STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 29, 2004
v	No. 246512 Hillsdale Circuit Court
WILLIAM JEFFREY BENOIT, Defendant-Appellant.	LC No. 96-207516

Before: White, P.J., and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of two counts of second-degree murder, MCL 750.317, and two counts of felony-firearm, MCL 750.227b. Defendant was sentenced to 25 to 50 years' imprisonment for the murder convictions and to the mandatory consecutive two-year terms of imprisonment for the felony-firearm convictions. We affirm.

Defendant first contends that there was insufficient evidence to convict him of second-degree murder because the actual shooter did not have the necessary intent to commit that offense. This Court reviews the evidence de novo and, considering the evidence in the light most favorable to the prosecution, determines whether a rational trier of fact would find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), our Supreme Court stated:

> The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).
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> Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. *People v Aaron*, 409 Mich 672, 728; 299 NW2d 304 (1980). The malice element for depraved heart murder is general mens rea. . . .

"To be convicted of aiding and abetting, a person must either have possessed the required intent or have participated while knowing that the principal had the requisite intent. . . . Such intent may be inferred from circumstantial evidence." *People v Wilson,* 196 Mich App 604, 614; 493 NW2d 471 (1992).

Defendant was involved in an argument with Rick Osborn at Daniel O'Brien's apartment, a former church. Defendant was essentially forced to leave the party. Several witnesses heard someone yell, "I'll be back" from defendant's car as he drove away; one of the witnesses identified defendant as the man who yelled this apparent threat. Defendant initially told his companion, Eric Helinski, that he was considering getting some friends from Indiana to come back with him and fight, or bringing back beer cans or a tire iron. Defendant subsequently raised the idea of doing a "drive-by" shooting. Defendant took a shotgun with him when the two left his brother's home and, according to Helinski, he loaded it while they were driving. Helinski subsequently unloaded it when they saw a town constable. They drove past the church; Helinski testified they could see the lights were on inside and some cars were still there. Defendant was driving at this point and Helinski was in the passenger's seat. Helinski reloaded the shotgun and asked defendant if he wanted to go through with it; according to Helinski, defendant responded affirmatively. Helinski asked again if defendant wanted to go through with it; defendant first said that they probably should not, but Helinski quoted him as reconsidering and saying, "Yeah, go ahead." Helinski testified that the lights were on inside the church, cars were still parked outside, and he believed there were people inside; he also stated that when they had been there earlier, the party had been concentrated at the front of the church – that is, by the front door. As defendant turned the car by the church, Helinski leaned out the window and fired the shotgun twice at the church, pulling each trigger individually in succession. Although Helinski claimed he was pointing the gun in the general direction of the church, but was not aiming at anything in particular, and that he was trying to shoot high, at least one of the shotgun blasts penetrated the front door, which Helinski acknowledged was not located "up high" on the church. Helinski subsequently pleaded guilty to two counts of second-degree murder.

Defendant emphasizes the fact that Helinski repeatedly insisted that he did not intend to shoot anyone; he intended simply to discharge the shotgun to "intimidate" the people in the church. Defendant is interpreting the facts in a light most favorable to himself, not to the prosecution. Intent may be, and usually is, established by minimal circumstantial evidence. *People v McRunels,* 237 MA 168, 181; 603 NW2d 95 (1999). Viewed in the proper light, defendant suggested the drive-by shooting; he brought the shotgun along and loaded it; he indicated that Helinski should "go ahead" with the shooting; circumstances indicated there were still people inside the church; defendant turned the car by the church to provide Helinski with the opportunity to shoot; and he never expressed surprise or dismay when Helinski did shoot the gun twice at the church.

Considering the evidence in a light most favorable to the prosecutor, sufficient evidence was introduced from which a rational juror could find beyond a reasonable doubt that Helinski acted in wanton and willful disregard of the natural tendency of his act of discharging a .12-gauge shotgun loaded with double-aught buckshot at a church occupied by a number of individuals to result in death or great bodily harm. The evidence also supported the inference that defendant aided and abetted Helinski knowing that Helinski intended to shoot at the church

in wanton and willful disregard for the natural tendency of such a shooting to result in death or great bodily harm.

Defendant next contends that the prosecutor improperly introduced testimony concerning Helinski's guilty plea and then highlighted that plea evidence during his closing argument. Defendant argues that the prosecutor's comments vouched for Helinski's guilt for the crime defendant was charged with aiding and abetting and that the prosecutor was implicitly suggesting that, if Helinski was guilty of this offense, defendant must be also. Defendant failed to object to the comments he now challenges[1] and has therefore forfeited any claim of error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Review by this Court of unpreserved claims is for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant must demonstrate that plain error occurred that affected his substantial rights. *Id.* In order to prevail on a plain error claim, defendant must establish that he was prejudiced; that is, that the error affected the outcome of the trial court proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

This claim presents an issue of prosecutorial misconduct. "The test for prosecutorial misconduct is whether, after examining the prosecutor's statements and actions in context, the defendant was denied a fair and impartial trial." *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003), citing *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Issues of prosecutorial misconduct are reviewed on a case-by-case basis, with challenged remarks being examined in context. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

The prosecutor's unobjected-to comments correctly stated the evidence that had been introduced. The prosecutor may properly comment on the evidence presented at trial and may argue reasonable inferences arising from that evidence. *Schutte, supra* at 721, citing *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Far from being an attempt to divert the jury's attention from the evidence and to urge them to decide the case on matters outside the evidence, the comments specifically asked the jury to examine the evidence and compare the testimony of the witnesses. Therefore, considered in context, the prosecutor's comments did not constitute improper vouching and did not deprive defendant of a fair trial.

The prosecutor's comments in closing and rebuttal argument were responsive to the arguments of defense counsel. Generally, a prosecutor's responsive comments will not constitute error requiring reversal. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Ricky Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993), citing *People v Sharbnow*, 174 Mich App 94, 100-101; 435 NW2d 772 (1989). Defense counsel argued that Helsinski was guilty of, at most, involuntary manslaughter and therefore that was the greatest crime of which defendant could be convicted. The prosecutor properly responded that Helsinski had admitted

[1] The prosecutor correctly points out that when the trial prosecutor began to elicit the fact that Helinski had pleaded guilty to two counts of second-degree murder, defendant initially objected to this questioning, but after discussion with the trial court, defendant *withdrew his objection* and the evidence regarding Helinski's guilty plea was admitted without objection. Defendant *did not object* to the prosecutor's comments during closing and rebuttal argument.

committing second-degree murder and the evidence showed that was the crime of which both he and defendant were, in fact, guilty.

Furthermore, defendant did not object to the prosecutor's remarks and the trial court instructed the jury that the arguments of counsel were not evidence. In the absence of a timely objection, the trial court's admonition that the arguments of counsel are not evidence is generally sufficient to dispel any prejudice arising from a prosecutor's improper remarks in closing argument. *Bahoda, supra* at 281. Defendant has failed to demonstrate plain error that affected his substantial rights by depriving him of a fair trial.

Defendant next contends that the trial court failed to secure his right to a fair trial when it permitted a spectator to display a sign with the picture of a young woman – apparently one of the victims – during the trial. "The state has a compelling interest in protecting a criminal defendant's right to a fair trial, which is guaranteed by the Sixth Amendment of the United States Constitution." *In re Contempt of Dudzinski*, 257 Mich App 96, 101; 667 NW2d 68 (2003).[2]

Although defendant brought this incident to the trial court's attention, after the trial court dismissed the spectator, defendant did not request a mistrial or any other relief. We conclude that defendant did not preserve this issue for appellate review because he did not object to the trial court's handling of the incident or request a mistrial. *People v Wise*, 134 Mich App 82, 105; 351 NW2d 255 (1984). Therefore, we need not review this claim.

Nevertheless, even if defendant's actions were sufficient to preserve this issue, we conclude that defendant has failed to demonstrate error requiring reversal. Several out-of-state cases have considered similar situations. See *Norris v Risley*, 918 F2d 828, 829-839 (CA 9, 1990); *State v Franklin*, 174 W Va 469; 327 SE2d 449 (1985). This Court has also dealt with this issue in a similar setting. In *People v King*, 215 Mich App 301, 304-305; 544 NW2d 765 (1996), this Court refused to find an abuse of the trial court's discretion in denying the defendant's motion for a mistrial where some spectators at the defendant's trial wore buttons depicting the victim. It was not clear how long these buttons were worn, but they were not brought to the court's attention until the twelfth day of the trial and the court thereupon ordered them removed. *Id.* at 305. In upholding the trial court's denial of the defendant's motion for a mistrial, this Court reasoned: "We are not persuaded by defendant's argument that the wearing of the buttons, which were less than three inches in diameter, was equivalent to communication with the jury or that they could have influenced the panel." *Id.* at 305.

We find *King* instructive and apply its reasoning in this case. The record indicates that the picture was displayed on only one occasion and it appears that it was excluded as soon as its

[2] In *In re Contempt of Dudzinski*, 257 Mich App 96; 667 NW2d 68 (2003), members of the audience were wearing shirts with the words "Kourts Kops Krooks" imprinted on them during a pre-trial hearing. *Id.* at 97-98. Although this occurred at a pre-trial hearing where no jury was present, this Court found that the trial court's direction that the spectators remove the shirts infringed on their First Amendment freedom of speech. *Id.* at 107. Nevertheless, this Court ultimately held that the trial court properly held the appellant in contempt for his refusal to obey the court's order to remove the shirt.

presence was brought to the court's attention. That trial counsel was satisfied by the trial court's action is reflected by the fact that he lodged no further objection. Furthermore, it may be assumed that he did not conclude that the incident affected the jury's impartiality or caused defendant any serious prejudice because he did not move for a mistrial. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000) ("However, because defendant objected to the reference to a polygraph test, but did not move for a mistrial, it appears that defendant was satisfied with the court's handling of the matter."). Accordingly, defendant has failed to demonstrate outcome-determinative plain error that deprived him of a fair trial.

Affirmed.

/s/ Helene N. White
/s/ Jane E. Markey
/s/ Donald S. Owens