

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANKIE CARL CRAIG,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2009

No. 280679

Washtenaw Circuit Court

LC No. 06-000737-FC

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions for first-degree (premeditated) murder, MCL 750.316(1)(a); conspiracy to commit first-degree murder, MCL 750.157a; armed robbery, MCL 750.529; and conspiracy to commit armed robbery, MCL 750.157a. Defendant was sentenced to life imprisonment for each conviction. We affirm.

Defendant first alleges that the prosecution's misconduct deprived him of a fair trial. Because defendant did not object to any of the alleged misconduct at trial, review of his claim is precluded unless an objection and instruction would not have cured the error, or failure to review would result in manifest injustice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant must show plain error that affected his substantial rights. Reversal is warranted only if such error exists and defendant was unjustly convicted or the fairness, integrity, or public reputation of the judicial proceedings would be seriously impacted. *Id.* The prosecution's remarks are examined in context and viewed as a whole, considering the defendant's arguments and the evidence admitted at trial. *Id.* at 330. We examine alleged prosecutorial misconduct to determine whether the defendant was deprived of a fair trial, *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), i.e., whether misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974).

Defendant first claims that the prosecution's argument shifted the burden of proof in violation of the presumption of innocence. A person accused of committing a crime is presumed innocent until proven guilty; the prosecution may not argue that an accused must prove his innocence. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987).

The prosecution argued in his rebuttal that:

I would suggest that when you heard that—about the presumption of innocence and as he sits here he’s an innocent man, etcetera. That’s exactly right. Throughout this whole week he has been an innocent man. He has sat there with the presumption of innocence.

And in a few minutes I would suggest to you that that’s going to change. At that point you’re going to start to think of him as a guilty man and that’s the verdict that you’re going to come back with.

You heard something about beyond a reasonable doubt and they always want to talk about how this is some insurmountable level that we have to get over.

Examining the prosecution’s remarks in context, we conclude that there was no error. Defense counsel argued that the prosecution failed to mention the burden of proof or the presumption of innocence in his closing argument and that the prosecution failed to show that its witnesses were believable beyond a reasonable doubt. The prosecution’s rebuttal argument was responsive to these assertions. Moreover, the prosecution’s remarks did not require defendant to prove his innocence or assert that the presumption of innocence disappears after the close of the proofs; rather, they were an attempt to persuade or suggest to the jury that the prosecution believed it would conclude that defendant was guilty “in a few minutes” when deliberations took place. Moreover, the trial court instructed the jury on the presumption of innocence and that it continued throughout the trial, unless and until the jury concluded that defendant was guilty beyond a reasonable doubt. Thus, “not only could the error have been cured by a timely instruction, the trial court did so by giving a proper instruction on the presumption of innocence by emphasizing that the presumption of innocence continues throughout the trial and into the deliberations.” *People v Solak*, 146 Mich App 659, 677; 382 NW2d 495 (1985).

Defendant next asserts that the prosecution’s arguments included impermissible character attacks and bad acts references. The prosecution’s remarks may not require reversal where they are responsive to matters raised by the defendant, even though, standing alone, they may be improper. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Generally, prosecutors have great latitude in their arguments and may 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). But, the prosecutor may not express a personal opinion regarding the defendant’s guilt or denigrate the defendant. *Id.* at 282-283. The prosecution also may not argue that other acts evidence admitted for a limited purpose under MRE 404(b) should be considered for other purposes as substantive evidence of a defendant’s guilt. *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).<sup>1</sup>

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<sup>1</sup> MRE 404(b)(1) provides that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Such evidence may be admitted to prove “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.” *Id.*

We conclude, with one exception, that the prosecution did not impermissibly argue that defendant was guilty of the charged offenses because he had a bad character. Contrary to defendant's contention, the prosecution did not argue that defendant was a "deadbeat dad" or that he was violent towards Amy Thompson, who entered into a plea agreement in connection with this incident and testified against defendant at trial. We also note that defendant does not challenge the admissibility of the evidence on which the prosecution's arguments were based.

The prosecution's references to the fact that defendant was unemployed, violently damaged the trailer in which he lived, and smoked crack cocaine, while constantly attempting, along with Thompson, to obtain money to purchase more crack were supported by the evidence admitted at trial, including defendant's own testimony during his direct examination, and were not improperly used by the prosecution to argue that defendant had a bad character.<sup>2</sup> The prosecution's intention in discussing the evidence is revealed by his statement that "I'm not suggesting to you that because Frankie Craig punched holes in his walls he murdered [the victim]." The prosecution's challenged remarks specifically responded to defendant's defense that Thompson lied at trial when she implicated defendant; Thompson was mean and angry, and she was the one in control and essentially manipulated defendant; there was no plan to rob the victim to obtain more money for crack; defendant did not participate in murdering the victim, and that, although defendant smoked crack, he was not that involved in obtaining it. Defense counsel even argued that defendant was "not the type of person" who would commit this crime as evidenced by the fact that he had a shotgun and did not shoot the police officer who approached him in Ohio. These arguments commented on the evidence and were relevant to defendant's motive and premeditation. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008) (Motive is always relevant in a murder case); *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992) (Premeditation may be established with evidence of the parties' relationship, defendant's actions before and after the killing, and the circumstances of the killing). In sum, the prosecution is permitted to comment on the evidence and reasonable inferences to be drawn from it and is not required to make such arguments in the blandest terms possible. *Bahoda, supra* at 282; *Unger, supra* at 239. The prosecution's challenged arguments were proper.<sup>3</sup>

An examination of the prosecution's closing argument reveals that there is only one brief reference to the digital cameras: "[b]ecause he hasn't been caught stealing digital cameras or any other illegal activities that that's somehow okay." Defendant has failed to show that the

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<sup>2</sup> Cumulative evidence is not prejudicial even when it is erroneously admitted. *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

<sup>3</sup> We note that defendant maintains the instant case is similar to the circumstances in *Washington v Hofbauer*, 228 F3d 689, 694-695, 696 (CA 6, 2000), where the defendant was charged with first-degree criminal sexual conduct against the nine-year-old daughter of his girlfriend, and the prosecution's arguments attacked defendant's character on collateral matters in arguing that he drank heavily, beat his girlfriend, was unemployed, and did not make payments on his girlfriend's home, and that therefore the victim's allegations "fit" defendant and his lifestyle. We disagree on the record before us. The prosecution did not make the challenged arguments to show that defendant had the propensity to commit the charged crime.

prosecution's brief comment on that piece of evidence, even if erroneously admitted (which defendant does not challenge), deprived defendant of a fair trial or constituted outcome-determinative error, given the other substantial evidence against defendant, the fact that the prosecution was responding to the defense theory, and the fact that Collins' testimony regarding defendant's statements as he was fleeing the crime scene did not constitute the admission of a bad act in order to show propensity, but merely related what occurred as defendant and Thompson made their escape. *Watson, supra*, 245 Mich App 586; *Duncan, supra*, 402 Mich 16; *Callon, supra*, 256 Mich App 329.

Defendant also objects to the prosecutor's remark during his rebuttal argument that defendant admitted that he was in the victim's trailer; there was a robbery, a knife was involved, and the victim was cut, "[b]ut at that point does he do what any civilized, decent person would do and stop and get out of there and stop this thing from going on any more? Nope. *This sick mind* said he decided to follow through with the robbery and he roughs him up and ties him with a gag around his mouth and we know what happens after that" (emphasis added). The prosecution may not denigrate a defendant with prejudicial or intemperate comments, *Bahoda, supra* at 283, but we conclude that the challenged comment did not rise to that level. The prosecution's reference in this case that defendant had a "sick mind" was only one brief remark, and defendant was not convicted on only innuendo and speculation. There was substantial evidence of defendant's participation in the robbery and murder. Thus, defendant has failed to demonstrate that this remark deprived defendant of a fair trial, or that an objection and instruction could not have cured any error. *Callon, supra* at 329. See also *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998) ("[A] well-tried vigorously argued case should not be overturned on the basis of a few isolated improper remarks that could have been corrected had an objection been lodged.")

Defendant's final claim of prosecutorial error alleges that the prosecution argued facts not in evidence. Although the prosecution may not argue facts that were not admitted into evidence, it may argue reasonable inferences drawn from the evidence. *Bahoda, supra* at 282; *Watson supra* at 588. We conclude that the evidence introduced at trial supported the prosecution's arguments. The doctor who examined the victim testified that the blow to the victim's head by a blunt object, possibly a rock, was a fatal injury that fractured his skull and injured his brain, but that the victim also received a fatal stab wound to his neck that led to death more quickly. Thompson testified that defendant hit the victim on the head with a rock when the victim was sitting in a reclining chair in his living room. There were blood spatter stains on the top of the chair, and the rock was found along with the other items in the black garbage bags discarded in the motel dumpster where defendant and Thompson stayed after the incident. The rock had traces of blood on it. Thompson testified that the victim was bleeding from his head and from a cut on his hand, and he was "wobbly" when he tried to stand and walk. The prosecution's argument that the victim was "wobbly" because of the blow to his head that fractured his skull was therefore a reasonable inference based on the evidence. Moreover, the trial court instructed the jury that the lawyers' statements and arguments were not evidence and that the jury "should only accept things the lawyers say that are supported by the evidence or by your own common sense or general knowledge." This curative instruction alleviated any prejudice, so reversal is not required. *Bahoda, supra* at 281; *Watson supra* at 592.

With respect to the above instances of alleged misconduct, defendant next argues that his trial counsel was ineffective because he failed to object to the prosecution's statements. Review of defendant's unpreserved claim is limited to mistakes that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Defendant must show that defense counsel's performance fell below an objective standard of reasonableness and prejudiced him so that, but for the error, there is a reasonable probability that the result would have been different. Defense counsel's decisions are presumed to constitute sound trial strategy. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999).

Defendant's main contention in arguing that his counsel was ineffective focuses on the prosecution's remark that the victim was "wobbly" because of his head wound. However, as discussed, the evidence admitted at trial and reasonable inferences drawn from the evidence properly supported this remark. Thus, defense counsel was not ineffective for failing to object to this argument because such an objection would have been futile. Defense counsel is not ineffective for failing to raise a meritless objection. *Unger, supra* at 255.

With respect to the prosecution's other statements, defendant offers no analysis other than claiming that defense counsel committed substantial errors. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *Watson, supra* at 587 (citation omitted). Defendant has therefore abandoned these claims. *Id.* Nevertheless, such claims lack merit because most of the prosecution's comments were proper, and defense counsel is not ineffective for failing to raise a meritless objection. *Unger, supra* at 255. Further, defendant has failed to show that there is a reasonable probability that the result would have been different if defense counsel had objected, given the evidence against him, particularly Thompson's testimony, which was corroborated by other evidence. *Henry, supra* at 145-146.

We affirm.

/s/ Donald S. Owens  
/s/ David H. Sawyer  
/s/ Jane E. Markey