STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2012
v	No. 300525 Wayne Circuit Court
DAMON ALLEN THOMAS, Defendant-Appellant.	LC No. 10-005408-FC

Before: O'CONNELL, P.J., and SAWYER and TALBOT, 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 750.227. He was sentenced to life imprisonment for the murder conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the April 30, 2010, shooting death of Marcelius Mitchell in Detroit. Evidence indicated that defendant knew Mitchell, who owed defendant money. On the night of the shooting, defendant went to Mitchell's apartment with a loaded handgun. As the two socialized, defendant requested his money and became impatient when Mitchell persisted in refusing to repay the debt. Defendant admitted in a statement to the police that he ultimately shot Mitchell five times, including once in the center chest area, before fleeing the scene and disposing of his gun and clothing.[1]

I. SUFFICIENCY OF THE EVIDENCE

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

[1] A video recording of defendant's statement was played for the jury. Defendant also signed a written statement that was admitted at trial.

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), amended 441 Mich 1201 (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). "[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 (2002). 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). 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). "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind[.]" *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

There was evidence that defendant, armed with a loaded five-shot firearm, went to Mitchell's apartment to socialize and collect a $100 debt. As the two men played video games, watched television, and smoked marijuana, it became apparent to defendant that Mitchell had no intention of repaying the debt. Defendant indicated during his police interview that he shot Mitchell after he became impatient with Mitchell's "bullsh*tting" in response to defendant's demands for repayment. Before shooting Mitchell, defendant recalled stating, "I'm a kill you, bitch." He then shot Mitchell once in the chest. When Mitchell did not instantly fall, defendant fired four more bullets, completely emptying his firearm. Defendant fled and disposed of his gun and clothes.

Viewed in a light most favorable to the prosecution, the evidence that defendant brought a loaded firearm to Mitchell's residence, stated his intent to kill Mitchell after realizing that Mitchell did not intend to repay the debt, shot Mitchell once the chest, and then shot Mitchell four additional times when Mitchell did not immediately fall after the first shot, and defendant's actions after the shooting, considered together, were sufficient to enable a rational jury to find the necessary premeditation and deliberation for first-degree murder beyond a reasonable doubt. *Anderson*, 209 Mich App at 537. While defendant argues that different inferences should be drawn from the evidence, it is for the jury, not this Court, to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). When reviewing a challenge to the sufficiency of the evidence, this Court "is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, 462 Mich at 400. The evidence was sufficient to sustain defendant's conviction of first-degree premeditated murder.

II. THE PROSECUTOR'S CONDUCT

Defendant argues that he is entitled to a new trial because the prosecutor impermissibly "vouched for the evidence," argued facts not in evidence, injected herself as a witness, and expressed her personal opinion that defendant was guilty during closing and rebuttal arguments. Defendant did not object to the prosecutor's remarks and arguments at trial, leaving this issue unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's 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 conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A prosecutor may not express personal opinions about a defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283, 531 NW2d 659 (1995), inject herself into trial as a witness, *People v Rodriguez*, 251 Mich App 10, 35; 650 NW2d 96 (2002), or 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). However, prosecutors are afforded great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence as it relates to their theory of the case, and they need not state their inferences in the blandest possible language. *Bahoda*, 448 Mich at 282; *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). A prosecutor's mere use of the words "I believe" and "I think" during closing and rebuttal arguments does not render the arguments improper. See *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

Viewed in context, the prosecutor's remarks were based on the evidence and reasonable inferences arising from the evidence as they related to her theory of the case. *Bahoda*, 448 Mich at 282. The prosecutor did not express her personal opinion of defendant's guilt or place the prestige of her office behind her arguments, but contended that the evidence presented at trial proved defendant's guilt beyond a reasonable doubt. The prosecutor's argument that defendant shot Mitchell with premeditation and deliberation was based on reasonable inferences from the evidence, which consisted primarily of defendant's own confession, that defendant took a recently purchased, fully-loaded firearm to Mitchell's residence to collect a debt, realized that Mitchell did not intend to repay, stated his intent to kill Mitchell, and shot Mitchell five times before fleeing, tossing the gun, and disposing of his clothes. The prosecutor's argument that the felony-firearm charge was established was a reasonable inference from defendant's statement that he shot Mitchell with a .38-caliber firearm, and the firearm expert's testimony that the recovered bullets were consistent with ammunition fired from a .38 revolver. Also, the prosecutor's argument that defendant was being truthful when he told his girlfriend that he went to Mitchell's house to collect a debt was a reasonable inference from the evidence, as depicted in the video recorded statement, that defendant repeatedly asked to call his girlfriend and that she was the only person he cared and was concerned about and wanted to tell her first.

Lastly, the prosecutor's narration in rebuttal argument was responsive to defense counsel's assertions in closing argument that the prosecutor's argument was "deceiving" and missing elements to establish murder, and was based on evidence from defendant's statement in which he chronicled the events and spoke in a derogatory manner about Mitchell. When making the challenged remarks, the prosecutor urged the jury to evaluate the evidence, discussed the

reliability of defendant's statement, and argued that there were reasons from the evidence to conclude that defendant was guilty of the charged crimes. The prosecutor's arguments were not clearly improper.

Further, a timely objection to the challenged remarks and arguments could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the jury was to decide the case based only on the properly admitted evidence, and that the jury was to follow the court's instructions. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

III. JURY INSTRUCTIONS

We reject defendant's next argument that he was denied his right to a properly instructed jury because the trial court failed to instruct the jury on the order of deliberations, contrary to CJI2d 3.11, and failed to provide a "not guilty" option for second-degree murder on the verdict form pursuant to *People v Wade*, 283 Mich App 462; 771 NW2d 447 (2009).

After the defense rested, the trial judge and the parties discussed the proposed jury instructions. On the following day, before closing arguments, the trial court noted that the instructions discussed the day before were prepared, and asked the attorneys to object at the end of instructions if anything was incorrect. After the trial court completed its final instructions and before the jury was dismissed for deliberations, it asked the attorneys if there was "[a]ny objection to [its] reading of the jury instructions." Defense counsel responded: No, Your Honor. The trial court also asked the attorneys to "come up and look at the verdict form," and asked if there was "[a]ny objection to the verdict form." Again, defense counsel answered, "No." Because defendant assented to the trial court's instructions as given and the verdict form, he has waived appellate review of this claim. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant's waiver extinguished any error. *Id.* at 216.

Even if this issue was not waived, however, there was no plain error that affected defendant's substantial rights. *Carines*, 460 Mich at 763. Examined in their entirety, *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003), the jury instructions did not convey, expressly or implicitly, that the jury must acquit defendant of first-degree murder before considering second-degree murder. The jury was instructed regarding the elements of first-degree murder and that, "For the crime of first-degree murder, you may also consider the less serious crime of second-degree murder." After the jury was instructed with regard to the charged counts, the jury was instructed that the verdict must be unanimous and to consider the court's instructions together. The jury was further instructed that it would receive a verdict form "listing the possible verdicts," and that it was to be filled out and signed after a unanimous verdict is reached. Regarding the first-degree murder charge, the verdict form specifically allowed the jury to select a general "not guilty" verdict, guilty of first-degree murder, or guilty of the lesser offense of second-degree murder. The jury convicted defendant of the highest offense, first-degree murder. On this record, defendant's unpreserved challenge to the jury instructions and

the verdict form would not warrant relief, even if analyzed under the standard applicable to review of forfeited issues.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant lastly argues that he was denied the effective assistance of counsel at trial. Again, we disagree. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, 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 Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *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).

We reject defendant's claim that defense counsel was ineffective for failing to locate two witnesses—the actual shooter and the actual shooter's cousin—who defendant contends would have supported a defense of innocence. Defendant does not identify the witnesses, but avers in an affidavit submitted with his brief that he informed defense counsel about the two witnesses. Accepting defendant's claim that defense counsel was aware of the proposed witnesses, the decision whether to call a witness is a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Considering that defendant gave a recorded confession in which he admitted shooting the victim, defendant has not overcome the strong presumption that counsel chose not to call the witnesses at trial and instead focused on the issue of intent as a matter of strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Moreover, defendant has not identified any evidence or submitted any offer of proof to show that the alleged witnesses would have actually admitted responsibility for this serious crime and provided testimony favorable to the defense. Absent such a showing, defendant has not established that he was prejudiced by defense counsel's failure to locate and present the two unnamed witnesses.

Defendant also contends that defense counsel should have objected to an anonymous tipster's hearsay statements, as relayed at trial by Sergeant Ryan Lovier, the admission of which defendant contends violated his constitutional right of confrontation. "The Confrontation Clause prohibits the admission of all out-of-court testimonial statements unless the declarant was unavailable at trial and the defendant had a prior opportunity for cross-examination." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007), citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "However, the Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 10-11; see also *Crawford*, 541 US at 59. "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Chambers*, 277 Mich App at 11. In this case, the testimony was not offered for the purpose of establishing the truth of the tipster's statements, i.e., to prove that defendant shot Mitchell. Rather, the statements merely provided context for understanding the course of action

that led to the police locating and arresting defendant. See *id.* Because there was no basis for an objection on hearsay or confrontation grounds, defendant's ineffective assistance of counsel claim on this basis cannot succeed. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

We also reject defendant's claim that defense counsel was ineffective for failing to move to suppress defendant's statement. Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999). Whether a statement was voluntary is determined by examining police conduct, while whether it was made knowingly and intelligently depends in part upon the defendant's capacity to understand the warnings given. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

No single factor is conclusive. *Cipriano*, 431 Mich at 334; *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998).

Defendant argues that his statement was coerced and involuntary because he was an 18-year-old "uneducated, troubled teenager." However, it is not apparent from the record that the statement was improperly obtained. On the contrary, the existing record indicates that defendant understood his rights and knowingly and intelligently waived them. The video recording of defendant's interview and his written statement are part of the record, and the interrogating officer testified at trial regarding the circumstances of defendant's interview. It is undisputed that defendant was advised of his *Miranda* rights before he was questioned, that he indicated that he understood those rights, and that he signed a written waiver of his rights. When the officer questioned defendant about the circumstances of the incident, he coherently articulated a detailed account of his actions at the time of the incident. The record shows that defendant could read and write, and there is no indication that he had any learning disabilities or psychological problems. There is no evidence that defendant was ill, intoxicated, or deprived of sleep, food, or drink, or under the influence of drugs. There is likewise no evidence that defendant was threatened, abused, or promised anything in exchange for his statement. While defendant might have been "troubled" and 18 years old, there is no indication that he lacked the capacity to understand the warnings given. Because it is apparent from the record that defendant's statement

was voluntarily, knowingly and intelligently made, defense counsel was not ineffective for failing to move to suppress it. See *Snider*, 239 Mich App at 425.

Defendant's last ineffective assistance of counsel claim is that defense counsel was ineffective for failing to object to the prosecutor's closing and rebuttal arguments. As discussed in section II, *supra*, the prosecutor's remarks were not clearly improper. Therefore, defense counsel's failure to object was not objectively unreasonable. Further, the trial court's jury instructions were sufficient to dispel any possible prejudice. Therefore, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Consequently, defendant has failed to establish an ineffective assistance of counsel claim.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot