

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME WILLIAM BORTHWELL,

Defendant-Appellant.

UNPUBLISHED

May 6, 2004

No. 243976

Wayne Circuit Court

LC No. 02-000276

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder,¹ second-degree murder,² and possession of a firearm during the commission of a felony.³ Defendant's convictions arose from the shooting deaths of Darren Butler and Twanseye Pitts on April 4, 1997, at an outdoor party in the Parkside housing project. Defendant was sentenced to mandatory life imprisonment for the first-degree premeditated murder conviction, twenty to thirty years' imprisonment for the second-degree murder conviction, and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Sufficiency of the Evidence

Defendant first contends that the trial court erred in failing to grant a directed verdict based on insufficiency of the evidence to support his convictions for first and second-degree murder. We disagree. In sufficiency of the evidence claims, this Court reviews the evidence in the light most favorable to the prosecution and determines whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.⁴

¹ MCL 750.316.

² MCL 750.317.

³ MCL 750.227b.

⁴ *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

“[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.”⁵

Defendant first alleges that the record fails to show that he actually shot either of the two victims. Although no witness actually saw Mr. Butler or Mr. Pitts fall from defendant’s gunfire, “[t]he general intent to kill need not be directed at an identified individual or the eventual victim.”⁶ Testimony placed defendant at the scene, in the presence of a relatively large group of people, shooting an automatic weapon, and specifically chasing Mr. Butler. This was sufficient to demonstrate that defendant had “the intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm.”⁷

Defendant also asserts that the evidence was insufficient to support a finding of premeditation. Specifically, defendant contends the prosecutor failed to present evidence pertaining to motive, planning or relationship. However, these are not the only factors that may be considered to establish premeditation. The circumstances surrounding the killing, including a consideration of the weapon used and the location of the wounds, are also relevant.⁸ To premeditate means that a person was able to think about an action beforehand.⁹ Premeditation requires sufficient time to allow the defendant to take a second look.¹⁰ In this instance, defendant left the party and returned with a weapon resembling an AK 47. Defendant shot Mr. Pitts three times and shot Mr. Butler nine times. Salina Newell, a witness to the shootings, testified that there was an initial series of shots, a short pause, and then defendant ran after Mr. Butler while shooting. Defendant certainly had sufficient time to take a second look.

II. Due Diligence

Defendant asserts that the trial court erred in determining that the prosecution exercised due diligence to secure the appearance of Geisha Garner at trial and by allowing Ms. Garner’s prior preliminary examination testimony to be read into the trial transcript. This Court reviews a trial court’s factual findings for clear error,¹¹ and reviews the determination of whether the prosecution exercised due diligence for an abuse of discretion.¹²

⁵ *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000); see also *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001) (finding circumstantial evidence sufficient to prove premeditation and deliberation).

⁶ *People v Abraham*, 256 Mich App 265, 270; 662 NW2d 836 (2003), citing *People v Lawton*, 196 Mich App 341, 350-351; 492 NW2d 810 (1992).

⁷ *Herndon*, *supra* at 386.

⁸ *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

⁹ *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), citing *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971).

¹⁰ *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998).

¹¹ *Lawton*, *supra* at 350-351.

¹² *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

Due diligence is the “attempt to do everything reasonable, not everything possible, to obtain the presence of a witness.”¹³ The prosecution took numerous steps to locate the witness over the months between the preliminary examination and trial. The prosecution was aware that Ms. Garner had moved to Tennessee. The prosecution contacted a local friend and family member and Ms. Garner’s former employer. The prosecution attempted to contact Ms. Garner at her last known address and worked with Tennessee authorities in an attempt to locate her. Moreover, defendant was not prejudiced by the absence of this witness, as her preliminary examination testimony was exculpatory to defendant. Accordingly, the trial court did not err in determining that the prosecution had exercised due diligence.

III. Prior Inconsistent Statements

Defendant contests the prosecution’s use of Ms. Garner’s prior inconsistent statement to the police as substantive evidence of his guilt. In the alternative, defendant contends that his trial counsel was ineffective for failing to object to the prosecution’s use of the prior inconsistent statement. Prosecutorial misconduct claims are reviewed on a case by case basis, examining any remarks in context to determine if the defendant received a fair and impartial trial.¹⁴ “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comment could have been cured by a timely instruction.”¹⁵

In support of his claim of prosecutorial misconduct, defendant relies upon *People v Stanaway*.¹⁶ Under *Stanaway*, a prosecutor may not introduce a witness’s prior inconsistent statement that tends to inculcate the defendant under the ruse of impeachment if the question of the witness’s credibility is not otherwise relevant to the case.¹⁷ The rule set forth by the *Stanaway* Court has been interpreted to mean that impeachment should be disallowed when (1) the substance of the statement used to impeach the credibility of the witness is relevant to the central issue of the case; and (2) there is no other testimony from the witness for which his credibility is relevant to the case.¹⁸

We find that *Stanaway* is not applicable to the facts of this case. The substance of the statements used by the prosecutor to impeach Ms. Garner’s credibility was relevant to a central issue in the case, specifically defendant’s identification as the shooter. There was also additional testimony elicited for which credibility of the witness was relevant. Ms. Garner’s preliminary examination testimony was directly in conflict with that of Ms. Newell. Ms. Garner provided testimony pertaining to the general nature of the party and how the shootings transpired. Therefore, the prior inconsistent statements were admissible to impeach credibility.

¹³ *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

¹⁴ *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

¹⁵ *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

¹⁶ *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994).

¹⁷ *Id.* at 692-693.

¹⁸ *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997).

Further, the fact that Ms. Garner recanted her prior statement to police was damaging to the prosecution's case and justified the admission of her prior inconsistent statement for impeachment purposes as non-hearsay pursuant to MRE 804(B)(1). The trial court provided a cautionary instruction pertaining to the proper use of the prior inconsistent statement within the jury instructions. As the prior inconsistent statement was admissible to impeach credibility, we find that the trial court did not err in admitting the prior statement.

Defendant further contends the prosecutor's use of the prior inconsistent statement as substantive evidence of his guilt was improper and prejudicial. A witness may be impeached with a prior inconsistent statement as long as the jury is instructed to consider the inconsistent statement solely in relation to the credibility of the witness, and not as substantive evidence establishing the elements of the charged offense.¹⁹ The trial judge instructed the jury that the prior unsworn and inconsistent statement was to be considered solely for the purpose of determining credibility of the witness, and that the statements of the attorneys were not to be considered as evidence by the jury. As the jury was properly instructed on the use of the prior inconsistent statements for impeachment, no error exists.²⁰

In the alternative, defendant argues he was denied effective assistance of counsel based on defense counsel's failure to object to the use of the prior inconsistent statement. As the trial court did not conduct a *Ginther*²¹ hearing, our review of defendant's ineffective assistance of counsel claim is limited to the existing record.²² Counsel is presumed to have provided effective assistance and defendant bears a heavy burden to prove otherwise.²³ To establish ineffective assistance of counsel, a defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that, but for the error of counsel, the result of the proceedings would have been different.²⁴ Defendant must overcome the strong presumption that his counsel's performance was sound trial strategy.²⁵

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.²⁶ Counsel is not required to advocate meritless positions.²⁷ As the court was justified in admitting Ms. Garner's prior inconsistent statement under the rules of evidence, there was no basis for counsel's

¹⁹ *People v Lyles*, 148 Mich App 583, 589-590; 385 NW2d 676 (1986).

²⁰ *People v Graves*, 458 Mich 476, 486; 581 NW2d 221 (1998).

²¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1978).

²² *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

²³ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²⁴ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

²⁵ *Id.* at 600.

²⁶ *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

²⁷ *Snider, supra* at 425.

objection. Given the evidence presented, counsel's actions at trial met an objective standard of reasonableness and professionalism.

IV. Prosecutorial Misconduct

Defendant's final issue on appeal alleges that the trial court erred in failing to uphold defense counsel's objection to the use of the term "flee" by the prosecution during rebuttal closing argument. The court had previously ruled that insufficient evidence existed for inclusion of a jury instruction on flight. As noted *supra*, we review claims of prosecutorial misconduct on a case by case basis, examining any remarks in context to determine if the defendant received a fair and impartial trial.²⁸ We further note that the trial court instructed the jury to decide the case solely on the evidence, and that the remarks of counsel were not evidence. Jurors are presumed to follow their instructions.²⁹

Defendant asserts that the prosecutor mischaracterized evidence in her rebuttal closing argument by indicating that defendant had fled the state. A prosecutor may not inject personal biases or beliefs into argument, but is "free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case."³⁰ The prosecutor's statements are considered as a whole and evaluated in the context of defense arguments and the evidence submitted at trial.³¹ Prejudicial effect will not be found if the prosecutor's comments could have been cured by a timely instruction.³²

The prosecutor's comment was made in response to the defense argument that the prosecutor's failure to produce the murder weapon created reasonable doubt of defendant's guilt. The prosecutor's statement was a comment on why the weapon could not be located. The comment constituted a fair rebuttal to defendant's closing argument.³³ Moreover, the statement was isolated and did not deprive defendant of a fair and impartial trial.³⁴

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

²⁸ *Aldrich, supra* at 110.

²⁹ *Graves, supra* at 486-487.

³⁰ *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

³¹ *Schutte, supra* at 721.

³² *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

³³ *Watson, supra* at 592-593.

³⁴ *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).