STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 29, 2010
v	No. 284982 Wayne Circuit Court
RUDY MAURICE THOMAS, Defendant-Appellant.	LC No. 07-014855-FC

Before: JANSEN, P.J., AND CAVANAGH AND K. F. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced a two-year term of imprisonment for his felony-firearm conviction, to be served first and consecutive to, a term of life imprisonment for his murder conviction. He appeals as of right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence of premeditation to support his conviction of first-degree premeditated murder. We disagree.

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, 440 Mich at 514-515. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). Premeditation and deliberation require "sufficient time to

allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005). The following nonexclusive list of factors may be considered to establish premeditation and deliberation: "(1) the previous relationship between the decedent and the defendant, (2) the defendant's actions before and after the crime, and (3) the circumstances surrounding the killing itself, including the weapon used and the location of the wounds inflicted." *People v Coddington*, 188 Mich App 584, 600; 470 NW2d 478 (1991).

The evidence at trial indicated that the victim was shot twice in the head while sitting inside a parked SUV during the afternoon. Solomon Israel, a passerby, heard someone in the SUV make a high-pitched plea to "stop" shortly before hearing gunshots. Moments later, Israel saw defendant get out of the passenger side of the SUV with a firearm in his hand, tuck the firearm into his waistband, and nonchalantly leave the area. There was testimony that the victim's injuries were consistent with first being shot upward in the chin and, after falling over, being shot a second time from close range in the top of the head. The evidence that the victim pleaded with the shooter to "stop" before being shot, that the victim was shot a second time in the head from close range after falling over from the first shot, and defendant's casual demeanor after the shooting, viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find that there was "sufficient time to . . . take a second look" and to support a finding of premeditation and deliberation for first-degree murder.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was denied the effective assistance of counsel at trial. Because defendant failed to raise this issue in a motion for a new trial or request an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

First, the record does not support defendant's claim that defense counsel was unprepared for trial. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). When claiming ineffective assistance due to defense counsel's alleged unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 641-642; 459 NW2d 80 (1990).

Here, defense counsel was adamant that he was prepared to proceed, and the trial court noted that defendant himself wanted to proceed with trial. Defendant makes no specific claims of prejudice, and does not indicate what defense counsel could have done differently that would have changed the outcome of trial had counsel had more time. Defendant asserts that defense counsel was not adequately prepared to challenge telephone recordings of defendant's conversations from jail, but as discussed in section IV, those recordings were properly admitted.

Further, defense counsel's questions, remarks, and arguments throughout trial demonstrate that he was familiar with the case and prepared for trial. There is simply nothing in the record to support defendant's assertion that defense counsel was unprepared to try the case.

We also find no merit to defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's opening statement. Defendant argues that defense counsel should have objected to the prosecutor's characterization of Israel as being afraid, and to the prosecutor's characterization of the shooting as a "stone cold execution," but as discussed in section III, *infra*, those remarks were fair comments on the evidence that the prosecutor intended to present at trial. Further, contrary to what defendant argues, defense counsel did object to the prosecutor's reference to the jail telephone recordings, but the court overruled counsel's objection. Thus, this claim of ineffective assistance of counsel cannot succeed.

Defendant also argues that defense counsel acted unprofessionally during his cross-examination of Israel, thereby allowing the prosecutor to comment that counsel was "not acting like an officer of the court should," and causing the trial court to admonish defense counsel because of his conduct. Although the record discloses that defense counsel became argumentative with Israel at times, apparently stood too close to him at one point, and inappropriately grabbed a document from his hand, it does not reveal that these instances were pervasive or out of proportion to the overall adversarial nature of the trial, or that they impacted defense counsel's presentation of a vigorous defense on defendant's behalf. While defense counsel apparently chose to pursue an aggressive style of questioning Israel, this was not objectively unreasonable given that Israel was the principal witness against defendant. Further, the records shows that Israel sometimes answered defense counsel's questions with a question and himself became argumentative with defense counsel. Moreover, defendant has not explained how counsel's conduct prejudiced him. And, in any case, the jury was instructed that it was not to consider the attorney's statements or the court's rulings as evidence, and that it was to rely only on the evidence in considering whether the prosecution had established defendant's guilt. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under the circumstances, the record does not demonstrate that defense counsel's conduct as a whole was objectively unreasonable, or that it prejudiced defendant's right to a fair trial.

Lastly, defendant agues that he was denied the effective assistance of counsel when defense counsel's wife, who is also an attorney but was not part of this case, acted as "a surrogate" by making an objection during trial. Defense counsel's wife's interjection was clearly improper and the trial court addressed the matter by ordering defense counsel's wife to leave the courtroom. However, we fail to see how defendant was prejudiced by this isolated occurrence because defendant has not explained how he was prejudiced.

For all of the foregoing reasons, we reject defendant's claim that he was denied the effective assistance of counsel at trial.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that several instances of the prosecutor's conduct denied him a fair trial. Specifically, defendant claims that the prosecutor acted improperly during opening and closing argument. Because defendant only objected to one of the complained of instances—the

prosecutor's reference to the jail recordings during opening statement—the majority of his challenges are unpreserved. We review preserved claims of prosecutorial misconduct case by case, examining the challenged remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). We will review defendant's unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We will not reverse if the alleged prejudicial effect of the prosecutor's remarks could have been cured by a timely instruction upon request. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. REFERENCES TO JAILHOUSE RECORDINGS

Defendant first contends that the prosecutor made improper references to jailhouse telephone recordings during opening statement and closing argument. We disagree. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). Viewed in context, the prosecutor's references to the jail telephone recordings during opening statement were designed to show that he intended to prove during trial that the principal witness, Israel, had been intimidated by defendant's associates to stop him from testifying and to show defendant's consciousness of guilt. Further, as discussed in section IV, the evidence was properly admitted at trial for these purposes. Therefore, the prosecutor was also free to comment on this evidence during closing argument. See *Bahoda*, 448 Mich at 282-284. Accordingly, the prosecutor did not engage in misconduct by referring to the recorded conversations during opening statement and closing argument.

B. "UNSWORN TESTIMONY" DURING OPENING STATEMENT

Defendant also asserts that the prosecutor improperly gave "unsworn testimony" in opening statement when he stated that Israel was "scared" and that the shooting was an "execution." We disagree. When a prosecutor states that evidence will be presented that later is not presented, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *People v Wolverton*, 227 Mich App 72, 75-76; 574 NW2d 703 (1997). Here, the prosecutor's statements were fair comments on the evidence that would be presented at trial. During trial, Israel testified that he was in court pursuant to a subpoena and that he was nervous about testifying. He explained that while he was in the hallway before the preliminary examination, defendant's family made him very uncomfortable and nervous. He was also concerned because he had been approached in an intimidating manner by one of defendant's associates at a restaurant sometime between the preliminary examination and trial. He further testified that less than a month before trial, his mother advised him that someone had come to her home looking for him, which contributed to his nervousness. In addition, the prosecution presented the jail telephone recordings in which defendant engaged in conversation about his associates seeing and approaching the witness.

Further, the prosecutor's characterization of the shooting as an "execution" was not improper. In relevant context, "execute" means "to murder." See *Random House Webster's College Dictionary* (1997). The medical examiner testified that the cause of death was multiple gunshot wounds, and the manner of death was homicide. She explained that the victim was first

shot upward in the chin and, after falling over, was shot a second time in the top of the head with a "weapon [] held very close to the head."

Defendant also argues that the prosecutor improperly referred to a woman who defendant had called from jail as defendant's "girlfriend." Although there was no direct evidence that the woman was defendant's "girlfriend," this remark did not deny defendant a fair trial. There is no indication that the prosecutor was acting in bad faith when he made the statement, and defendant has not indicated how he was prejudiced by the mere reference to a female with whom he regularly conversed. The woman's actual status had no bearing on the significance of the content of the conversations in the recordings. None of these claims of misconduct denied defendant a fair trial.

C. IMPROPER REMARKS DURING CLOSING ARGUMENT

Defendant next contends that the prosecutor impermissibly argued facts not in evidence and mischaracterized the evidence during closing argument. We do not agree. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). But a prosecutor may use "hard language" when it is supported by the evidence, and is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Viewed in context, the prosecutor's remarks were based on the evidence and reasonable inferences arising from the evidence as they related to his theory of the case. See *Bahoda*, 448 Mich at 282-284. The prosecutor's argument that defendant was "hiding" was a reasonable inference from evidence that defendant could not be located between the time he was identified in February 2007 and his arrest in August 2007, and defendant's indication in a telephone conversation that someone had disclosed his location. Further, the prosecutor's statement that the victim made a "high pitch *scream*" was a reasonable inference from Israel's testimony that he heard a high pitch voice "yell out." Also, the prosecutor's argument that defendant was the person who took out a gun and executed the victim with premeditation and deliberation were reasonable inferences from the evidence that defendant was identified as the person who shot the victim at close range, first under the chin and then in the top of head, exited the car, tucked the firearm in his waistband, and then casually left the scene.

Defendant further argues that the prosecutor impermissibly acted "as an expert in slang" when he argued that defendant's use of the term "to holler" in the jail telephone recordings meant "to intimidate." A prosecutor may not inject himself into trial as a witness. See *Rodriguez*, 251 Mich App at 35. Even if the prosecutor should not have provided the definition for the colloquial phrase "to holler," the challenged remark did not affect defendant's substantial rights. Israel had already testified during trial that defendant's associate had approached him in a daunting manner, and the jail recordings further indicated that defendant's associates had seen and approached the witness. Thus, the jury was not exposed to an unrelated reference. Further, the trial court's instructions that the attorney's statements were not evidence protected his right to a fair trial. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Defendant was not denied a fair trial and his claim of prosecutorial misconduct fails.

IV. ADMISSION OF THE JAILHOUSE RECORDINGS

Lastly, we also reject defendant's claim that the trial court abused its discretion by admitting the jail telephone recordings because they were not relevant and unduly prejudicial. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The defense theory at trial was misidentification and that Israel was not credible. The telephone recordings were relevant because they tended to corroborate Israel's identification of defendant as the perpetrator of the crimes and Israel's testimony that he was approached by one of defendant's associates. Defendant also made comments referring to Israel and indicating that he was upset about defendant's own location being disclosed, which tended to show an awareness of guilt. The evidence was not inadmissible simply because the nature of the evidence was prejudicial, and defendant has not otherwise demonstrated that he was unfairly prejudiced by the evidence. See MRE 403.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly