

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICOLE ANN DUPURE,

Defendant-Appellant.

UNPUBLISHED

November 15, 2007

No. 270833

Macomb Circuit Court

LC No. 2005-004353-FC

Before: Wilder, P.J., and Cavanagh and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction following a jury trial of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), and conspiracy to commit first-degree premeditated murder, MCL 750.316(1)(a) and MCL 750.157a. The trial court sentenced defendant to concurrent sentences of life imprisonment without parole. We affirm defendant's convictions for first-degree murder and conspiracy to commit first-degree premeditated murder, and remand for correction of defendant's judgment of sentence.

This case stems from the murder of 89-year-old Shirley Perry. The prosecution theorized that defendant conspired with her boyfriend, William Thomas Blevins, to rob and murder Perry in her home, and aided and abetted Blevins in her killing.

Defendant first argues on appeal that the prosecutor improperly shifted the burden of proof onto her, through a line of questioning pursued on redirect examination of a police officer. Specifically, defendant argues that the prosecutor engaged in misconduct when he asked the officer whether the facts Blevins admitted to during a police interview amounted to an admission of first-degree premeditated and felony murder. The officer responded that they did. It appears defendant is arguing that the prosecutor committed misconduct by having the officer opine that Blevins admitted his guilt, which then placed on defendant the burden of proving Blevins was not guilty, which given the association of the two, would amount to defendant having to prove she was not guilty. We see no merit in this unpreserved argument.

Generally, a prosecutor may not undermine the presumption of innocence by suggesting that a defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, a prosecutor may argue that particular evidence is undisputed. *Id.* Additionally, although a

defendant does not have the burden of producing any evidence, once the defendant advances a theory or defense, the prosecutor does not shift the burden of proof by commenting on that theory or any inferences drawn from the defense's case. *Id.*

Here, during the cross-examination of the officer in issue, defense counsel suggested that the officer's interrogation of Blevins had given Blevins an opportunity to minimize his own involvement in the crime, and unfairly implicate defendant. Taken in context, the prosecutor's line of questioning on redirect examination was clearly in response to defense counsel's cross-examination. As such, the prosecutor's questions and comments do not amount to misconduct requiring reversal.

Further, Blevins testified to premeditating the murder of Perry, conspiring with defendant to kill Perry, killing Perry, and robbing her during the killing. Therefore, the officer's testimony as to these facts was cumulative. What is more, defendant did not dispute Blevins's guilt at trial. Rather, defendant's theory of the case was that Blevins acted alone. This undermines the premise of defendant's argument on appeal. In other words, defendant's own theory of the case was premised on the notion that Blevins was guilty. If the prosecutor's questioning left the jury with this impression, this would only buttress defendant's theory.

Finally, prior to the start of its deliberations, the trial court instructed the jury that defendant was not required to prove her innocence and that she "is presumed to be innocent." Juries are presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, no error requiring reversal has been established.

Finally, we agree that defendant is entitled to correction of her judgment of sentence to properly reflect her convictions of one count of first-degree murder, based on alternative theories of premeditation and felony murder, and one count of conspiracy to commit first-degree premeditated murder. *People v Bigelow*, 229 Mich App 218, 220-221; 518 NW2d 744 (1998).

Defendant's conviction of first-degree murder and conspiracy are affirmed. Defendant's sentences are also affirmed. We remand for the ministerial task of modifying defendant's judgment of sentence to specify conviction and sentence for one count of first-degree murder, supported by two theories, and one count of conspiracy to commit first-degree premeditated murder. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood