STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENEAL MARTIN IV,

Defendant-Appellant.

UNPUBLISHED
October 19, 2001

No. 221716
Wayne Circuit Court
LC No. 99-000325

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a term of imprisonment of natural life for the murder conviction, and a consecutive term of two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant contends that the evidence was insufficient to sustain his murder conviction. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

Defendant specifically contends that there was insufficient evidence supporting the premeditation element. We disagree. First-degree, premeditated murder is the intentional killing of another, done with premeditation and deliberation. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). "Premeditation" requires sufficient time to allow the defendant to take a "second look," and may be inferred from the circumstances surrounding the homicide. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). For example, the following factors may be relevant: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998).

Here, there was evidence that defendant walked to his truck, retrieved a weapon, and walked back in the victim's direction before shooting the victim. Although there was conflicting testimony as to how close defendant was to the victim at the time of the shooting, there was no evidence suggesting that the shooting was so immediate that defendant lacked sufficient time to

take a "second look." Further, there was evidence that two shots were fired, and that defendant continued to approach the victim between the shots. Because the medical examiner's testimony indicated that there was only one gunshot wound, defendant either: (i) missed on the first shot, providing additional time to take a "second look" before firing the weapon a second time, or (ii) hit the victim with the first shot, providing additional time to take a "second look" before firing the weapon a second time, albeit inaccurately or unsuccessfully. In other words, defendant's second discharge of the weapon provides further support for a conclusion that defendant had ample time to take a "second look," but elected not to do so.

In addition, there were no facts suggesting a physical confrontation between defendant and the victim, nor was there evidence of even a heated discussion. At most, the victim may have made an insulting statement to Kristal Rush; however, Rush denied that her relationship with defendant was beyond that of mere acquaintances. The record was devoid of any evidence of mitigating circumstances, such as a fight or "heat of passion." Viewing this evidence in a light most favorable to the prosecution, we believe that a rational trier of fact could have concluded that defendant had sufficient time to take a "second look" before shooting the victim, as necessary to support a finding of deliberation. Accordingly, we reject defendant's challenge to the sufficiency of the evidence supporting his first-degree premeditated murder conviction.

Defendant also contends that he was deprived of his constitutional right to a fair trial because the prosecution, through the conduct of the investigating officers, intimidated Rush. We denounce witness intimidation in all forms. Here, Rush testified that, although she was not charged with any crime, the police held her for several days. She testified that she made statements implicating defendant so that she could get home to her children by Christmas. If Rush's testimony regarding her detention is true, and we have been presented with no evidence to the contrary, we condemn the actions of those responsible.

However, we are asked to decide whether the aforementioned events denied *defendant* a fair trial, and not whether Rush was treated improperly. This issue was not raised below. Nevertheless, defendant may avoid forfeiture of this issue under the "plain error" rule. *People v* Carines, 460 Mich 750, 763; 597 NW2d 130 (1999). The *Carines* Court explained:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights . . . [which] generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings.[1] [*Id*.]

In the instant matter, we are not persuaded that defendant can satisfy the third requirement because, if anything, Rush's testimony regarding her interrogation was damaging to the prosecution's case. After reviewing the record, we believe that her testimony called into

[1] Even if defendant satisfies these three requirements, reversal is warranted only when the error resulted in the conviction of an innocent defendant, or "when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'" *Carines, supra* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

question the accuracy of the police investigation. Without her testimony, defendant still had to overcome eyewitness testimony placing defendant at the scene of the murder and firing a weapon. Put another way, we believe that defendant was convicted despite Rush's testimony, and not because of it. Thus, we are not persuaded that the purported intimidation affected the outcome of the instant matter.

In *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992), there was a question whether police intimidation of a witness deprived the defendant of a fair trial, where the witness's initial statement to the police and her trial testimony differed. The defendant argued that the intimidation by the police led the witness to testify untruthfully. *Id.* at 25. We opined:

> This is not a case where the actions of the court or prosecutor drove a defense witness from the stand. Rather, this prosecution witness testified, and the question is whether she told the truth or was pressured into lying. In this case, the jury was able to perform its traditional role of assessing credibility because defense counsel read into the record portions of the initial police interview where the threats or insinuations of jail and prosecution were made. The witness also testified that her testimony against defendant, not her initial interview with the police, was the truth. [*Id.* at 29.]

Ultimately, we ruled that defendant could not avoid forfeiture of the issue, and was not entitled to relief on appeal. *Id.*

Here, Rush testified in some detail regarding her detention. In particular, she testified that the detention prompted her to make statements that were not true. She also testified that her trial testimony, which was essentially exculpatory for defendant, was true. While the facts in *Stacy* were reversed, in both that case and the instant matter the jury was the final arbiter of the witness's veracity, notwithstanding allegations of police intimidation. Thus, as in *Stacy,* we are not persuaded that the intimidation deprived defendant of a fair trial. Rather, we believe that informing the jury of the purported intimidation helped ensure that defendant receive a fair trial. Consequently, we conclude that defendant may not avoid forfeiture of this issue. *Carines, supra* at 763.

Defendant further contends that the prosecutor erred by presenting Rush's testimony because she knew or should have known that Rush would testify inconsistently with her earlier statements. Defendant contends that Rush was allowed to testify solely "to place incompetent and highly prejudicial evidence before the jury." Again, defendant did not raise this issue below. Therefore, we review only for "plain error." *Carines, supra* at 763. MRE 607

As a preliminary matter, we disagree with defendant's contention that Rush testified solely to place prejudicial evidence before the jury. Rush's testimony was largely cumulative to the testimony of other witnesses, except for the circumstances occurring before and after the murder. However, these circumstances were not absolutely essential to proving defendant's guilt. Regardless, we are not persuaded that the prosecution should have known that Rush's testimony would differ from her statements. Although Rush failed to appear at the preliminary examination and apparently sought to avoid testifying, these facts do not necessarily suggest that her testimony was likely to differ.

Nevertheless, even if the prosecution suspected that Rush would testify differently from her statements, we do not believe that it was plain error to present Rush's testimony. A party may challenge the credibility of any witness, including its own. MRE 607. Moreover, this was not a situation where Rush was likely to assert a Fifth Amendment privilege to remain silent. See *People v Poma*, 96 Mich App 726, 730-731; 294 NW2d 221 (1980). We also believe that presenting a witness who may or may not testify consistent with an earlier statement is distinguishable from knowingly offering inadmissible evidence. See *People v Giacalone*, 399 Mich 642, 645; 250 NW2d 492 (1977), quoting ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, § 5.6(b). In fact, where it is suspected that there will be a variance between a prior statement and testimony, the jury is the proper body to resolve the variance and accord a proper weight to the evidence. *Stacy, supra* at 29. Finally, even if we were to conclude that the prosecution erred by allowing Rush to testify, because Rush's testimony was more damaging to the prosecution's case, we do not believe that the prosecution's decision to present Rush's testimony affected the outcome of the trial.[2]

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[2] An argument could be made that the prosecution had an ethical duty to present Rush's testimony *because* there was a chance that she would testify differently from her prior statements. "A prosecutor has a duty to 'make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree if the offense.'" *People v Aldrich*, 246 Mich App 101, 111; NW2d (2001), quoting MRPC 3.8. Thus, to the extent that the prosecutor became aware that Rush would testify differently than her statements, the greater error would have been to not present her inconsistent testimony. Indeed, that would have deprived defendant of exculpatory evidence, and prevented the jury from considering all the relevant facts.

We would also note that defendant's reliance on *People v White*, 401 Mich 482; 257 NW2d 912 (1977) is misplaced. The *White* Court opined:

> We do not approve of the practice of the people in a criminal case calling a witness they are under no duty to call, and who they have reason to know will deny all knowledge of the event and thereby add nothing of substance to the people's case, for the sole purpose of placing before the jury highly damaging evidence that the jury must be instructed may be considered only for impeachment purposes. [*Id.* at 509-510.]

First, the *White* decision preceded the amendments to MRE 607, which allow any party to impeach any witness. Second, we doubt whether the prosecution had sufficient knowledge that Rush would change her testimony. It is plausible that Rush avoided the preliminary examination because she did not want to be compelled to testify against defendant, an acquaintance. Indeed, one would think that, if she provided erroneous information implicating defendant, she would have wanted to set the record straight. Thus, it is equally likely her failure to testify at the preliminary examination suggested that she would testify consistently with her statements. Finally, Rush's testimony provided details about the events that were not available through any other witness, such as why she was having a dispute with the victim. In other words, unlike the facts in *White*, Rush added testimony of substance to both the people's case and the development of a factual record.

Defendant argues that the prosecution made several remarks that constituted prosecutorial misconduct. Generally, "[p]rosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Where there is no objection to the purported prosecutorial misconduct, appellate review is precluded absent "plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000); see *Carines, supra* at 763. In addition, we will not reverse where a timely objection and curative instruction would have eliminated the prejudicial effect of the prosecutorial misconduct. *Schutte, supra* at 720-721.

Defendant contends that prosecutorial misconduct occurred when the prosecutor, during closing argument, invited the jury to consider impeachment evidence as substantive evidence. Indeed, "[a] prosecutor may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, we believe that the prosecutor's comments fairly presented the issue of Rush's credibility to the jury. Indeed, it was the jury's province to determine whether Rush's testimony was the truth, or, alternatively, whether her testimony was false in light of her prior statements. Further, a prosecutor may argue from the facts that a witness is either credible or unworthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The prosecutor could argue that Rush's testimony lacked credibility based on referencing her prior inconsistent statements. In other words, the prior inconsistent statements provided the factual support for the prosecution's assertion that Rush's testimony lacked credibility. Accordingly, we find no error.

Defendant also contends that prosecutorial misconduct occurred when the prosecutor stated that defense counsel did not "want to hear any damaging evidence" during a discussion on a defense objection. A prosecutor may not personally attack defense counsel because there is a risk that it may infringe on the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996). Here, defense counsel objected to the prosecutor's comments, and requested that the trial court instruct the prosecutor to desist from "editorializing." Indeed, the trial court instructed the prosecutor that she was to only respond to objections with legally relevant information. Thus, it would appear that defendant received essentially the relief that was requested. While an admonishment before the jury may have been desirable, this relief was not requested. Regardless, although the comment was imprudent, we are not persuaded that it was serious enough to deprive defendant of a fair trial.

Defendant also contends that the prosecutor's question regarding the fairness of the corporeal lineup was misconduct. The prosecutor specifically inquired whether an attorney was present at the lineup to ensure fairness. We note, however, that defense counsel's immediate objection was sustained before the witness could answer. Accordingly, we do not believe that this question impacted the fairness of the trial.

Defendant challenges the propriety of the prosecutor's question: "Obviously he has gained weight, but about the same?" We agree with defendant to the extent that the prosecutor may not argue facts that are not in evidence. *Stanaway, supra* at 686. However, we note that the witness answered that defendant weighed "about the same," directly rejecting the prosecution's unsupported assertion. Moreover, viewing the remarks in context, we believe that the prosecutor was speaking colloquially with the witness regarding defendant's appearance, particularly how it

had changed slightly since the corporeal lineup. Nevertheless, a timely objection and cautionary instruction would have removed whatever prejudicial effect may have resulted from the question and not cured by the answer. Consequently, we do not believe that defendant was deprived of a fair trial by this comment.

Defendant also asserts that the prosecutor improperly suggested that defendant had made threats against Rush. We disagree. Rush testified that, hypothetically, she might be afraid to testify against an acquaintance that she saw murder someone else, where the acquaintance told her not to tell anyone. Rush's statements to the police, although admissible solely as impeachment evidence, indicated that, after the murder, defendant told Rush not to tell anyone. It also indicated that Rush observed the murder.[3] To be sure, Rush's testimony refuted both of these facts. However, it was the jury's province to determine the veracity of Rush's testimony, and her earlier statements were relevant to that determination. We believe that the jury was provided with an adequate foundation to validly determine Rush's credibility. Accordingly, we are not persuaded that the commentary deprived defendant of a fair trial.

In summary, we agree with defendant that certain statements by the prosecutor approached prosecutorial misconduct. However, we do not believe that any of the comments, viewed separately or cumulatively, deprived him of a fair trial, as necessary to warrant appellate relief. *Rice, supra* at 435.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens

[3] Indeed, there was testimony from two witnesses that Rush saw defendant murder the victim.