STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ADAM SMITH,

Defendant-Appellant.

UNPUBLISHED
May 15, 1998

No. 197751
Genesee Circuit Court
LC No. 95-053259 FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD ISAAC CANNOY, JR.,

Defendant-Appellant.

No. 197758
Genesee Circuit Court
LC No. 95-053249 FC

Before: Hoekstra, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

This case arises from the shooting and stabbing of a third youth by defendants. Following a joint jury trial before separate juries, defendants Smith and Cannoy were convicted of first degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Each was sentenced to a two-year term of imprisonment for the felony-firearm conviction to be followed by a life term in prison without parole for the first degree murder conviction. This Court consolidated defendants' appeals as of right, and we now affirm.

I

Defendant Smith argues that the trial court erroneously admitted the statement police officers obtained from him while he was in police custody because the statement was made involuntarily in light of his age, lack of experience, isolation from family or counsel, and the inherently coercive atmosphere of the interrogation. We disagree. When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Robinson*, 386 Mich 551, 557; 194 NW2d 709 (1972). However, we give deference to the trial court's assessment of the weight of the evidence and credibility of the witnesses and will not reverse the trial court's findings unless they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J), 44 (Weaver, J); 551 NW2d 355 (1996).

Whether a waiver of *Miranda* rights is voluntary and whether an otherwise voluntary waiver is knowing and intelligent are separate questions. *People v Garwood,* 205 Mich App 553, 555-556; 517 NW2d 843 (1994). Here, the issue presented for our review is only whether defendant's statement was made voluntarily. When determining whether a statement is voluntary, a court should solely examine the conduct of the police. *People v Howard,* 226 Mich App 528, 538; 575 NW2d 16. Absent police coercion, the issue of whether defendant's statement was given voluntarily cannot be resolved in defendant's favor. *Garwood, supra* at 555-556.

Our review of the testimony at the *Walker*[1] hearing in this case reveals that the police detective began an informal questioning of defendant approximately three hours after defendant's arrest, after the detective had completed interviews of the witnesses. The detectives informed defendant of his *Miranda*[2] rights and ensured that defendant understood his rights before waiving them. There was no evidence presented that the detective used coercive or deceptive tactics in questioning defendant. There was no evidence presented that the detective threatened or abused defendant. There was no evidence presented that the police detective made defendant any promises of leniency if he confessed to the crimes. Last, the informal questioning of defendant and the compilation of defendant's formal statement together took less than two hours, a relatively short duration. Because the evidence shows that there was no police coercion, we hold that defendant's confession was voluntarily given and therefore properly admitted at trial.

II

Defendants Smith and Cannoy argue that the jury should not have heard evidence of their membership in an Aryan Nations gang because the evidence was irrelevant and highly prejudicial. Specifically, defendants refer to the prosecution's opening statements and closing arguments, which include references to homicide as part of the gang mentality, and the prosecution's questions to witnesses about defendants' very short hairstyles. Thus, defendants are apparently presenting both a prosecutorial misconduct argument and an argument about the erroneous admission of evidence. We disagree with both parts of this argument.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Opening argument is the appropriate time to state a fact that will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Here, the fact that defendants were members of a gang was

subsequently supported by testimony at trial. Similarly, because such evidence was admitted at trial, the prosecution was free to argue the evidence and all reasonable inferences

arising from it as they relate to its theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Therefore, defendants were not denied a fair trial because of prosecutorial misconduct.

Whether the trial court erroneously admitted the evidence is a decision that we will not disturb on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.* We first reject defendants' claim that the evidence was irrelevant. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401, *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993), modified on other gds 445 Mich 1205; 520 NW2d 338 (1994). Defendant Smith concedes that the only arguable basis that would justify admission of the evidence was as proof of motive for the offense. See MRE 404(b)(1). As a general rule, proof of motive, while not essential, is relevant in a prosecution for first-degree murder. *People v David Wells*, 102 Mich App 122, 128; 302 NW2d 196 (1980). "This is particularly true where the accused does not deny participation to some extent or being present at the scene of the crime but claims lack of intent." *Id.* at 129. "Evidence of motive is also material in proving premeditation or deliberation." *Id.* Here, where defendants were charged with premeditated murder and claimed a lack of intent or premeditation, the evidence of gang membership provided the factual context for understanding an otherwise inexplicable act and thereby helped to establish motive. Therefore, the evidence was not irrelevant.

Additionally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403, *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909, modified, remanded 450 Mich 1212; 539 NW2d 504 (1995). "Unfair prejudice" does not mean "damaging" because any relevant evidence will be damaging to some extent. *Id.* at 75 (quoting *Sclafani v Peter S Cusimano, Inc*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983)). Rather, unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence. *Id.* at 75-76.

In support of his position that the evidence resulted in unfair prejudice against him, defendant Smith cites the decision of this Court in *Wells, supra*, where we found that the gang-related evidence was inadmissible because of unfair prejudice. Although *Wells, supra*, and this case both involve a murder arising from gang-related activities, *Wells* is inapposite to this case. The trial court in *Wells, supra* at 125, permitted the prosecution to admit extensive evidence of past gang rivalry and individual episodes of violence between defendant's gang and the victims' gang. This Court reversed the trial court's decision, stating that it could not condone the admission of evidence of past episodes where the evidence had no tendency to prove the defendant's intent or motive. *Id.* at 129.

Whereas *Wells* involved evidence of past episodes of gang violence, this case involves admission of evidence of gang membership. Whereas the prosecution in *Wells, supra* at 129, failed to present testimony that the defendant knew about the alleged gang activities or that they had any bearing on his actions, this case clearly presents the reverse situation. Defendant Smith's theory of the case was that his fear of defendant Cannoy, the alleged leader of the gang, had a significant bearing on his actions,

to the point of duress. Similarly, evidence was presented that defendant Cannoy's anger over the victim's snitching to a rival gang influenced his actions. Because the prosecution in this case established a valid connection between the evidence and the crime charged, we cannot say that no justification or excuse exists for the trial court's ruling. See *People v Williams*, 143 Mich App 574, 585-586; 374 NW2d 158 (1985). Accordingly, we hold that the trial court did not abuse its discretion in admitting the testimony as motive evidence.

In addition to the evidence of gang membership that defendants Smith and Cannoy both raise on appeal, defendant Cannoy argues that the trial court erroneously admitted evidence of his assaultive behavior and thereby deprived him of a fair trial. He refers specifically to testimony about his temper and episodes where defendant Cannoy assaulted his girlfriend or defendant Smith. Although we agree that defendant's jury should not have been present to hear extrinsic evidence of defendant Cannoy's assaultive behavior, or, at the least, should have received an instruction to disregard the evidence as irrelevant, appellate courts should not reverse a conviction unless the error was prejudicial. MCL 769.26; MSA 28.1096, MCR 2.613(A), *People v Mateo*, 453 Mich 203, 210, 212; 551 NW2d 891 (1996). Whether a nonconstitutional error is harmless depends upon the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *Id.* at 215. Here, the evidence against defendant Cannoy was overwhelming. Therefore, because there is not a reasonable probability that admission of the testimony affected the jury's verdict, the error was harmless.

III

Defendant Cannoy argues that the trial court should have granted his motion for separate trials because defendant Smith claimed fear of defendant Cannoy as a defense to the charges against him, whereas defendant Cannoy claimed that he had no knowledge of defendant Smith's plan to murder the victim. We disagree. We review the trial court's decision for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994).

In general, a defendant does not have a right to a separate trial. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). Indeed, a strong policy favors joint trials in the interest of justice, judicial economy, and administration. *People v Etheridge*, 196 Mich App 43, 52; 492 NW2d 490 (1992). Consequently, the decision to sever or join the trials of defendants lies within the discretion of the trial court pursuant to MCL 768.5; MSA 28.1028, and MCR 6.121(D). *Hana, supra* at 331. Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *Id.* at 346. Severance is not required simply where the defenses are inconsistent, but where they are mutually exclusive or irreconcilable. *Id.* at 349. The use of dual juries, which is a partial form of severance, is evaluated under the same standard applicable to motions for separate trials. *Id.* at 351-352, 359.

Here, defendant filed a pretrial motion that merely requested a separate trial. Defendant did not attach an affidavit supporting his motion. Neither did defendant make an offer of proof during the hearing on his motion. In other words, defendant did not supply the trial court with the required

showing of prejudice. "The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision." *Hana, supra* at 347. Indeed, when the trial court indicated that it would instead grant only defendant's alternative request for separate juries, defendant acquiesced. Defendant cannot now predicate error. *People v Barclay,* 208 Mich App 670, 673; 528 NW2d 842 (1995).

In an attempt to show that the requisite prejudice in fact transpired, defendant Cannoy again culls several examples of testimony presented before his jury regarding defendant Cannoy's assaultive nature. We conclude that any error that did occur does not rise to the level of prejudice required in *Hana, supra* at 346. These excerpts of testimony, which were elicited by defendant Smith's counsel to show that Smith was forced to participate in the murder because of Cannoy's assaultive nature, share one fatal flaw: duress is not a defense to murder. *Etheridge, supra* at 53, 56. Therefore, the testimony did not serve to exculpate Smith or shift blame from Smith to Cannoy. See *id.* at 53. Moreover, the erroneous admission of the testimony may have occurred at a separate trial at which defendant's girlfriend and defendant Smith were called to testify. In other words, defendant has demonstrated that error occurred, but not that severance is the necessary means of rectifying the error. Therefore, even with the benefit of hindsight, we hold that the trial court did not abuse its discretion in denying defendant's motion for severance.

Last, defendant makes a related argument predicated upon MRE 404(b)(2). Specifically, defendant cites this Court's decision in *People v Mitchell,* 223 Mich App 395; 566 NW2d 312 (1997), remanded ___ Mich ___ ; ___ NW2d ___ (1998), for the proposition that he was entitled to notice from defendant Smith that Smith intended to introduce the evidence of bad acts. We decline to extend the holding in that case to find that a codefendant is entitled to notice from another codefendant of his intent to introduce evidence of prior bad acts. The plain language of the court rule is that "[t]he *prosecution* in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence." MRE 404(b)(2) (emphasis supplied). Therefore, defendant's argument does not provide a basis for finding that the trial court abused its discretion in denying the motion for severance.

IV

Defendant Cannoy next argues that the prosecution presented insufficient evidence to support his first-degree murder conviction. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor 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, amended 441 Mich 1201 (1992). First-degree premeditated murder is murder "perpetrated by means of poison, or lying in wait, or other wilful, deliberate, and premeditated killing." MCL 750.316(1)(a); MSA 28.548(1)(a). Here, defendant is apparently arguing that the prosecution did not present sufficient evidence of premeditation. However, defendant's argument is without merit because premeditation and deliberation can be reasonably inferred from the circumstances surrounding the killing. *People v Daniels,* 163 Mich App 703, 706; 415 NW2d 282 (1987). Moreover, because of the difficulty of proving an actor's state of mind,

minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Here, the prosecution presented the jury with evidence that the victim was lured down to the river, shot numerous times and then stabbed numerous times in the chest. Several witnesses testified that defendant Cannoy had talked about killing the victim and that defendant Cannoy was upset with the victim because he suspected the victim had "snitched" on him regarding a prior incident. Indeed, defendant Cannoy's own testimony at trial was that he handed defendant Smith the knife used to stab the victim. Therefore, when the evidence is viewed in the light most favorable to the prosecution, the jury had sufficient evidence from which it could infer that defendant Cannoy premeditated the murder. We decline to upset the jury's resolution of the questions of credibility and intent. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

V

Defendant Cannoy next argues that three instances of prosecutorial misconduct denied him a fair trial. We disagree. We must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Paquette*, *supra* at 342. A defendant's opportunity for a fair trial may be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980).

First, defendant claims that prosecutorial misconduct occurred when the prosecutor had the police detective read defendant's statement into the record. Because the statement included defendant's refusal to talk with the detective until he had an attorney present, defendant argues that the testimony concerned his post-arrest silence and therefore its admission requires reversal. We disagree. The prosecution sought to admit defendant's statement because it would help to substantiate earlier testimony that defendants were part of the Aryan Nation gang. At trial, defendant objected to the use of the statement because the gang membership evidence was unduly prejudicial, not because the testimony contained references to defendant's refusal to talk with the detective. Additionally, defendant did not ask for any portion of the statement to be redacted before being read into the record. Therefore, defendant has failed to preserve this issue for appellate review. *People v Strunk*, 184 Mich App 310, 322-323; 457 NW2d 149 (1990).

Nevertheless, we review this issue because defendant presents it as one involving a significant constitutional question. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 452; 506 NW2d 542 (1993). If the prosecutor had elicited testimony concerning defendant's right to remain silent, then reversal would be required. See *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). However, the record reveals that defendant did not remain silent, but eventually gave a statement that included the references to gang membership that the prosecution sought to have admitted at trial. Therefore, defendant's constitutional right to remain silent was not involved. See, e.g., *People v Hunt*, 68 Mich App 145, 147; 242 NW2d 45 (1976). Accordingly, the admission of this testimony did not deny defendant a fair trial.

Defendant Cannoy next claims that prosecutorial misconduct occurred because of the manner in which the prosecutor questioned the detective about his interview of defendant. Because this claim depends on the same excerpt of testimony to which defendant only objected on grounds of relevancy and is not a constitutional challenge, we decline to review it because the prejudicial effect of this line of questioning was not so great that it could not have been cured by an appropriate instruction. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).

Last, defendant Cannoy argues that during its closing argument, the prosecution improperly attacked the credibility of defendant and defendant's theory of the case by characterizing defendant as a gang leader, manipulator, and liar, among other similar characterizations. However, defendant made no objections to these remarks; therefore, we decline to review this issue because no miscarriage of justice will occur. *Duncan, supra* at 15-16.

VI

Defendant Cannoy next argues that the trial court failed to properly instruct the jury on the use of similar acts evidence admitted at trial. However, defendant neither requested a cautionary instruction, nor did he object to the cautionary instruction regarding prior similar acts that the trial court gave. Therefore, we hold that defendant has waived appellate review of this issue. *People v Adamski*, 198 Mich App 133, 143; 497 NW2d 546 (1993).

VII

Defendant Cannoy next argues that the trial court abused its discretion in allowing the jury to deliberate late into the evening. We disagree. Again, this issue is unpreserved for our review because defendant failed to object on the record below. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). Nevertheless, we review this issue because defendant has raised a challenge to his constitutional right to a fair trial by jury. *Jones, supra* at 452.

In matters of trial conduct the trial judge has great power and wide discretion. *People v London*, 40 Mich App 124, 129-130; 198 NW2d 723 (1972) (quoting *People v Roby*, 38 Mich App 387, 389-390; 196 NW2d 346 (1972)). However, a jury verdict may be coerced if the jury is required to deliberate until an unreasonable hour. *People v Cadle*, 204 Mich App 646, 657-658; 516 NW2d 520 (1994). Here, after closing arguments and instructions were completed, the jury was sent out to deliberate at 2:23 p.m. Court reconvened at 4:11 p.m. to answer the jury's request for various excerpts of transcript. The court was in recess at 4:19 p.m. At 10:08 p.m., the jury asked the judge whether it could leave. On the record, but outside the presence of the jury, the trial judge stated the following:

> It's my preference at this time because of news reports that are – I understand are being circulated widely in the community, that we remain here to try to reach a verdict tonight. The jury, while they have been in deliberations for some period of time, they have been fed, and I don't think that it's an impressive thing to keep them.

Both the prosecution and defense counsel stated that they agreed with the judge's decision. Court reconvened again at 12:12 a.m., at which time the trial judge sent the jury home with instructions to avoid any media reports on the case. The jury returned the following morning at 8:00 and reached its verdict at 3:57 p.m. We do not find that the court abused its discretion in conducting this trial.

VIII

Last, defendant Cannoy argues that the cumulative effect of these alleged errors requires this Court to reverse his conviction; however, because we have found no errors requiring reversal, defendant's argument is without merit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Richard A. Bandstra

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

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