STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2016
v	No. 329359 Kent Circuit Court
MATTHEW ROBERT BRUNN, Defendant-Appellant.	LC No. 15-001135-FC

Before: BORRELLO, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

Defendant, Matthew Robert Brunn, was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to life imprisonment. Defendant now appeals by right. We affirm.

On December 30, 2014, a motel employee discovered the 81-year-old victim's body lying on a bed. She could tell that he was dead. Dr. Stephen Cohle, a forensic pathologist and the Chief Medical Examiner for Kent County, performed an autopsy on the victim, and he opined that the cause of the victim's death was asphyxiation by strangulation and that the manner of death was homicide. Detective Daniel Raap eventually interviewed defendant, and a video of this interview was played at defendant's trial. In the video, defendant admitted that he choked the victim with his arm and took property belonging to the victim. Defendant indicated that on the night of the homicide, he and the victim started to "fool around." Defendant did not want to continue; he got mad, and he "hurt" the victim.

Defendant first argues that the video of defendant's interview with Detective Raap should have been redacted to exclude the reference to defendant's previously having been on parole for a choking incident unrelated to the instant case.

Before trial, defendant moved in limine to exclude from evidence defendant's prior convictions, and the trial court ruled that it would "keep *parole* out of this." The prosecutor also indicated that evidence of defendant's prior record would not be introduced unless defendant testified. But the motion in limine did not specifically mention the interview of defendant, or the statements that defendant challenges on appeal. Furthermore, defendant did not object to the video of defendant's interview with Detective Raap, either before it was admitted or while it was being played for the jury. Indeed, the trial court specifically inquired about the admissibility of

defendant's "statement to Detective Raap" and asked, "Any objection to the statement?" Defense counsel replied, "I believe that comes in per well-settled law, your Honor."

We conclude that defendant has waived appellate consideration of this issue. A waiver occurs when a party intentionally relinquishes or abandons a known right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). When a party waives a right under a rule he may not later seek appellate review of a claimed violation of the right because "his waiver has extinguished any error." *Id*. (quotation marks and citation omitted). In *Carter*, the trial court stated its decision regarding how to respond to a note from the jury; the trial court asked the attorneys for their input, and defense counsel responded, "Satisfaction with that part of it, Judge." *Id*. at 211-212. The Court held that the issue was waived on appeal because defense counsel had expressed his satisfaction with the trial court's ruling. *Id*. at 215, 220.

In this case, defense counsel clearly expressed that defendant's interview statement, taken as a whole, was admissible, and defense counsel never objected to any specific portions of the interview. While the motion in limine applied broadly to prior convictions, and the statement regarding defendant's prior choking incident could be viewed as falling within the scope of the motion in limine, defendant's subsequent and specific approval of the admissibility of the interview serves to extinguish any error regarding admitting the statement that might have existed. *Carter*, 462 Mich at 215, 220. When an issue is waived, rather than forfeited, "there is no 'error' to review." *Carter*, 462 Mich at 219. Therefore, we do not address this issue further.

Next, defendant alleges two instances of prosecutorial error[1] during closing arguments. Defendant failed to preserve these claims for appeal because he did not contemporaneously object and request that the trial court give a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

Ordinarily, this Court reviews de novo claims of prosecutorial error to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). But relief is not warranted where the defendant does not timely and specifically object unless an objection could not have cured the error, or the failure to grant relief would result in a miscarriage of justice. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In other words, if a defendant fails to contemporaneously object or request a curative instruction regarding an alleged error, then "review is limited to ascertaining whether plain error affected defendant's substantial rights." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Prosecutorial error will not require reversal "where a curative instruction could have alleviated any prejudicial effect." *Ackerman*, 257 Mich App at 448-449. A curative instruction will be sufficient to eliminate the prejudicial effect of most prosecutorial errors. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[1] Because defendant does not claim that the prosecutor violated the rules of professional conduct or that the prosecutor committed illegal conduct, defendant's claim will be referred to as one of "prosecutorial error." See *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015).

"A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Claims of prosecutorial error are decided on a case-by-case basis. The reviewing court examines the pertinent portion of the record in context to determine if the defendant was denied a fair and impartial trial. *Id*. at 435. Prosecutors have great latitude presenting their arguments at trial, and may properly argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Unger*, 278 Mich App at 236.

Defendant first argues that the prosecutor improperly sought the jury's sympathy for the victim during closing argument when the prosecutor commented on the victim's and defendant's going to the motel:

> Within two hours there, [the victim] is dead because the defendant has choked him out. And, you know, as I played the defendant's video yesterday, you might have thought, *Well, geez, I feel a little bit sorry for him*. He was crying at points. I submit to you, maybe he does feel some remorse. Maybe. Or, maybe he is just disappointed that he got caught, and that's why he's crying. He's put himself in this position. Because I think the true [defendant] comes out in what he does after he kills [the victim]. Does he call anyone for help? No. What's the first thing he does? He takes [the victim's] items: the car keys, the ATM card, the credit card, and leaves.
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> What does he do? Well, apparently, after you choke someone out, you get thirsty. Because this is the true [defendant]. He goes and buys some cigarettes and a pop, thinking nothing of what he has just done.
>
> And from there, it's all done, every action of his is for [defendant]. He goes and gets high, and he keeps using [the victim's] ATM card to get money to continue to get high. That is the true [defendant]. That is the true person we're dealing with here. The minute he leaves, [the victim's] dead. He goes to the gas station across the street, uses [the victim's] cards, and buys himself some cigarettes and pop. Again, that is the type of person we're dealing with here. [The victim's] statement, *When* [defendant] *gets angry, he gets violent*, all came true here.
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> When we talk about the conduct here, and whether or not you agree with them going to the hotel and [the victim] befriending him, this was a two-way street here, ladies and gentlemen of the jury. One might say, even, that the defendant was playing [the victim] here to get his money, to get his credit cards, and things of that nature.
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> [The victim], I submit to you, was more than that, because you heard from Lucas Williams. What did Lucas Williams tell you? Well, [the victim] was a fixture down in the Heartside neighborhood; that he helped out a bunch of people, including Lucas Williams. There was a little bit more to him. And if we're going

> to—the Judge is going to instruct you that sympathy, prejudice, things of that nature, should not enter into your deliberation process.
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> But if we do, we win that every time. [The victim] had relatives. He had loved ones that cared for him. He was a living person who was helping people.

Defendant challenges the last three paragraphs of the above argument.

"A prosecutor may not appeal to the jury to sympathize with the victim." *Unger*, 278 Mich App at 237. In *Unger*, this Court found that a prosecutor's comments were improper where the prosecutor "suggested that defense counsel had 're-victimized' [the victim] during the course of trial." *Id*. at 237. Nonetheless, the *Unger* Court found that reversal was not required on plain error review because the comments did not affect the outcome of the trial. *Id*. The Court stated that the comments, when viewed in context, "were relatively brief and did not likely deflect the jury's attention from the evidence presented." *Id*. Moreover, the trial court had instructed the jury that the statements of the attorneys were not evidence and to only accept them if supported by the evidence or common sense and general knowledge. Ultimately, the Court concluded that "because a timely objection and curative instruction could have alleviated any prejudicial effect of the improper prosecutorial statement, we cannot conclude that the error denied defendant a fair trial or that it affected the outcome of the proceedings." *Id*. at 237.

In contrast, this Court found in *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988), that the prosecutor improperly sought the jury's sympathy for the victim by continuously referring to the victim, on multiple occasions during closing argument, as " 'the poor innocent baby.' " The Court granted a new trial based on ineffective assistance counsel and the prosecutor's improper closing argument, which included other instances of misconduct in addition to improperly seeking the jury's sympathy for the victim. *Id*. at 578-582.

Here, defendant challenges a relatively brief reference by the prosecutor to sympathetic qualities of the victim. We conclude that even if the prosecutor's statements were improper, reversal is not required because the comments were not outcome determinative. The reference to the victim's sympathetic qualities was relatively brief, and it was immediately preceded by the prosecutor's acknowledgment that sympathy and prejudice should not play a part in the jury's deliberation process. While defendant relies on *Dalessandro*, the instant case does not involve the multiple sympathy-seeking references that were present in that case. Additionally, the trial court instructed the jury that "[y]ou must not let sympathy or prejudice influence your decision," that "[t]he lawyers' statements and arguments are not evidence," and that "[y]ou should only accept the things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." "[J]urors are presumed to follow their instructions." *Unger*, 278 Mich App at 235. Moreover, the trial court could have given a curative instruction if defense counsel had timely objected, and such an instruction could have cured any prejudicial effect that the prosecutor's statement may have had. *Id*. at 235, 237. Although the prosecutor's statements were improper, they were not outcome determinative, and reversal is not required. See *Ackerman*, 257 Mich App at 448-449; *Unger*, 278 Mich App at 235, 237.

Next, defendant argues that the prosecutor improperly shifted the burden of proof to defendant and indirectly commented on defendant's failure to testify by arguing that there was "no evidence" that the victim unplugged the telephone in the motel room. During closing arguments, the prosecutor argued:

> I submit to you, when you begin to pull this all together and you begin to apply the facts to the law, it's pretty clear that the defendant, when you begin to look at everything here—and I ask you to go back to the testimony that indicated on November 15, 2014, the defendant took [the victim's] car without his permission. He admitted that. Why is that important? Well, he was arrested for that. This time there wasn't going to be anyone left around to call.
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> Why do I specifically state there isn't going to be anyone left around to call? Well, the defendant chokes out [the victim] first. Then I ask you to take a look at Exhibit 11. Exhibit 11 is the picture of the phone, and it's specifically the cord. And the cord is pulled out of the phone. I submit to you, there's a reason for that. There's a reason for that; so that no one can call in.
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> But why is that phone disconnected? I submit to you, there's been no evidence here that [the victim] did it. I submit to you that, in all likelihood, the defendant did.

Specifically, defendant challenges the last paragraph of the above argument.

The Constitutions of both the Michigan and the United States protect a person's right against being "compelled in any criminal case to be a witness against himself[.]" US Const, Am V; Const 1963, art 1, § 17. Thus, a defendant in a criminal case may rest on the " 'presumption of innocence,' " and "no reference or comment may be made regarding defendant's failure to testify." *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995); see also MCL 600.2159 ("A defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.").

Additionally, a prosecutor may not "shift the burden of proof" by suggesting that the defendant must prove something by presenting evidence or offering a reasonable explanation for damaging evidence. *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). But a prosecutor is permitted to comment "that the evidence against the defendant is 'uncontroverted' or 'undisputed,' even if defendant is the only one who could have contradicted the evidence[.]" *Fields*, 450 Mich at 115 (citations omitted). "A prosecutor's remark that the evidence is undisputed is proper in urging the weight to be given the testimony." *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991).

In this case, the prosecutor did not comment at all on the fact that defendant did not testify. And while the prosecutor observed that there was no evidence that the victim unplugged the telephone cord and argued that defendant likely unplugged it, the prosecutor did not thereby imply that defendant was responsible for producing evidence to contradict this theory. Rather, the prosecutor was arguing his theory of what occurred in the motel room. Prosecutors "are

generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. The prosecutor in the instant case was also permitted to argue that the evidence was uncontroverted. See *Fields*, 450 Mich at 115. Thus, the prosecutor did not comment on defendant's exercise of his right not to testify, and the prosecutor did not shift the burden of proof to defendant. *Id*.; *Fyda*, 288 Mich App at 463-464.

Moreover, even if the statement could be understood as commenting on defendant's failure to testify or as an attempt to shift the burden of proof, reversal is not required because the statement was not outcome determinative. The statement was brief and dealt with relatively minor subject matter as part of the prosecutor's theory of how the murder was committed. Additionally, the trial court instructed the jury that "[t]he prosecutor must prove each element of each crime beyond a reasonable doubt" and that "[t]he defendant is not required to prove his innocence or to do anything." The trial court also instructed the jury that "[e]very defendant has the absolute right not to testify" and that the jury "must not consider the fact that he did not testify" or let that fact "affect your verdict in any way." The trial court further instructed the jury about the presumption of innocence and that the burden of proof belonged to the prosecution. "[J]urors are presumed to follow their instructions." *Unger*, 278 Mich App at 235. Therefore, even if the prosecutor's statements were improper, they were not outcome determinative and reversal is not required. *Id*. at 237; *Ackerman*, 257 Mich App at 449.

Next, defendant claims that he received ineffective assistance of counsel on two grounds. Defendant did not preserve his ineffective assistance of counsel claims because he did not move the trial court for a new trial or an evidentiary hearing. *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013). "Unpreserved issues concerning ineffective assistance of counsel are reviewed for errors apparent on the record." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). "A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law." *Unger*, 278 Mich App at 242. Factual findings are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id*.

To establish a claim of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Lockett*, 295 Mich App at 187. "Effective assistance of counsel is presumed," and "[t]he defendant bears a heavy burden of proving otherwise." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Further, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *Unger*, 278 Mich App at 242-243. "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Strickland v Washington*, 466 US 668, 700; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first argues that defense counsel was ineffective for failing to redact the video of defendant's police interview to prevent the jury from hearing about defendant's prior choking incident. Regardless of whether defense counsel's performance was deficient or not, which we need not decide, defendant cannot satisfy the prejudice prong. There was overwhelming evidence of defendant's guilt introduced at trial. Defendant admitted during the interview that he choked the victim and that he took the victim's ATM card, cash, and car keys before leaving the

scene. Dr. Cohle opined that the victim's cause of death was asphyxiation by strangulation. A surveillance video and bank records established that defendant was using the victim's ATM card during the late night and early morning hours before the victim's body was discovered. The contested statements from the interview video were brief compared to the length of the entire interview, which exceeded one hour. Defendant simply has not shown that there is a reasonable probability that the outcome of the trial would have been different but for the admission of the contested statements, *Lockett*, 295 Mich App at 187, and he therefore has failed to show that he was denied the effective assistance of counsel. See *Strickland*, 466 US at 687, 700.

Next, defendant argues that defense counsel was ineffective for failing to object to the statements in the prosecutor's closing statement that allegedly sought the jury's sympathy for the victim and the statements that allegedly commented on defendant's failure to testify and shifted the burden of proof. Even if the comments were improper and defense counsel's performance deficient for failing to object and obtain curative instructions, a determination that we need not make, defendant has failed to meet the prejudice prong. Defendant has not explained how, in light of the other evidence against defendant, he would not have been convicted *but for* defense counsel's failure to object to these statements, neither of which dealt directly with the elements of first-degree felony murder. Again, defendant has not established "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Lockett*, 295 Mich App at 187. Because defendant has failed to satisfy the prejudice prong, he has failed to show that he was denied the effective assistance of counsel. *Strickland*, 466 US at 687, 700.

We affirm.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Jane E. Markey