STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
v	No. 246413 Kalamazoo Circuit Court
KENNETH LEE KOCHER, II, Defendant-Appellant.	LC No. 02-001852-FC

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

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree murder, MCL 750.317. The trial court sentenced him to 48 to 90 years' imprisonment. We affirm defendant's conviction, but remand for resentencing.

The instant case arises from allegations that defendant killed Terry DeHollander, the roommate of a man he blamed for the death by drug overdose of his sister, Lynette Kocher. At trial, the prosecution argued that defendant and Jeff Rurka, Lynette's boyfriend, went to the victim's apartment intending to kill the roommate. After failing to find the intended target, Rurka stabbed the victim numerous times and defendant cut the victim's throat.

I. Great Weight of the Evidence

Defendant first argues that the trial court abused its discretion in denying his motion for a directed verdict of acquittal or for a new trial, because the verdict was against the great weight of the evidence. We disagree.

A verdict is against the great weight of the evidence where the evidence presented at trial preponderates heavily against the verdict and a serious miscarriage of justice would result from allowing the verdict to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Motions for a new trial "based solely on the weight of the evidence regarding witness credibility are not favored." *Id.*, 639. Generally, credibility constitutes a question reserved for the jury and a trial court may not substitute its own views on the issue when ruling on a motion for new trial. *Id.*, 642. The only exceptions occur where the testimony contradicts indisputable facts or laws, "is patently incredible or is so inherently implausible that it could not be believed by a reasonable juror." *Id.*, 647.

Defendant argues that the jury's verdict was against the great weight of the evidence because it was based on the testimony of Brian Parker, a man with whom defendant shared a prison cell. Defendant contends that this testimony was impeached of all probative value, was patently incredible or inherently implausible, and was not corroborated by any evidence from a disinterested independent source.

Contrary to defendant's assertions, the evidence presented at trial did not weigh in defendant's favor. Rather, the prosecutor presented testimony from both Parker and defendant's girlfriend, Sharon Lang, stating that defendant admitted to slitting the victim's throat after Rurka stabbed him. Although defense counsel attempted to impeached Parker and Lang, we find no basis for concluding that their statements were inherently implausible or incredible. Their testimony was implicitly contradicted by that of Jeanette Sager, who stated that Rurka was angry with defendant because Rurka had "to do it all himself." But conflicting testimony, even where impeached to some extent, provides insufficient grounds for granting a new trial. *Lemmon, supra*, 647.

Defendant also asserts that because he did not have blood on his clothing or the cast on his ankle, it was physically and practically impossible for him to have slit the victim's throat. However, the forensic pathologist testified that the victim's throat could have been cut from in front or from behind. Lang explained that defendant told her that the victim was laying on the floor and he picked him up by the hair and slit his throat. Further, Parker testified that defendant told him that he and Rurka "cleaned up" after the assault. Therefore, the absence of blood on defendant's clothing and cast does not present a physical or practical impossibility to him having committed the crime.

Because the trial court's decision was not "manifestly against the clear weight of the evidence," *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003), we find no abuse of discretion in its denial of defendant's motion for a new trial.

II. Admission of Photographs and Videotape

Defendant next contends that the trial court violated his right to a fair trial by admitting a videotape and photographs of the crime scene, as well as photographs from the victim's autopsy. Defendant claims that the gruesome nature of this evidence caused it to be far more prejudicial than probative. We disagree.

We review a trial court's decision to admit or exclude evidence for abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Such abuse occurs where an unprejudiced person would say that there was no basis for a particular ruling. *Id.* But a decision on close evidentiary question cannot ordinarily constitute an abuse of discretion. *Id.*

Evidence that has "*any* tendency" to make a fact at issue more or less probable is relevant. *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), mod, remanded 450 Mich 1212 (1995), emphasis in original. Although generally admissible under MRE 402, relevant evidence may be excluded if the danger of unfair prejudice substantially outweighs its probative value. *Id.*, 75; MRE 403. Courts should exclude photographs under MRE 403 if they may lead the jury to abdicate its truth-finding function and convict due to passion. *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). But photographs "are not excludable simply

because a witness can orally testify about information contained in [them]" and "[g]ruesomeness alone need not cause exclusion." *Mills, supra*, 76.

In admitting the photographs and videotape in the instant case, the trial court found that they were relevant to establish intent and to show the extent of the decedent's injuries and his cause of death. It further stated that, although gruesome, the evidence would not inflame the jury and lead to a verdict based on passion alone. On appeal, defendant merely contends that he was prejudiced due to the graphic nature of the evidence and that any probative information it contained could have been presented through testimony. But under *Mills*, these do not constitute sufficient reasons for excluding relevant photographic evidence. Defendant has failed to meet the "heavy burden" of showing that the challenged evidence should have been excluded as unfairly prejudicial. *People v Houston*, 261 Mich App 463, 467-468; 683 NW2d 192 (2004). Consequently, we find that the trial court did not abuse its discretion in allowing the prosecution to present this evidence to the jury.

III. Prosecutorial Misconduct

Defendant argues that he is entitled to a new trial because of certain improper statements made by the prosecution during the cross examination of a witness and during its rebuttal argument. We disagree.

Because defendant failed to preserve his claims of prosecutorial misconduct, we may only review the issue for plain error affecting his substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *Id.*, 448-449.

When reviewing claims of prosecutorial misconduct, we examine the pertinent portion of the lower court record and evaluate the alleged misconduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Prosecutors may not make statements of fact to the jury that are unsupported by the evidence presented at trial. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). But 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 Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Further, the prosecution is entitled to make a "fair response" to issues raised by the other party. See *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). Even where remarks standing alone may be improper, they do not constitute error warranting reversal where they are based on the evidence or made in response to "matters raised by the defendants in their proofs and closing arguments." *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

The first incident that defendant asserts constitutes misconduct occurred during the prosecution's cross-examination of defendant's grandmother, Bertha Perry. On direct examination, defense counsel had questioned Perry regarding several conversations she had with Rurka following Lynette's funeral. Perry testified that during their last conversation, Rurka told her how sorry he was and that he wanted to help Kenny somehow, and that she replied that the only thing he could do was to "tell the truth about what happened." On cross-examination, the prosecution asked Perry if she had already decided what the truth was when she had this

conversation. Perry replied that she knew the truth because defendant told her that, although he had been present, Rurka was the one who killed the victim and defendant never lied to her. The prosecution then asked if it would surprise her to know that Rurka told the police that defendant "did it all" and that Rurka did nothing. Perry replied that this did not surprise her, that she would lie if she were in Rurka's position, but that she would not similarly lie if in defendant's position.

Defendant asserts that the prosecution committed misconduct in questioning Perry regarding Rurka's statement identifying defendant as the killer because Rurka did not testify at trial and defendant had no opportunity to cross-examine him regarding the statement. But defense counsel first elicited testimony regarding Rurka's statements during its direct examination of Perry. Thus, the question constituted a fair response. Furthermore, when examined in context, it is apparent that the prosecution questioned Perry regarding Rurka's statement in order to show that she was biased in favor of defendant rather than to introduce the statement as substantive evidence of defendant's guilt. Even if the question had been improper, defendant could have requested a limiting instruction. "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 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Next defendant contends that the prosecution engaged in misconduct during rebuttal by characterizing defense counsel's closing argument as presenting "red herrings" by citing defendant's history of nonviolent behavior, the fact that he was wearing a cast, and the lack of blood on his clothing. Rather than accusing defense counsel of active misrepresentation, the prosecution argued that the defendant's theory of the case placed undue emphasis on these factors. Under *Duncan*, *supra*, this constituted a fair response. Further, prosecutors are given wide latitude and need not confine their arguments to the "blandest of all possible terms." *Aldrich*, *supra*, 112. Thus, the comments did not constitute misconduct.

However, defendant further asserts that the prosecution argued facts not in evidence when it stated that a possible explanation for the lack of blood was that the defendant wore mechanic's overalls when killing the victim. None of the evidence presented suggests that defendant or Rurka ever possessed mechanic's overalls. But testimony did establish that Rurka carried a black garbage bag after he and defendant visited the victim's apartment, the bag was partially full, and it appeared to contain clothing. We find that this evidence supports the inference that the garbage bag may have contained bloody clothing -- an inference defense counsel also made in her closing argument -- and that it could have contained two sets of such clothing, not just one. Thus, the prosecutor's statement in this regard was permissible. The reference to overalls merely emphasizes the prosecution's point that defendant would not necessarily have had blood on him if he had worn and subsequently removed a layer of clothing. Although colorfully stated, the prosecution's comment does not amount to misconduct.

