

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE DARNELL GAMBLE,

Defendant-Appellant.

UNPUBLISHED

October 22, 2009

No. 284824

Ingham Circuit Court

LC No. 07-001144-FC

Before: Jansen, P.J., and Fort Hood and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317,¹ carrying a concealed weapon, MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The circuit court sentenced defendant as a second habitual offender, MCL 769.10, to prison terms of 480 to 840 months for second-degree murder, 30 to 90 months for carrying a concealed weapon, and 30 to 90 months for felon-in-possession. Defendant was also sentenced to a consecutive two-year term for felony-firearm. Defendant now appeals as of right, and we affirm.

A. Insufficiency of the Evidence

Defendant argues that there was insufficient evidence to support his second-degree murder conviction. Specifically, he contends that the prosecution failed to prove that he was the person who murdered the decedent. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that all essential elements of the prosecution's case were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). A reviewing court must draw all reasonable inferences and resolve all credibility issues in favor of the jury verdict. *Id.* at 400.

¹ Defendant was charged with open murder, see MCL 750.318. The jury was instructed on the elements of both first-degree and second-degree murder, and acquitted defendant of first-degree murder.

Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence from which a rational trier of fact could have concluded that defendant was the person responsible for the decedent's death. The testimony established that approximately one week prior to the decedent's murder, defendant and the decedent were allegedly involved in an incident at Gregory's, a bar in Lansing, during which the decedent allegedly shot at and damaged defendant's car. Defendant does not deny that this testimony established a possible motive. Other testimony revealed that on the night of the shooting at Cheetah's, a nightclub, defendant was angry at the decedent and advised a friend of the decedent to tell the decedent that defendant wanted money to fix his truck. According to a witness, defendant told him that if the decedent tried anything funny, defendant was ready for him. The witness testified that defendant then showed him the butt of a gun. The witness testified that he believed that defendant might use the gun on the decedent. Other witnesses testified that moments before the decedent was shot, defendant and the decedent had a conversation near the front of the club. One witness overheard defendant tell the decedent to "Wait until we get outside" in an angry voice. Another witness testified that, days after the incident at Cheetah's, he had overheard defendant stating that he had shot someone at Cheetah's. It was determined that the decedent was shot with either a .38 special or .357 magnum. There was testimony at trial that defendant had a .357 magnum in his possession prior to the shooting at Cheetah's. We conclude that the evidence, when viewed in a light most favorable to the prosecution, was sufficient to support defendant's conviction of second-degree murder. Although most, if not all, of the evidence presented against defendant at trial was circumstantial, it is axiomatic that "[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Id.* (citation omitted).

B. Directed Verdict

Defendant next argues that the circuit court erred by denying his motion for a directed verdict on the charge of first-degree murder. In particular, he asserts that because there was insufficient evidence that he killed the decedent with premeditation, the jury should not have been instructed regarding the elements of first-degree murder. We find no error.

Defendant preserved this issue when he moved for a directed verdict below. In reviewing the circuit court's denial of a motion for directed verdict, we view the evidence in a light most favorable to the prosecution to determine if there was sufficient evidence from which a rational trier of fact could have found the defendant's guilt beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

To properly convict a defendant of first-degree premeditated murder, there must be sufficient evidence presented from which a rational trier of fact could conclude that the defendant intentionally killed the victim with premeditation and deliberation. MCL 750.316(1)(a).

To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. . . . [P]remeditation and deliberation characterize a thought process undisturbed by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response

to a “second look.” [*People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971).]

A jury may infer premeditation from the defendant’s actions before and after the murder, as well as from the circumstances of the killing. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). “[U]se of a deadly weapon . . . establishes premeditation where circumstances show a motive or plan that would enable the trier of fact to infer that the killing was not a spur-of-the-moment decision.” *People v Plummer*, 229 Mich App 293, 305 n 1; 581 NW2d 753 (1998).

The evidence, when viewed in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to reasonably conclude that defendant killed the decedent with premeditation and deliberation. Defendant does not dispute that the prosecution presented evidence that he had a motive to kill, or that the decedent was killed with a gun. Instead, he contends that there was no evidence of premeditation. But defendant’s actions before and after the killing amply demonstrate that the shooting was not a spur of the moment decision. Moreover, there is no evidence of a fight or surprise that affected defendant’s ability to premeditate. To the contrary, the evidence of defendant’s calm manner, both before and after the shooting, tends to show that defendant’s thought process was undisturbed by hot blood. We cannot conclude that the circuit court erred when it denied defendant’s motion for a directed verdict on the charge of first-degree murder.

Even more importantly, we cannot omit mention that the jury actually acquitted defendant on the charge of first-degree murder. Thus, any error that occurred in this regard was harmless, and did not affect the outcome of the proceedings. See *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998).

In the alternative, defendant argues that reversal is warranted because the jury requested testimony and evidence from the circuit court and at one point indicated that it was at an impasse. Defendant correctly argues that, when there is evidence that a jury’s verdict was undoubtedly the product of compromise, “reversal may be warranted in certain circumstances.” *Id.* at 487-488. However, the fact that a jury asks questions during deliberations is not necessarily indicative of jury compromise. See *People v Clark*, 172 Mich App 1, 5; 432 NW2d 173 (1988). A review of the notes the jury sent to the court establishes that the jury was seeking greater clarification of the evidence, which is not indicative of a compromise, but rather shows that the jury wished to faithfully undertake its obligation. Moreover, the court twice instructed the jury not to compromise the views of individual jurors to reach a verdict. A jury is presumed to follow its instructions. *Graves*, 458 Mich at 486. Lastly, we note that after the verdict was read, the jurors were polled and each juror stated that he or she was in agreement with the second-degree murder verdict. We perceive no error requiring reversal in this regard.

C. Admission of the Photograph

Defendant argues that the circuit court abused its discretion by admitting a photograph of the decedent’s heart at trial. Specifically, defendant argues that because it was undisputed that the decedent died from a single gunshot that penetrated his heart, and because a doctor testified about the contents of the photograph, the photograph was neither necessary nor instructive

regarding a material fact of this case. Defendant also argues that the photograph was inadmissible because it was cumulative, gruesome, and highly prejudicial.

The admission of evidence is generally reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). However, “[w]hen the admission of evidence involves a preliminary question of law, such as whether . . . a rule of evidence precludes the admissibility of evidence, the issue is reviewed de novo.” *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Our Supreme Court has held that photographic evidence may be admitted for the purpose of corroborating a witness’s testimony. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Photographs are not inadmissible merely because other testimony or evidence covered the same issue, or simply because they are gruesome. *Id.* Only where the evidence is so unfairly prejudicial that its prejudicial effect substantially outweighs its probative value will it be deemed inadmissible. MRE 403. Defendant has failed to demonstrate any particular reason why the disputed photograph was so unfairly prejudicial that it should have been excluded under MRE 403 in this case.

Defendant persuasively argues that, because the decedent’s cause of death was undisputed, the photograph of the decedent’s heart was strictly unnecessary. We agree that the circuit court likely should have exercised its discretion to exclude the photograph from evidence under the reasoning of *People v Turner*, 17 Mich App 123; 169 NW2d 330 (1969). But in light of the other, independent evidence of defendant’s guilt in this case, we simply cannot say that it is more probable than not that the result of defendant’s trial would have been different if the photograph had been excluded from evidence. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). We perceive no error requiring reversal.

D. Ineffective Assistance of Counsel

Defendant argues in his supplemental brief, filed *in propria persona*, that his trial counsel committed several errors that deprived him of the ineffective assistance of counsel. We cannot agree.

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. The right to counsel encompasses the right to the effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The determination whether a defendant received the effective assistance of counsel requires a focus on the assistance actually received. *Id.* at 596. Since effective counsel is presumed, a defendant who challenges his counsel’s performance bears a heavy burden. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed, a defendant must show (1) that trial counsel’s actions fell below that of a reasonably competent attorney when objectively viewed, and (2) that but for trial counsel’s unreasonable conduct, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant did not file a motion for a new trial or a *Ginther*² hearing. Thus, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Defendant first contends that counsel's failure to object to improperly admitted alibi testimony and instances of prosecutorial misconduct at trial deprived him of the effective assistance of counsel. The decision regarding whether to object to evidence at trial is a matter of trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). Defense counsel has wide discretion as to matters of trial strategy, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), and we will not second-guess defense counsel's decisions with the benefit of hindsight, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

During the prosecution's case in chief, the prosecutor called defendant's friend, David Ramsey, as a witness. Ramsey testified that defendant could not have killed the decedent because defendant was with him at his house when the decedent was shot. In essence, Ramsey provided defendant with an alibi—even though, as will be seen, that alibi was false. Defendant argues that because it was known prior to trial that Ramsey was lying, his counsel should have objected to Ramsey's testimony. According to defendant, defense counsel's failure to object to Ramsey's testimony prejudiced the outcome of his case because it misled the jury into believing that he had attempted to create a false alibi. Contrary to defendant's arguments, however, trial counsel did not have a legal basis upon which to object to Ramsey's testimony. Accordingly, counsel was not ineffective for failing to do so. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Moreover, because defendant's counsel effectively clarified any possible misconception that defendant endorsed Ramsey's testimony, any error on counsel's part did not result in prejudice to defendant.

Defendant also contends that counsel's failure to object to prosecutorial misconduct deprived him of the effective assistance of counsel. Specifically, defendant argues that defense counsel should have objected when the prosecutor improperly vouched for the credibility of Alex Love during closing argument. But we have thoroughly reviewed the record and cannot agree with defendant's assertion that the prosecutor improperly vouched for Love during closing argument. We conclude that the prosecutor's remarks were proper. Therefore, any objection would have been meritless. Counsel is not ineffective for failing to make a meritless or futile objection. *Id.*

Defendant next contends that counsel's failure to call a *res gestae* witness deprived him of the effective assistance of counsel. Specifically, defendant asserts that counsel should have called Robert Dyer, a Cheetah's employee, to testify on his behalf. Defendant asserts that Dyer's testimony would have exonerated him. Trial counsel's failure to call a particular witness is presumed to be a matter of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Although defendant argues that Dyer's testimony would have been beneficial, the record is silent in this regard. Because there is no indication on the record that Dyer would have

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

testified favorably, as defendant alleges, we must presume that trial counsel's decision not to call Dyer as a witness was sound trial strategy. *LeBlanc*, 465 Mich at 578.

Lastly, defendant contends that the cumulative effect of his counsel's errors at trial deprived him of the effective assistance of counsel. It is true that the cumulative effect of several minor errors can warrant reversal even when the individual errors would not. *Unger*, 278 Mich App at 258. However, because we have concluded that defense counsel committed no errors at trial, defendant's argument must fail.

E. Prosecutorial Misconduct

Defendant also argues in his supplemental brief that the prosecution's conduct at trial deprived him of his constitutional right to a fair trial. Defendant failed to preserve this issue below. Thus, we review his arguments for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Prosecutors have a special responsibility to ensure that criminal defendants receive a fair and impartial trial. See *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). We review claims of prosecutorial misconduct on a case-by-case basis, and must evaluate the prosecutor's comments in context and in light of their relationship to the evidence. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Defendant first contends that because it was undisputed that the decedent was not killed with a .380 Bursa firearm, any admission of evidence at trial regarding a .380 Bursa was irrelevant, and it was misconduct for the prosecutor to try to admit such evidence. However, it is evident that the prosecutor's efforts to admit evidence pertaining to the .380 Bursa were made in good faith. A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defendant next contends that the prosecutor's knowing presentation of Ramsey's false testimony at trial constituted misconduct. We agree, but find that no plain error occurred. A prosecutor may not knowingly use false testimony to obtain a conviction. *Banks v Dretke*, 540 US 668, 694; 124 S Ct 1256; 157 L Ed 2d 1166 (2004); *People v Aceval*, 282 Mich App 379, 389; 764 NW2d 285 (2009). Here, the evidence clearly established that the prosecutor knew prior to calling Ramsey that his testimony concerning defendant's purported alibi was false. Consequently, the prosecution's only benefit in calling Ramsey was to try to establish that defendant was attempting to create a false alibi and to attack defendant's credibility. This was clearly impermissible, and we cannot condone such behavior by prosecutors in this state. We find that the use of Ramsey's testimony was improper.

However, although it was improper for the prosecution to introduce Ramsey's testimony, defendant is not entitled to relief on this issue because it is not plain that the outcome of trial would have been different had the testimony been excluded. Defendant maintained throughout the proceedings below that he was present at Cheetah's at the time the decedent was shot, and accordingly did not file a notice of alibi. Moreover, the jury was informed that defendant did not endorse Ramsey's testimony and the reasons why defendant did not do so. Finally, in light of the other evidence admitted at trial, it cannot be said that defendant would have been acquitted had Ramsey not testified. Although the prosecution committed serious misconduct by

knowingly introducing Ramsey's false testimony, defendant simply cannot demonstrate that this unpreserved instance of prosecutorial misconduct affected the outcome of the proceedings. We find no outcome-determinative plain error. *Callon*, 256 Mich App at 329.

Next, defendant contends that he was deprived of a fair trial when the prosecution improperly vouched for the credibility of Alex Love during closing argument. However, for reasons already expressed, defendant's argument in this regard is unpersuasive. As we concluded above, the prosecutor did not improperly vouch for Love during closing argument.

Finally, defendant argues that the cumulative effect of the prosecution's misconduct at trial deprived him of a fair trial. We acknowledge that the cumulative effect of several minor instances of misconduct can warrant reversal although the individual errors would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). But we have identified only one instance of prosecutorial misconduct in this case. Because defendant has failed to demonstrate more than one instance of prosecutorial misconduct, he cannot show a cumulative prejudicial effect. See *id.*

F. Motion to Sever

Defendant argues that the circuit court abused its discretion when it denied his motion to sever the felon-in-possession charge from the remaining charges. We review a circuit court's decision regarding a motion to sever for an abuse of discretion. *People v Williams*, 483 Mich 226, 234 n 6; 769 NW2d 605 (2009). A defendant is not entitled to relief unless he or she can demonstrate that the erroneous failure to sever a charge deprived him or her of a fair trial. See *People v Swint*, 225 Mich App 353, 379; 572 NW2d 666 (1997). "[R]eversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect [on the jury] in light of the weight and strength of the untainted evidence." *Id.* (citation omitted).

When the charges against a defendant all relate to the same offense, it is within the circuit court's discretion to grant the defendant's motion to join the charges or sever them for separate trials. MCR 6.120(B) and (C). In making its decision, the court should consider how its decision might affect the defendant's ability to receive a fair trial. See *People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997). In a criminal case in which one of the charges against the defendant is felon-in-possession, the defendant's right to a fair trial may be impaired if the defendant's prior conviction is made known to the jury. See *id.* However, unfair prejudice does not result, and defendant is not entitled to a new trial, when the trial court employs certain procedural safeguards. *Id.* These safeguards include the parties' stipulation to the defendant's prior conviction, a limiting instruction advising the jury that it must consider each charge separately, and an instruction to the jury that it is to consider the defendant's prior conviction only as it relates to the current charge. *Id.* at 660; see also *United States v Mebust*, 857 F Supp 609, 613 (ND Ill, 1994).

Before trial, defendant moved to sever the felon-in-possession charge from the remaining charges set for trial. Although the circuit court apparently agreed that the introduction of the name and nature of defendant's prior felony conviction would be unduly prejudicial, it denied defendant's motion because it believed that adequate safeguards could be taken to ensure a fair trial. However, following this ruling, the circuit court read the felony information to the jury,

which listed the name and nature of defendant's prior felony conviction. Thus, the jury learned that defendant had been previously convicted of carrying a concealed weapon and/or discharge of a weapon at a building.

We find that the circuit court erred when it subsequently informed the jury of the name and nature of defendant's prior conviction. Nevertheless, we find that defendant not entitled to relief. Immediately after the court read the felony information to the jury, it informed the jury that the felony information was not evidence and that it should not consider it when deciding defendant's case. Because a jury is presumed to follow its instructions, it can be assumed the jury did not consider the nature of defendant's prior conviction in rendering its verdict. *Graves*, 458 Mich at 485. Further, aside from the initial remark at the beginning of the trial, the specific nature of defendant's prior conviction was never mentioned again. The jury never heard any other mention of the name or nature of defendant's prior conviction, and the prosecution never attempted to introduce any evidence of defendant's prior conviction. Moreover, the circuit court advised the jury that it could consider only evidence that was properly admitted in rendering its decision, and instructed the jury that defendant was entitled to individual consideration regarding each of the charges against him. For these reasons, we find that the circuit court's error did not deprive defendant of a fair trial.

G. Jury Venire

Criminal defendants are constitutionally entitled to an impartial jury that is drawn from a fair cross-section of the community. *Taylor v Louisiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975); *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996).

[T]o establish a prima facie violation of the fair cross-section requirement, a defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [*Hubbard*, 217 Mich App at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

We generally review de novo questions pertaining to the systematic exclusion of minorities from a jury venire. *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). But an unpreserved claim of systematic exclusion is reviewed for plain error affecting the defendant's substantial rights. See *id.* at 161-162; see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that he was deprived of his constitutional right to a fair and impartial jury because African-Americans were systematically excluded from the venire. But defendant has failed to provide any data or concrete evidence to support his argument. Instead, he has merely asserted that the proportion of African-Americans on jury venires in the Ingham Circuit Court "clearly demonstrate[s] that the under representation of blacks in Circuit Court arrays results from a systematic problem" While defendant's assertion may well be true, we have no specific evidence that would permit us to adopt his assertion as fact. Consequently, we have

no means of conducting a meaningful review of defendant's allegation on appeal. *McKinney*, 258 Mich App at 162. While we certainly do not condone any improper jury-selection methods that may have been employed in the Ingham Circuit Court, we can afford defendant no relief on the basis of the record before us. *Id.*

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher