STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2010
v	No. 284499 Saginaw Circuit Court
JERRY WILLISON LONG, Defendant-Appellant.	LC No. 07-029124-FC

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

PER CURIAM.

Defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, two counts of discharging a firearm from a vehicle, MCL 750.234a, one count of carrying a concealed weapon (CCW), MCL 750.227, and seven counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to a life term for the first-degree premeditated murder and conspiracy to commit first-degree murder convictions, 285 to 600 months for each assault with intent to commit murder conviction, 24 to 48 months for each discharging a firearm from a vehicle conviction, 38 to 60 months for the CCW conviction, and 24 months for each felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant's convictions arise from a series of shootings that occurred on the evening of March 2, 2007, which culminated in the death of 14-month-old Stacy Evans, Jr. It is undisputed that defendant was not the actual shooter in this case. However, defendant was the driver and owner of the vehicle used by the shooters to commit these crimes. Defendant also purchased bullets for the shooters. At trial, the prosecution presented the testimony of Cameron Youngblood, who was present during all three shootings. In exchange for his testimony, Youngblood was granted immunity from prosecution.

Defendant argues that the trial court abused its discretion when it refused his request for several jury instructions. Specifically, defendant requested that the trial court instruct the jury according to the model accomplice jury instruction, CJI2d 5.5, and the cautionary instruction on accomplice testimony, CJI2d 5.6, as well as CJI2d 5.13, the agreements in exchange for testimony instruction, or a modification of it.

While a trial court must ordinarily instruct the jury regarding accomplice testimony upon request, it is not required to give instructions that are not supported by the evidence. *People v Ho*, 231 Mich App 178, 188-189; 585 NW2d 357 (1998). Whether the evidence presented at trial is sufficient to warrant a particular jury instruction is within the sole discretion of the trial court. *People v Young*, 472 Mich 130, 135; 693 NW2d 801 (2005). The trial court concluded that CJI2d 5.5 and 5.6 should not be given because there was insufficient evidence that demonstrated that Youngblood was an accomplice. An accomplice is someone who "'knowingly and willingly helps or cooperates with someone else in committing a crime.'" *People v Allen*, 201 Mich App 98, 105; 505 NW2d 869 (1993), quoting CJI2d 5.5. After reviewing the record, we conclude that there was scant evidence suggesting that Youngblood acted as an accomplice. Other that offering defendant gas money, there is nothing in the record to suggest that Youngblood knowingly and willingly helped or cooperated with anyone in the shootings. Further, other than Youngblood's presence during each shooting, there is no record evidence to suggest that there was any agreement between Youngblood and defendant or anyone else to shoot anyone, nor is there any evidence to suggest that Youngblood encouraged, helped, aided, or supported defendant or the others involved at any point during the shootings. The mere presence during a criminal act, even if the person has knowledge a criminal act will occur, is not enough to establish criminal liability as an accomplice. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). For these reasons, the trial court did not abuse its discretion when it denied defendant's request for the disputed accomplice and cautionary instructions.[1]

Defendant argues that the circumstances surrounding Youngblood's involvement and testimony fit within the intent and scope of CJI2d 5.13, or a modified version of it. It is unclear from the record whether defendant requested the standard or a modified version of CJI2d 5.13. The usage note for the instruction states that it "should be used only when evidence has been elicited concerning the sentencing advantages of a plea or dismissal agreement offered in exchange for a witness's testimony." The record clearly reflects that Youngblood was granted immunity from prosecution in exchange for his testimony against defendant. No charges were ever filed. Thus, the unmodified version would not have been appropriate.

With regard to a potential modification, defendant suggests that CJI2d 5.13 could have been modified to refer to "possible" charges and penalties. We cannot say the trial court erred in failing to give such an instruction because, as noted, it is unclear from the record whether it was ever requested. In any event, defendant cannot establish that a miscarriage of justice occurred.

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[1] Defendant also argues that the trial court's reliance on the fact that Cameron had not been charged with a crime as a basis for denying defendant's request for the disputed accomplice instructions was erroneous. Specifically, defendant argues that because it is not a prerequisite to the disputed accomplice instructions that an accomplice be charged with a crime or be offered favorable treatment, the trial court erred when it focused on this fact. Defendant is correct that it is not prerequisite to the disputed accomplice instructions that an accomplice be charged with a crime or offered favorable treatment. See *People v Reed*, 453 Mich 685, 693 n 10; 556 NW2d 858 (1996). However, simply because it is not a required precondition does not mean that it cannot be considered when determining if the instruction should be given. Indeed, it seems particularly relevant on the point. Certainly, it provides additional support to a conclusion reached based on the circumstances of the crime alone.

Young, *supra* at 141-142; MCL 769.26. The terms of Youngblood's immunity agreement were introduced at trial and defense counsel extensively addressed the terms and Youngblood's testimony in light of that agreement during cross-examination. Further, the trial court instructed the jury that when assessing witness credibility it could consider whether the witness had any "personal interest in how this case is decided." "In general," the court continued, "does the witness have any special reason to tell the truth or any special reason to lie." It is reasonable to assume that the jury would consider an immunity agreement a "special reason" that might impact a witness's testimony. For these reasons, it cannot be concluded that the trial court's failure to give the CJI2d 5.13 instruction was outcome determinative.

Defendant also argues that several instances of prosecutorial misconduct deprived him of a fair trial. Because defendant did not object below to the conduct cited on appeal, our review is for plain error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Prosecutorial misconduct issues are decided on a case-by-case basis, with the reviewing court examining and evaluating a prosecutor's remarks in context. *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). As a general rule, prosecutors are afforded great latitude in their arguments and trial conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor may not inject issues broader than the defendant's guilt or innocence. *People v Rice* (*On Remand*), 235 Mich App 429, 438; 597 NW2d 843 (1999).

Defendant argues that the prosecutor improperly injected issues broader than his guilt or innocence when he intentionally violated a motion in limine and questioned defendant about his alleged intent to have sex with an underage girl. While a prosecutor's good faith effort to admit evidence does not amount to misconduct, *Dobek*, *supra* at 70, it is evident from the record that the prosecutor's question was improper and not a good faith effort to admit evidence. Nevertheless, defendant is not entitled to relief on this issue because the error was harmless. The record reflects that immediately after the prosecutor asked the question and before defendant could answer, defendant's trial counsel asked to approach the bench. Presumably defendant's trial counsel objected to the question as improper, and the trial court agreed because defendant was not directed to answer the question. It is well settled that an attorney's questions are not evidence, *id.* at 66 n 3, and the trial court properly instructed the jury regarding this area of the law. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that during his closing arguments the prosecutor improperly appealed to the sympathy of the jury and implied to the jury that it was their civic duty to convict defendant. Defendant's claim is based on the following argument:

> Now, you, you know, folks that are at their own home at the end of their long work day, that may be watching the news or may have a newspaper out, they're not in the same position that you're in. They may look at, you know, what they hear on the news or read in the newspaper and say, oh, my God, how can people behave that way? And dismiss it and put it out of their mind in some

> fashion, perhaps in an effort to make themselves feel more secure in their own lives, to feel better about their . . . day to day lives.
>
> You don't have their ability to put those blinders on. You have to face the evidence that you've seen, analyze it, and weigh it in a common sense and a reasonable fashion.

A prosecutor may not ask the jury to convict the defendant as part of their civic duty. *Bahoda*, *supra* at 282. When viewed in context, however, it is not plain that in making the above statements that the prosecutor attempted to appeal to the jury's fears and encouraged them to look outside the evidence and convict defendant. The prosecutor did not tell or imply that the jury had a civic duty to convict defendant or that the jury should suspend their own powers of judgment. Instead, the prosecutor suggested that unlike other people who could pretend that the facts of this case did not happen, the jurors could not ignore the evidence and had an obligation to weigh and analyze it. Advising the jury that they have an obligation to listen to all of the evidence and to weigh and analyze that evidence is not interjecting issues broader than defendant's guilt or innocence into the proceedings. *Rice*, *supra*.

Defendant also argues that the following statements were improper because they appealed to the sympathy of the jury:

> Find him responsible for what he actually did, for his choices that night. Sure, having found out that young child was killed, he's probably not happy about that. He made choices that . . . night that resulted in this *young child . . . being killed*. . . .
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> * * *
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> Because he thought about it ahead of time, he weighed the pros and cons, deliberated it, had two hours to reflect to get himself out of this situation, he's guilty of first-degree murder, not second. *It would be an injustice to find him guilty of second-degree murder*. [Emphasis added.]

Specifically, defendant argues that these statements were improper because they exploited the death of a young child and argued that it would be justice if the jury found defendant guilty of first-degree murder.

Prosecutors may freely argue the evidence and any reasonable inferences that arise from the evidence. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). Although a prosecutor may not appeal to the sympathy of the jury, *People v Hedelsky*, 162 Mich App 382, 385-386; 412 NW2d 746 (1987), a prosecutor may use emotional language in his or her arguments, *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

When viewed in context it is not plain that the prosecutor's statements were improper, because the statements were based on the evidence and reasonable inferences that arose from that evidence. While the prosecutor's argument that the evidence demonstrated that defendant was

guilty of first-degree murder was strong, a prosecutor is not required to argue the evidence in the blandest terms possible. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Further, it is not misconduct for a prosecutor to argue that a defendant should be convicted of the greater charge and not the lesser included alternative.

Lastly, defendant argues that the cumulative effect of the prosecutor's errors denied him of a fair and impartial trial. The cumulative effect of several instances of prosecutorial misconduct can deprive a defendant of a fair and impartial trial, although individually the errors would not. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). However, in this case there is only one instance of prosecutorial misconduct, which was harmless in light of the totality of the proceedings.

Affirmed.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood