STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2001
v	No. 221301 Wayne Circuit Court
LEON D. FOSTER, Defendant-Appellant.	LC No. 98-012671

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was thereafter sentenced to consecutive terms of twelve to twenty-five years' imprisonment for the second-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court's preliminary instruction on reasonable doubt diminished the prosecutor's burden of proof and shifted the burden of proof to defendant. Because defendant failed to preserve this issue for appellate review by objecting during the trial, we review this issue only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

When read in its entirety, a jury instruction regarding reasonable doubt must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). In addition, an instruction defining reasonable doubt may not shift the burden of proof by requiring jurors to have a reason to doubt the defendant's guilt. *Jackson*, *supra* at 391. Rather, the instruction must convey that a reasonable doubt is an honest doubt based upon reason. *Id*.

The reasonable doubt instruction, when read in its entirety, did not diminish the prosecutor's burden of proof or shift the burden of proof to defendant, especially since the trial court instructed the jury that the burden of proof never shifts to defendant. The trial court's home-buying illustration emphasized the fact that reasonable doubt is a higher standard of proof

than that utilized in a civil case and that reasonable doubt must be a doubt based upon reason. In fact, the purpose of the illustration was to clarify the difference between a decision based on reason and that which is not.

Further, we do not find that reversal is required pursuant to *Cage v Louisiana*, 498 US 39; 111 S Ct 328; 112 L Ed 2d 339 (1990). The trial court's instruction in the present case, taken in its entirety, could not have been interpreted to allow a finding of guilt on a lower degree of proof than that required for conviction. Unlike *Cage, supra* at 40, the trial court did not instruct the jurors that a reasonable doubt is such a doubt as would give rise to a grave uncertainty or liken reasonable doubt to a moral certainty. Rather, the trial court stated that reasonable doubt was something "pretty substantial." The instruction, therefore, taken together with the illustration on reasonable doubt, properly conveyed the concept of reasonable doubt to the jurors and did not diminish the prosecutor's burden of proof or shift the burden of proof to defendant.

Consequently, the trial court's preliminary jury instruction on reasonable doubt did not constitute plain error which affected defendant's substantial rights.

Defendant next argues that the trial court abused its discretion by excluding certain testimony of two police officers who spoke to defendant at the scene of the shooting. Decisions whether to admit evidence are within the sole discretion of the trial court and will be reversed only where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

During an offer of proof, defendant offered the preliminary complaint report of two police officers who spoke to defendant shortly after the shooting. The reports indicated that defendant told the police officers that defendant had been abducted and taken to a house earlier in the day, that defendant and the victim were fighting over a weapon when they were both shot, that defendant escaped from the house after the struggle, and that another person standing in the area was also involved in the incident. Defendant maintains that the evidence supported his self-defense theory and should have been admitted as an excited utterance under MRE 803(2).

The excited utterance exception to the hearsay rule provides that a statement relating to a startling event made while the declarant was under the stress of excitement caused by the event, is not excluded by the hearsay rule. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Admissibility of a statement under the excited utterance exception requires: (1) that there be a startling event, and (2) that the resulting statement be made while under the excitement caused by the event. *Id.*. The primary focus of the excited utterance exception is on the lack of capacity to fabricate rather than the lack of time to fabricate. *Id*. at 551. A trial court may consider all the circumstances bearing on spontaneity and lack of deliberation in determining whether a statement falls within the excited utterance exception. *People v Kowalak (On Remand)*, 215 Mich App 554, 559; 546 NW2d 681 (1996).

We find that the trial court's decision not to allow the officers' testimony was not an abuse of discretion. Although a startling event occurred, there was a question regarding whether the statements were made while defendant was under the excitement caused by the event because there was a discrepancy regarding how long after the shooting the statements were made. During defendant's argument in support of the admission of the evidence, however, he admitted that,

according to the officers' preliminary complaint reports, the shooting occurred at 8:30 a.m. and was reported to police at 8:45 a.m. While the primary focus of the excited utterance exception is on the lack of capacity to fabricate rather than on the lack of time to do so, the trial court found that defendant had the opportunity to fabricate during the interval between the shooting and the arrival of the police officers. Such a consideration was appropriate in determining whether the statements were within the excited utterance exception. *Kowalak, supra* at 559. Therefore, the trial court's determination that defendant had the capacity and opportunity to fabricate the statements did not constitute an abuse of discretion.

Furthermore, the trial court found that the statements evidenced some deliberation on behalf of defendant and did not appear to be spontaneous. Interestingly, Officer Michael Mockeridge's preliminary complaint report did not mention defendant's contention that he was abducted and taken to a house earlier that day, and Officer Charles Dudley's report mentioned this remark only after it indicated that defendant had escaped from the house after a struggle with a person inside the house. From the context of the reports, therefore, it appears that defendant's abduction was a mere afterthought in an attempt to formulate a reason for his presence at the house. In any event, whether the statements were properly admissible under the excited utterance exception to the hearsay rule was a close evidentiary question, and rulings on such questions do not ordinarily constitute an abuse of discretion. *People v Sabin (On Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

Lastly, defendant argues that the prosecutor improperly remarked about his presence at trial in a wheelchair, thereby denying him a fair trial. We review claims of prosecutorial misconduct to determine whether a defendant was denied a fair and impartial trial. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Alleged prosecutorial misconduct is reviewed on a case-by-case basis and evaluated in the context of the particular facts of each case. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). While a prosecutor may properly argue the evidence and draw reasonable inferences from the evidence during closing argument, she may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998); *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995).

The prosecutor's remarks were not improper because she was simply commenting on the evidence presented at trial. Officer Mark Williams testified to the fact that defendant appeared at trial in a wheelchair when he identified defendant as the man sitting in the wheelchair. Because this fact was admitted into evidence through Williams' testimony, the prosecutor could comment on the evidence and argue that the wheelchair was a mere "prop" rather than a legitimate medical necessity. Such an argument was a reasonable inference to be drawn from the evidence that, although the shooting occurred over six months before trial, and defendant was only shot in the foot, he appeared at trial in a wheelchair. In addition, the trial court instructed the jury that the attorneys' comments and arguments were not evidence. Therefore, because the prosecutor's remark was not improper, it did not deny defendant a fair trial.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Kathleen Jansen