

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RONALD LEE STANTON,

Defendant-Appellant.

UNPUBLISHED

October 1, 2002

No. 229090

Jackson Circuit Court

LC No. 99-096033-FC

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder and first-degree felony murder, MCL 750.316. He was sentenced as a fourth habitual offender, MCL 769.12, to two terms of life imprisonment without parole. He appeals as of right. We affirm in part, vacate in part, and remand.

I

Defendant was charged and tried in 2000 for the 1973 murder of a young woman. The investigation was never closed, and it was reinstated with new vigor when DNA testing became available in the late 1990s. The seminal fluid found within the victim's vagina during the first autopsy was matched with defendant, who had been a suspect from the beginning of the investigation. In 1976, while in prison for an unrelated crime, and after being advised of his *Miranda*¹ rights, defendant made several statements to a police detective about details of the murder, i.e., that the police were looking for the wrong gun, that defendant could lead the police to where the gun could be recovered, that ammunition defendant had purchased at K-Mart was not the ammunition used, that defendant had been drinking at the time, and that defendant did not know either the deceased or the deceased's fiancé. Defendant ended the interview by saying he wanted to talk with his father before talking any more about the murder.

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

¹ *Miranda v Arizona*, 384 US 436 ; 86 S Ct 1602 ; 16 L Ed 2d 694 (1966).

In this appeal, defendant first argues that the prosecutor violated his constitutional rights by referring to defendant's silence as evidence of guilt. Specifically, defendant asserts that the prosecution deliberately elicited testimony from the police detective about defendant's refusal to provide information during questioning. However, since defendant did not object to the police detective's testimony on those grounds², the trial court was never called upon to address the argument that defendant now makes on appeal. To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999).

Defendant also challenges reference to his silence by the prosecutor in his rebuttal argument as improper. Again, however, defendant failed to make an appropriate objection at trial. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Under these circumstances, our review is limited to a determination whether plain error occurred that affected defendant's substantial rights, i.e., an error that affected the outcome of the lower court proceedings. See *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

The isolated statement by the police detective that there was no further discussion with defendant about the murder because defendant no longer wanted to talk did not affect the outcome of defendant's trial. Further, there can be no constitutional error arising from the detective's statement where the prosecutor did not exploit the issue of defendant's post-*Miranda* silence. See *People v Dennis*, 464 Mich 567; 628 NW2d 502 (2001), and cases cited therein. Moreover, the limited references by the prosecutor during rebuttal argument regarding the detective's interview of defendant did not place the evidence of defendant's silence before the jury as substantive evidence of defendant's guilt. Rather, the prosecutor's rebuttal argument was proper response to the theories defense counsel had proffered during his closing argument. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Defendant has not demonstrated plain error that affected his substantial rights. *Carines*, *supra* at 763-764.

II

Defendant next argues that the trial court abused its discretion in admitting testimony, over defense objection, by defendant's ex-wife about "confidential observations" she made while they were still married. According to defendant, his ex-wife's testimony that he owned guns and was not home on the evening in question violated the privilege statute, MCL 600.2162.

² Indeed, not only did defendant fail to object on the same ground he asserts on appeal, but defendant also made affirmative use of his testimony that he had not remained silent, thus arguably waiving any error. See *People v Sutton (After Remand)*, 436 Mich 575, 596; 464 NW2d 276 (1990). One who waives his rights may not seek appellate review of a claimed deprivation of those rights for the waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant did not preserve this issue by specifying on the record his grounds for objecting to the testimony of defendant's ex-wife at trial. See MRE 103(a)(1). Accordingly, we review this issue to determine whether a plain error affected defendant's substantial rights. See *Carines, supra*; *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

At the time the charged offense was committed, MCL 600.2162 provided that "[a] husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent . . . nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage" Although an ex-spouse's observations made during the marriage may be protected as confidential communications, the privilege does not extend to observations that could have been made by any third person outside of the marital home and relationship. *People v Camon*, 110 Mich App 474, 481-482; 313 NW2d 322 (1981).

Because defendant himself admitted to the police detective that he owned guns, the communication of defendant's ex-wife about defendant's gun ownership was not a confidential communication protected by the statute. Similarly, defendant's return home on the morning of July 3, 1973, could have been observed by any neighbor and was not an observation made possible by defendant's marriage. Hence, defendant has not established plain error in the admission of this limited testimony by defendant's ex-wife. Its admission did not affect defendant's substantial rights. See *Carines, supra*.

III

Defendant also argues that he was denied a fair trial because the trial court's instructions to the jury on first-degree felony-murder did not require the jury to find malice. Defendant generally asserts that the felony-murder instruction as a whole was confusing and ambiguous.

Defendant did not object to the trial court's jury instructions in this regard. Indeed, when the trial court specifically inquired whether there were any other objections, defense counsel stated, "No, your Honor, thank you." Accordingly, we find that defendant has waived this issue on appeal. See *People v Carter*, 462 Mich 206, 214-220; 612 NW2d 144 (2000). One who waives his rights may not seek appellate review of a claimed deprivation of those rights for the waiver extinguishes any error. *Id.* at 215.

IV

Defendant argues that he was denied a fair trial by attempts on the part of the prosecutor during closing argument to evoke sympathy from the jurors for the deceased.

Appeals to the jury to sympathize with the victim are improper. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, even when the error is preserved, as here, it is not a ground for reversal unless, after an examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999); *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *Id.*

Our review of the record satisfies us that the prosecutor's comments, in an otherwise proper closing argument, do not require reversal. The trial court sustained defense counsel's objections and instructed the jury during final jury instructions that counsel's statements and arguments are not evidence. Further, the trial court instructed the jury not to be influenced by sympathy or prejudice. The prosecutor's error was not outcome determinative.

V

Defendant contends that the prosecution presented insufficient evidence to support his murder convictions. First, defendant argues that the identification evidence was insufficient because the DNA evidence and his statements to the police were insufficient to connect him to the murder, and no witness was able to positively identify his truck at the scene. Additionally, defendant argues that the evidence was insufficient to support either of the alleged felonies underlying his felony-murder conviction.

Due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* 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; *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Further, the prosecution need not negate every reasonable theory of innocence but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *Nowack, supra*.

Here, the prosecution presented sufficient evidence to identify defendant as the perpetrator of the murder. In pertinent part, the prosecution presented DNA evidence proving defendant had sexual relations with the victim. The prosecution also presented several statements by defendant that implied guilty knowledge; specifically, that the police were looking for the wrong gun, that defendant could lead the police to where the gun could be recovered, that defendant knew certain ammunition was not used, and that defendant did not know either the deceased or the deceased's fiancé. Although no witness positively identified defendant's truck at the scene, this Court will not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Similarly, while defendant discounts the weight of the DNA evidence and disagrees with the inculpatory nature attributed to his statements, when viewing this evidence in a light most favorable to the prosecution, it is apparent that the prosecution sufficiently proved its own theory of identification beyond a reasonable doubt. We find sufficient evidence supported defendant's conviction for first degree murder.

However, the evidence supporting the predicate felonies of kidnapping, MCL 750.349, and rape, MCL 750.520 (repealed by 1974 PA 266, § 3), is much more tenuous. The only actual evidence of kidnapping was the fact that the victim was found dead in an area several miles away from where she had last been seen and from the testimony that a neighbor heard someone screaming that night, and that the screams seemed to come first from outside, then from inside a

vehicle that drove away. Although the imagination can use these facts to create a scenario where defendant kidnapped the victim, they do not provide a sufficient basis from which one can reasonably infer that the murder occurred during the commission of a kidnapping. Likewise, the only evidence of rape was the presence of defendant's semen in the victim's vagina. The statute in effect at the time, MCL 750.520, required that the rape occur "by force and against her will." However, there was no evidence presented linking the timing of the sexual intercourse with the murder. "[A]n inference cannot be based upon evidence which is uncertain or speculative or which raises merely a conjecture or possibility". *People v Boose*, 109 Mich App 455, 471; 311 NW2d 390 (1981). We therefore find defendant's conviction for felony murder was not sufficiently supported by the evidence.

VI

Defendant argues that his conviction as a fourth habitual offender should be vacated because the trial court failed to afford him a jury trial on the habitual offender charge.

The prosecution has conceded error in this regard, and the parties have since filed a stipulation accepted by the trial court "that (1) the judgment of sentence be amended to delete all reference to the habitual offender charge and (2) the habitual offender charge be dismissed" (6/20/01 stipulation within lower court record). On June 26, 2001, the trial court signed and entered an amended judgment of sentence in accordance with the stipulation. Accordingly, this issue is now moot.

VII

Finally, defendant argues that his convictions for both first-degree premeditated murder and first-degree felony murder arising out of the death of a single victim violate his state and federal constitutional rights against double jeopardy. We agree.

Multiple murder convictions arising from the death of a single victim violate double jeopardy. *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). Because we find defendant's conviction for felony murder was not supported by sufficient evidence, we vacate that conviction and affirm defendant's conviction for one count of first-degree premeditated murder. Defendant's sentence should be amended accordingly.

Affirmed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin