

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS MICHAEL ELLIOTT,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 246773

Wayne Circuit Court

LC No. 02-004744-01

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to prison terms of life without parole for the murder conviction and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm.

This case arises from the shooting death of Howard Smith. Defendant first argues that the verdict was against the great weight of the evidence because the trial testimony of the eyewitness conflicted with the testimony of other witnesses and with the eyewitness' previous statements to the police. However, questions regarding the credibility of witnesses and conflicting testimony do not constitute sufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998). When there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Id.* at 642-643. The trial court is permitted to make judgment on the credibility of a witness only under very narrow circumstances:

if the "testimony contradicts indisputable physical facts or laws," . . . "[w]here the testimony is patently incredible or defies physical realities," . . . "[w]here a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror," . . . or where the witness' testimony has been seriously "impeached" and the case marked by "uncertainties and discrepancies." [*Id.* at 643-644 (citations omitted).]

Aaron Heard, the only eyewitness who identified defendant as the person who shot Howard Smith, acknowledged at trial that he made three different statements in 1986 when the incident occurred. All three accounts of the events were similar. However, in an August 17, 1986, statement, Heard did not identify the shooter. In an August 28, 1986, statement, Heard

identified defendant as the shooter. In an August 29, 1986, statement, Heard recanted the August 28, 1986, statement, claiming only that he had seen defendant come from the area where Howard Smith was shot, and that he wanted to get defendant off the street and thought he was doing police a favor. Heard explained at trial that he had altered his statements to police after receiving a threatening telephone call from defendant. He testified that he was willing to tell the truth at trial because he no longer lived in that neighborhood. This explanation is not so incredible or implausible or seriously impeached that it would permit the trial court to take the testimony away from the jury.

Although the testimony of other witnesses contradicted portions of Heard's testimony, the testimony did not contradict indisputable facts or law, nor is it patently incredible or in defiance of physical reality. Defendant argues that because witnesses disagreed as to where Heard was located at the time of the incident, it defies physical reality for Heard to testify to being at the crime scene when two witnesses testified that he was at a different location. However, there are not clear indisputable facts that Heard was in a different location. This, instead, is a question of credibility, which is to be left to the determination of the jury.

Defendant next argues that the prosecutor did not produce sufficient evidence to establish that the murder was premeditated. When a defendant argues on appeal that there was insufficient evidence to support a conviction, this Court reviews the evidence in a light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and the act of killing was deliberate and premeditated. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995), citing MCL 750.316. A finder of fact may infer deliberation and premeditation "from all the facts and circumstances surrounding the incident, including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself." *Id.* "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).

Here, defendant left his sister's wedding reception with a loaded gun in his waistband. Defendant stopped in front of the victim's family's house and, after arguing with the victim, shot him three times. After the first shot, the victim ran toward the house and defendant shot him again in the back while he was running away. Defendant had sufficient time to take a second look and reconsider what he was doing as the victim was running away. Viewing the evidence in the light most favorable to the prosecution, we conclude that sufficient evidence was presented to allow a rational jury to conclude that defendant killed the victim with deliberation and premeditation.

Defendant also argues that he was denied a fair trial by improper prosecutorial remarks. Defendant failed to preserve his claim for review because he failed to object to the prosecutor's statements in the trial court. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). This Court reviews an unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of

judicial proceeding independent of the defendant's innocence. If a curative instruction could have alleviated any prejudicial effect, the appellate court will not find reversible error. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

First, defendant claims that the prosecutor shifted the burden of proof by arguing that Heard's statements were not impeached. However, it was defendant's contention that Heard's version of events was not credible. The prosecutor's comments were allowed to establish that Heard was being truthful in his testimony because he had not been impeached with anything since the case reopened. Because the prosecutor was merely pointing out the weaknesses in defendant's argument, he did not improperly shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995).

Second, defendant argues that the prosecutor improperly attacked defense counsel. A prosecutor is not permitted to personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), or the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). The alleged improper comments by the prosecutor about defense counsel creating havoc were in response to defense counsel's remarks in his closing argument. Defense counsel had remarked that police procedures were not followed. Defense counsel also brought up the time of death, indicating that the prosecutor had to show that it was after 12:30 a.m. to corroborate the prosecutor's theory. Defense counsel also stated that there was no forensic evidence to prove that defendant shot the victim. Also, defense counsel told many stories regarding his own family and his own knowledge of the law that he gleaned from growing up.

In response to these comments, the prosecutor tried to redirect the jury's attention to the essential elements of the crime and the necessary issues. The prosecutor's comments were not a direct attack on defense counsel but rather a response to defense counsel's arguments. Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *Schutte, supra* at 721. In determining whether an invited response merits reversal, a court should consider the conduct that prompted the prosecutorial response and the proportionality of that response. *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003). Because defense counsel brought up many issues that were not germane to the case, it was appropriate for the prosecutor to point out that these topics just confused the issue, and to try to focus the jury on the elements of the charges.

Third, defendant argues that the prosecutor improperly injected his personal belief in defendant's guilty each time the prosecutor said, "I believe." We disagree. The prosecutor does not have to preface every statement with "the evidence shows" for it to be understood to be in the argument. *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). A review of the prosecutor's closing argument reveals that the prosecutor's use of the term "I believe" referred to the evidence. We find no impropriety in the prosecutor's comments.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot