STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 6, 2002
V	No. 227651 Monroe Circuit Court
WILLIAM HENRY BICKLEY III, Defendant-Appellant.	LC No. 99-030124-FC

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment without parole for the murder conviction and a consecutive two-year term for the felony-firearm conviction. We affirm.

I. Facts and Proceedings

Defendant's convictions arose from an incident in which defendant shot the victim, Kristina Ott, during a heated argument. Defendant did not deny killing Ott, but claimed that he shot her accidentally.

According to defendant, he first met Ott at a concert on New Year's Eve of 1998 and saw her three additional times before starting a relationship in March 1999. According to Thomas Howick, defendant's co-worker, on April 8, 1999, defendant jokingly told him that his girlfriend was getting annoying and that maybe he was going to blow off her head. Howick, who socialized with defendant, said that defendant was laughing when he made that statement, and he seemed to be joking. Defendant claimed that he did not remember the conversation with Howick.

Michael Croteau, who shared defendant's apartment, was awakened the night of April 8, 1999, by noises coming from the living room. He got up and left his bedroom. He saw defendant sitting in the recliner in the living room and Ott lying on the floor in front of defendant. Croteau said "hello" to them, went to the kitchen to get a drink of water, and then went back to bed and fell asleep. He was then awakened by the sound of defendant and Ott arguing in defendant's bedroom. They shouted at each other heatedly for quite a while, and the loud screaming continued when they left the bedroom and went down the hallway into the living

room. He heard defendant say, "I don't like you disrespecting me in my house," and "we could talk this out if we both stay calm." He heard Ott say that she was just joking, and that she loved defendant and wanted to be his girlfriend. There was much swearing, with defendant telling Ott several times to leave the house, but she refused to do so. The argument would ease up and then start all over again. This went on for quite a while, and Croteau started to become concerned because the argument was quite heated.

Croteau then heard defendant walk down the hall and say in an angry voice that "he was sick of this, or that he was gonna take care of this." Defendant went into his bedroom and when he came out of the bedroom, Croteau heard a mechanical clicking of defendant's sawed-off shotgun, as if it were being racked. Croteau described the sound as being "like the noise you hear when someone puts a round into a gun, clicking. Holding one hand and sliding it up and down." He heard defendant walk down the hallway and say, "say goodnight, bitch," then heard the gun go off.[1]

Croteau heard defendant mumbling and swearing in the living room. He did not hear Ott's voice. He heard the kitchen cupboards opening, the closets opening, garbage bags rustling, thumping, running water, and defendant walking back and forth. He heard the front door being opened, accompanied by the sound of rustling and thudding noises. Then everything was quiet. He then heard the front door being opened again, followed by the sounds of more pans, running water, and the vacuum.

Croteau was scared and feared for his life. He tried to think of a way to leave his bedroom without going through the apartment because he did not know defendant's state of mind at that moment, and he did not know the whereabouts of the gun. Croteau tied bed sheets together and anchored them around his bed in an attempt to escape through the window. He changed his mind about escaping through the window because he was not sure whether the bed sheets would hold him and he did not want to leave his puppy behind in the bedroom.

Defendant knocked on Croteau's bedroom door. When Croteau eventually unlocked the door, he saw blood on defendant's feet. Defendant said that he "just did the ultimate bad thing anybody can do." When Croteau asked what had happened, defendant said, "I killed her," and "I murdered Kris." Defendant repeatedly said that he did not want to go to prison and told Croteau that he had to help him take care of this. He was rambling, saying that he could get away with this and that no one could know that Ott was there. Croteau told him to call 911 or his family but defendant refused, saying that he had to clean up and that he was going to leave. Meanwhile, defendant was pacing between his own bedroom and the hallway. Defendant asked Croteau what to do. Croteau told him to calm down. Defendant also asked about how to clean up blood. It appeared to Croteau that defendant was distraught, scared, and somewhat confused.

Defendant then went to the living room and started to clean up. When Croteau heard the front door open, he searched for the gun. There was a lot of blood in the living room on the couch, the floor and the ceiling. There was human tissue on the wall and hair on the ceiling.

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[1] Deborah Ross, defendant's neighbor, heard a bang at 2:55 a.m. on the morning of April 9, 1999.

Some of the living room furniture was moved. Garbage bags were between the dining area and the end of the kitchenette. Defendant, himself, was scrubbing bloodstains on the hallway floor outside the apartment.

Croteau went back to his bedroom and grabbed his dog. He promised defendant that he would help, but said that he first needed to get the dog out of there. He left the apartment and ran to a nearby apartment building and knocked on doors for help. When no one responded, he entered a vacant apartment and stayed there for a few minutes to check whether defendant was following him. He then went to a different apartment building where someone let him inside to call 911.

Deputy Todd Sulfaro, of the Monroe County Sheriff's Department, was the first to arrive at defendant's apartment at 3:43 a.m. on April 9, 1999. As he pulled in the driveway, he saw defendant running back and forth across the windows of the apartment, ducking down and then running up the stairs on his hands and knees. Sulfaro was joined by Michigan State Police Troopers Amanda Crooker and Leon Baker. They knocked on defendant's apartment door. When defendant opened the door, he was in bloodstained shorts and his toenails were encrusted with blood. Sulfaro grabbed defendant, pulled him to the floor, and handcuffed him. Defendant started crying and told Sulfaro that Ott shot herself, she was dead, and he put her in the dumpster.[2]

After defendant was handcuffed, he stated that his girlfriend had started talking about how her life was not worth anything and then she killed herself. He said that he put her in the dumpster. Crooker saw a large pool of blood in the living room and it appeared that someone had tried to clean it up. Most of the furniture had been moved to the back master bedroom. Sulfaro stated that defendant did not appear to be under the influence of intoxicants. Baker found the body under garbage bags in the dumpster, located about 100 to 150 feet away from the front door of the apartment.

Detective David Davison of the Monroe County Sheriff's Department, the officer in charge of the case, interviewed defendant twice. At the first interview, which took place at the Monroe County Sheriff's Department, defendant gave two different versions of what occurred that morning. At the trial, two audiocassette tapes representing the tape-recording of the first interview were played to the jury. In that tape-recorded interview, defendant waived his *Miranda*[3] rights, denied that he was under the influence of any type of alcohol, medication or narcotics, but stated that he finished his second twenty-two ounces of beer at about 1:30 a.m. that morning.

In the statement, defendant said he was at work until at 11:30 p.m. the night of April 8, 1999. He went home, took a shower, and he brought out his shotgun from his bedroom and set it on the coffee table in the living room so as to clean it the next morning. He then watched television in the living room. At about 1:15 a.m., there was a knock on the door. It was Ott and

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[2] Crooker, on the other hand, said that after defendant opened the door, he looked at her and said it was an accident.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

a man.[4] The man said that Ott asked him to bring her over to defendant's apartment. The man left after about five minutes. Ott was very intoxicated, and said that she had been at the bar since 8:00 p.m. that evening and drank too much. She then sat on defendant's lap and started to kiss him, but he was not in the mood. He told her that he did not consider himself in a relationship with her. She said that no one wanted her, her boyfriend beat her, and defendant did not love her. When she started to get emotional, defendant told her that he had had two beers and he did not want to drive her home and risk getting pulled over. He suggested that she go to bed. She swore at him and he told her to calm down and go to bed. She started to scream, cry and curse him. She pulled the gun off the coffee table next to the couch were she was sitting. Defendant knew that the gun was loaded, but he was certain that the safety release was on. However, in a split second the trigger went off and she shot herself.

Defendant panicked, got up from his chair and went to hold her. He went to his bedroom and grabbed a blanket because there was a lot of blood. He knew that he should have called emergency, but he just sat there with her, with a blanket, holding her head for a few minutes. He "freaked out" and did not know what to do. There was blood all over the couch, on the wall, and the rug. Defendant was in shock. About fifteen minutes later, he took her body to the dumpster.

Defendant was certain that his roommate, Croteau, had heard them arguing but that Croteau did not want to get involved. Defendant knocked on Croteau's bedroom door. Croteau looked pale and he gave defendant "the awfulest look." Croteau told him to leave, but defendant said that he could not leave. It did not cross his mind to call for emergency. Croteau then walked out of the apartment with his dog. After Croteau left, defendant moved the furniture out of the room, trying to clean up. He then saw the police through the peephole of his door.

During the tape-recorded interview, Davison told defendant that, based on the description of the location where defendant said Ott had been sitting on the couch and the location of the hole that the bullet made when it ricocheted eight inches above the floor in the wall, it would have been impossible for Ott to have shot herself.[5] Defendant then changed his story. Defendant stated that the safety release on the gun was not on. Ott picked up the gun, asked why no one wanted her, and said that she was going to shoot herself. Defendant explained that Ott did not mean to play with the gun, but that she was under the influence of marijuana. Defendant told her that the gun was loaded. He got up to grab the gun at the same time Ott got up to grab it. He grabbed the gun by the stock and she grabbed it by the pump. He tried to pull the gun. He did not know if he pulled the trigger.

Defendant was transported to the Michigan State Police Post in Monroe. A second interview with defendant was conducted by Trooper Scott Beard, with Davison present. Here,

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[4] Richard Clark, an employee at a bar called Pirate's Landing, testified that the bar's security employee suggested that Clark drive Ott home because she was intoxicated. He drove Ott to defendant's apartment at her request. He stayed in the apartment for about fifteen minutes.

[5] At trial, Monroe County Deputy Sheriff Donald Vandercook testified that he arrived at defendant's apartment at 4:00 a.m. the morning of April 9, 1999, and measured the height of the bullet hole in the living room wall and traced the bullet's path to the laundry room, where he found a slug.

defendant gave his third version of the events. Defendant and Ott were arguing in the living room and then in the bedroom. He told Ott to leave, but she refused. They were arguing because she accused him of having a child with April Shepherd. His response was, "don't disrespect me." There was a lot of loud screaming. They then continued their argument in the living room. Defendant told the detective that he had lied and that the gun was not laying on the coffee table. It was on the dining room table. He said that he picked up the gun and repeatedly told her to leave. But she kept on arguing with him. He knew that the gun was loaded. He aimed it at her, and without knowing it, he pulled the trigger and shot her in the head. She was still sitting on the couch. He did not remember telling Ott to "say goodnight, bitch." Davison claimed that defendant told him that he shot her "because he was pissed off at her." That is when he carried her down to the dumpster and started to clean up.

At trial, defendant told the following version of the events of April 8. He returned home from work at about 11:45 p.m. When he got home from work, he got a phone call from his friend and neighbor, Shane. He asked to stop by after work. He remembered that he had some shells and he took his gun and shells out of the bedroom and put them in the dining room table for Shane to look at. He then grabbed the whiskey and a bottle of beer out of the refrigerator. He took a few muscle relaxant pills and watched TV. At about 1:00 a.m., he heard a knock at the door. Ott was drunk, and a man was with her. The man stayed ten to fifteen minutes. Ott sat on the couch, and defendant sat on the recliner. She came over and sat on his lap.

Croteau walked out of his bedroom and told defendant and Ott not to stain his chair. Ott slid off the chair and onto her back on the floor in front of defendant. She then got up and went to the bathroom. She called him from the back of the hallway. She was in the bedroom with her top off and asked him to come to bed. He told her to wait because he was unsure whether Shane was coming.[6] He went back to the living room, finished his beer, turned off the lights, locked the door and turned off the television and walked back to the bedroom. She was still sitting there on the bed with her top off. He told her that he was tired and stressed, and she accused him of seeing Shepherd. He told her that Shepherd had moved to Virginia. She asked whether he and Shepherd had a child together. When he told her that he did not, she accused him of being a liar and started to yell and swear at him. He told her to get dressed and get out. She told him to take her home. When he refused to do so, she grabbed an ashtray and threw it across the room at him, but it hit the wall. He got angry. She tried to hit him and he grabbed her by the arm.

Defendant dragged Ott down the hallway and told her he was not tolerating this kind of disrespect in his house. She said that she would not leave unless he took her home. The argument was loud and defendant was angry. He told her to calm down and sleep it off, and that they could talk about it when they had level heads. They argued more, and defendant became very irritated. He walked to the dining room and picked up the gun. He knew that the gun had been loaded five months earlier. He wanted to scare Ott because she would not leave the apartment. He did not know what happened next. He ran around the couch to hold her. He panicked and started to clean up. Defendant admitted that his statements to the police were not

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[6] Shane Blessing testified that he passed by defendant's apartment between 3:00 a.m. and 3:30 a.m. that morning, and found the police outside. He went home and tried to call defendant several times.

true, but he was scared because he knew that he was in trouble. He was not intoxicated during the interviews because the incident sobered him up.

The autopsy report indicated that the manner of death was homicide and the cause of death was a contact shotgun wound to the head. There was an entrance wound adjacent to the left side of the nose, and the corresponding exit was under the left ear. A muzzle imprint was present around part of the entrance wound. Much of the left cheek was missing, as well as a portion of the left neck and the left ear. There was bruising on the left forearm and the fifth finger region of both hands, consistent with defense injuries. According to Davison, a contact wound means that the shotgun was up against Ott's face when the shotgun was fired.

II. Standard of Review

A. Jury Instructions

Defendant claims that the trial court erred by failing to instruct the jury on both common law manslaughter, MCL 750.321, and statutory involuntary manslaughter, MCL 750.329. However, defendant did not preserve this issue below. Accordingly, we review this issue to determine whether defendant has demonstrated plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.*

B. Directed Verdict

When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *Aldrich*, *supra* at 122. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The court may not determine the weight of the evidence or the credibility of the witnesses, regardless of how inconsistent or vague the testimony. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Rather, questions regarding the credibility of witnesses are to be left to the trier of fact. *Id.*

C. Admission of Evidence

The decision whether to admit evidence is within the trial court's discretion, and should be reversed only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

D. Prosecutorial Misconduct

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, ___ Mich App ___; ___ NW2d ___ (Docket No 208845, issued 4/26/02) slip op p 9. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *Aldrich, supra* at 110; *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). This Court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 761-764.

E. Ineffective Assistance of Counsel

Because defendant did not move for a *Ginther*[7] hearing, our review is limited to errors apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Review of an unpreserved constitutional issue is limited to determining whether the defendant demonstrated a plain error affecting his substantial rights. *Carines, supra* at 763-764.

III. Instructional Error

Defendant first argues that his rights to a properly instructed jury, due process, and a fair trial were denied by the failure of the trial court to instruct the jury on both common-law and statutory involuntary manslaughter. We disagree.

Because defendant did not request instructions on either of these charges or object to the instructions as given, he has the burden of showing a plain error that affected his substantial rights in order to avoid forfeiture. *Carines, supra* at 763. Here, the evidence does not convince us that defendant is actually innocent. Moreover, it is clear from the record that any error that may have occurred did not "seriously [affect] the fairness, integrity or public reputation of" defendant's trial. *Id.* Therefore, defendant is not entitled to relief on this claim.

IV. Directed Verdict

Defendant next claims that his first-degree murder conviction must be reversed because the prosecutor failed to prove the elements of premeditation and deliberation for this conviction beyond a reasonable doubt. Specifically, defendant argues that the evidence merely shows that he acted impulsively in the heat of passion when the victim continued arguing with him and refused to leave his apartment. He also argues that the evidence showed that there was no time for reflection to allow premeditation and deliberation prior to the shooting. We disagree.

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the "defendant intentionally killed the victim and that the act of killing was premeditated and

[7] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *Carines*, *supra* at 757. Premeditation and the intent to kill may be inferred from the facts and circumstances surrounding the killing. *Kelly*, *supra* at 642; *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995). To premeditate is to think about beforehand. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). To deliberate is to measure and evaluate the major facets of a choice or problem. *Id*. at 300. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Id*.

There was testimony that defendant told his co-worker a day prior to the shooting that his girlfriend was annoying and that he may blow her head off. The testimony of defendant's roommate, if believed, circumstantially showed that it took some time for defendant to leave his girlfriend in the living room, walk to the bedroom, retrieve his gun, rack it, and walk back to the living room. He had a moment to reflect when he placed the gun against her face and told her to "say goodnight, bitch." There was a moment to reflect when she responded by saying "goodnight." Even defendant's own statement to the police suggested at least two opportunities for him to reconsider his action. If defendant's third and final statement to the police were to be believed, defendant still had to get up from where he was sitting in the living room, walk over to the dining room table, pick up the gun, and walk back to where the victim was sitting on the living room couch. He still had a moment of reflection when he placed the gun against her face.

Furthermore, evidence of defendant's conduct following the shooting was sufficient to prove premeditation and deliberation. He wrapped the victim's body in a blanket and dragged it down three flights of stairs, across about 150 feet in front of his apartment building, and threw it in a dumpster. He proceeded to clean up the living room. When defendant spoke to his roommate, he said that he "just did the ultimate bad thing anybody can do" and asked for help cleaning up. He also asked his roommate about which cleaning products would remove blood. There was no language of remorse over the tragic death of a young woman and no explanation that the shooting was an accident or that it was no fault of his own. Defendant repeatedly said that he did not want to go to prison, he could get away with this, and no one would know that the victim had been at the apartment. In addition, defendant gave three inconsistent statements to the police, claiming first that his girlfriend committed suicide, then that he struggled with her over the gun and it accidentally fired, and finally that he aimed the gun at her to scare her because she would not leave his apartment. Though circumstantial, this evidence was sufficient proof of deliberation and premeditation. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

