by defendant, to which the prosecutor did not object, be made to the report. The prosecutor did not agree to the deletion of the dismissed charges, but, rather, opined that whether the dismissed charges should be deleted from the report should be left to the discretion of the probation department. We also note that, because the sentencing court had no discretion in sentencing defendant to life in prison without the possibility of parole, the challenged information could not have affected defendant's sentence. Thus, we conclude that the information regarding the dismissed charges need not be stricken.

Finally, in his supplemental brief, defendant argues that the trial court should have suppressed Brandon Gohagen's testimony because it violated MCL 775.7; MSA 28.1244. MCL 775.7; MSA 28.1244 provides that the court may direct the county treasurer to pay the expenses of a state witness who travels from out of state or who "is poor." The statute further provides that "no fees shall be allowed or paid to witnesses on the part of the people in any criminal proceeding or prosecution except as is provided in this section and act." MCL 775.7; MSA 28.1244. Defendant asserts that the payment of "fees" includes an offer by the prosecution to withhold prosecution or bring reduced charges against a witness who agrees to testify for the prosecution. We disagree. First, this issue is not preserved for review where defendant did not move to suppress Gohagen's testimony on the basis of MCL 775.7; MSA 28.1244 in the trial court. *People v Hamacher,* 432 Mich 157, 168; 497 NW2d 43 (1989). Furthermore, we find no merit in defendant's argument. Where a word is not defined in a statute, the word should be given its plain and ordinary meaning, taking into account the context in which the word was used. *People v Lee,* 447 Mich 552, 557-558; 526 NW2d 882 (1994). Here, the plain and ordinary meaning of the term "fee" does not include a plea agreement. Furthermore, taking into

consideration the context in which the term is used, we do not believe the Legislature intended that the term include a plea agreement. Therefore, defendant is not entitled to reversal on the basis of Gohagen's plea agreement.

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Defendant George DeJesus first argues that the trial court erred in admitting the testimony of Terrell Gholston regarding the statements Gohagen made to him with respect to Gohagen's and defendant's involvement in Midkiff's murder because Gohagen's statements did not qualify as prior consistent statements under MRE 801(d)(1)(B). However, as discussed above with respect to our resolution of this issue in codefendant Melvin DeJesus' appeal, the admission of the testimony was proper under MRE 801(d)(1)(B). Defense counsel repeatedly raised the possibility that Gohagen's testimony was influenced by the plea agreement. Thus, Gohagen's prior consistent statements, which were made before the plea agreement was offered, were offered to rebut defense counsel's charge that Gohagen's statements were influenced by the plea agreement. MRE 801(d)(1)(B); *Tome, supra; Rodriguez, supra.*

Defendant next argues that the trial court abused its discretion in admitting the testimony of Angela Rodriguez that Midkiff told her that she did not like defendants and that she thought "they were trouble." However, defendant failed to object to the admission of the testimony at trial. Because the admission of the testimony was not plain error affecting defendant's substantial rights, we will not further review this issue. MRE 103(d).

Defendant next argues that the trial court abused its discretion in allowing the prosecutor to display the crime scene and autopsy photographs, as well as a photograph of Midkiff as she normally appeared, during her opening statements, and in later admitting the photographs into evidence. As we discussed above with respect to our resolution of this issue in codefendant Melvin DeJesus' appeal, the trial court did not abuse its discretion in allowing the prosecutor to display the photographs during opening statements or in admitting the photographs into evidence. While the crime scene and autopsy photographs were prejudicial by nature, they showed the extent of Midkiff's injuries and were relevant to proof of the intent to kill. The probative value of the photographs was not outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra* at 76. Similarly, we find no error in the admission of the photograph of Midkiff as she normally appeared before the murder. In addition, the use of the photographs during the prosecutor's opening statements was not improper where the crime scene photographs were authenticated, and the trial court determined that they would be admissible later during the prosecutor's presentation of her proofs, before the photographs were displayed during the prosecutor's opening statements. Any error was harmless where the same or similar photographs were seen by the jury during the prosecutor's presentation of her case.

Defendant next argues that the trial court abused its discretion in denying his motion for a mistrial on the basis of Jeremy Wilkes' reference to defendants' involvement with a gang. However, as discussed above with respect to our resolution of this issue in codefendant Melvin DeJesus' appeal, the trial court did not abuse its discretion in denying defendant's motion for a mistrial because Wilkes' brief

reference to defendant's gang involvement did not amount to "an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *Lugo, supra* at 704.

Defendant next argues that the trial court erred in admitting the photograph of him holding a gun in each hand at arm's length and pointed directly at the camera. Defendant objected to the admission of the photograph on the basis that it was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice. MRE 402; MRE 403. We agree that the probative value of the photograph was substantially outweighed by the danger of unfair prejudice. Based on the quality of the photograph and the position of the guns in the photograph, it is unlikely that Gohagen could have accurately identified the guns in the photograph. The minimal probative value is substantially outweighed by the danger of unfair prejudice from the photograph, which shows defendant in a disturbing pose and fuels an inference that defendant is violent. Thus, we conclude that the trial court abused its discretion in admitting the photograph into evidence. However, an error in the admission of evidence is not a ground for reversal "unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). It is highly unlikely that the admission of the photograph affected the verdict. Thus, we conclude that the error was harmless.

Defendant next argues that he was denied a fair trial by prosecutorial misconduct. We disagree. The test for prosecutorial misconduct is whether the prosecutor's conduct denied the defendant a fair and impartial trial. *Paquette, supra* at 342. The reviewing court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.* Appellate review of allegations of error to which defendant did not object at trial is foreclosed unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *Stanaway, supra* at 687.

Defendant first asserts that the prosecutor committed misconduct by repeatedly appealing to the sympathy of the jurors throughout the trial. We have reviewed the prosecutor's statements to which defendant refers, and conclude that the prosecutor's comments and arguments were not improper appeals to the jury for sympathy. The prosecutor's statements were supported by the evidence and the reasonable inferences therefrom. *Bahoda, supra* at 282. Furthermore, because the jury was instructed at the conclusion of the proofs that it should not allow sympathy to influence its verdict, and any prejudice could have been cured by an immediate instruction had defendant objected to the prosecutor's statements at trial, the remarks did not amount to error requiring reversal. See *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988).

Defendant next argues that the prosecutor appealed to the fears of the jurors and made improper civic duty arguments throughout the trial. Generally, prosecutors are accorded great latitude in their arguments and conduct. *Bahoda, supra* at 282. However, it is improper for a prosecutor to make civic duty arguments that appeal to the fears and prejudices of the jurors. *Id.* After having reviewed the record, we cannot conclude that the prosecutor's remarks constituted an improper civic duty argument. Any prejudice that may have resulted from the prosecutor's comments could have been cured by an appropriate instruction and failure to further review this issue will not result in a miscarriage of justice. *Stanaway, supra* at 687.

Next, defendant contends that the prosecutor argued facts not in evidence when she stated that Midkiff knew that defendant was holding Gohagen's gun while Gohagen was sexually assaulting her. In light of Gohagen's testimony that he took his gun from his waistband and handed the gun to George DeJesus before he sexually assaulted Midkiff, the prosecutor's statements were a reasonable inference from the evidence. *Bahoda, supra* at 282. We also reject defendant's argument that the prosecutor improperly encouraged the jury to ignore evidence that the screened-in tent, referred to in Gohagen's testimony, did not exist. The prosecutor's argument that the tent was not seen in the videotape of the crime scene because "the crime scene video doesn't pan over that far," was a reasonable argument made in response to defense counsel's argument that the tent did not exist because it was not shown on the videotape.

Defendant next argues that the prosecutor denigrated him and defense witness Crystal Sauro. First, defendant asserts that the prosecutor denigrated him when she referred to him as evil, a "cold-blooded murderer," and a "sadistic executioner." When viewed in context, the prosecutor's remarks were not improper. Furthermore, defendant failed to object to the remarks at trial. Because any prejudice resulting from the remarks could have been cured by an immediate jury instruction and failure to further review the issue will not result in a miscarriage of justice, we conclude that defendant is not entitled to reversal on the basis of the prosecutor's remarks. *Stanaway, supra* at 687. Similarly, we conclude that defendant is not entitled to reversal on the basis of his argument that the prosecutor denigrated defense witness Crystal Sauro, who was codefendant Melvin DeJesus' girlfriend. During her closing argument, the prosecutor stated, "Isn't that amazing? A fifteen year old girl's father is taking her over to her boyfriend's house to spend the night, in the early evening hours, almost as amazing as her testimony." It appears that the prosecutor's remarks were intended to cast doubt on Sauro's testimony. In any event, reversal is not required because defendant did not object to the remarks, any prejudice could have been cured by a jury instruction, and the remarks did not result in a miscarriage of justice. *Id.*

Finally, defendant argues that the prosecutor committed misconduct by moving to admit Gohagen's plea agreement, in which Gohagen agreed to provide truthful testimony. As discussed above with respect to codefendant Melvin DeJesus' appeal, the admission of the plea agreement was not improper because the prosecutor did not use the agreement to demonstrate that she had special knowledge that Gohagen was testifying truthfully. *Bahoda, supra* at 276.

Next, defendant argues that the trial court erred in denying his motion for a directed verdict with respect to the first-degree criminal sexual conduct charge. We disagree. When reviewing a trial court's ruling regarding a motion for a directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). Thus, this Court must consider the evidence presented by the prosecution up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* at 345.

Defendant was charged with first-degree criminal sexual conduct on an aiding and abetting theory. "'Aiding and abetting' describes all forms of assistance rendered to the perpetrator of the crime and comprehends all words or deeds that might support, encourage, or incite the commission of a

crime." *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). To establish that a defendant aided and abetted a crime, the prosecution must show that 1) the crime charged was committed by the defendant or some other person, 2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and 3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid or encouragement. *Id.* Here, it is undisputed that Gohagen committed the crime of first-degree criminal sexual conduct against Midkiff. Evidence further established that Melvin told Midkiff that he would shoot her if she was not quiet. Before Gohagen sexually assaulted Midkiff, defendant motioned to Gohagen to hand him Gohagen's gun. The act of holding Gohagen's gun while Gohagen sexually assaulted Midkiff encouraged and assisted the assault. In addition, the evidence indicated that defendant knew that Gohagen intended to commit first-degree criminal sexual conduct when he motioned for Gohagen's gun where defendant was present when codefendant Melvin DeJesus ordered Midkiff to have sexual intercourse with Gohagen. Thus, the prosecution presented sufficient evidence from which a rational trier of fact could have found that defendant was guilty beyond a reasonable doubt of aiding and abetting first-degree criminal sexual conduct.

Defendant next argues that his first-degree premeditated murder and first-degree felony murder convictions were not supported by sufficient evidence. We disagree. When reviewing a challenge to the sufficiency of the evidence, this Court examines the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992).

To establish first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Defendant first argues that the evidence was insufficient to establish that he acted with the premeditated intent to kill Midkiff. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* Premeditation and deliberation may be inferred from the circumstances of the killing. *Id.* Gohagen's testimony indicated that he and George followed Melvin into Midkiff's house after Melvin stated his intent to "mess with" Midkiff. Gohagen's testimony further indicated that after Midkiff was sexually assaulted in her bedroom, George began to tie her hands and feet, and then carried her to the basement. When Midkiff pleaded that she would not tell anyone about the incident if defendants left the house, Melvin stated, "I know you won't tell anyone, bitch." It can be inferred form this statement that Melvin had the premeditated intent to kill Midkiff. Furthermore, by kicking Midkiff after hearing Melvin's statement and, thus, knowing that Melvin intended to kill Midkiff, it can also be inferred that George had the premeditated intent to kill Midkiff. Gohagen's testimony further indicated that George kicked Midkiff in the upper body at least two times before Gohagen left the house. When viewed in the light most favorable to the prosecution, the foregoing evidence was sufficient to justify a rational trier of fact in finding that defendant had the premeditated intent to kill Midkiff.

Defendant also challenges the sufficiency of the evidence with respect to his first-degree felony murder conviction. The elements of felony murder are 1) the killing of a human being, 2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with

knowledge that death or great bodily harm was the probable result, and 3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316; MSA 28.548. *People v Kelly*, 231 Mich App 627, 642-643; 588 NW2d 480 (1998). Defendant asserts that Gohagen's testimony that he only saw George kick Midkiff twice before Gohagen ran out of the house is not sufficient to establish that defendant had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. However, Gohagen's testimony that defendant tied up Midkiff, carried her to the basement, heard Melvin state, "I know you won't tell anybody, bitch," and then began, along with Melvin, to kick Midkiff in the upper body, was sufficient evidence that defendant possessed the intent to kill or, at the very least, the intent to do great bodily harm. Therefore, defendant's felony murder conviction was supported by sufficient evidence.

Defendant next argues that the trial court's jury instructions regarding felony murder and first-degree criminal sexual conduct were erroneous and require reversal of his convictions. We disagree. A trial court is required to instruct the jury concerning the law applicable to the case and to fully and fairly present the case to the jury in an understandable manner. MCL 768.29; MSA 28.1052; *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). Even if the instructions were somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Here, defendant did not object at trial to the instructions he now claims were erroneous. Failure to object to jury instructions waives error unless relief is necessary to avoid manifest injustice. *People v Swint*, 225 Mich App 353, 376; 572 NW2d 666 (1997).

Defendant contends that the trial court's felony murder instruction was erroneous due to an error in the court's instruction on first-degree criminal sexual conduct, the felony on which the felony murder charge was based. Specifically, defendant argues that the court's first-degree criminal sexual conduct instruction was erroneous because it described third-degree criminal sexual conduct rather than first-degree criminal sexual conduct. The court's instruction stated that the jury could find that defendant committed first-degree criminal sexual conduct if it found that "defendants used force or coercion to commit this sexual act *or* aided and abetted someone who used force or coercion to commit this sexual act." First-degree criminal sexual conduct requires sexual penetration accompanied by one of several aggravating circumstances.[3] MCL 750.520b(1)(a)-(h); MSA 28.788(2)(1)(a)-(h); *People v Petrella*, 424 Mich 221, 238-239; 380 NW2d 11 (1985). One of the aggravating circumstances is that the actor is aided or abetted by one or more person and the actor uses force or coercion to accomplish sexual penetration. MCL 750.520b(1)(d); MSA 28.788(2)(1)(d). While the court's instruction was not perfect, under the facts of this case, the instruction fairly presented the issues to the jury. There was no evidence that George DeJesus committed first-degree criminal sexual conduct as a principal. Thus, to find him guilty of first-degree criminal sexual conduct, the jury must have found that he "aided and abetted someone [Gohagen] who used force or coercion to commit the sexual act." Accordingly, the court's instruction properly required the jury to find that the principal used force or coercion to accomplish the sexual penetration, and that the principal was aided and abetted by one or more persons. MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii). Furthermore, any error was harmless where the evidence was clearly sufficient to support a finding that defendant aided and abetted Gohagen's commission of first-degree criminal sexual conduct. Thus, defendant is not entitled to reversal on the basis of the court's first-degree criminal sexual conduct instruction.

Defendant next argues that the trial court erred in denying his motion for a separate trial. We disagree. A trial court's decision to sever or join defendants is reviewed for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994).

"Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Hana, supra* at 346. Absent any "significant indication" on appeal that the requisite prejudice in fact occurred at trial, the failure to make such a showing precludes this Court from reversing a joinder decision. *Id.* at 346-347. Here, defendant has not shown that the defenses argued at trial were mutually exclusive or irreconcilable, or that his substantial rights were affected in any other way. Any prejudice that resulted from the joint trial was "incident spillover prejudice," which was not sufficient to require severance. *Id.* at 349.

Finally, as discussed above with respect to codefendant's argument that his convictions of first-degree premeditated murder and first-degree felony murder violated double jeopardy principles, we agree with George DeJesus' argument that his judgment of sentence should be amended to indicate that he was convicted of first-degree murder supported by the two theories of premeditated murder and felony murder. *Bigelow, supra* at 220. We further agree that defendant's first-degree criminal sexual conduct conviction must be vacated on the ground that defendant's convictions of felony murder and the predicate offense violate double jeopardy principles. *Id.* at 221; *Warren, supra* at 354. It follows that the felony-firearm conviction related to the vacated criminal sexual conduct conviction must also be vacated. *Harding, supra* at 716-717.

Defendants' convictions of one count of first-degree murder are affirmed. We remand for the modification of defendants' judgments of conviction and sentence to indicate that they were each convicted of one count of first-degree murder supported by two theories: premeditated murder and felony murder. One felony-firearm conviction with respect to each defendant is affirmed. Defendants' convictions and sentences for first-degree criminal sexual conduct and one count of felony-firearm are vacated. On remand, the information regarding the incarceration of defendant Melvin DeJesus' brother, Jesse DeJesus, beyond the fact that he was incarcerated, must be deleted from Melvin DeJesus' presentence report. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Gary R. McDonald
/s/ Kurtis T. Wilder

[1] Defendants' appeals were consolidated by an order of this Court dated July 6, 1998.

[2] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

[3] Third-degree criminal sexual conduct requires sexual penetration through the use of force or coercion. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b).