

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO MIGUEL FREEMAN,

Defendant-Appellant.

UNPUBLISHED

July 15, 2010

No. 290679

Wayne Circuit Court

LC No. 08-012974-FC

Before: MURRAY, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life in prison for the murder conviction, two years' probation for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. We affirm.

I. FACTS

This case arises out of the shooting death of Derrick Carmichael at the Six Mile Coney Island in Highland Park on the evening of April 2, 2008. The restaurant cashier, Melinda Goins, testified that during her shift that evening, Carmichael and a regular patron known as "Red" arrived at the restaurant shortly before defendant, with whom Goins was involved in an "intimate" relationship. Upon defendant's arrival, an argument ensued between defendant and Carmichael. Red was not involved in this altercation. After several minutes, Goins heard a single gunshot from the lobby of the restaurant and heard Red declare, "Oh, shit," before running out the door. However, it was not until a boy entered the restaurant and started screaming that Goins noticed Carmichael lying facedown on the floor and called the police.

At trial, Goins testified that following the shooting, she spoke on the phone several times with defendant, who made a number of inculpatory statements. Specifically, defendant told Goins that he had shot Carmichael, that he would not kill a friend and Carmichael was not his friend, and that "my brother can't believe I did it." Notably, Goins explained that Carmichael and Goins had a history of confrontations, having been in arguments at the Coney Island on two occasions prior to the shooting and having engaged in a physical fight during which Carmichael gave defendant a black eye and defendant had to be restrained from choking Carmichael. Goins

additionally indicated that on the day of the shooting, she noticed a sawed off shotgun in defendant's bedroom. Defendant later indicated to Goins that this was the shotgun he used to kill Carmichael. Consistent with this rendition of events, Carmichael's autopsy revealed that he died of a single gunshot wound to the back of the head, and police found a spent shotgun shell casing and three shotgun pellets at the scene of the shooting. Goins reported this inculpatory information to police, and defendant was subsequently arrested at Sinai Grace Hospital where was admitted under the alias, Trevion Smith.

Contrary to Goins's rendition of events, defendant denied knowing Carmichael, engaging in any arguments or fights with him, telling Goins or his brother that he had shot anyone, or showing a shotgun to Goins. Instead, defendant relayed that while leaving the Coney Island the night of the shooting, he noticed two men enter the restaurant, one of whom was carrying a large object, and heard a loud noise. Shortly thereafter, defendant was shot while walking in the middle of the street two blocks from his house by a man defendant claimed resembled one of the men he observed entering the Coney Island the night of the shooting. It was after this, defendant explained, that he was admitted to Sinai Grace under the alias Trevion Smith since he "feared for his family."

Following his jury trial, defendant was found guilty of the aforementioned offenses, and the instant appeal ensued.

II. ANALYSIS

A. PROSECUTORIAL MISCONDUCT

Defendant first argues that numerous instances of prosecutorial misconduct deprived him of a fair trial. As defendant failed to object to each instance of alleged error below, our review is for plain error affecting substantial rights. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To warrant reversal, the error must result in the conviction of an innocent defendant or must seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763. If a curative instruction could have alleviated any prejudicial effect, there is no error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003). Prosecutorial misconduct occurs if a defendant is denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In evaluating issues of prosecutorial misconduct, this Court must examine the prosecutor's remarks in context, on a case-by-case basis. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

As his first allegation of error, defendant claims the prosecution improperly bolstered Goins's credibility during opening statement and closing argument by indicating that Goins did not "have any ax to grind" or have reason to fabricate her testimony and that she was an honest person, and by referencing Goins's testimony during an investigative subpoena and preliminary examination.

Regarding Goins's motivation to testify, while it is improper for a prosecutor to vouch for the credibility of a witness by implying the prosecutor has special knowledge of the veracity of a witness's testimony, *Bahoda*, 448 Mich at 276, that is not what occurred here. Rather, the prosecutor's comment during opening statement, as well as her conclusion during closing

argument that Goins was an “honest person,” were proper arguments from the facts (or facts that would be presented) that Goins did not have an ulterior motive in inculcating defendant in the shooting. It is certainly proper for a prosecutor to argue from facts that a witness is credible and worthy of belief, *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008), and to “comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes[.]” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Indeed, “[t]he credibility of a witness is always an appropriate subject for the jury’s consideration,” *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995), and in this case, the evidence supported the prosecutor’s argument that Goins did not testify against defendant for improper motives.

However, the prosecutor’s opening and closing statements were improper insofar as they referenced Goins’s prior consistent statements that were made under oath at the investigative subpoena and preliminary examinations and had not been entered into evidence to rebut a recent charge of fabrication. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987) (“As a general rule, neither a prosecutor nor anyone else is permitted to bolster a witness’ testimony by referring to prior consistent statements of that witness.”); *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987) (evidence of a prior consistent statement is admissible under certain circumstances to rebut a charge of recent fabrication).¹

Nonetheless, we can find no prejudice where the transcript of the preliminary examination was used in every instance but one only to refresh Goins’s recollection as allowed under MRE 612, no transcript was entered as evidence, and the trial court instructed the jury that the attorneys’ arguments were not evidence. Further, in the only instance where the prosecutor read the substance of the preliminary examination transcript into the record, that portion merely repeated facts to which Goins had already testified at trial.² Defendant’s substantial rights were not violated under these circumstances.

Next, defendant asserts the prosecution denigrated defendant by characterizing him as one who “snuff[ed] out [Carmichael’s] life like he’s a piece of garbage.” A prosecutor “must refrain from denigrating a defendant with intemperate and prejudicial remarks.” *Bahoda*, 448 Mich at 283. However, prosecutors are entitled to argue the evidence and all reasonable inferences arising therefrom, *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989), and “may use ‘hard language’ when it is supported by evidence and are not required to

¹ The prosecution claims these references were made in good faith in anticipation of defendant’s attack on Goins’s credibility. However, the prosecution cites no authority in support of this anticipatory rebuttal theory, and it is not incumbent upon us to locate authority in support of the prosecution’s argument. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

² Specifically, the prosecution read the following exchange while questioning Goins: “‘Okay, and did [defendant] say what he did after [defendant and Carmichael] were done arguing?’ And did you [Goins] give the answer: ‘Yes. [Defendant] said he shot [Carmichael]?’” Goins answered affirmatively to this question. However, Goins had previously testified that defendant told her he had shot Carmichael.

phrase arguments in the blandest of all possible terms[.]" *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Where here, Carmichael was shot in the back of the head at close range with a shotgun and where evidence was presented that defendant left the scene and admitted to the shooting, we conclude that the prosecutor's remarks were exactly the kind of "hard language" envisioned in *Ullah*.

Likewise, we reject defendant's contention that the prosecutor denigrated defendant by accusing defendant of dishonesty to the point that it insulted the juror's intelligence "to come up with this kind of nonsense at the [eleventh] hour to try escape responsibility for taking another human being's life." Indeed, defendant admitted during cross-examination that he waited until the day he testified at trial to inform anyone that the person who shot him resembled one of the men who allegedly entered the restaurant before the shooting as defendant was leaving. And our Supreme Court has held that a prosecutor may "argue that a witness, including the defendant, is not worthy of belief" to the point of suggesting that a defendant fabricated his testimony after hearing other witnesses testify provided such an inference is supported by the evidence. *People v Buckey*, 424 Mich 1, 14-16; 378 NW2d 432 (1985). Such hard language and argument provide no basis for a finding of prosecutorial misconduct in this case.

Nor do we find merit in the argument that the prosecutor improperly denigrated defense counsel by characterizing his argument as "nonsense," "a red herring designed to take you away from the evidence in the case and to try to get you to go off on these wild goose chases which are not relevant to the evidence," and as an argument designed to "reward killers." It is true that a prosecutor may not question defense counsel's veracity, suggest that defense counsel is intentionally attempting to mislead the jury, personally attack defense counsel, or denigrate the defense. *Watson*, 245 Mich App at 592; *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). Nevertheless, the prosecutor's comments must be considered in light of defense counsel's arguments, *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997), and therefore a comment that might otherwise be improper "may not rise to an error requiring reversal when the prosecutor is responding to defense counsel's argument[.]" *Kennebrew*, 220 Mich App at 608.

First, the terms "nonsense," "red herring" and "wild goose chase" each explicitly refer to defense counsel's arguments, and not defense counsel personally, and as such fail to rise to the level of "accusatory prejudice" that supports a claim of prosecutorial misconduct in this context.³ See *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007) (finding that reference to defense counsel's arguments as red herrings were properly made in response to defense counsel's argument); see also *Watson*, 245 Mich App at 592-593.

Second, the reference to rewarding killers⁴ was made in response to defense counsel's argument that the prosecution's evidence was insufficient where the prosecution failed to call

³ Indeed the context of the alleged improper remarks reveals they were made in response to defense counsel's questioning of why Goins did not see defendant with a shotgun while he was inside the restaurant.

⁴ Specifically, the prosecutor stated:

(continued...)

other witnesses who were present during the shooting and Goins was not credible. Indeed, defense counsel vigorously attacked the prosecutor's theory that Goins was not initially forthcoming to police out of fear and concern for her safety, accused Goins of lying, and questioned why the prosecutor failed to call other witnesses present during the shooting. Thus, while the prosecutor's comments may have been improper under different circumstances, it is clear that in this context the comments were a direct reference to the evidence supporting the prosecutor's theory (that Goins's testimony was credible and sufficient) and a refutation of defense counsel's assertion that the prosecutor, in fact, had no evidence of the crime, that an acquittal was appropriate where other witnesses present during the shooting did not testify, and that Goins's testimony alone was insufficient.⁵

Defendant also attacks the prosecutor's comment that Goins's hearing the gunshot was "direct evidence in a way" that defendant killed Carmichael given that Goins overheard defendant's argument with Carmichael. While a prosecutor may argue reasonable inferences from the evidence, he is not free to argue facts not in evidence or to mischaracterize the evidence. *Watson*, 245 Mich App at 588. Here, the context reveals the prosecutor made the challenged comment as an attempt to emphasize her previous reminder to the jury that "[c]ircumstantial evidence is just as good as direct evidence." And, even if there was error, no prejudice resulted where the prosecutor *immediately* followed the challenged comment with the concession that Goins did not actually observe defendant with a gun at the time of the shooting, and the trial court instructed the jury on the difference between direct and circumstantial evidence.

In view of the foregoing analysis, we reject defendant's final argument that the cumulative affect of the prosecutor's misconduct denied him a fair trial. See *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) (for the cumulative effect of several minor errors to rise to a level warranting reversal, the effect must be so seriously prejudicial that they deny defendant a fair trial). On this same note, defendant cannot maintain his unpreserved claim of ineffective assistance of counsel for failure to object to the alleged prosecutorial errors where as previously set forth error was either nonexistent –and counsel is not required to make fruitless objections–or was not outcome determinative. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995) ("To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but

(...continued)

I would suggest to you that what counsel is asking you to do is reward the fact that only one person was brave enough or cared enough or was forthright enough to do what they thought they should do in this case. We don't reward killers because witnesses are scared or because they don't want to go through this process.

⁵ Defendant's reliance on *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), is unavailing where that case involved repeated references to the defense counsel's arguments—many of which were made prior to defense counsel's closing arguments—as "lies" and a "sham." The prosecutor's comments here, in contrast, were isolated, not personal in nature, and were clearly tied to the evidence.

for counsel's error, the result of the proceedings would have been different.”); see also *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (defense counsel is not required to make meritless motions or fruitless objections).

B. SUFFICIENCY OF THE EVIDENCE

As defendant’s final assignment of error, he claims the evidence was insufficient to support his first-degree murder conviction. Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

“In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998); MCL 750.316. “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). “Premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties; (2) the defendant’s actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant’s conduct after the homicide.” *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999) (quotation and citation omitted). “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).

When viewed in the light most favorable to the prosecution, sufficient evidence existed to support defendant’s conviction. According to Goins, defendant had a history of confrontations with Carmichael, so much so that they argued every time they saw each other. Goins, herself, personally witnessed two prior arguments at the Coney Island, and was even informed by defendant that he had received a black eye in a fight with Carmichael on a prior occasion, and Goins observed that defendant had to be restrained from choking Carmichael. The day of the homicide, defendant arrived at the restaurant after Carmichael, and rather than leaving, engaged in a loud argument with Carmichael for several minutes. Notably, after Goins heard a single gunshot, defendant fled the restaurant—having made no attempt to determine if Goins, his girlfriend, was safe until calling her on the phone later. The most damning evidence identifying defendant as the shooter, however, are defendant’s admissions to Goins following the shooting that he shot Carmichael, that his brother could not believe he had shot Carmichael, and that the shotgun Goins had seen previously the day of the shooting was the weapon defendant used.

Defendant counters that the evidence did not show premeditation. However, in addition to the aforementioned circumstances, relevant to our analysis is that Carmichael died when he sustained a wound to the side and back of the head caused by three shotgun pellets fired at close range and passing entirely through his head. Although the brutal nature of a killing alone does not establish premeditation, it may show that a defendant had time for a second look, which need

only be a few seconds. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999); *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). And when we consider the brutal nature of this killing, combined with the location of the wounds inflicted, the type of weapon used, that the defendant brought the weapon to the scene, and defendant's conduct before, during, and after the killing, we conclude that defendant acted with premeditation and deliberation with sufficient time for a second look. *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993) (defendant's conduct as well as the type of weapon used and location of the wounds inflicted may create an inference of premeditation). In reaching this conclusion, we are mindful that Goins's testimony contained minor inconsistencies and conflicted with defendant's rendition of events. Notwithstanding, such bears directly on credibility and is a determination for the finder of fact and not this Court. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Thus, defendant's challenge to the sufficiency of the evidence is without merit.

Affirmed.

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

/s/ Elizabeth L. Gleicher