Defendant also argues that he was too intoxicated to have premeditated and deliberated the shooting. Voluntary intoxication may be a defense to first-degree murder if the intoxication prevents the defendant from premeditating and deliberating. *People v Lavearn*, 201 Mich App 679, 684; 506 NW2d 909 (1993), rev'd on other grounds 448 Mich 207 (1995). Here, there was no evidence to show that defendant was intoxicated when he told his co-worker the day before the shooting that he may blow off his girlfriend's head. In addition, though defendant claimed to

be drinking and taking drugs, there was no evidence showing the level of defendant's intoxication, if any, at the time he killed the victim. Therefore, whether defendant was so intoxicated that he was prevented from premeditating or deliberating was a question for the jury to decide, and we will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514.

Viewing these circumstances in the light most favorable to the prosecution, a conclusion may be made that evidence of premeditation and deliberation existed, and the jury could reasonably infer that defendant had an opportunity to take a "second look" before killing the victim. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

V. Evidentiary Error

Defendant also contends that the trial court erred when it allowed defendant's tape-recorded statements to be played to the jury because the prosecution failed to establish the proper foundation for admitting the inaudible tapes. Defendant argues that the two tapes were so inaudible that, as a whole, they were untrustworthy and their admission was, therefore, reversible error. Because defendant failed to object to admission of the tapes based on their alleged inaudibility, we review this claim for plain error affecting his substantial rights. *Carines, supra* at 763-764.

The fact that a recording may not reproduce an entire conversation, or may be indistinct or inaudible in part, has usually been held not to require its exclusion. *People v Frison*, 25 Mich App 146, 148; 181 NW2d 75 (1970). However, the recording may be rejected if it is so inaudible and indistinct that the jury must speculate as to what was said. *Id.* Unless the unintelligible portions of a tape recording are so substantial as to render the recording as a whole untrustworthy, the recording is admissible and the decision whether to admit it should be left to the sound discretion of the trial judge. *Id.*

We have thoroughly reviewed the record and conclude that any unintelligible portions of the tape were not so substantial as to render the recording untrustworthy, nor did the alleged inaudibility required the jury to speculate. *Id.* Furthermore, the parties stipulated to allowing Davison to summarize the taped testimony, and defendant was allowed to thoroughly cross-examine Davison. Therefore, we find no abuse of discretion in the trial court's decision to allow the tapes to be played for the jury.

VI. Prosecutorial Misconduct

Defendant next alleges four instances of prosecutorial impropriety, claiming that the prosecutor, during closing and rebuttal arguments, misstated the testimony. Defendant argues that he is entitled to a lesser sentence or a new trial because the jury was swayed when the prosecutor misstated the testimony that was essential to prove the elements of premeditation and deliberation. We disagree.

Defendant failed to preserve this issue by an objection to the alleged prosecutorial remarks at trial. *Aldrich, supra* at 110. Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *Id.* This Court should reverse

only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines, supra* at 761-764.

Prosecutors cannot make statements of fact unsupported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Schutte, supra* at 721. The prosecutor's comments must be considered as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

A prosecutor need not confine argument to the "blandest of all possible terms," but has wide latitude and may argue the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). We have carefully reviewed the four disputed prosecutorial remarks, and we conclude that these remarks, read in context, show that the prosecution was summarizing the facts in evidence and encouraging the jury to draw reasonable inferences from those facts. There was no prosecutorial misconduct.

VII. Ineffective Assistance of Counsel

Defendant next claims that he was deprived of effective assistance of counsel because his counsel failed to reasonably investigate the circumstances, facts and mitigating evidence of the case. Defendant asserts that because such conduct cannot be deemed trial strategy, a new trial or a remand for a *Ginther* hearing is warranted. We disagree.

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). A defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994).

Defendant claims that his counsel (1) failed to obtain critical audio and video recordings in sufficient time to review and use their contents at trial; (2) failed to interview the witnesses who were important to challenging the premeditation and deliberation elements of first-degree murder; (3) and refused to challenge the constitutionality of defendant's statements to the police.

We conclude, in light of our review of the record, that defense counsel's decisions regarding pre-trial investigation and admission of evidence constituted sound trial strategy. Further, the record does not show any grounds upon which defense counsel could challenge the voluntariness of defendant's confessions. Therefore, defendant failed to prove that he received ineffective assistance of counsel or to show plain error affecting a substantial right. *Carines,*

supra at 763-764

Affirmed.

/s/ Michael J. Talbot
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder