STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 29, 2000
v	No. 211825 Kent Circuit Court
TOMIKA DAMON SHAW, Defendant-Appellant.	LC No. 97-009637-FC

Before: Gribbs, P.J., and Cavanagh and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of first-degree premeditated murder, MCL 750.316; MSA 28.548, and conspiracy to commit first-degree murder, MCL 750.157(a); MSA 28.354(1). The trial court sentenced defendant to the mandatory term of life imprisonment for each conviction. We affirm.

I

In his first issue, defendant argues that the trial court erred in admitting the hearsay testimony of Tobias Allen and Aaron Shaw. This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *People v Adams*, 233 Mich App 652, 656; 592 NW2d 794 (1999).

Defendant asserts that the testimony of Tobias regarding statements made by codefendant Russell Allen should not have been admitted because there was no independent proof of a conspiracy, as required by MRE 801(d)(2)(E). Because defendant did not raise this argument in the trial court, it is not preserved for appellate review. In any case, defendant's argument is without merit because there was sufficient independent evidence that defendant and codefendant Allen formed a conspiracy to kill the decedent.[1]

Turning to defendant's specific complaints, he first asserts that Tobias' testimony that defendant's relationship with the decedent had deteriorated constituted inadmissible hearsay. 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). Consequently, defendant's argument

fails because Tobias' testimony that defendant's relationship with the decedent was "getting worse" does not constitute hearsay, as it was not an out-of-court statement and was apparently based on Tobias' own observations.

Defendant also asserts that Tobias' testimony that the decedent was threatening to inform the police of defendant's drug dealing was inadmissible hearsay. The testimony was not hearsay because it was not offered to prove the truth of the matter asserted, but merely to establish that the decedent had in fact made such threats. Further, the statement was admissible under the state of mind exception to the hearsay rule, MRE 803(3), to show that defendant believed that the decedent had threatened him. See *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999) ("Proof of motive in a prosecution for murder, although not essential, is always relevant . . . ."). Even if the statement does not fall under any hearsay exception, defendant was not prejudiced by the admission of the testimony, as it was cumulative to Tanya Salas' testimony that she had heard the decedent threaten to alert the police to defendant's drug-related activities.

Next, defendant objects to testimony that Tobias overheard defendant call the decedent several times on the day of the shooting and that defendant asked Tobias to kill the decedent for him. However, this testimony was not hearsay, as it was Tobias' description of events that he witnessed. Likewise, defendant's complaint regarding Tobias' testimony that he went to the bar and saw codefendant Allen prior to leaving is without merit. The challenged testimony does not constitute hearsay, as it describes what Tobias himself did and saw.

In addition, defendant complains that Tobias should not have been allowed to testify that he observed defendant and Allen isolate themselves in order to have private conversations. We disagree. Tobias offered no testimony regarding the contents of the conversations. Accordingly, the testimony was not hearsay, as it was based on events witnessed by Tobias, and it was properly admitted.

With regard to Aaron Shaw's testimony, defendant has failed to identify the particular statements that he contends constitute inadmissible hearsay. Accordingly, defendant has waived this claim of error. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

II

Defendant next contends that he was denied a fair trial because Laura Riddle was permitted to testify that she was awakened by codefendant Allen crying and heard him tell Amy Hennrick, "She was after me, and that [sic] she is all bloody." This Court reviews the trial court's decision to admit evidence for an abuse of discretion. *Adams, supra*.

Defendant did not object to Riddle's testimony at trial; however, codefendant Allen contemporaneously objected. The trial court allowed the testimony but gave the jury a cautionary instruction. Codefendant Allen's request for a mistrial at the conclusion of Riddle's testimony was denied. Because defendant's codefendant raised the objection, and the trial court's ruling obviously

affected both defendants, this Court may choose to address the issue despite the fact that it is technically not preserved. See *People v Griffin*, 235 Mich App 27, 41, n 4; 597 NW2d 176 (1999).

Defendant contends that the statement was inadmissible hearsay. Defendant is mistaken. The statement was not hearsay because it was not offered to prove the truth of the matter asserted, that is, that a bloody woman had been chasing Allen. Rather, the statement was offered as evidence that Allen was troubled by the fact that he had killed the decedent.

In arguing that the trial court abused its discretion in allowing the testimony, defendant also relies on a number of cases from other jurisdictions in which courts have ruled that testimony concerning statements made while the declarant was sleeping were unreliable and therefore inadmissible. For the most part, these cases are not on point because Allen was awake at the time that he made the statement at issue. However, in *State v Tyler*, 251 Kan 616; 840 P2d 413 (1992), the Kansas Supreme Court held that a witness' testimony reading the defendant's description of a dream had been improperly admitted. The court explained:

> It is an abuse of discretion to admit evidence of a defendant's sleep-induced dream to prove his state of mind. Such evidence is too speculative to be reliable. Although [the defendant's] statement to [the witness] was not part of the actual dream, it was so closely related to the dream that it also lacks probative value. [*Id*. at 632.]

We believe that the reasoning of the *Tyler* court is applicable in the instant case and therefore conclude that the trial court erred in admitting Riddle's testimony. Nevertheless, the error was harmless. In view of both the cautionary instruction provided by the trial court and the considerable evidence that defendant hired Allen to kill the decedent, it is more probable than not that the outcome would have been the same absent the error. See *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

III

Next, defendant asserts that the trial court erred in admitting the decedent's diaries and other evidence of the decedent's statements. However, defendant has not identified the *particular* statements, in the diary or otherwise, that he considers to be inadmissible hearsay and therefore erroneously admitted. Accordingly, defendant has waived this claim of error. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Kelly*, *supra*.

We note that defendant generally argues that statements concerning defendant's drug dealing and the decedent's threats to tell the police about his activities were not admissible to show the decedent's state of mind. Any statements in the diary indicating that defendant sold drugs would constitute hearsay; however, as Tobias Allen, Aaron Shaw, Sheryl Farrell, and Tanya Salas all testified from firsthand knowledge that defendant was selling drugs, defendant was not prejudiced by the admission of any such statements. Similarly, statements that the decedent threatened to alert the police to defendant's drug-dealing activities were cumulative to Tanya Salas' testimony that she witnessed the decedent do so.

IV

Defendant further claims that he was denied a fair trial because the prosecutor "emphasiz[ed] repeatedly" that Tobias Allen had not been promised anything with regard to a pending murder charge in an unrelated case. Defendant did not object at trial to the comments of which he now complains. To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. In the absence of a proper objection, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Defendant contends that the prosecutor elicited false testimony when Tobias stated that he had not been promised anything with regard to his pending murder case. Defendant maintains that, "while no definite promises had been made, Tobias Allen surely expected leniency in the brutal murder case, and was in fact granted leniency at sentencing as a direct consequence of his testimony." Defendant has attached to his brief a copy of the transcript of the hearing at which Tobias was sentenced for second-degree murder. However, the transcript corroborates Tobias' testimony that he had received no promises regarding the pending murder charge; the trial judge, who also presided over the instant case, specifically stated that the prosecutor had not requested that he take Tobias' testimony against defendant into consideration. Thus, defendant has provided no evidence to support his claim that the prosecutor elicited false testimony or that Tobias had reasonable expectations of leniency in his murder case. The fact that the judge, on his own initiative, took Tobias' cooperation in this case into consideration when fashioning the sentence in an unrelated case does not establish that defendant was denied a fair trial.

V

Defendant maintains that the prosecutor improperly elicited testimony from Detective Nyquist that the latter believed that defendant had not been forthcoming in his statement to the police and that the shooting of the decedent resembled an execution rather than a gang murder. Defendant did not object at trial to the prosecutor's questions.[2] Consequently, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Nantelle, supra*.

The prosecutor did not act improperly in eliciting from Detective Nyquist that the latter believed that defendant had not been forthcoming in his interview with the police. MRE 701 permits a lay witness to provide opinion testimony which is rationally based on the perception of the witness and helpful to the determination of a fact in issue; an assessment of the truthfulness of a coparticipant in a conversation falls into that category. Moreover, Nyquist did not merely testify that he thought that defendant had not told the police all that he knew; he explained the bases for this conclusion. Specifically, defendant alleged that the decedent might have been shot by someone with a grudge against defendant, but would not say who or why. Nyquist considered this refusal to provide information odd, considering that the victim in the shooting had been defendant's girlfriend and the mother of his child. Also, defendant stated that he probably would not be able to identify the shooter

because it had been too dark to see; however, Nyquist had been at the scene and thought that the street lighting had provided adequate illumination.

Defendant relies on cases stating that a witness may not give an opinion on the credibility of another witness or the guilt or innocence of the accused.[3] Defendant's reliance on these cases is misplaced, however, because Nyquist did not offer an opinion on the testimony of another witness or on whether defendant was complicit in the shooting of the decedent. Nyquist merely testified that he thought that defendant had been "hiding something" during an interview that took place ten months before trial. We find neither prosecutorial misconduct nor error.

The next instance of alleged prosecutorial misconduct occurred when Nyquist testified that the shooting appeared to be an "execution type" murder, rather than a gang murder. Defendant's argument with regard to this allegation of error is not entirely clear; however, he is apparently contending that Nyquist's testimony constituted inadmissible profile evidence. However, a profile is "a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity." *People v Hubbard*, 209 Mich App 234, 239; 530 NW2d 130 (1995). Here, Nyquist, a homicide detective, testified regarding the conclusions he reached about the crime based on the evidence that had been obtained. Nyquist did *not* testify that people who commit execution-style murders usually exhibit certain otherwise innocuous characteristics displayed by defendant. See *People v Murray*, 234 Mich App 46, 52-53; 593 NW2d 690 (1999). Accordingly, the prosecution did not present inadmissible profile evidence, and there was no error.

VI

Defendant maintains that the prosecutor improperly elicited testimony from Tobias that he had been threatened, called a "snitch," and assaulted while he was in jail. Defendant did not object at trial to the prosecutor's questions. Defendant's contention that Joann Hennrick's testimony that her daughter Amy had told her that she had been threatened if she testified at defendant's trial is likewise not preserved.[4] Consequently, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Nantelle*, *supra*.

We conclude that the failure to consider the issue would not result in a miscarriage of justice. As defendant notes, the threats against Tobias and Amy Hennrick were never connected to either defendant or codefendant Allen, and the testimony concerning the threats was therefore irrelevant. However, the testimony regarding the threats constitutes a very small fraction of the testimony presented during the three-week trial, it was not emphasized, and substantial evidence was presented establishing that codefendant Allen killed the decedent at defendant's request.

Defendant also argues that the prosecutor improperly bolstered Tobias' testimony by eliciting the fact that the witness had no prior felony convictions. However, by failing to provide any citation to the record, defendant has not properly presented this issue for appellate review. See *Kelly*, *supra*. In any case, Tobias testified that he sold drugs, acted as defendant's enforcer, and was currently facing a

murder charge in an unrelated case. Under the circumstances, testimony that Tobias had no felony convictions was not likely to have significantly affected the jury's evaluation of his credibility.

VII

Next, defendant argues that the prosecutor injected prejudicial innuendo into the proceedings by comparing the present case to the O.J. Simpson case. Because defendant did not object to the prosecutor's comment at trial, review is precluded unless a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Nantelle*, *supra*.

After carefully reviewing the challenged argument, we are not persuaded that the prosecutor was attempting to subtly compare defendant to O.J. Simpson. The prosecutor was merely arguing that defense counsel had ignored the evidence against defendant and instead sought to put the police on trial. While it might have been better for the prosecutor to make his point in another manner, it is unlikely that his lone reference to Mark Fuhrman deprived defendant of a fair trial. In any case, review of this issue is not required because any prejudicial effect resulting from the remark could have been eliminated by a timely curative instruction, and the failure to consider the issue will not result in a miscarriage of justice. See *id.*

VIII

Defendant further asserts that he was denied a fair trial because the prosecutor asked many of the witnesses how many children defendant had fathered and by how many different women. Because defendant has not provided any citation to the record, he has not properly presented this issue for appellate review. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. See *Kelly*, *supra*. In any case, reversal is not required because any prejudicial effect could have been eliminated by a timely curative instruction, and the failure to consider the issue will not result in a miscarriage of justice. See *Nantelle*, *supra*.

IX

In a supplemental brief, defendant claims that he was denied due process because the police intimidated several witnesses in order to obtain their testimony. However, by failing to provide citation to the record, defendant has not properly presented this issue for appellate review.[5] See *id.*

We briefly note, however, that we find nothing in the record to warrant remand for an evidentiary hearing. There is no allegation that the actions of the police or the prosecutor drove a defense witness from the stand. Rather, defendant claims that prosecution witnesses were intimidated into testifying. However, the jury was aware that material witness warrants had to be obtained for Tobias Allen, Aaron Shaw, and Marquetta Tarver; that Tarver had been told that she could be charged as an accessory after the fact for not informing the police when they questioned her that she was in possession of the murder weapon; and that a detective had been "aggressive" with Shaw. Both Tobias and Tarver stated that they were testifying truthfully, and Shaw testified that he only told the police what

he knew after he ascertained that they had already discovered everything from other sources. Thus, the jury was able to perform its traditional role of assessing credibility. See *People v Stacy*, 193 Mich App 19, 28; 484 NW2d 675 (1992).

Affirmed.

/s/ Roman S. Gribbs
/s/ Mark J. Cavanagh
/s/ Hilda R. Gage

[1] Aaron Shaw testified that defendant told him that defendant wanted to "get rid of" the decedent. Tobias Allen testified that defendant asked him to kill the decedent and on three or four occasions formulated a plan where Tobias was supposed to kill the decedent while defendant established an alibi. When Tobias failed to kill the decedent every time, defendant asked him if he knew anyone who would "do the job." Tobias told defendant that codefendant Allen needed money. Subsequently, both Aaron and Tobias observed defendant and Allen having private conversations, and defendant stopped asking Tobias to kill the decedent. The day of the shooting, Tobias heard defendant say to Allen, "Only chance we got, is you going to do it?" Allen responded, "I will do it, man, don't worry, stop sweating me." Tobias also heard defendant call the decedent and repeatedly ask her to come over until she agreed. Renae Winegar testified that she heard defendant tell Tobias after the shooting that he had paid Allen $3,500, but would not pay him the rest of the money because Allen had been talking. Considering this testimony, a rational trier of fact could find by a preponderance of the evidence that defendant and Allen had formed a conspiracy to kill the decedent. See *People v Vega*, 413 Mich 773, 782; 321 NW2d 675 (1982); *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991).

[2] When the prosecutor asked Nyquist if he had found any evidence indicating that the shooting had been a gang murder, codefendant Allen objected on the basis that there had not been any testimony "of what a gang murder is and how it's accomplished." The prosecutor rephrased his question and asked what evidence had influenced the direction of the investigation. Nyquist explained that, based on the physical evidence and interviews with witnesses, he came to believe "this was the type of murder which was an execution type." No objection was raised to this testimony. Accordingly, defendant's allegation of prosecutorial misconduct with regard to Nyquist's testimony that the shooting appeared to be an execution has not been preserved for appellate review.

[3] See, e.g., *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Smith*, 158 Mich App 220, 230-231; 405 NW 156 (1987); *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985); *People v Adams*, 122 Mich App 759, 767; 333 NW2d 538 (1983), rev'd on other grounds 421 Mich 865; 364 NW2d 282 (1985).

[4] Counsel for codefendant Allen first objected that the subject had not come up in cross examination, then objected that the testimony constituted hearsay. Defendant now argues that the testimony was irrelevant because the prosecution never connected the threats to either defendant or codefendant Allen.

To preserve for appeal an argument that the prosecutor committed misconduct during trial, a defendant must object to the conduct at trial on the same ground as he asserts on appeal. *Nantelle, supra*.

[5] Defendant merely refers this Court to the statement of facts in his brief on appeal. However, the statement of facts is 24 pages long, and the responsibility of going through it to find the specific instances of alleged police intimidation, as well as accompanying citations to the record, belongs to defendant's appellate counsel, not this Court.