Because none of the challenged actions amount to prosecutorial misconduct, we find no plain error and decline to further review the issue.

IV. Effective Assistance of Counsel

Defendant asserts that he was denied the effective assistance of counsel. We disagree.

To prevail on this claim, defendant must show that his attorney's performance fell below an objective standard of reasonableness under prevailing professional norms, and that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different and the resultant proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To establish deficient performance, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.*, 302. "This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). Decisions as to what evidence to present and whether to call a particular witness are presumed to be matters of trial strategy and the failure to call witnesses or present other evidence constitutes ineffective assistance of counsel only when it deprives defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Defendant first asserts that his counsel was ineffective for failing to call a blood spatter expert to support the defense theory that defendant could not have slit the victim's throat without getting blood on his clothes or cast. Defense counsel asserted this defense consistently throughout the trial, presenting lay witness testimony and pictures as to the lack of blood on defendant's cast and clothing. Because the defense was actually raised, defendant's contention that his counsel was ineffective in failing to call a blood spatter expert lacks merit. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Further, given testimony that the victim's throat could have been cut from behind, there is no basis for assuming that a blood spatter expert would have been necessarily helpful to defendant's case. Not calling such an expert is presumed to be a strategic decision based on the facts and evidence and will not be second-guessed by this Court. *Hoyt, supra*.

Defendant next asserts that his counsel was ineffective in failing to object to the improper statements made by the prosecution during its cross-examination of Perry and its rebuttal to defendant's closing arguments. But as noted above, the prosecution's comments did not constitute misconduct. Because a defense counsel need not "make a meritless motion or a futile objection," counsel's failure to object on these ground did not constitute ineffective assistance. *Goodin*, *supra*, 433.

Finally, defendant asserts that his counsel was ineffective in failing to request a mere presence instruction. Considering the jury instructions as given, there is no basis for concluding that such an instruction would have affected the outcome of defendant's trial. The trial judge specifically instructed the jury as to the elements of both first-degree and second-degree murder, including aiding and abetting. While defendant may have been entitled to an instruction regarding mere presence, the instructions given to the jury clearly required that, to find defendant guilty, the jury must find that he acted affirmatively in furtherance of the commission of the murder, by either direct participation or by assisting in its commission. Thus, the jury must have concluded that he was not merely present at the time of the assault, but that he participated in or aided and abetted the assault in some way. Because defendant has not shown a reasonable probability that requesting an instruction on mere presence would have altered the outcome of his trial, he cannot establish that his counsel was ineffective in failing to request such an instruction.

V. Sentencing

Defendant asserts that the trial court clearly erred in sentencing him outside the guidelines range without articulating substantial and compelling reasons for a departure. The prosecution concedes the point and we agree.

Generally, a trial court must choose a minimum sentence within the range provided by the sentencing guidelines. *People v Lowery*, 258 Mich App 167, 169-170; 673 NW2d 107 (2003). But under MCL 769.34(3), a trial court may only depart from the statutory guidelines "if it has substantial and compelling reasons to do so, and states those reasons on the record." *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003).

In the instant case, the guidelines called for a minimum sentence between 12.5 and 46.8 years (270 to 562 months). The prosecution recommended the highest possible minimum under the guidelines and the trial court sentenced defendant to a term of 48 to 90 years. In doing so, it failed to articulate any reason for its departure. Consequently, we must remand to the trial court so that it may either resentence defendant or articulate substantial and compelling reasons for departing from the guidelines recommendation. *People v Babcock*, 469 Mich 247, 258-259; 666 NW2d 231 (2003).

Defendant further contends that during sentencing, the trial court noted that defendant failed to demonstrated any remorse for his crime and implied that this refusal mandated that he receive a severe sentence. Because of this, defendant contends that his resentencing should occur before a different judge. But a sentencing court may consider evidence of a lack of remorse in determining an individual's potential for rehabilitation. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003). Its actions are improper only where "it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by action such as asking the defendant to admit his guilt or offering him a lesser sentence if he did." *Id.* We find no evidence of such improprieties or of the personal bias or prejudice necessary for the removal of a trial judge. See *Cain v Dep't of Corrections*, 451 Mich 470, 494-497; 548 NW2d 2 (1996). We therefore deny defendant's request.

We affirm defendant's conviction, but remand for resentencing. We do not retain jurisdiction.

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