Court of Appeals, State of Michigan

ORDER

People of MI v Eddie Andrew Mesik

Docket No. 282088

LC No. 06-008735-FH

William C. Whitbeck
Presiding Judge

Alton T. Davis

Elizabeth L. Gleicher
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued July 23, 2009, is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

SEP 10 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 23, 2009
v	No. 282088 Iron Circuit Court
EDDIE ANDREW MESIK, Defendant-Appellant.	LC No. 06-008735-FH

Before: Whitbeck, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), and armed robbery, MCL 750.529. The armed robbery conviction was vacated, and defendant was sentenced to life in prison without parole. Defendant appeals as of right, and we affirm.

On November 13, 2006, the body of Darrell McDonald was discovered in his apartment. McDonald's wrists had been bound with brown extension cords and tied to his ankles with black coaxial cable, and a sock had been stuffed in his mouth. McDonald had suffered a total of 32 stab wounds to his chest and abdomen, numerous cuts on his hands, and three incised wounds to the neck. McDonald had last been seen at the apartment of one of his friends where there were several other people, including defendant and his friend Bradley Starnes.

Defendant first argues that the trial court erred in excluding the contents of a letter from Starnes to witness Kyle Remer. Defense counsel asked Remer on cross-examination about the contents of a letter he received from Starnes while both were in jail. Defendant was specifically interested in a single statement in the letter, in which Starnes told Remer, "Hey, do whatever it takes to get yourself out of trouble." Plaintiff objected, and the trial court ruled that the jury could consider the fact that he received the letter but not the contents. Defendant argues that the trial court's decision to exclude the contents of the letter deprived him of the right to present a defense. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Whether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question that this Court reviews de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

We conclude that defendant was not deprived of his constitutional right to present a defense. He had ample opportunity through other testimony and evidence to challenge Remer's credibility and alleged bias against defendant. Defendant was able to show that Remer and Starnes shared a longstanding friendship, that they corresponded during Starnes's incarceration, and that Remer had a motive to protect Starnes. The single statement upon which defendant focuses in the letter was little more than a cumulative detail. Furthermore, its probative value was minimal in context: the next three sentences in the letter were, "I don't care if you have to go against me. Like I said, do whatever it takes. It's your life on the line." The trial court's exclusion of the contents of the letter did not in any way impair defendant's right to present a defense, and thus, even if we presume that the exclusion was erroneous, it was harmless. See *People v Shepherd*, 472 Mich 343, 347; 697 NW2d 144 (2005).

Defendant next argues that the prosecutor improperly introduced hearsay and double hearsay statements. Because this claim or error was not raised below, we review for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Hearsay is inadmissible unless a recognized exception applies. MRE 802. Where multiple levels of hearsay are involved, all declarations made must either not be hearsay or must fall within a recognized exception. MRE 805. After reviewing the portion of the record of which defendant complains, we find highly improper and misleading questioning by the prosecutor, but no actual hearsay.

The first improper questioning was as follows:

> *Q.* But Mr. Remer simply got it wrong when he said to this jury in this courtroom and at a preliminary exam at another hearing under oath that you said we killed him? He's mistaken about that?
>
> *A.* I would say so, yes.
>
> * * *
>
> *Q.* He also talked about, Mr Remer talked about, his private conversation with Mr. Starnes at the preliminary exam didn't he? Where he had a one-on-one conversation with Mr. Starnes that you were there for, correct?
>
> *A.* I don't recall that.
>
> *Q.* Do you remember the testimony [at the preliminary examination]? If he testified to it or are we making it up? The fact of what he said in court.
>
> *A.* I don't remember that exactly.
>
> *Q.* You don't remember the point where Kyle Remer testified in District Court saying I spoke with Bradley Starnes. He told me that they killed him. You don't remember when he testified to that at the preliminary exam and your attorney was objecting saying you can't use this against Mr. Mesik and there was a slight back and forth and the judge said no we'll only use this against Mr. Starnes. Do you remember that part?

A. I'm not sure.

Q. Mr. Remer is testifying against Mr. Starnes. And he testified against Mr. Starnes. Hasn't he?

A. I'm, yes, I guess so.

Q. He's testified that Mr. Starnes has actually taken credit for this killing saying we killed him. Put himself in jeopardy. This is what Mr. Remer has testified to, correct?

A. I'll say again I don't exactly recall.

Q. It's in the transcript. Will you take my word for it?

A. If it's in-

Q. Do you want to see it?

A. I guess I could see it, yes.

The transcript was never actually provided. In fact, during oral argument before this Court, the prosecutor conceded that Remer did not actually make several of the statements that the prosecutor had attributed to him, including "I spoke with Bradley Starnes. He told me that they killed him." The prosecutor's questioning was therefore misleading and, in our view, improper.[1]

However, there is no hearsay in any of the above questioning. Regarding the first question, Remer had already testified at defendant's trial, where he stated that defendant and Starnes told Remer "that they killed Red."[2] Remer had also already testified at trial that he had said at the preliminary examination that defendant told him that they killed McDonald. The prosecutor's first question was therefore no more than a summary of a prior witness's testimony at trial. Furthermore, the purpose of the question was apparently to challenge defendant's position that Remer was biased in favor of Starnes and against defendant, rather than to prove that, in fact, defendant had killed McDonald. Because the challenged statement was not offered for the truth of its contents, it is not hearsay. MRE 801(c). Statements against penal interest are also not hearsay. MRE 801(d); MRE 804(b).

The remaining challenged questions are also not hearsay because they are not even evidence. Had defendant confirmed, as a witness from the stand, any of the assertions by the prosecutor, those confirmations would have constituted evidence. But defendant only denied any recollection of the matters about which he was asked. Although the prosecutor's questions were,

[1] However the mischaracterization of the testimony occurred, we note that at the time of the rulings complained of, the trial judge would not have known the misrepresentations were inaccurate.

[2] "Red" was McDonald's nickname.

as noted, misleading and improper, the prosecutor's questions are not evidence and therefore cannot be hearsay. The trial court properly instructed the jury that "evidence includes only the sworn testimony of witnesses and the exhibits admitted into evidence" and, among other things, "the lawyers' questions to witnesses are not evidence" and should be considered "only as they give meaning to the witnesses' answers." Because there is no evidence from which we could conclude that the jury would be unable to follow its instructions, the trial court's instructions cured any prejudice. See *People v Callon*, 256 Mich App 312, 330-331; 662 NW2d 501 (2003).

In sum, although the questioning was improper, it did not constitute hearsay, and defendant has not shown plain error affecting substantial rights.

Defendant next argues that he is entitled to reversal due to prosecutorial misconduct. We disagree. We also review this unpreserved claim for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant first argues that the prosecutor's introduction of hearsay and double hearsay statements, discussed above, constituted prosecutorial misconduct. As noted, however, the questioning was not hearsay, and the jury was properly instructed to disregard the attorneys' questions as constituting evidence.

Defendant also argues that the prosecutor engaged in misconduct because he misrepresented Remer's preliminary examination testimony. Specifically, he challenges the prosecutor's representation to defendant on cross-examination that Remer had testified to a private conversation with Starnes in which Starnes admitted that he and defendant killed McDonald. Defendant is correct that the prosecutor did ask him about this alleged testimony, and he is also correct that Remer never did testify to such a conversation at the preliminary examination. However, defendant consistently responded that he did not recall that Remer had so testified. Under these circumstances, defendant cannot establish the requite level of prejudice under the plain error rule.

Defendant also argues that the misrepresentation of Starnes's testimony was reiterated during the prosecutor's closing argument. However, the passage of the closing cited by defendant includes references to what Remer stated defendant admitted to, not Starnes.

Finally, defendant argues that the prosecutor's statements during closing arguments related to the presumption of innocence denied him a fair trial. Regardless of how the prosecutor described the burden of proof, the trial court properly instructed the jury regarding the presumption of innocence and clearly stated that the jury must take the law as given by the court. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

Defendant next argues that he is entitled to a new trial because he was denied effective assistance of counsel. We disagree. Our review of this unpreserved claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant

proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first argues that counsel was ineffective for failing to raise a hearsay objection to the prosecutor's reference to Remer's preliminary examination testimony during cross-examination of defendant. As discussed above, the cited testimony was properly admitted. Defense counsel has no obligation to raise a meritless motion or make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Defendant also argues that counsel was ineffective for failing to object to the prosecutor's mischaracterization of Remer's preliminary examination testimony during closing argument. As noted above, while the questioning did mischaracterize the prior testimony, defendant's denials remained unchallenged by extrinsic evidence. Therefore, this argument fails because defendant has not established that there is a reasonable probability that the result of the proceedings would have been different had he objected. *Rodgers*, *supra* at 714. Finally, defendant argues that he was denied effective assistance of counsel for failure to object to the prosecutor's description of the presumption of innocence. Again, any error was effectively cured by the court's jury charge.

Finally, we reject defendant's argument that the trial court erred in allowing the introduction of photographs of the body at the crime scene. A trial court's decision to admit photographs into evidence is reviewed for an abuse of discretion. *Aldrich*, *supra* at 113. Evidence would be unfairly prejudicial if it presents a danger that the jury would give undue or preemptive weight to marginally probative evidence. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). While gruesome photographs should not admitted solely to garner sympathy from the jury, a photograph that is admissible for some other purpose is not rendered inadmissible because of its gruesome details. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998).

Defendant argues that the photographs were not necessary because the manner of death was not disputed at trial and instead the main dispute involved the number and identity of the murderers. However, the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Therefore, while defendant did not contest McDonald's cause of death, the prosecution was not relieved of its duty to prove all of the elements of first-degree murder, including intent. The photographs were helpful to meet this burden.

Affirmed.

/s/ William C.Whitbeck
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher