STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 16, 2004
v	No. 250253 Berrien Circuit Court
RUSSELL ARTHUR REITZ, Defendant-Appellant.	LC No. 2002-404904-FC

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

PER CURIAM.

Defendant appeals as of right his convictions of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

I

First, defendant argues that there was insufficient evidence for the jury to find him guilty beyond a reasonable doubt. We disagree. This Court reviews de novo a claim of insufficient evidence. *People v Lueth,* 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court must consider whether there was sufficient evidence to justify a rational trier of fact finding guilt beyond a reasonable doubt. *People v Johnson,* 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant does not contend that the elements of first-degree murder or felony-firearm were not proven. Rather, defendant argues that the testimony of witnesses Charles Casper, Douglas Beckwith, and Christine Gnodtke was biased and not credible. Defendant argues that there was insufficient credible evidence to prove that defendant was the person who shot the victim, Dale Peterson. Identity is always an essential element of a criminal prosecution. *People v Oliphant,* 399 Mich 472, 489; 250 NW2d 443 (1976).

Casper testified that on the night in question, he drove defendant to Peterson's house. According to Casper, defendant, who was dressed completely in black, said he wanted to "kick Dale's ass." Peterson was a business partner of Lori Towle, defendant's girlfriend. According to Casper, they drove past Peterson's house and saw that the lights were on. Casper stated that defendant gave him Peterson's telephone number and told him to call Peterson and tell Peterson that Towle's vehicle was disabled. According to Casper, "I was supposed to make up a story and tell him that Lori was broke down somewhere close so that he would come out of his house to go get her." Casper testified that he tried calling Peterson a couple of times, but there was no

answer. Casper returned to Peterson's house with some beer. Casper testified that as he pulled up to Peterson's house, defendant approached the car. Defendant took a couple of beers and told Casper to return in a half hour. Casper testified that he went to a saloon for approximately a half hour and then went back to Peterson's house. According to Casper, as he was driving down the road to Peterson's house, defendant stepped out of a cornfield, got into the car, and told him to "shut up and drive." They drove to Towle's house, where Casper saw defendant holding a silver revolver, and defendant told Casper that "he had shot the f_ _ _er" several times, once in the head. A short time later, defendant "ditched" the gun and his all-black clothing. At trial, a forensic pathologist confirmed that Peterson had been shot seven times, once in the back of the head.

Gnodtke, Peterson's neighbor, testified that between 1:30 a.m. and 2:00 a.m. on the night of the shooting, she heard what she thought were firecrackers. Gnodtke was asked specifically what she heard, and she stated, "Like boom, boom, boom, boom." According to Gnodtke, fifteen minutes later, she heard two more "booms." Although Gnodtke testified that it had rained on the night in question, other witnesses testified that it did not rain during this time period.

Beckwith was in jail for probation violation at the same time defendant was in jail. He testified that, while in jail, defendant offered him $10,000 to kill Casper because Casper was the only witness who could testify against him.

This Court has held that questions regarding the credibility of witnesses are to be resolved by the trier of fact. *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003). Further, this Court has stated that it should not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *Id.* In the case at hand, the jury obviously found the above witnesses to be credible, which was the jury's role. The Court does not sit as "the thirteenth juror" in assessing the credibility of witnesses. *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

Defendant also argues that there was insufficient evidence because there was no DNA or blood evidence. The police did not find the gun that was used to kill Peterson and did not have any direct physical evidence linking defendant to this crime. However, circumstantial evidence and reasonable inferences arising from that evidence may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

In order to convict defendant of first-degree murder, there must be sufficient evidence to establish that defendant intentionally killed Peterson, and that the act of killing Peterson was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). We conclude that the testimony of Casper and Gnodtke, when viewed in a light most favorable to the prosecution, established that defendant intentionally killed Peterson and that the killing was premeditated.

Defendant asserts that because he had an alibi, there was insufficient evidence to support the conviction. "The testimony of an alibi witness is to be given weight relative to its content, and it is not always sufficient to create doubt where other substantial evidence is present." *People v Amos*, 10 Mich App 533, 536; 159 NW2d 855 (1968). Moreover, "[i]t is within the jury's province to determine the credibility of all witnesses, including any whose testimony tends

to establish an alibi." *People v Diaz*, 98 Mich App 675, 682; 296 NW2d 337 (1980). Therefore, defendant's argument fails.

Next, defendant argues that the prosecutor improperly implied that defendant stole Peterson's gun a few weeks before the murder, and then killed Peterson with this gun. This argument, as presented by defendant, is a prosecutorial misconduct claim, rather than a sufficiency of the evidence claim. Appellate review of this issue is waived because defendant failed to properly present this issue in his statement of questions presented. *In re BKD*, 246 Mich App 212, 218; 631 NW2d 353 (2001). Moreover, this argument was based on a rational view of the circumstantial evidence presented.

Defendant also contends that Kimberly Brown's testimony created a reasonable doubt regarding his guilt. We disagree. Defendant argues that Brown's testimony, that she rode by Peterson's house close to the time the crime occurred and saw no lights on at Peterson's house, is contrary to the testimony of Judy Foster, who testified that when she found Peterson in his driveway, the lights were on at Peterson's house. Although Brown testified that she rode past Peterson's house on her motorcycle between midnight and 1:00 a.m. on the night in question and did not see any lights on at Peterson's house, on cross-examination Brown testified that she was nervous driving down the road Peterson lived on because it was very dark. The jury could have reasonably concluded that because Brown was so nervous driving down the road that night, she could have been mistaken about the lights.

Finally, defendant argues that because he initially told the police a lie with regard to where he was on the night in question, that should not have been used by the jury to find him guilty. However, as noted above, there was sufficient evidence presented to allow the jury to find, beyond a reasonable doubt, that defendant intentionally killed Peterson and that the killing was premeditated.

II

As his second issue, defendant asserts that the prosecutor's actions denied him a fair trial and denied him his due process rights. Because defendant failed to object to the allegedly improper conduct, this Court will only review the claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Defendant argues the prosecution improperly elicited MRE 404(b) testimony. Defendant references numerous occasions where the prosecution questioned witnesses about defendant's use of marijuana and cocaine. MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct as issue in the case.

"While MRE 404(b)(1) is one of a few rules with which 'other acts' evidence may properly be admitted, it is a rule of inclusion that contains a nonexclusive list of 'noncharacter' grounds on which evidence may be admitted." *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). "This rule permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct." *Id.* To protect against impermissible inferences, the Court established a procedural safeguard in the form of a four-pronged standard that a trial court must insure is satisfied before admission of other acts evidence:

> First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury. [*Id.*, quoting *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994).]

In *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996), the defendant argued that the prosecution improperly introduced evidence that he had used marijuana on the evening when he and the complainant had sexual relations. While the Court stated that there were substantial limits on the admissibility of evidence concerning other bad acts (MRE 404(b)), it also stated that it was essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place. *Id.* at 741. The Court noted that, in the case before it, the jury was called upon to decide what happened during a private event between two persons. *Id.* at 742. The Court concluded that the more the jurors knew about the full transaction, the better equipped they were to perform their duty. *Id.* The Court then cited *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978), for the following analysis:

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence. [*Sholl*, *supra* at 742.]

The Court continued, stating:

> "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." [*Id.*, quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964).]

On the other hand, in *People v Benon*, 413 Mich 530, 534; 321 NW2d 372 (1982), the Court concluded that evidence of the witnesses' prior drug purchases from the defendant was not admissible because the identification of the defendant was not an issue. The Court held that the prior purchases of drugs were not so "inextricably related" to the later sales that they might be considered "an integral part" of them. *Id.*, citing *Delgado*, *supra* at 76.

The prosecution contends that, like the facts in *Sholl,* the testimony regarding drug use was part of the complete story and directly related to the circumstances of the crime. We agree that the references to the drug use by defendant and Casper on the night in question are directly relevant to the charged crime. This evidence was offered to show preparation, i.e., mental preparation, by defendant, as well as Casper. This evidence was also relevant in that it provided detail and context as to what occurred on the night in question. While this evidence is prejudicial, its probative value is not substantially outweighed by the danger of unfair prejudice. Thus, eliciting this evidence was not clear error. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant also argues that the prosecutor improperly elicited testimony regarding threats to kill Casper. Defendant cites Detective Buller's testimony that the police kept Casper overnight because he was afraid Casper would "get assassinated." Our Supreme Court has stated that "[a] defendant's threat against a witness is generally admissible." *Sholl, supra* at 740. The Court further stated that such a threat can demonstrate consciousness of guilt. *Id.* However, for evidence of threats to be admissible, a connection to the defendant must be shown. *People v Lytal,* 119 Mich App 562, 576; 326 NW2d 559 (1982).

We conclude that Detective Buller's testimony regarding the threat of "assassination" of Casper was proper, because the prosecutor connected the threat with defendant through Beckwith's testimony that defendant wanted Casper killed. Thus, defendant has not shown plain error affecting his substantial rights. *Carines, supra*.

Defendant again contends that the prosecutor improperly implied that defendant had committed a burglary of Peterson's home prior to the murder. However, defendant has provided no authority in support of his argument, and he may not leave it to this Court to search for authority to sustain this position. *In re Keifer,* 159 Mich App 288, 294; 406 NW2d 217 (1987).

The prosecutor's use of other people's bad acts against defendant is raised on appeal. Defendant cites Washington's testimony that Towle asked him for an alibi. Because defendant failed to object to this line of questioning, we review defendant's claim for plain error. *Schutte, supra* at 720. Even if Washington's testimony regarding an alibi for Towle was plain error, defendant has failed to show how this error affected his substantial rights. *Carines, supra* at 763. Thus, defendant's argument fails.

Defendant also argues that the prosecutor denigrated the "beyond a reasonable doubt" standard. Defendant cites remarks made by the prosecutor during voir dire.

Generally, this Court reviews claims of prosecutorial misconduct on a case-by-case basis to determine whether, examining the record as a whole, the defendant was denied a fair trial. *People v Hicks,* 259 Mich App 518, 522; 675 NW2d 599 (2003). However, because defendant did not object to the above remarks, this Court's review is limited to determining whether plain error occurred that affected defendant's substantial rights. *Id.* Reviewing these remarks in context, the prosecutor was trying to determine whether the potential jurors would be able to convict defendant based on the circumstantial evidence only. As discussed above, circumstantial evidence and reasonable inferences arising from that evidence may be sufficient to prove the elements of a crime. *Avant, supra* at 505. Therefore, we conclude that there was no plain error.

On appeal, defendant takes issue with the prosecutor's closing statement, where he gave the following examples to help explain the "reasonable doubt" standard:

> Keep in mind, ladies and gentlemen, it is not beyond all doubt. It is based upon reason and common sense. For example, purchasing a home, getting married, buying a car. We all think about how we're going to pay for it, where's the money going to come from, what's the money going to be like in the future? I like this car, is it a good car, a good house. Do any of these have any defects in them?
>
> And we analyzed that and we decided, no, we're going to buy the house, we're going to get married, we're going to buy the car. In the back of our mind there's still a little bit of doubt because we're not positive. But we still buy the house, we still get married, we still buy the car. That's reasonable doubt.
>
> If you see the house has a crack in its foundation you know we're not going to buy that house. That's a reasonable doubt. If the car's missing a tire, no, you're not going to buy that car. That's a reasonable doubt.

Even if the prosecutor's examples were improper, the jury was instructed that "[a] reasonable doubt is a fair, honest doubt growing out of the evidence or lack of evidence. It is not an imaginary or possible doubt, but a doubt based on reason and common sense. A reasonable doubt is just that, a doubt that is reasonable under the facts of this case after a careful consideration of the evidence." Because juries are presumed to follow the court's instruction, *People v Rodgers*, 248 Mich App 702, 717; 645 NW2d 294 (2001), defendant has failed to show plain error affecting his substantial rights. *Carines, supra*.

Defendant also argues that the prosecutor allegedly interjected his own opinion of Casper's credibility. "A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, the prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *Id.* See also *People v Calloway*, 169 Mich App 810, 821; 427 NW2d 194 (1988), vacated on other grounds 432 Mich 904 (1989), wherein this Court stated that the prosecutor may comment upon the witness's credibility during his or her closing argument, especially when there is conflicting evidence and the question of the defendant's guilt or innocence turns on which witness to believe. We conclude that the prosecutor did not personally vouch for the credibility of Casper, but rather argued that the evidence demonstrated that Casper was credible. *Howard, supra*.

Further, defendant asserts that the prosecutor argued facts not in evidence. "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *Id.* After reviewing the complained of remarks and the trial testimony, we conclude that the prosecutor properly argued the evidence and made reasonable inferences from that evidence.

Next, defendant argues that the prosecutor invited improper speculation. Defendant cites the prosecutor's closing statement, in which he addressed Gnodtke's testimony that it was raining on the night in question, even though other witnesses testified to the contrary. After reviewing Gnodtke's testimony, we conclude that the prosecutor was properly arguing that, although Gnodtke was not positive about the weather conditions that night, she was positive that she heard four "booms" at 2:10 a.m. on August 18, 2002, and two "booms" a few minutes later.

Finally, defendant argues that the cumulative effect of the above alleged errors resulted in an unfair trial. However, "[b]ecause no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

III

For his third major issue, defendant argues that the trial court abused its discretion by admitting disputed evidence. The decision as to whether evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

First, defendant asserts that the trial court erred in allowing Detective Buller to testify that Casper's first statement to the police was false.

In general, all relevant evidence is admissible, MRE 402, including evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In addition, MRE 701 allows opinion testimony by a lay witness as long as the testimony is "rationally based on the perception of the witness" and is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." In the present case, the officer's opinion that Casper's first statement to the police was false was relevant because it explained why the police continued to question him. Detective Buller explained that he did not personally know that this statement was false because he was not present when the murder happened. Rather, it was his opinion that Casper's initial statement was false in light of other information the police had obtained. Based on the record before this Court, we conclude that an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was justification for the trial court's ruling. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

Second, defendant raises the issue of the taped conversation between Casper, defendant, and Towle. Defendant argues that the trial court should have granted his motion for mistrial because the jury had a copy of the transcript of the whole tape, even though the tape stopped abruptly three-quarters of the way through while being played for the jury.

"A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant . . . and impairs his ability to get a fair trial." *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). In the case at hand, the trial transcript reveals that the jury had one copy of the transcript for only a matter of minutes and that the trial court gave the jury a curative instruction. Thus, we

conclude that the trial court did not abuse its discretion in denying defendant's motion, as this irregularity was not prejudicial to defendant and did not impair his ability to get a fair trial.

Defendant also argues that the transcript was never authenticated against the tape. However, Detective Buller was asked the following:

> *Q*. Ask you to take a look at People's Proposed Exhibit 28. Do you recognize that?
>
> *A*. Yes. It's the transcription of the conversation between Charles Casper, Russell Reitz, and Lori Towle.
>
> *Q*. And does that accurately depict what was transcribed or stated on the tape?
>
> *A*. Yes, it does.

At this point, the prosecutor asked to distribute the copies of the transcription to the jury, but defense counsel objected on the basis of lack of foundation. The trial court also asked Detective Buller if he played the tape while he read the transcribed version, and Detective Buller responded, "Yes, I did." When asked if they matched, Detective Buller stated, "Yes, they're accurate."

MRE 901(a) provides that the requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Based on Buller's testimony, we conclude that the trial court did not abuse its discretion in providing the jury with the transcription of the taped conversation between Casper, defendant, and Towle.

Next, defendant argues that the trial court erred in allowing the tape provided to Washington by Towle to be played for the jury. Washington was shown exhibit 32, which, according to Washington, was a cassette tape he received from Towle. According to Washington, Towle and defendant were on the tape discussing what they were doing the night in question. When the prosecutor asked to play the tape for the jury, defense counsel objected on the basis that there was no foundation authenticating the tape.

MRE 901(b) provides the following:

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> * * *
>
> (5) *Voice Identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

Washington was questioned as to how he knew defendant's voice, and he stated that defendant called him collect. When asked, "And what was said once the collect call came in? Did it give the name of the individual?" Washington responded, "Yes." Washington was also asked, "And based upon what you've heard over the phone and what you heard on the tape, were they the same voices of Rusty," and he responded, "Yes."

We conclude that the trial court did not abuse its discretion in allowing this tape to be played, as the above testimony was sufficient to connect defendant's voice to the one on the tape in question.

IV

As his final issue, defendant argues that he is entitled to a new trial because his trial counsel was allegedly ineffective. We disagree. Defendant has failed to preserve this issue because he did not move for a hearing or a new trial on this basis. *Rodgers, supra* at 713. Because there was no hearing, this Court's review is limited to errors apparent on the record. *Avant, supra* at 507.

Defendant asserts that the lack of objection to the testimony regarding the use of marijuana and cocaine fell below an objective standard of reasonableness under prevailing professional norms. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). However, as discussed above, such testimony was properly elicited by the prosecutor to show preparation and to provide a complete story as to what happened on the night in question. Because counsel is not obligated to make futile objections, *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002), defendant's argument is without merit.

Defendant also contends that the lack of objection to testimony regarding threats to Casper's life fell below the objective standard. Although we concluded that Detective Buller's testimony regarding the fear of the "assassination" of Casper was improper, defendant has failed to demonstrate a reasonable probability that, in the absence of counsel's unprofessional error, the outcome of the proceeding would have been different. *Avant, supra* at 507. With regard to Beckwith's testimony that defendant wanted Casper killed, we conclude that this testimony was properly elicited by the prosecutor. Thus, defendant's counsel was not obligated to make a futile objection. *Milstead, supra* at 401.

Defendant also argues that trial counsel's failure to object to Washington's testimony that Towle wanted him to provide her with an alibi fell below the objective standard. After reviewing such testimony, we believe that it could have been trial strategy for the jury to hear that Towle was the one who wanted or needed an alibi for the night in question. Thus, defendant has not overcome the strong presumption that the assistance of his counsel was sound trial strategy. *Avant, supra* at 507-508.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello