STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 8, 2004
v	No. 247079 Wayne Circuit Court
ANDRE LAMAR JACKSON, Defendant-Appellant.	LC No. 01-012804-01

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for two counts of first-degree murder, MCL 750.316(a), two counts of first-degree felony murder, MCL 750.316(b), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison for both first-degree murder convictions, life in prison for both first-degree felony murder convictions, and two years in prison for the felony-firearm conviction. We affirm in part, and vacate in part, and remand for further proceedings in accordance with this opinion.

Defendant's first issue on appeal is that the prosecution failed to sustain its burden of proving guilt beyond a reasonable doubt. We disagree.

In reviewing whether there was sufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Knowles*, 256 Mich App 53, 57-58; 662 NW2d 824 (2003). "The elements of first-degree murder are that the defendant killed the victim and that the killing was either 'willful, deliberate, and premeditated,' MCL 750.316(1)(a), or committed in the course of an enumerated felony, such as larceny, MCL 750.316(1)(b)." *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Defendant was convicted under both theories and we conclude that there was overwhelming circumstantial evidence of defendant's guilt, including opportunity and motive.

Defendant and victim, Marcalan Dalton, were friends before this incident. Defendant had owed Dalton money and had called Dalton's house numerous times in the two weeks before the incident occurred to let Dalton know that he had the money to pay him. On the night of Dalton's disappearance, he stated to numerous people that he and victim, Rodney Ross, were going to

defendant's house to pick up money. Neither Dalton nor Ross was ever seen alive again after that night. Defendant admitted that he owed Dalton money for a drug-related debt and that Dalton had stopped by the night of October 7, 2001, to pick up the money. Although defendant and Dalton were supposedly friends, defendant, who had been calling Dalton on a regular basis, never called Dalton's house again after the night of October 7, 2001. On October 8, 2001, the next day, defendant took all his belongings and moved out of his sister's house and had not contacted any family or friends since then. Furthermore, defendant's sister told a member of Dalton's family that defendant had left with Ross and Dalton on the night of October 7, 2001. Upon arrest, defendant told the police that he had been staying at his children's mother's house; however, this statement was contradicted at trial. Defendant also told the police that he had blackouts, that he gets high on ecstasy and cocaine, that he is a male prostitute, and that he has AIDS.

We conclude that the above evidence was sufficient to support defendant's convictions. The evidence shows that defendant had a motive to kill Dalton because he owed him a substantial amount of money for a drug-related debt. Furthermore, defendant admitted to "getting high on ecstasy and cocaine," thus, providing further motive to kill Dalton, i.e., to obtain money to buy more drugs. The evidence also shows that defendant had an opportunity to commit the murders since he admitted that Dalton and Ross came over the night of October 7, 2001.

With respect to willfulness and premeditation, the evidence is just as compelling. Defendant had been trying to contact Dalton for two weeks. He finally spoke with Dalton on October 7, 2001, and told Dalton that he had money for him. Dalton went to defendant's place to pick the money up and never returned. Dalton's and Ross' bodies were found four days later inside Dalton's truck. Ross was located in the front passenger side of the vehicle with a contact gunshot wound to the back of his head. Dalton's body was located in the rear passenger side of the vehicle with a close range gunshot wound to the right cheek. Dalton's leg and jeans were muddy, indicating that his body had been moved. Based on this evidence, a reasonable jury could infer that defendant had planned these murders before they occurred and that defendant had been calling Dalton to lure him over to pick up his money. Furthermore, based on the location of the gunshot wounds, a reasonable jury could infer that this was a very purposeful and calculated act. First, defendant would have to bring the gun with him, then pull the gun out, place it to the back of Ross' head and finally, pull the trigger. Not only did defendant pull the trigger to shoot Ross, but he pulled the trigger once more to shoot Dalton. In that time frame, defendant would have had ample time to think again about the nature and consequences of his actions. Based on the evidence, the jury could have easily inferred that defendant's plan was to lure Dalton over and never allow Dalton and Ross out of the car alive. Viewed in the light most favorable to the prosecution, we conclude that this evidence is more than sufficient to establish premeditation beyond a reasonable doubt.

Furthermore, we conclude that there was more than sufficient evidence presented at trial to show that the murders were committed in the course of a larceny. Two days after defendant's arrest, the police located two of the rings that Dalton had been wearing on October 7, 2001, at Zeidman's Pawn Shop. According to the pawn slip, defendant pawned these two rings on October 11, 2001, at 8:46 a.m., in return for $50. Defendant's signature and fingerprints were located on the pawn slip, and defendant's DNA was found on one the rings confiscated from the

pawn shop. This in itself would be enough, when viewed in the light most favorable to the prosecution, to establish beyond a reasonable doubt that defendant committed the murders in the course of a larceny.

We further conclude that there was sufficient evidence to support the jury's verdict on the felony-firearm count. In order to obtain a felony-firearm conviction, the prosecution must prove that (1) defendant was in possession of a firearm (2) during the commission of, or the attempt to commit, a felony. MCL 750.227b; *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Possession of the firearm may be actual or constructive and can be proven by circumstantial evidence. *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000). Because the above evidence was sufficient to show that defendant committed the murders in the course of a larceny, and because a firearm was used to commit the murders, as evidenced by the gunshot wounds to Ross' and Dalton's heads, the above evidence, although circumstantial, is also sufficient to show that defendant was in possession of a firearm during the commission of a felony.

Defendant's second issue on appeal is that the trial court erred in failing to suppress defendant's statement that was made after his illegal arrest. We disagree.

We review a trial court's findings of fact regarding a motion to suppress evidence for clear error. *People v Williams*, 240 Mich App 316, 319; 614 NW2d 647 (2000), citing *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). However, we review the trial court's ultimate decision regarding a motion to suppress de novo. *Williams*, *supra* at 319.

Both the United States and Michigan Constitutions require that an arrest, with or without a warrant, be supported by probable cause. US Const, Am IV; Const 1963, art 1, § 11. The law permits a police officer to arrest an individual without a warrant "if a felony has been committed and the officer has probable cause to believe that the individual committed the felony." *People v Kelly*, 231 Mich App 627, 631; 588 NW2d 480 (1998); see also MCL 764.15(1)(c). Probable cause will be found when the facts and circumstances within an officer's knowledge are sufficient to warrant a reasonable person to believe that an offense had been or is being committed. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

The trial court's decision that defendant's arrest was supported by probable cause was based on the following evidence: (1) Dalton spoke to defendant on the phone on the night of October 7, 2001; (2) approximately forty-five minutes later, Dalton and Ross were in route to defendant's house to pick up money that defendant owed Dalton; (3) someone from defendant's house heard a car pull up; (4) defendant exited the house and then later came back in; (5) defendant was the last person to see Dalton and Ross alive; and (6) the next day, defendant packed up his belongings and disappeared. We conclude that the above evidence regarding defendant being the last person to see Ross and Dalton alive, coupled with defendant's disappearance shortly after Dalton's and Ross' deaths, was sufficient to warrant a reasonable person to believe that the offense had been committed by defendant. Accordingly, the trial court did not err in finding that the police possessed sufficient probable cause to arrest defendant, and therefore, properly admitted defendant's custodial statements into evidence.

Defendant's third issue on appeal is that he was denied a fair trial due to the trial court's improper admission of hearsay at trial. We disagree.

A trial court's determination of evidentiary issues is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998), citing *People v Adair*, 452 Mich 473, 482; 550 NW2d 505 (1996). "Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently." *Smith, supra* at 550, citing *People v Bahoda,* 448 Mich 261, 289; 531 NW2d 659 (1995). The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Smith, supra* at 550.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. *People v Tanner,* 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 802. According to MRE 613(b), extrinsic evidence of a prior inconsistent statement by a witness is admissible so long as the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or where the interests of justice otherwise require.

Here, the prosecutor called defendant's sister to the stand and questioned her regarding whether she had ever met or heard of Ross and Dalton, which she denied. The prosecutor then asked her whether she had ever told anyone that defendant left with a person named Allie-El on the evening of October 7, 2001, which she also denied. The prosecutor recalled one of Dalton's family members who claimed that defendant's sister told her, during a phone conversation, that defendant had left with Ross and Dalton on the evening in question. Defense counsel objected on the basis of hearsay, but was overruled by the trial court. The trial court admitted the evidence as a prior inconsistent statement to impeach defendant's sister.

We find this to be a close evidentiary issue. Even though the testimony may not have been inconsistent with defendant's sister's statement regarding who defendant left with on the night in question, it was properly admitted to impeach her regarding her denial of knowing or ever hearing of Ross and Dalton. Because we generally do not reverse close questions arising from the trial court's exercise of discretion on evidentiary issues, we conclude that the trial court did not abuse its discretion in allowing the testimony at trial. *Smith, supra* at 549-550.

Defendant's fourth issue on appeal is that his trial counsel was ineffective for failing to object to the admission of evidence regarding defendant being a male prostitute, having AIDS, and refusing to take a polygraph examination. We disagree.

Because defendant had failed to preserve this issue for review by moving for a new trial or an evidentiary hearing, we must review this issue on the basis of the existing record. *People v Sabin (On Second Remand),* 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "[A] trial court's findings of fact are reviewed for clear error." *Id.* "Questions of constitutional law are reviewed . . . de novo." *Id.*

To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *Smith, supra* at 556,

citing *Strickland v Washington*, 466 US 668, 688-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Upon arrest, defendant made a statement, which was admitted at trial, that he was a male prostitute and had AIDS. Defendant now alleges that his trial counsel was ineffective for failing to object to the admission of this statement. Decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). 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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001), citing *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). We conclude that defendant has failed to show that defense counsel's failure to object was not sound trial strategy. There could be numerous reasons why defense counsel did not object to defendant's admission that he was a male prostitute and had AIDS. Defense counsel may not have wanted to draw further attention to the admission. In any event, defendant has failed to show that he was prejudiced by the admission of this evidence. There is nothing in the record to indicate that the jury based its decision to convict defendant on the fact that he was a male prostitute and had AIDS. Defendant has failed to show that a reasonable probability exists that the outcome of the proceedings would have been different had the above evidence been excluded.

Defendant next contends that his trial counsel was ineffective for failing to object to the testimony regarding defendant's refusal to take a polygraph examination. The Supreme Court of Michigan has held that "testimony concerning the result of a polygraph examination is not admissible at trial." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), citing *People v Barbara*, 400 Mich 352, 377; 255 NW2d 171 (1977). References to a polygraph examination, however, do not always constitute error requiring reversal. *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000), citing *People v Rocha*, 110 Mich App 1, 8; 312 NW2d 657 (1981). This Court has set forth the following factors to determine if reversal is required when references to polygraph examinations are made: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. *Rocha, supra* at 8.

Here, the officer in charge of the case made the references inadvertently during an explanation regarding defendant's refusal to sign his statement and regarding why the officer does not record or videotape his interviews. Although the officer made two references to defendant's refusal to take a polygraph examination, both references were brief, were made in response to legitimate questions posed to him, and were not made to bolster anyone's credibility. Furthermore, the references did not involve the admission of test results, but merely involved defendant's refusal to take the examination. As stated above, decisions regarding what evidence to present are presumed to be matters of trial strategy. *Garza, supra* at 255. Because the above references were inadvertent, brief, and did not involve polygraph examination results, defense

counsel may have thought it more harmful than helpful to object to the references. Furthermore, defendant has failed to show that a reasonable probability exists that the outcome of the proceedings would have been different had the polygraph examination references been excluded.

Defendant's fifth issue on appeal is that he was denied a fair trial due to instances of prosecutorial misconduct during closing arguments. We disagree.

Because defendant has failed to preserve the issue, we will only review this claim for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). The test for prosecutorial misconduct is whether a defendant was denied his right to a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Generally, prosecutors are accorded great latitude regarding their arguments and conduct, and they are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2002), abrogated in part on other grounds by *Crawford v Washington*, 541 US __; 124 S Ct 1354; __ L Ed 2d __ (2004).

Defendant claims that the prosecutor, in his closing and rebuttal arguments, attacked defense counsel's honesty and integrity, shifted the burden of proof, and misstated the evidence. This Court has held that a prosecutor's comments, which attack defense counsel and characterize the defense theory as a red herring, misleading, or deceiving, formed a basis for reversal. See *People v Dalessandro*, 165 Mich App 569, 578-580; 419 NW2d 609 (1988); *People v Kent*, 157 Mich App 780, 794; 404 NW2d 668 (1987). However, this Court has also held that, although improper, comments such as this were not grounds for reversal if they were brief and went towards a non-material subject, if they were in response to defense counsel's closing argument, or if they could have been cured by a timely instruction. See *People v Watson*, 245 Mich App 572, 586, 592-593; 629 NW2d 411 (2001); *People v Howard*, 226 Mich App 528, 544-545; 575 NW2d 16 (1997). In context, we find that the prosecutor's remarks were proper as reasonable rebuttal of defense counsel's theory that someone other than defendant shot Dalton and Ross, took Dalton's rings, and then gave/sold them to defendant. Furthermore, any prejudice that may have resulted from these comments could have been cured by a timely instruction. *Schutte, supra* at 721.

We further conclude that the prosecutor did not improperly shift the burden of proof. Generally, a prosecutor may not imply that a defendant must prove something or present a reasonable explanation for damaging evidence; as such an argument tends to shift the burden of proof. See *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Here, the prosecutor's comments during rebuttal were directed to the weaknesses inherent in the defense theory, which were that there was no evidence that defendant stole Dalton's rings or that a larceny even occurred at the time of the murder. The prosecutor's rebuttal argument presented the jury with the logical inference that if Dalton was not robbed, he would still have had the $300 he picked up from defendant on him when his body was found. The prosecutor did not suggest that defendant had a duty to produce evidence to rebut his argument, but rather, asked the jury to assess the existing evidence in a logical manner. The prosecutor was not commenting on

defendant's failure to produce evidence, but on the weakness of the defense theory. In any event, any perceived prejudice was cured by the trial court's instruction that "the prosecutor must prove each of the following element[s] beyond a reasonable doubt." See, generally, *Schutte, supra* at 720-721.

Finally, we conclude that the prosecutor did indeed misstate the facts, as he claimed that defendant pawned Dalton's rings two days after Dalton's disappearance, but the trial testimony shows that defendant pawned the rings approximately four days after Dalton's disappearance. We further conclude, however, that the misstatement did not amount to a plain error affecting defendant's substantial rights, as the prejudicial effect of the comment could have been cured by a timely objection and curative instruction. *Schutte*, *supra* at 721. Furthermore, immediately after closing arguments, the lower court instructed the jurors that the attorneys' statements and arguments were not evidence. Therefore, any prejudice caused by the prosecutor's misstatement could have been and, indeed, was eliminated.

Defendant's final issue on appeal is that his constitutional protection against double jeopardy was violated when the trial court sentenced him for four counts of first-degree murder arising out of two deaths. We agree.

Dual convictions for premeditated murder and felony murder arising from the death of a single victim violates double jeopardy. *People v Bigelow*, 229 Mich App 218, 220; 581 NW2d 744 (1998). The appropriate remedy to protect defendant's rights against double jeopardy is to modify the judgment of sentence to clarify that defendant's convictions were for two counts of first-degree murder supported by two theories – first-degree premeditated murder and first-degree felony-murder involving larceny. *Id*., citing *People v Zeitler*, 183 Mich App 68; 454 NW2d 192 (1990). Here, because defendant was convicted of four counts of first-degree murder arising from the death of two people, his rights against double jeopardy were violated. Accordingly, we remand to the trial court for entry of an amended judgment of sentence to clarify that defendant's convictions were for two counts of first-degree murder supported by two theories – first-degree premeditated murder and first-degree felony-murder involving larceny.

Defendant's convictions are affirmed. However, we vacate defendant's first-degree and felony-murder sentences and remand to the trial court for entry of an amended judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Kathleen Jansen