STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY SIMMONS,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 202474
Kalamazoo Circuit Court
LC No. 96-001350 FC

Before: Jansen, P.J., and Holbrook, Jr., and MacKenzie, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was thereafter sentenced to the mandatory terms of life in prison for the murder conviction and two years in prison for the felony-firearm conviction. Defendant appeals as of right and we affirm.

Defendant first claims that he was denied a fair trial by the introduction of "prejudicial and unreliable" hearsay evidence volunteered by one of the witnesses to the shooting, Daarina Horton. Defendant did not object to Horton's alleged hearsay statement at trial. Error may not be predicated on a ruling admitting evidence unless a substantial right of the party was affected and a timely objection appears on the record. MRE 103(a)(1).

Hearsay is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). A statement is an oral or written assertion, or conduct intended as an assertion. *People v Jones (On Rehearing, After Remand)*, 228 Mich App 191, 215; 579 NW2d 82 (1998). An "implied assertion" is not an assertion under this definition, and, therefore, does not constitute a statement, or hearsay. *Id.*

Horton testified that others present outside the restaurant had said that a man was going to shoot someone. Horton admitted that she had merely assumed that defendant had been that individual whom the out-of-court declarants had expected to shoot someone because they had been looking at him. She admitted that the out-of-court declarants could have been referring to someone else.

Moreover, even if it were assumed that Horton's testimony unequivocally indicated that the out-of-court declarants were looking specifically at the individual Horton later identified as defendant when making the statement, neither Horton's testimony nor any other evidence presented at trial suggested that the out-of-court declarants' conduct (i.e., looking at defendant) had been intended as an assertion by them.

Therefore, because the evidence presented at trial does not indicate that the out-of-court declarants, overheard by Horton, orally asserted or engaged in a conduct evincing an intent to assert that defendant, i.e., the person Horton observed to have paced back and forth, was going to shoot someone, the testimony challenged on appeal was not hearsay. Accordingly, no substantial right of defendant was affected.

Defendant next claims that he was denied a fair trial by assertedly misleading closing argument statements made by the prosecutor. Specifically, defendant contends that the prosecution's conclusions regarding the sequence of the gunshots, the underpinning for the proof of the premeditation element, was not supported by the evidence presented at trial. The prosecution suggested at trial that the gunshot wounds were inflicted in the following order: (1) chest, (2) legs and buttock, and (3) head. The prosecution, presumably, emphasized the sequence of the gunshots in order to permit the inference that defendant had enjoyed a "second look" before firing the fatal gunshot to the victim's head. Again, defendant failed to object to the closing argument. Appellate review of alleged prosecutorial remarks is generally precluded where the defendant fails to object or request a curative instruction, unless the misconduct was so egregious that no curative instruction could have eliminated the prejudice or if failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The forensic pathologist noted six gunshot wounds. She stated that the fatal gunshot to the face had been fired from a range of six to twenty-four inches. Evidence was presented that the first gunshot had been directed to the victim's chest from a distance of approximately thirty-five feet and that two other gunshots preceded the close range gunshot to the victim's head. Thus, we conclude that the prosecutor's argument regarding the sequence of the gunshots was properly based upon the evidence adduced at trial and reasonable inferences drawn therefrom. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996) ("a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case"). Accordingly, the prosecutor's remarks at closing argument were proper and defendant was not denied a fair trial on this basis.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie