

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ONDRE W. STURGESS, a/k/a ANDRE  
STURGESS,

Defendant-Appellant.

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UNPUBLISHED  
December 7, 2001

No. 223719  
Genesee Circuit Court  
LC No. 99-004490-FC

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and thereafter sentenced as a fourth-offense habitual offender, MCL 769.12, to 62 ½ to 100 years' imprisonment. Defendant appeals as of right. We affirm, but remand to the trial court for the limited purpose to make certain changes to defendant's presentence investigation report.

I

Defendant first argues that the trial court erred when it denied his motion for a directed verdict. Specifically, defendant argues that the trial court should not have allowed the jury to consider the first-degree murder charge because the prosecution presented no evidence of premeditation and deliberation. Defendant argues that allowing the jury to consider the improper charge of first-degree murder forced the jury to reach a compromise verdict.

When reviewing a trial court's decision on a motion for a directed verdict, we review the record de novo to determine whether the evidence presented by the prosecution, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). A court, however, may not determine the weight of evidence or the credibility of witnesses, regardless of how inconsistent or vague the testimony was. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

To convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and

deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). Factors that may be considered to establish premeditation include: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998).

In this case, there was sufficient evidence to support a finding of premeditation and deliberation. First, defendant and the victim had a prior relationship. By all accounts, they had been living together in a trailer for several days. Additional evidence indicated that defendant was abusive toward the victim and forced the victim to "turn tricks" to provide defendant with money to support his drug habit.

Further, defendant's actions before the crime also supported a finding of premeditation and deliberation. Several witnesses testified that defendant, shortly before pouring the gasoline on the victim, was angry with her because she had returned from "turning tricks" with only \$16. Defendant accused the victim of "smoking his money." At least two witnesses observed defendant hit, punch, and kick the victim. Defendant was also heard hitting the victim with an object, possibly a rope, in the bedroom. Defendant continued taunting the victim for several minutes and repeatedly told her that he had given her enough chances.

Similarly, defendant's conduct after the crime is equally supportive of finding premeditation and deliberation. Defendant was observed trying to extinguish the fire on the victim; however, defendant also abruptly left the trailer without discerning whether help had been summoned. Defendant even threatened both witnesses and told them to say nothing. When defendant went to Kenneth Kinder's house, to obtain money or a gun from him, defendant referred to the victim as a "bitch" and showed no signs of remorse. See *People v Paquette*, 214 Mich App 336, 342-343; 543 NW2d 342 (1995) (defendant's lack of remorse can be considered when determining whether there is evidence of premeditation and deliberation). Eventually, defendant checked into a hospital under an alias.

Additionally, the circumstances of the killing also favor a finding of premeditation and deliberation. After emerging from the bedroom, defendant sat on the couch and started to smoke crack cocaine. The victim remained on the floor, crying. During this time, defendant told Tommy Horton to get the gas can out of the truck. However, when Horton refused, defendant went out and retrieved the gas can. Defendant brought the gas can inside the trailer, poured gas on the victim, and watched her cry out that the gas was stinging her eyes. Defendant took another "hit" of crack cocaine and then proceeded to taunt the victim with the crack pipe. While taunting the victim, defendant lit the lighter twice, before the victim was engulfed in flames. The victim suffered extensive burns, primarily second- and third-degree burns, from which she subsequently died.

Taken in a light most favorable to the prosecution, there was sufficient evidence to support a finding of deliberation and premeditation. Therefore, the trial court properly denied defendant's motion for a directed verdict and allowed the jury to consider the charge of first-degree murder.

## II

Next, defendant argues that the trial court abused its discretion when it refused to instruct the jury on the defense of intoxication.

The determination whether a jury instruction is applicable to the facts of the case is within the trial court's discretion. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998).

A criminal defendant has the right to have a properly instructed jury consider the evidence against him. . . . However, a trial court is not required to present an instruction of the defendant's theory to the jury unless the defendant makes such a request. . . . Further, when a jury instruction is requested on any theories or defenses and is supported by evidence, it must be given to the jury by the trial judge. . . . A trial court is required to give a requested instruction, except where the theory is not supported by evidence. [*People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995).]

We agree with defendant that there was sufficient evidence that he was intoxicated at the time of the criminal act. While intoxication is a defense to the specific intent crime of first-degree murder, a charge that we have determined was properly submitted to the jury, intoxication is not a defense to the general intent crime of second-degree murder, the crime of which defendant was convicted by the jury. See *People v Langworthy*, 416 Mich 630; 331 NW2d 171 (1982). Because defendant was convicted of a crime for which intoxication is not a defense, any error in not instructing the jury on intoxication was harmless. *People v Hansma*, 84 Mich App 138, 147-148; 269 NW2d 504 (1978).

## III

Next, defendant argues that the prosecutor engaged in misconduct throughout the trial, depriving him of a fair trial.

Defendant has raised five separate instances of alleged prosecutorial misconduct, but objected to only one instance at trial. "Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 317 (2000). To avoid forfeiture under the plain error rule, plain error must have occurred and must have affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Otherwise, claims of prosecutorial misconduct are examined in context to determine whether defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

First, defendant argues that the prosecutor engaged in misconduct by misstating the law, that is, by misinforming the jury about the crime of manslaughter. During closing argument the prosecutor stated:

There's a third one that the judge will give you, a third option, which I do not think applies but the judge is duty bound to give it to you, so I'm gonna explain it to you.

That is, Involuntary Manslaughter. Involuntary Manslaughter means it's not murder. When you say Involuntary Manslaughter as a jury, you're saying he did not murder [the victim]. Involuntary Manslaughter means basically it was an accident.

In Involuntary Manslaughter the key element we'll describe for you is gross negligence. Gross negligence means more than carelessness; it means willfully disregarding others. It means basically, failing to take ordinary care to avoid injuring another. And that's why I'm saying it doesn't apply, because here you're talking about not taking ordinary care to avoid injury to another. You know, somebody on the highway not being as careful as they should be when they're driving. That's gross negligence. That's not taking ordinary care. That's not the facts of this case.

Defendant did not object to these remarks. Therefore, we review defendant's claim for plain error. We find no error warranting reversal. The prosecutor's statements to the jury were similar to the jury instructions given by the trial court. It is true that the prosecutor did equate involuntary manslaughter to an accident. However, we do not believe that this affected the outcome of the proceedings. The trial court properly instructed the jury on the elements of involuntary manslaughter and instructed the jury that the arguments of the lawyers are not evidence. Thus, the trial court's instructions dispelled any prejudice. *Id.* at 281.

Second, defendant argues that the prosecutor engaged in misconduct by mischaracterizing the evidence. Defendant now objects to the prosecutor's statements that defendant "put a flame to" the victim and that the prosecutor improperly argued that defendant "strategically" kept the gas can away from himself, although these comments were not challenged below. This was not a mischaracterization of the evidence. The evidence at trial supported the prosecutor's arguments because there was testimony that defendant held a lighter and crack pipe only eighteen inches from the victim. Further, there was testimony concerning where defendant put the gas can inside the trailer. The prosecutor was permitted to argue the evidence and all reasonable inferences arising from it as they related to his theory of the case. *Id.* at 282.

Third, defendant argues that the prosecutor engaged in misconduct by appealing to the jury to sympathize with the victim. A prosecutor should not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). A prosecutor, however, need not use the least prejudicial evidence available to establish a fact at issue, nor must he state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

In this regard, defendant argues that the prosecutor appealed to the jury to sympathize with the victim, during opening statement, when eliciting testimony about the victim's injuries from witnesses, and during closing argument. Defendant's complaint is that the prosecutor improperly elicited "far more testimony than necessary about how painful" the victim's injuries were. Defendant did not object to these statements. Moreover, there is no error here. The prosecutor's statements were based on the testimony of the witnesses and the victim's injuries were horrible. See *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). As we have stated, a prosecutor need not state his arguments in the blandest possible terms. Therefore, we

do not believe that the challenged remarks were such that the prosecutor asked the jury “to suspend their judgment and decide the case on the basis of sympathy.” *Id.*

Fourth, defendant argues that the prosecutor engaged in misconduct by referring to this case as a “murder” case. Since this was a murder case, we fail to see how the prosecutor’s comments were in error or denied defendant a fair trial. Moreover, during the instances where the prosecutor made such references when questioning witnesses, defense counsel objected and the trial court sustained the objections and cautioned the jury. Consequently, the trial court immediately cured any prejudicial effect.

Fifth, defendant argues that the prosecutor engaged in misconduct by eliciting testimony from two witnesses to demonstrate that defendant was a bad person and had a propensity for violence. Defendant claims that the prosecutor did this on two occasions with two different witnesses. On the first occasion, the prosecutor elicited testimony from Kinder that defendant came to his house after the incident and asked for a gun. Defendant argues that this evidence was improper because it had “no probative value” and “it only served to imply that the defendant intended to do violence.”

Defendant did not object to the prosecutor’s questioning of this witness. However, even if we were to conclude that it was error, it is not error requiring reversal. There was overwhelming evidence presented at trial demonstrating defendant’s guilt. Therefore, we are unable to conclude that this reference affected defendant’s substantial rights.

Defendant also complains about the prosecutor’s questioning of Sergeant Eddy regarding defendant’s use of an alias at the hospital and the fact that defendant had used that same alias in the past when arrested. Again, defendant did not object to this questioning. Therefore, it must also be reviewed for plain error. Here, we do not find error. A defendant’s use of an alias can be admissible to call into question defendant’s credibility, *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997), to establish identity, *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996), and even to show consciousness of guilt, *People v Cutchall*, 200 Mich App 396, 399-401, 405; 504 NW2d 666 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996).

In this case, at least two of these purposes applied. Defendant fled from the crime scene and hours later checked into a hospital under the name Kenneth Carter. This is evidence that the jury could consider consciousness of guilt. Further, because defendant checked into a hospital under an alias, the police had to demonstrate that Kenneth Carter, the man in the hospital with burn injuries, was the same person as Ondre Sturgess, the boyfriend of the victim and the man witnessed in the trailer lighting the crack pipe. Sergeant Eddy’s testimony made this connection for the jury by indicating that defendant has used the name Kenneth Carter in the past because this was noted on police records. See *People v Harvey*, 167 Mich App 734, 750; 423 NW2d 335 (1988). It is true that Sergeant Eddy did not need to state that defendant had used this name on prior occasions when arrested; however, in light of defendant’s failure to object, we find that defendant has not shown that this fleeting reference affected defendant’s substantial rights.

#### IV

Defendant next argues that he was denied his right of allocution.

A review of the sentencing transcript reveals that defendant was not denied the opportunity to address the trial court before sentencing. The thrust of defendant's argument is that the trial court's interruptions rendered his opportunity to speak meaningless. Although the trial court interrupted defendant to ask questions, defendant answered those questions, stated what he had to say to the trial court, and read a letter. This was all accomplished before the trial court rendered the sentence. Consequently, defendant was not denied his right of allocution. MCR 6.425(D)(2)(c); *People v Howell*, 168 Mich App 227, 236-237; 423 NW2d 629 (1988).

V

Lastly, defendant argues that the trial court failed to correct two errors in his presentence report. Defendant argues on appeal, as he did below, that the term "absconded" should have been stricken from the presentence report. The trial court agreed that the report should read, "failed to report for parole" rather than "absconded." Therefore, we remand for the trial court to direct the probation officer to correct the report in this regard. MCR 6.425(D)(3)(a).

Defendant also argues that the presentence report's reference to his gang membership should be stricken. At sentencing, defendant objected to the reference in the presentence report that he was a member of a gang. The trial court never formally resolved this and the presentence report still reflects defendant's alleged gang membership. In a situation where the trial court fails to resolve a claimed inaccuracy, the case must be remanded to the trial court for it to clarify whether the disputed matter played a role in its sentencing decision. *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992). If the trial court determines that it did, defendant shall be resentenced and the trial court shall resolve this challenge pursuant to MCR 6.425(D)(3). *Landis, supra*. If it is determined that the disputed matter played no part in the sentencing decision, defendant's sentence is affirmed and the trial court need only strike the disputed matter from the presentence report. *Id.*

Affirmed, and remanded for the limited purpose of correcting and considering the challenged information in defendant's presentence report in accordance with this opinion. A corrected copy of the presentence investigation report shall be forwarded to the Department of Corrections. We do not retain jurisdiction.

/s/ Mark J. Cavanagh  
/s/ Martin M. Doctoroff  
/s/ Kathleen Jansen