STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2010
v	No. 288256 Macomb Circuit Court
ARTHUR NELSON REAM, Defendant-Appellant.	LC No. 2008-000588-FC

Before: M. J. KELLY, P.J., and TALBOT and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his conviction after a jury trial of first-degree premeditated murder. MCL 750.316. The trial court sentenced defendant to life without the possibility of parole. On appeal, defendant argues that the evidence against him was legally insufficient and contrary to the great weight of the evidence at trial. He also argues that the prosecutor deprived him of a fair trial through various comments during closing arguments. For these reasons, he contends that he is, at the least, entitled to a new trial. Because we conclude that there were no errors warranting relief, we affirm.

I. SUFFICIENCY AND WEIGHT OF THE EVIDENCE

A. STANDARDS OF REVIEW

We shall first address defendant's claims that the evidence against him was constitutionally insufficient or, in the alternative, contrary to the great weight of the evidence. Specifically, defendant contends that, because the victim's body was never found, there was no evidence to support the conclusion that he killed the victim with premeditation. This Court reviews de novo challenges to the sufficiency of the evidence to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). However, whether a verdict was against the great weight of the evidence is a matter committed to the trial court's discretion. Accordingly, this Court's review is limited to determining whether the trial court abused its discretion. *Id.* at 83-84.

B. EVIDENCE OF PREMEDITATION

To establish first-degree premeditated murder, a prosecutor must prove that the defendant intentionally killed the victim with premeditation and deliberation. MCL 750.316(1)(a); *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007). Premeditation and deliberation require sufficient time between the intent and the act for the defendant to take a second look to reconsider his or her actions before killing. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident, including the previous relationship between the defendant and the victim, the defendant's actions before and after the crime, and the circumstances of the killing. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). No direct evidence connecting the defendant to the crime is required; circumstantial evidence is enough. *People v Saunders*, 189 Mich App 494, 495; 473 NW2d 755 (1991).

The prosecutor presented sufficient evidence to convict defendant of first-degree premeditated murder. At trial, the prosecution presented evidence that defendant became acquainted with the thirteen-year-old victim, Cindy Zarzycki, through his son Scott Ream. Cindy was dating Scott. Testimony also established that Cindy was a happy child, was not depressed, and had not expressed any intent to run away. Evidence established that, on April 20, 1986, Cindy left home to walk to a local Dairy Queen to meet defendant and was never seen again.

The evidence established that defendant phoned Cindy and asked her to meet him at the Dairy Queen to go to his son's surprise birthday party. However, the evidence also established that Scott's birthday was not in April, but actually in January. Scott's mother also stated that she was not aware of any party for Scott and there was evidence that defendant had made impromptu arrangements for Scott to be out of town on April 20, 1986. Scott's mother also testified that defendant lived at his carpet business at the time in question.

The evidence further established that Cindy actually went to the Dairy Queen on the day she disappeared. Cindy's younger brother, Eddie Zarzycki, testified that he followed after his sister on her way to the Dairy Queen, but that she told him to go back home because she was going to meet someone. Cindy's friend, Cathy Bouford, also saw a white van at the Dairy Queen on the day and around the time when Cindy was to meet defendant. Testimony established that defendant owned a white van at the time and that he replaced it later that summer. Finally, there was evidence that the Dairy Queen was located a short drive away from defendant's carpet business. From this evidence, a reasonable jury could find that defendant deliberately lured Cindy to the Dairy Queen through the ruse about his son's birthday and that Cindy was never seen again because defendant killed her.

Moreover, when this evidence is considered in conjunction with the evidence concerning defendant's actions following Cindy's disappearance, the jury could conclude that defendant killed Cindy with premeditation. Defendant behaved nervously at the mention of Cindy's name when interviewed in 1994. When interviewed again in 2007, defendant first indicated that he did not know Cindy. Then he told detectives that he did know Cindy and knew where she was buried. Moreover, defendant kept a memento of Cindy—a picture of her from a missing child poster—and there was evidence that suggested that he got rid of all of his phone records from 1986. Finally, defendant told Shane Enser that he was going to trial because he killed a girl.

Viewed in the light most favorable to the prosecution, a reasonable jury could find that defendant lured Cindy to the Dairy Queen, took her away, and murdered her with premeditation. *Roper*, 286 Mich App at 83.

C. GREAT WEIGHT

Defendant also argues that, given the weak evidence of premeditation, it is clear that the jury's verdict was against the great weight of the evidence. A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). "Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

We cannot conclude that the evidence in this case preponderated so heavily against the verdict that it would amount to a miscarriage of justice to let the verdict stand. The prosecution presented evidence that defendant was the last known person to have been with Cindy before she disappeared and that he lured Cindy to the Dairy Queen with stories about a surprise birthday party for Scott when it was not in fact Scott's birthday and Scott was out of town. In addition, Bouford saw what could have been defendant's van at the Dairy Queen at the time when Cindy planned to meet defendant. Moreover, defendant's actions after Cindy's disappearance are evidence of consciousness of guilt and an effort to conceal his actions. Defendant indicated that he knew the location of Cindy's body and admitted to having a fetish for 13 and 14 year old girls. Moreover, defendant told Enser that he was on trial because he killed a girl. Defendant's alibi, that he was shopping with his wife, Jill Rutledge, on April 20, 1986, was refuted by Jill's testimony at trial. And, as already noted, there was sufficient evidence to support a finding of premeditation. Given the totality of the evidence, we cannot conclude that the trial court abused its discretion when it denied defendant's motion for a new trial. *Roper*, 286 Mich App at 84.

II. PROSECUTORIAL MISCONDUCT

A. STANDARDS OF REVIEW

Defendant next argues that the prosecutor engaged in various acts of misconduct, which, he argues, deprived him of a fair trial. In the absence of an objection at trial, a challenge to prosecutorial remarks is foreclosed on appeal unless no curative instruction could have removed any undue prejudice to the defendant or manifest injustice would result from a failure to review the alleged misconduct. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000). In order to avoid forfeiture on appeal, defendant must show plain error, which affected his substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To establish that the error affected substantial rights, the defendant must generally show that error affected the outcome of the proceedings. *Id.* This Court will reverse a verdict for plain error only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of defendant's innocence. *Id.*

B. APPEAL TO SYMPATHY

Defendant first argues that the prosecutor committed misconduct by appealing to the sympathy of the jurors. The role and responsibility of a prosecutor differs from that of other lawyers: his duty is to seek justice and not merely to convict. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Id.* at 63-64. A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

The prosecutor began his closing argument by trying to remind the jury about the testimony concerning the hours and days after Cindy went missing. In particular, the prosecutor asked the jury to imagine the strain that the family was under during that time and noted that several witnesses had testified that Cindy did not have the sort of problems that might otherwise explain Cindy's disappearance. From this evidence, the prosecutor invited the jury to conclude that the only rational explanation was that Cindy was dead. In this context, the prosecutor stated:

> Now, people wiser than I have said that the greatest tragedy that can befall a person is the premature loss of a child. We have children. We raise our children. We love our children. And when a child predeceases us, it's about the greatest tragedy one can imagine because we raise them, we nurture them, we do as well as we can. There are no perfect parents. I know I'm not. But when a child predeceases you, especially when it's unexpected, not if the child is suffering from cancer and you know the child is going to die, that's the greatest tragedy. But compound that. Compound that by the fact that you don't know, didn't have a chance to say goodbye. You don't know, because your child doesn't return home, a child who has never run away, a child who has never talked about running away, a child who does not suffer from depression, a child who is not pregnant, a child who has no reason to run away, and she's not home and it's Sunday afternoon, and you have not seen her since the morning. You do not allow your mind to think the worst because we know what the worst is. The worst is that the child's dead.
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> And now twenty-two years have passed by. This family can't even bury her. They know she's dead. Obviously, she's dead. They know it, but they don't have a body to bury. And as years go by they try to envision what she would look like at the age of twenty, at the age of twenty-seven, and now she would be thirty-one. What does she look like?

Although this statement was part of a broader argument concerning the evidence that Cindy was dead rather than simply missing, it clearly involved an appeal for sympathy for the victim and her family. A prosecutor may not try to sway the jury's judgment by an appeal to sympathize with the victim or victim's family. *Watson*, 245 Mich App at 591. Therefore, we agree that the prosecutor acted improperly when he interjected these elements into his statement.

Where the prosecutor intentionally injected inflammatory remarks with no apparent justification except to arouse prejudice, this Court will not hesitate to reverse. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). However, this Court will not view a particular statement in isolation and out of context in search of error warranting reversal. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996) (noting that this Court will not review a prosecutor's remarks in a "vacuum," but in context). Rather, the remarks must be read in their full context and reversal will not be warranted unless this Court concludes that the remarks denied the defendant a fair trial. *Bahoda*, 448 Mich at 266-267, 267 n 7.

In this case, the remarks at issue were part of the prosecutor's efforts to remind the jury about the circumstances surrounding Cindy's disappearance and to argue that the circumstances suggested that Cindy was dead. Although the prosecutor made references that clearly invoked some level of sympathy for the Cindy's family, the remarks did not pervade the prosecutor's opening statement and we do not believe that the prosecutor was intentionally trying to get the jury to suspend its power of judgment and convict defendant notwithstanding the evidence. See *Bahoda*, 448 Mich at 287 (noting that the remarks may have been "ill-advised," but did not warrant reversal because the Court did not "believe the jury suspended its power of judgment" as a result of the remarks); *Watson*, 245 Mich App at 591 (noting that the comment at issue in that case was not particularly inflammatory and, for that reason, did not warrant relief). Indeed, the remarks at issue occurred at the very beginning of an otherwise lengthy closing statement[1] wherein the prosecutor spent the vast majority of the time summarizing the relevant evidence and arguing that the evidence showed that defendant killed Cindy. Additionally, even though defendant's trial counsel did not object to these remarks, the trial court instructed the jury that they "must not let sympathy or prejudice influence [their] decision." The trial court also instructed the jury that the parties' statements were not evidence:

> Many things are not evidence and you must be careful not to consider them as such. I will now describe some of the things that are not evidence. The fact that the defendant is charged with a crime and is on trial is not evidence. *The lawyers' statements and arguments are not evidence.* They are only meant to help you understand the evidence and each sides' legal theories. The lawyers' questions to the witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers. *You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.* [Emphases added.]

These instructions cured any minimal prejudice occasioned by the prosecutor's appeal to the sympathies of the jury. *Watson*, 245 Mich App at 591-592. Therefore, this misconduct did not amount to error warranting relief. *Carines*, 460 Mich at 764.

[1] The transcript shows that the court began its session at 9:00 a.m. and that the prosecutor's closing statement ended at about 11:07 a.m. with a sidebar conference.

C. CHARACTER ARGUMENT AND FACTS NOT IN EVIDENCE

Defendant also argues that the prosecutor engaged in misconduct by impermissibly arguing that defendant's sexual fetish for young girls established his propensity to commit murder and by arguing facts not in evidence that defendant committed a sexual assault on Cindy. A prosecutor may not comment on the character of the defendant if his character is not at issue. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Moreover, a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Unger*, 278 Mich App at 241. However a prosecutor has wide latitude and may argue the evidence and all reasonable inferences from it. *Cox*, 268 Mich App at 453. He need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

Defendant specifically argues that the following remarks were wholly improper and so prejudicial as to warrant a new trial:

> Now, let's examine what his intentions were when he was with her. I've already mentioned in direct [sic] that he's not there to talk about her future. It's obvious he's there to have sex with her. He has a fetish for thirteen-year-old girls. There's no reason for him to be alone with her for a bogus party. One of two things. I'm going to have sex with her and then I'm going to kill her to cover it up because I can't trust her in not telling anybody. I'm going to have sex with her. I—I want her. I want her. I want her so badly. I have a fetish. She's good-looking. I'm going to kill her. Because he has to kill her after that. He can't say Cindy, go home. She's not four years old. She's not two years old. She's thirteen. She's going to tell her family that she's been raped and they're going to come right to him. They're going to come right to him. He has to dispose of the evidence. It's like throwing burglar tools out of a window. That's what he did, threw her out.
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> Maybe his having a fetish for thirteen-year-old girls led him to believe that she wanted to have sex with him even though she's obviously under age by at least three and a half years. But she wants—he wants to have sex with her because she was nice to him.

As already noted, this Court will not read a prosecutor's remarks in isolation. *Kennebrew*, 220 Mich App at 608. Instead, we must read them in their full context to determine whether they were inappropriate and deprived defendant of a fair trial. *Bahoda*, 448 Mich at 266-267, 267 n 7. The context is important because remarks that otherwise might be inappropriate during a closing statement might not be inappropriate when made in rebuttal and in response to an argument made by defendant's trial counsel. *Kennebrew*, 220 Mich App at 608.

The remarks at issue were made during the prosecutor's rebuttal and were clearly made in response to several arguments made by defendant's trial counsel. During his closing, defendant's trial counsel argued that Cindy might merely be missing and suggested that defendant had no motive to murder Cindy because he barely even knew her. Defendant's trial

counsel also noted that the investigating officers did not even investigate purported sightings of Cindy in various parts of the country and implied that the prosecution and investigating officers had simply settled on defendant as a target and wanted the jury to "stack their circumstances" and find defendant guilty.

In response to these arguments, the prosecutor reiterated that there was ample evidence to prove that Cindy was dead; indeed, the defendant himself stated that he was on trial because he killed someone and that he knew where the body was but would not say where as a matter of principle. The prosecutor then explained why defendant might have been motivated to kill Cindy:

> Now, let's examine what his intentions were when he was with her. I've already mentioned in direct [sic] that he's not there to talk about her future. It's obvious he's there to have sex with her. He has a fetish for thirteen-year-old girls. There's no reason for him to be alone with her for a bogus party. One of two things. I'm going to have sex with her and then I'm going to kill her to cover it up because I can't trust her in not telling anybody. I'm going to have sex with her. I—I want her. I want her. I want her so badly. I have a fetish. She's good-looking. I'm going to kill her. Because he has to kill her after that. He can't say Cindy, go home. She's not four years old. She's not two years old. She's thirteen. She's going to tell her family that she's been raped and they're going to come right to him. They're going to come right to him. He has to dispose of the evidence. It's like throwing burglar tools out of a window. That's what he did, threw her out.

As defendant correctly notes, there was no direct evidence that Cindy was sexually assaulted. But contrary to defendant's contentions, the evidence of the circumstances surrounding Cindy's disappearance permit an inference that defendant arranged to meet Cindy for a sexual purpose. The evidence established that defendant used an elaborate ruse to get Cindy to meet with him on the day in question and that he took peculiar steps to ensure that he would be alone with her. These steps included calling Cindy late on Saturday to get her to meet with him Sunday—a day when he could be alone at his business—and sending his fourteen-year-old son to Texas on short notice, during school, with a man defendant only knew from work. There was also evidence that defendant admitted to having a sexual "fetish" for children Cindy's age. Given the evidence concerning the nature of the ruse, the efforts to ensure that he would be alone with Cindy, the disparity in their ages, and his admitted fetish, it was not unreasonable to argue that defendant lured Cindy to the Dairy Queen for a sexual purpose.

There was also evidence from which the jury could have concluded that Cindy died and that she died at defendant's hands. Once the jury made the inferences that defendant killed Cindy and that he met with her on the day of her death for a sexual purpose, the jury could then reasonably infer that defendant was motivated to kill Cindy because he acted on his intentions and wanted to cover up the evidence that he either tried to or did sexually assault Cindy. Because there was record evidence to support the initial inferences as well as the inference to be drawn from those inferences, the prosecutor could properly argue them. *Cox*, 268 Mich App at 451 ("Prosecutors are free to argue the evidence and any reasonable inferences arising from the evidence . . . ."); see also *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (stating that a jury may make inferences from inferences and determine the weight to be

accorded those inferences). Further, we do not agree that this argument involved an improper propensity argument; the prosecutor merely asked the jury to evaluate the evidence and draw one of many possible conclusions concerning the meaning of the evidence.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder