

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS ARZOLA LOPEZ,

Defendant-Appellant.

UNPUBLISHED

April 14, 1998

No. 186092

Bay Circuit Court

LC No. 94-001189 FC

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of voluntary manslaughter, MCL 750.321; MSA 28.553, and one count each of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, carrying a firearm with unlawful intent, MCL 750.226; MSA 28.423, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2). Defendant pleaded guilty before trial to being a felon in possession of a firearm. MCL 750.224f; MSA 28.421(6). After trial, he pleaded guilty to being an habitual offender, third offense. MCL 769.11; MSA 28.1083. He was sentenced to concurrent prison terms of 20 to 30 years for the manslaughter convictions and 6-1/2 to 10 years each for the CCW conviction, carrying a firearm with unlawful intent conviction, and felon in possession of a firearm conviction. His sentence is to be served consecutive to a two-year term for the felony-firearm conviction. Defendant now appeals as of right. We affirm.

Defendant's convictions stem from the fatal shooting of two men (Bernard Porter and Michael Wilkins) and the non-fatal shooting of a third man (Tannon Bell) at an apartment in Bay City. The prosecution's theory of the case was that the shootings were in retaliation for an earlier attack on a member of defendant's gang (Cleo Brown). The prosecution argued that defendant and a friend (Fernando Nunez), armed with firearms, entered into the apartment where the shooting occurred with the intent to avenge the attack on Cleo Brown and eventually kill Porter. Defendant argued that the shootings were defensive and that they occurred only after defendant and Nunez were attacked in the apartment by a group of men.

I

Defendant's first argument on appeal is that he was denied a fair trial and due process of law by having been charged with open murder. Defendant essentially argues that since the prosecution conceded that there was no convergence of the actus reus and the mens rea, he was therefore overcharged. We disagree. The prosecutor has wide discretion over what charges to file against a defendant; we review such decisions for an abuse of that discretion. *People v Yeoman*, 218 Mich App 406, 413; 554 NW2d 577 (1996). An abuse of discretion will not be found absent a showing of clear and intentional discrimination based on an unjustifiable standard such as race, religion, or some other arbitrary classification. *People v Oxendine*, 201 Mich App 372, 377; 506 NW2d 885 (1993). Defendant did not present any such evidence, and we find no support for his contention that the overcharging was the result of clear and intentional discrimination.

II

Defendant next argues that the trial court erred when it denied his motion for a directed verdict with regard to both the first and second-degree murder charges. In reviewing a motion for a directed verdict based on insufficiency of the evidence in a criminal jury trial, the trial court must consider the evidence presented by the prosecution up to the time the motion is made. *People v Garcia*, 398 Mich 250, 256; 247 NW2d 547 (1976). The court must determine whether a rational trier of fact might conclude that the essential elements of the crime were proven beyond a reasonable doubt. *Id.* On appeal, we review a trial court's denial of a motion for directed verdict de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995).

First-degree murder, other than felony-murder, is a specific intent crime. It requires proof of an intent to kill, which is premeditated and deliberate. *Garcia, supra* at 259. Premeditation and deliberation require the passage of sufficient time to allow the defendant to take a "second look." *People v Graves*, 224 Mich App 676, 678; 569 NW2d 911 (1997), appeal granted in part, 456 Mich 903; 572 NW2d 14 (1997). These elements may be inferred from the circumstances surrounding the killing, including the parties' prior relationship and the actions of the accused before and after the crime. *Graves, supra*; *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Second-degree murder requires proof that the killing was done with malice and that it was without justification or excuse. *People v Smith*, 148 Mich App 16, 21; 384 NW2d 68 (1985). "Malice" is a mental state consisting of "the intent to kill, to cause great bodily harm, or to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Vasquez*, 129 Mich App 691, 694; 341 NW2d 873 (1983).

In the present case, the evidence supports the conclusion that defendant engaged in the required mental thought process necessary to classify his action as a premeditated and deliberate murder. It is undisputed that prior to the murder, defendant drove to Saginaw to pick up weapons and two individuals, and that he subsequently stopped at his house to clean all fingerprints off the weapons. Witnesses testified that defendant made statements while at his house regarding who in the gang was to be a "driver" and who was to be a "shooter." Moreover, Porter's fiancée testified that defendant came up to her in the hospital and told her that Porter would be dead before the day was over. Finally, when

the circumstances surrounding the parties' relationship is taken into account, it seems highly unlikely that defendant entered Wilkins' apartment without hostile intent. As Detective Osterman testified, it is presumed that if a gang member is "disrespected" (assaulted), the gang must retaliate and the retaliation must be a little more severe than that which was inflicted on the "disrespected" member. The evidence indicates that defendant intended some sort of retaliation and that he obtained weapons in pursuit of this goal.

Viewing the evidence in the light most favorable to the prosecution, the lower court record supports the prosecution's theory that the defendant carefully thought out and prepared for the killings, and that defendant never renounced his intentions or attempted to withdraw from a potentially dangerous confrontation. To establish premeditation, it is only necessary to prove that there was "[s]ome time span between initial homicidal intent" and "ultimate action." *People v Hoffmeister*, 394 Mich 155, 161; 229 NW2d 305 (1975). The time interval in this case between defendant's initial threats and plans and the shootings was sufficient to afford defendant a chance to consider the consequences of going to an apartment, armed with guns, knowing that guns were usually present at the apartment, and confronting the individuals who had assaulted his friend earlier that day. This case is thus unlike *People v Vail*, 393 Mich 460, 471; 227 NW2d 535 (1975), in which all witnesses but one (whose testimony was contradictory) testified that the defendant's gun fired almost simultaneously with that of the victim.¹

The dissent concludes that the trial court erred when it allowed the jury to consider the charge of first-degree murder and that the "circumstances surrounding the killing establish that defendant did not go to Wilkins' apartment in order to seek out and kill Porter and Berry." The dissent fails to acknowledge, however, the factors that are consistent with premeditation. Defendant drove to Saginaw to obtain the necessary weapons and assistance. He cleaned fingerprints off the guns. He told Bernard Porter's fiancée "we're gonna kill those niggers before the night is over." These factors establish that defendant planned for a confrontation with Porter and/or Wilkins. Furthermore, the fact that he ultimately did go to the apartment and that he brought his guns with him indicates not only that he thought weapons might be necessary, but that he never fully renounced his intentions to kill the men in retaliation for their attack on Cleo Brown.

Therefore, viewing the evidence in a light most favorable to the prosecution, we believe that there was sufficient evidence to warrant submission of the first and second-degree murder charges to the jury. The circumstances surrounding the offense demonstrate an intent to kill that was both deliberate and premeditated. Similarly, we find that defendant's actions created a high risk of death or great bodily harm. Therefore, we decline to disturb the trial court's decision.

III

Defendant next argues that the trial court erred in admitting the testimony of a gang expert because the expert's testimony was not relevant to any of the issues before the jury and because the testimony and photographs admitted through the expert were more prejudicial than probative under MRE 403. We find no error.

First, the trial court did not abuse its discretion by admitting the testimony of Detective Osterman concerning how gangs operate. A trial court has the discretion to admit expert testimony if it determines (1) that the subject matter involves special skill and training beyond the experience of the average person, (2) that the testimony will aid the trier of fact in deciding the ultimate issue, and (3) that the testimony's probative value is not outweighed by the likelihood of prejudice, confusion or waste of time. *People v Smith*, 425 Mich 98, 105-106; 387 NW2d 814 (1986). In this case, the trial court noted that evidence regarding gang activity and behavior was "not yet considered common knowledge within the general public." The court determined that the testimony would educate the jury and help the jury to determine whether defendant's conduct was consistent with how a gang would avenge a beating of a friend and/or member. Since the prosecutor's theory of the case was that defendant was required to retaliate against Porter and Berry for their earlier attack on a member of defendant's gang, defendant's motive and intent became important issues to which the gang testimony was directly relevant. Moreover, since several other witnesses testified about gang operation and their respective membership in gangs, we do not believe that defendant was prejudiced by Osterman's testimony.

Defendant also argues that the trial court abused its discretion in admitting, along with Osterman's testimony, a number of photographs depicting defendant in gang colors giving gang hand signals. The trial court admitted the photographs to show that defendant was part of a gang that wore gang clothing, that he was involved in gang signs, and more importantly, the significance of being disrespected. We find no error in the admission of these pictures. However, assuming arguendo, that the admission of these pictures was error, we do not believe that the erroneous admission of the pictures requires reversal of defendant's conviction. MRE 402. Witnesses testified that defendant was a member of the MLD (Maniac Latin Disciples), and defendant's attorney admitted in his opening argument that defendant was a gang member. Other witnesses testified that defendant was the Chief of the MLD, and one witness even testified as to what certain gang signs and phrases meant. Given the abundance of evidence on this issue, we do not believe that a failure to vacate the judgment would result in substantial injustice to defendant. MCR 2.613(A); *People v Huyser*, 221 Mich App 293, 299; 561 NW2d 481 (1997).

IV

Defendant's next argument on appeal is that the trial court abused its discretion when it admitted the prior statements of an unavailable witness (Jamal White). The two statements at issue concern the fact that prior to the shooting, defendant obtained two guns from White, and that defendant told White that he wanted to "fuck up" the people who attacked Cleo Brown. White asserted his Fifth Amendment right under the federal constitution when called to testify. The trial court declared White unavailable to testify under MRE 804(a)(1) and admitted White's statements to the police as statements against interest under MRE 804(b)(3). Defendant now argues that White's statements lacked the requisite indicia of reliability necessary to satisfy Confrontation Clause concerns because White made both statements while in police custody during formal interrogations. We find no error.

The determination of whether a statement was against the declarant's penal interest is an issue of law. Accordingly, our review is de novo. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). However, the determination of whether a reasonable person in the declarant's shoes would

have believed the statement to be true and the determination whether circumstances sufficiently indicated the trustworthiness of the statement depend in part of the trial court's findings of fact and in part on its application of the applicable legal standard to those facts. Accordingly, we review the trial court's findings of fact under a clearly erroneous standard and the trial court's decision to admit the evidence under an abuse of discretion standard. *Barrera, supra* at 268-269.

The trial court did not abuse its discretion by admitting White's statements. In *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993), our Supreme Court determined that when a trial court seeks to evaluate a statement against penal interest that inculcates an individual in addition to the declarant, the court must evaluate the circumstances surrounding the making of the statement as well as its content:

The presence of the following factors would favor admission of such a statement: whether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates -- that is, to someone to whom the declarant would likely speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.

On the other hand, the presence of the following factors would favor a finding of inadmissibility; whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth. [*Id.*]

This list is not exhaustive; the totality of the circumstances must indicate that the statement is sufficiently reliable to allow its admission as substantive evidence although the defendant is unable to cross-examine the declarant. *Id.*

In the present case, the trial court conducted a detailed and thorough examination of the above criteria and deemed the statements to be trustworthy. First, the court found that the statements were voluntary. The court noted that White had been read his *Miranda*² rights and that he agreed to waive his rights and talk to the police officers. The court also noted that White did not "recant or retract any statements," that he "appeared to answer all questions forthrightly and to the best of his memory." Second, the court found that while the statements were not made contemporaneously with the events referenced, they were not so remote that they should be disregarded. In this respect, the court stated that White appeared to have knowledge of the events and that his statements were inculcating against himself. Third, the court recognized that the statements were made to police officers rather than friends or family members, but noted that there were still indications that White told the truth during the interviews. Fourth, the court found that some of White's statements were made at the inquiry of police officers, but that some of the information was given voluntarily and at White's own initiation. Fifth, the court found that White did not indicate a motive of revenge and that he did not attempt to minimize his role or responsibility, to shift blame to defendant, or to curry favor with the police officers. Finally, the court found that White did not have a motive to lie and that he did not attempt to distort the truth.

We believe that the trial court did an excellent job of analyzing the totality of the circumstances and in determining the reliability and trustworthiness of White's statements. A review of the totality of the circumstances indicates that admission was appropriate. Numerous details of White's statements were corroborated by the testimony of other witnesses. Furthermore, the evidence indicates that White's statements were voluntarily given. Given the circumstances, we find no error.

V

The next argument for our consideration is whether the twenty- to thirty-year sentences for voluntary manslaughter are disproportionate to the offense and the offender. We review the sentencing of an habitual offender for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). There is no abuse of discretion where a trial court sentences a defendant within the statutory limits, and when an habitual offender's underlying felony, in the context of his previous felonies, evidences that he has an inability to conform his conduct to the laws of society. *Hansford, supra* at 326.

We find no abuse of discretion. While defendant argues that he did not shoot any of the victims, we note that defendant was responsible for driving to Saginaw to pick up guns and accomplices and that he carried a loaded gun to an apartment where he knew he would encounter hostilities. He gave a weapon to a fourteen-year-old boy (Nunez) and brought the boy along with him. The events which took place would not have occurred but for defendant purposefully obtaining weapons and assistance. As a result of his actions, two people were killed and another was seriously injured. Furthermore, despite defendant's age (twenty-four at the time of the offense) we note that defendant has an extensive prior criminal record and that he was on parole for a prior felony when the shooting occurred. Clearly, defendant has an inability to conform his conduct to the laws of society. *Hansford, supra*. The serious nature of these crimes, defendant's extensive criminal history, and his inability to reform indicate that the trial court did not abuse its discretion in imposing sentence.

VI

Defendant next argues that he was denied his due process rights when the prosecutor "injected improper comments" during his closing arguments and when the prosecutor "impermissibly shifted the burden of proof." Since defendant failed to object to the prosecutor's conduct, appellate review is precluded unless failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's statements could have been cured by a timely curative instruction. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). Here, timely curative instructions could have eliminated any prejudice resulting from the prosecutor's arguments. Thus, failure to review this issue will not result in a miscarriage of justice. In any case, we conclude that defendant has not shown reversible error.

The first allegation of prosecutorial misconduct concerns several statements made by the prosecutor during closing argument. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v*

Lawton, 196 Mich App 341, 353; 492 NW2d 810 (1992). A prosecutor may not make a statement to the jury which is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but is free to argue the evidence and all reasonable inferences arising from it as it relates to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may not suggest that a defendant has to prove something or present a reasonable explanation for damaging evidence, as such arguments tend to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). A prosecutor may not comment on a defendant's failure to testify, but may argue that certain evidence is uncontradicted. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996).

First, we do not believe that the comments cited by defendant were improper. The prosecutor's references to prior testimony constitute reasonable inferences to be drawn from the evidence. While defendant correctly states that the phrase "Carlos is comin' at him" is inaccurate in that several witnesses testified that Porter hit defendant first, an instruction could have cured this minute error. Therefore, after reviewing the record, we conclude that defendant was not denied a fair trial.

Defendant's second allegation of prosecutorial misconduct concerns whether the prosecution impermissibly shifted the burden of proof. Defendant points to several prosecutorial statements indicating that defendant did not tell Detective Coyer that he was in fear of death or great bodily harm. Since defendant's statement had been introduced into evidence, such comment was permissible. The prosecutor did not comment on defendant's right to testify or the fact that defendant had not testified. However, defendant also points to the fact that the prosecutor commented on defendant's refusal to give a taped statement (though defendant did give a statement). While we believe such comment to be improper, the prosecutor's actions did not result in the denial of a fair trial for defendant. First, a curative instruction could have lessened, if not eliminated, any error. Second, the record indicates that the prosecutor did not deny the people's burden of proving beyond a reasonable doubt that defendant committed the charged crimes. Furthermore, the jury was properly instructed as to the definition of reasonable doubt. *People v Lee*, 212 Mich App 228, 254; 537 NW2d 233 (1995). Accordingly, we decline to reverse.

VII

Defendant next contends that he was denied his right to the effective assistance of trial counsel when counsel failed to voice critical objections during his closing argument. 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 that "there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Stanaway, supra* at 687-688. Claims of ineffective assistance must be evaluated under an objective standard of reasonableness. *Id.* at 687-688. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *Id.* at 687. We believe that defendant failed to meet this burden because he did not show that counsel's failure to object to the statements was unreasonable or that the result of the trial would have been altered had he done so. As noted above in our discussion of Issue VI, with the exception of two minute statements, the prosecutor made no improper comments. With regard to those statements, we note that the jury was properly instructed

that the prosecutor had to prove beyond a reasonable doubt that defendant was not acting in self-defense at the time of the shootings. Accordingly, defendant cannot prove that he was prejudiced by this error and his ineffective assistance of counsel claim must fail. See *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994).

VIII

Defendant's final argument is that he was denied his due process rights because the totality of the trial court's errors deprived him of a fair trial. While a single error may not necessarily provide the basis for reversal, it is possible that the cumulative effect of a number of errors may require reversal. *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974). The test to determine whether reversal is required is not whether there are some irregularities, but whether defendant has had a fair trial. *Id.* In the present case, reversal is not required. While the prosecutor did make several improper comments, any harm caused by the comments was cured by the fact that the jury was properly instructed on the issue of self-defense. Accordingly, it cannot be said that the cumulative error denied defendant a fair trial. *Id.*

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

¹ In any case, even if the charge was unwarranted by the proofs, we would agree with the majority in *People v Graves*, *supra*, that the holding in *People v Vail* (that actual prejudice may be presumed by the mere "possibility of a compromise verdict" when a jury considers an unwarranted charge) should be rejected and that defendant should be required to prove actual prejudice. See *Graves*, *supra* at 679.

² *Mirnda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).