

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SONYA RENEE O'NEAL,

Defendant-Appellant.

UNPUBLISHED

August 11, 2009

No. 283676

Wayne Circuit Court

LC No. 07-009823-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT REED,

Defendant-Appellant.

No. 283677

Wayne Circuit Court

LC No. 07-009823-FC

Before: Stephens, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendants Sonya O'Neal and Robert Reed were both convicted, by a separate juries, of two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of first-degree premeditated murder, MCL 750.316(1)(a), two counts of armed robbery, MCL 750.529, assault with intent to commit murder, MCL 750.83, two counts of assault with intent to rob while armed, MCL 750.89, first-degree home invasion, MCL 750.110a(2), unlawful imprisonment, MCL 750.349b(1), felon in possession of a firearm, MCL 750.224f(1), and possession of a firearm during the commission of a felony, MCL 750.227b(1). Both defendants were sentenced to a two-year term of imprisonment for the felony-firearm conviction, to be followed by concurrent terms of life imprisonment for each murder conviction. Defendant O'Neal was additionally sentenced to concurrent prison terms of 468 to 1,000 months each for the armed robbery and assault convictions, 20 to 30 years for the home invasion conviction, 14 to 22-1/2 years for the unlawful imprisonment conviction, and 4 to 7-1/2 years for the felon in possession conviction. Defendant Reed was additionally sentenced to concurrent prison terms of 562 to 1,000 months each for the armed robbery and assault convictions, 26 to 40 years for the home invasion conviction, 20 to 30 years for the unlawful imprisonment conviction, and 80 to 120 months for

the felon in possession conviction. Defendant O'Neal appeals as of right in Docket No. 283676, and defendant Reed appeals as of right in Docket No. 283677. We affirm both defendants' convictions and sentences, but remand for correction of each defendant's judgment of sentence to reflect a single conviction and sentence of first-degree murder for each of the two victims, supported by two alternate theories.

Defendants' convictions arise from the robbery of Ronell Thompson, an admitted drug dealer, during which two children were shot in the head and killed.

I. Admission of Evidence

Defendant O'Neal first argues that the trial court erred in admitting evidence of certain items found in her home during the execution of a search warrant. Defendant O'Neal argues that much of the challenged evidence was not connected to the charged offense and, therefore, was inadmissible evidence of other bad acts under MRE 404(b)(1). We disagree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). MRE 404(1)(b) precludes the admission of evidence of other bad acts to prove the character of a person in order to show action in conformity therewith, but does not preclude such evidence for other permissible purposes. In deciding whether to admit evidence of other bad acts, a trial court must decide whether the evidence is being offered for a proper purpose, and is relevant to an issue of fact or consequence at trial. The court must also determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice in light of the availability of other means of proof; and fourth, whether a cautionary instruction is appropriate. *People v Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000); *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994).

The police found five guns at defendant O'Neal's house during the execution of a search warrant: (1) a .40-caliber assault rifle; (2) a tech nine semi-automatic weapon; (3) a .45-caliber handgun; (4) a nine millimeter handgun; and (5) a 12-gauge shotgun. All of the guns (and ammunition) were introduced into evidence, except for the shotgun. At trial, witnesses identified the tech nine and the .40-caliber assault rifle as weapons that were used during the offense, and defendant O'Neal's attorney conceded that those two weapons were relevant and admissible. Although it was undisputed that the nine millimeter and .45-caliber handguns that fired the rounds that were recovered from the scene and from the victims' bodies were found at a codefendant's home, not at defendant O'Neal's home, there was evidence that the assailants possessed at least four handguns when they arrived at the victim's house. Considering that two of the other guns found at defendant O'Neal's house were linked to the offense and that there was evidence that additional unidentified handguns were used during the offense, evidence that additional handguns were found at defendant O'Neal's house was directly relevant to this crime, independent of MRE 404(b)(1).

The only remaining gun is the 12-gauge shotgun that was found in defendant O'Neal's basement. Defendant O'Neal also challenges the admission of evidence that \$15,900 in cash was found in her bedroom, along with 96 Ecstasy pills, and two Molotov cocktails that were found in her yard. We agree that because none of these items could be connected to the charged offense, they are evidence of other bad acts. As a whole, however, the guns (including the shotgun)

tended to impeach defendant O’Neal’s police statement in which she claimed that she did not know much about guns (although she believed that codefendant Lyons was holding a .45-caliber gun during the robbery). The guns (including the shotgun) also tended to corroborate the codefendant’s and the victims’ testimony concerning the facts of the offense, and tended to impeach defendant O’Neal’s claim that she was unarmed during the offense, had little experience with weapons and had no leadership role in the crime.

In context, it is not outside the scope of principled outcomes for a trial court to determine that the evidence found in defendant O’Neal’s home, including the guns and the security system, and the witnesses’ description of the offense, the testimony concerning the 12-gauge shotgun, the Molotov cocktails, the cash, and the Ecstasy pills¹ tended to show that she was a leader rather than a low-level follower. Therefore, this evidence was relevant to the credibility of defendant O’Neal’s police statement concerning her allegedly passive role in the offense. Her role in the execution of two children was of great importance to the issues before the triers of fact. While the probative value of these items (the shotgun, the cash, the pills, and the Molotov cocktails) regarding that leadership role was moderate, their prejudicial effect did not substantially outweigh that probative value. In context, the evidence was at best only moderately prejudicial. For these reasons, we conclude that the trial court did not abuse its discretion in admitting the challenged evidence.

II. Failure to Define Great Bodily Harm

Next, defendant O’Neal argues the trial court erred by failing to define “great bodily harm” as part of the definition of malice for both first-degree felony murder and second-degree murder. Because defendant O’Neal did not request an instruction on the definition of great bodily harm, this issue is not preserved. Accordingly, we review the issue for plain error affecting defendant O’Neal’s substantial rights. *People v Carines*, 460 Mich 750, 766-767, 772-773; 597 NW2d 130 (1999), *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001).

The trial court instructed the jury that the malice necessary to prove both first-degree felony murder and the lesser offense of second-degree murder requires an intent to kill, an intent to do great bodily harm, or the knowing creation a very high risk of death or great bodily harm, knowing that death or great bodily harm would be the likely result. Although the trial court did not define great bodily harm, reversal is not required where, as here, a court fails to define a term that is generally familiar to lay persons and is susceptible of ordinary comprehension. *People v Martin*, 271 Mich App 280, 352; 721 NW2d 815 (2006). Thus, the failure to define great bodily harm was not plain error. Furthermore, the jury also convicted defendant O’Neal of two counts of first-degree premeditated murder. Thus, it is apparent from the jury’s verdict that it found that

¹ As noted by defendant O’Neal, an officer testified that he was told by a trained narcotics officer that the pills were Ecstasy. Defendant O’Neal correctly argues that the officer’s testimony was hearsay. The trial court overruled defendant O’Neal’s objection because the jury had already heard it. Regardless, the officer’s comment was brief and, in light of the weight and strength of the untainted evidence, there is no reasonable probability that it had any effect on the jury’s verdict. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

defendant O'Neal acted with an actual intent to kill. Therefore, the failure to define great bodily harm did not affect defendant O'Neal's substantial rights. Thus, appellate relief is not warranted.

III. Sufficiency of the Evidence for Assault with Intent to Rob While Armed

Defendant O'Neal next argues that there was insufficient evidence to support her conviction of assault with intent to rob while armed because, although two teenagers were admittedly assaulted, the purpose was not to rob *them*, but to rob another adult male. We disagree.

Contrary to what defendant O'Neal argues, a conviction for assault with intent to rob while armed does not require that the person being robbed and the person being assaulted be same. See *People v Harris*, 110 Mich App 636, 643-644; 313 NW2d 354 (1981). It is enough to show that the assault was committed as a means to further the intended robbery, as happened in this case. *Id.* at 643. Defendant O'Neal's reliance on *People v Fossey*, 41 Mich App 174, 184-185; 199 NW2d 849 (1972), is misplaced because that case involved a double jeopardy issue, which is not at issue here. We therefore reject this claim of error.

IV. Cumulative Error

Defendant O'Neal also argues that the cumulative effect of multiple errors at trial deprived her of a fair trial, even if an individual error, standing alone, would not require reversal. However, because we have not found that any errors were committed at trial, defendant O'Neal is not entitled to reversal on this basis. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), overruled on alternative grounds by *People v Miller*, 482 Mich 539, 759 NW2d 850 (2008).

V. Prosecutor's Conduct

In his appeal, defendant Reed argues that misconduct by the prosecutor deprived him of a fair trial. We disagree.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and challenged remarks must be reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995).

Where a defendant fails to object to alleged misconduct, "appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice." *Noble, supra* at 660; see also *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).² As with other unpreserved issues, a defendant must show plain error affecting his substantial rights. *Id.* at 720; see also *Carines, supra* at 763-764.

² Abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A. Vouching for Credibility

Defendant Reed appears to argue that the prosecutor improperly vouched for the credibility of codefendant Moore. Although defendant Reed raises this issue in the title of his argument and in the preservation of the issue section of his brief, he fails to address it in the body of his brief. Therefore, we consider the issue abandoned. *People v McPherson*, 263 Mich App 124, 137-138; 687 NW2d 370 (2004). A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

B. Defendant Reed's Conviction for Criminal Sexual Conduct

Defendant Reed argues that the prosecutor improperly elicited from a police officer that defendant Reed had a prior conviction for criminal sexual conduct. The officer testified that he asked defendant Reed why he appeared so nervous and defendant Reed explained that it was because he was on probation for criminal sexual conduct.

Although we agree that defendant Reed's nervous behavior when the police arrived was relevant, the fact that he was on probation for criminal sexual conduct (as contrasted with any other offense) was not particularly relevant. However, a finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *Noble, supra* at 660. Even if it was unnecessary and improper to reveal the nature of the prior conviction, we cannot conclude that it deprived defendant Reed of a fair trial. The prosecutor never attempted to articulate a theory that defendant Reed's prior conviction was relevant to any fact of consequence at trial. Moreover, the evidence of defendant Reed's participation in the crime was overwhelming. There is no basis for concluding that any error affected the outcome of trial or undermined the reliability of the jury's verdict. See *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996).

C. Knowing Presentation of Perjured Testimony

Next, defendant Reed argues that the prosecutor committed misconduct by knowingly allowing two witnesses to present perjured testimony. We again disagree.

Defendant correctly argues that a prosecutor may not knowingly use false testimony, and must report and correct perjury committed by a government witness when it appears. *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 276-278; 591 NW2d 267 (1998). "If a conviction is obtained through the knowing use of perjured testimony, it must be set aside if there is a reasonable likelihood that the false testimony could have affected the judgment of the jury." *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009).

In the present case, two teenage victims denied telling the police that they were aware of the adult male victim's drug activities. However, the mere fact that certain testimony may be contradicted does not compel a prosecutor to disbelieve the witnesses and correct their testimony. *Lester, supra* at 278-279; see also *Herndon, supra* at 417-418. Moreover, the witnesses' awareness of the victim's drug activities was irrelevant to the charges pending against defendant Reed. Further, given the overwhelming evidence of defendant Reed's participation in

the offense, there is no reasonable possibility that the challenged testimony had any effect on the jury's verdict.

D. Shifting the Burden of Proof

Defendant Reed lastly argues that the prosecutor improperly shifted the burden of proof during closing argument. We disagree.

A prosecutor cannot undermine the presumption of innocence by suggesting that the defendant has an obligation to prove anything, because such an argument tends to shift the burden of proof. See *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989); see also *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). However, a prosecutor may properly argue that particular evidence is undisputed. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). "Further, although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument with regard to the inferences created does not shift the burden of proof." *Id.*; see also *Fields*, *supra* at 105, 108-109, 115.

In the present case, the comment challenged by defendant Reed was made in response to defense counsel's argument that defendant Reed should be acquitted because there was no physical evidence placing him at the scene. The prosecutor noted that there was evidence that defendant Reed threatened to harm codefendant Moore if Moore testified against him, and asked why defendant Reed would make such a threat. Viewed in context, the prosecutor was not suggesting that defendant Reed had an obligation to prove anything, but rather was commenting on the inference to be drawn from that evidence, i.e., it supported an inference that defendant Reed was involved, and on the weight of the evidence in light of its undisputed character. Accordingly, there was no misconduct.

VI. Judgments of Sentence

Defendants O'Neal and Reed both argue that they were improperly convicted of four counts of first-degree murder arising from the deaths of only two victims, thereby violating their double jeopardy rights. Defendant O'Neal further argues that her dual convictions for both first-degree felony murder and armed robbery constitute a double jeopardy violation.

Whether double jeopardy applies is a question of law that is reviewed de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). As defendants O'Neal and Reed both argue, a defendant may not be convicted and sentenced for both first-degree felony murder and first-degree premeditated murder for the death of a single victim. *People v Williams*, 265 Mich App 68, 72; 692 NW2d 722 (2005), *aff'd* 475 Mich 101 (2006). Therefore, as plaintiff concedes, each defendant's judgment of sentence should be modified to reflect a total of two convictions and sentences for first-degree murder (i.e., one conviction and sentence for each victim), with each conviction supported by two alternate theories. *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998).

Contrary to what defendant O'Neal additionally argues, however, it is not a violation of double jeopardy to convict a defendant of both felony murder and the predicate felony. *People v Ream*, 481 Mich 223, 225-226; 750 NW2d 536 (2008). Furthermore, the victims of the two

murders were different than the armed robbery victim. Therefore, defendant O'Neal's convictions for felony murder and armed robbery do not violate double jeopardy protections.

Affirmed and remanded for correction of each defendant's judgment of sentence consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder