STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAJUAN D. HALE,

Defendant-Appellant.

UNPUBLISHED
December 16, 2003

No. 243733
Wayne Circuit Court
LC No. 01-005525

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him to thirty-five to sixty years' imprisonment for his second-degree murder conviction and to two years' imprisonment for his felony-firearm conviction. We affirm defendant's convictions but remand for resentencing on the second-degree murder conviction.

Defendant's first contention on appeal is that the prosecutor made a number of statements in her opening statement and closing argument that amounted to prosecutorial misconduct requiring a new trial. We disagree.

In a claim of prosecutorial misconduct, this Court examines the specified "misconduct in context to determine whether it denied the defendant a fair and impartial trial." *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000), remanded on other grounds 465 Mich 884 (2001). However, defendant failed to preserve his claim for review on appeal because he failed to object to the prosecutor's statements in the trial court. This Court will only review unpreserved claims if a curative instruction could not have removed any undue prejudice to the defendant or if manifest injustice would result from failure to review the alleged misconduct. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003); *McAllister*, *supra*, 241 Mich App 473. Moreover, unpreserved nonconstitutional claims are reviewed for plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error doctrine, the defendant must show that (1) an error actually occurred; (2) the error was plain (clear or obvious); and (3) the plain error affected substantial rights. *Id.* The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*, 763-764; *Callon*, *supra*, 256 Mich App 329.

Defendant argues that the prosecutor improperly expressed her personal belief in defendant's guilt, used inflammatory language to incite the jury, appealed to the civic duty of the jurors, and made an appeal for justice for the victim. A prosecutor has "great latitude" in making his statements and arguments at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may draw inferences from the evidence, but may not mischaracterize the evidence or argue facts not in evidence. *Id.; People v Goodin*, 257 Mich App 425, 432-433; 668 NW2d 392 (2003); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Although the prosecutor has a duty to ensure that the defendant receives a fair trial, he also has a duty to advocate the conviction of the guilty. "[P]rosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). However, the prosecutor "should not resort to civic duty arguments that appeal to the fears and prejudices of jury members or express their personal opinions of a defendant's guilt." *Bahoda, supra*, 448 Mich 282-283. Similarly, the prosecutor should not encourage a conviction on the ground that the victim deserves justice. See *People v Abraham*, 256 Mich App 265, 275-276; 662 NW2d 836 (2003).

Defendant argues that the prosecutor improperly expressed her personal belief that defendant was guilty of murder by her many characterizations of the killing as a murder and defendant as the man who murdered Nelson Hardiman. However, the opening statement is the proper time to state those facts to be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Defendant was charged with first-degree premeditated murder. As such, it was proper for the prosecutor to state those facts to be proven at trial tending to show that defendant murdered Hardiman and to use the word "murder."

In determining whether the prosecutor improperly injected her personal beliefs in her closing argument, this Court needs to determine if the statement was supported by facts presented during trial or was a reasonable inference from those facts. *Bahoda, supra*, 448 Mich 282; *Goodin, supra*, 257 Mich App 432-433; *Watson, supra*, 245 Mich App 588. It is not improper for the prosecutor to state that a defendant is guilty of the charged offense if the statement is based on evidence presented at trial. *People v Lee*, 212 Mich App 228, 256; 537 NW2d 233 (1995). We find that the prosecutor's reference to the killing as a murder was supported by the facts in evidence. Carrie Pearson testified that defendant left the bar and attempted to reenter it with a gun. Both Antonio Vernon and Reginald Marshall testified that defendant wanted to take the fight outside and that once outside, defendant retrieved a gun from his van. They testified that they saw defendant shoot Hardiman multiple times in the back while he was running away, spit on Hardiman's body, and attempt to run over Hardiman's body as he drove away. Marshall testified that defendant proceeded to shoot Hardiman five or six more times after Hardiman had fallen to the ground. We find that it was not plain error for the prosecutor to characterize the crime as a murder and defendant as the murderer in her opening statement and closing argument. Therefore, these comments did not amount to prosecutorial misconduct entitling defendant to a new trial.

Defendant argues that the prosecutor used inflammatory language to incite the jury by referring to defendant's treatment of Hardiman as a piece of garbage or a dog. Taken in context, the prosecutor's remarks in her opening statement were related to facts she intended to prove at trial. The prosecutor intended to show that although Hardiman was not blameless in this

situation, defendant was not acting in self-defense when he shot Hardiman seven times in the back in the middle of the street. As the opening statement is the proper time for the prosecution to state what it intends to prove at trial, *Johnson, supra*, 187 Mich App 626, we find that it was not plain error for the prosecutor to make these statements.

Taken in context, we find that the prosecutor's statements in her closing argument also were not improperly inflammatory. Although this is "hard language," the evidence presented at trial supported the facts that defendant shot Hardiman numerous times in the back while he was running away and that he shot at, spit on, and tried to run over Hardiman. The prosecutor was reacting to the defense theory that Hardiman's actions provoked defendant to react as he did. We find that the prosecutor's remarks in her closing argument were not plain error. Therefore, the challenged statements in the opening statement and closing argument did not amount to prosecutorial misconduct entitling defendant to a new trial.

Defendant argues that the prosecutor made improper appeals to the civic duty of the jurors. In her closing argument, the prosecutor stated:

> We don't want to believe that people, there are people out there living with us in society that have so very little regard for human life.
>
> * * *
>
> What I want to suggest to you, unfortunately, there isn't a good explanation, but I think you also know from your common sense, and you certainly know from hearing the evidence in this trial, the fact is that there are people, and there are times in this life, and in this society we're living in right now, where people just don't have any regard for human life, and where people just do terrible, terrible things.
>
> * * *
>
> We, unfortunately, we've got something going on in this society, if you watch the news, if you read the newspaper, unless your head's in the sand, you know that there is an epidemic of violence in this country. Unfortunately, especially young African-American men killing other young African-American men about nothing, because that's what this is, in the grand scheme of things.
>
> * * *
>
> You don't create a situation because your male pride is offended, because you get into an argument in a bar. You don't murder somebody over that, and we can't solve that big, overarching problem. That's not—unfortunately, that's not what you can do, but what you can do, and what you have to do, when you consider this case, is this is a part of it.
>
> Every part of that poison that's going on in society, it adds up. It all makes it all go round. This is the part you're responsible for, is this man murdering another man over nothing.

In *People v Cooper*, 236 Mich App 643, 650-651; 601 NW2d 409 (1999), this Court found that the statement "another senseless shooting in the City of Detroit and almost another dead young black man, but it didn't happen that way" in the prosecutor's closing argument amounted to an improper civic duty argument as it injected into the case an issue broader than guilt or innocence. This Court reasoned that the statement could have suggested to the jury that a disapproval of gun-related violence in their neighborhood – the City of Detroit – was a factor to be considered in determining the defendant's guilt. *Id.*, 651. The court held that it was also improper to make reference to the race of the victim as this did not affect the determination of the defendant's guilt. *Id.* However, this Court declined to reverse, because the statement was short and did not affect the obvious conclusion that a horrible crime had occurred. *Id.*, 652. Also, because both the victim and the defendant were African-American, the Court concluded that the comment regarding the victim's race was unlikely to cause undue prejudice to the defendant's trial. *Id.* The Court also concluded that any undue prejudice to the defendant could have been removed by a curative instruction had the defendant requested one and a miscarriage of justice did not occur. *Id.*

Like in *Cooper, supra*, we find that the prosecutor's statements amounted to an improper civic duty argument because they injected an issue into the trial broader than defendant's guilt or innocence – the epidemic of violence in this country. These comments encouraged the jurors to do their part in solving this broader social problem by convicting defendant for the murder of Hardiman, and the comments suggested that disapproval of violence in society was an appropriate factor to consider in determining defendant's guilt. The prosecutor's comments were quite lengthy. The prosecutor also improperly referenced race in her closing argument by stating, "Unfortunately, especially young African-American men killing other young African-American men about nothing . . . ."

Although the prosecutor committed plain error by making an improper civic duty argument, reversal is not required. Had defendant objected at trial, curative instructions could have been given that would have removed any undue prejudice. Further, we find that the evidence presented at trial strongly supported defendant's conviction for murder; therefore, the error did not affect the outcome of the trial or result in a miscarriage of justice or the conviction of an innocent defendant. Also, any undue prejudice to defendant's trial was cured by the trial court's instructions to the jury that the questions and statements of the lawyers are not evidence and that the prosecutor must prove each element of the crime beyond a reasonable doubt. These instructions served to cure any undue prejudice the prosecutor's statements may have caused. See *Bahoda*, *supra*, 448 Mich 281, *Abraham*, *supra*, 256 Mich App 276, and *Ullah*, *supra*, 216 Mich App 682-683. Finally, like in *Cooper, supra,* 236 Mich App 652, both defendant and Hardiman were African-American, so the reference to race was unlikely to place undue prejudice against defendant. A new trial is not warranted.

Defendant additionally argues that the prosecutor made an improper appeal for justice on behalf of the victim, Hardiman, when she stated in her closing argument, "And there's going to be some justice for it, and you are the ones, at least the part of the justice that comes here on earth, you're the ones that has it in your hands. So that's an important job, and I know that you will take it seriously." Defendant also points out that in her rebuttal closing argument, the prosecutor told the jury to "[g]ive [Hardiman] the justice that he deserves, that you have in your hands."

In *Abraham*, *supra*, 256 Mich App 273, the prosecutor stated in her rebuttal closing argument that "after taking pause and looking at everything that Ronnie Green deserves justice" and that "Ronnie Green deserves justice whether or not the bullet that killed him was from the gun of someone other than Nathaniel Abraham, or from the gun of Nathaniel Abraham." This Court found that the prosecutor's first statement specifically replied to the defense argument that bringing the charges against a young boy was improper. *Id.*, 275. This Court found that the second comment was improper because it asked the jury to convict the defendant to give Green justice rather than on a determination that the defendant was the one who shot Green. See *id.*, 275-276. This Court also found that the comment was unnecessary because causation was not at issue, the statement was not made in response to a defense argument, and it misstated the law. *Id.* However, this Court declined to reverse the defendant's conviction based on this statement because it was one isolated, poorly worded comment and was probably made in error. *Id.*, 276. Also, the Court found that any prejudice that this comment could have brought on the defendant was cured by the trial court's instructions to the jury that the attorney's arguments are not evidence, that the prosecution bears the burden of proof of all the elements, and that all the elements require proof that the defendant actually falls within their parameters. *Id.* This Court also determined that any error was harmless beyond a reasonable doubt due to the evidence of the defendant's guilt. *Id.*

In this case, we find that the prosecutor did make an improper appeal for justice amounting to plain error because the statements asked the jury to convict defendant to give Hardiman justice rather than on a determination that defendant shot Hardiman. Nevertheless, we find that reversal is not required because a curative instruction could have removed any potential undue prejudice, the trial court's instructions to the jury, as we found *supra*, cured any undue prejudice these statements may have caused, and the evidence of defendant's guilt was strong.

Defendant's second contention on appeal is that the trial judge abused his discretion in departing upward from the sentencing guidelines range and that his sentence violated the principle of proportionality.

When reviewing a defendant's sentence, this Court must first determine whether the sentence falls within the appropriate sentencing guidelines range. *People v Babcock*, 469 Mich 247, 256; 666 NW2d 231 (2003). If so, this Court must affirm the defendant's sentence absent certain errors. MCL 769.34(10). If not, this Court must determine if the trial court stated substantial and compelling reasons on the record for a departure. *Babcock*, *supra*, 469 Mich 256. The existence of those factors relied upon by the trial court is a factual determination that this Court reviews for clear error. *Id.*, 273. Whether the factors are objective and verifiable is a matter of law that is reviewed de novo. *Id.* Whether the objective and verifiable factors form substantial and compelling reasons for departing from the sentencing guidelines is reviewed by this Court for abuse of discretion. *Id.*, 274. There is an abuse of discretion "when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.*

Defendant's sentence did not fall within the appropriate sentencing guidelines range. Defendant's prior record and offense variable scores placed him in the sentencing guidelines range of 162 to 270 months. The trial court departed upward from the sentencing guidelines range, sentencing defendant to thirty-five to sixty years' imprisonment for his second-degree murder conviction. The substantial and compelling reasons stated on the record for this departure were that (1) Hardiman was unarmed; (2) defendant shot him seven times, once in the

head, six times in the back; (3) defendant shot Hardiman in the back; (4) Hardiman was running away when he was shot; (5) defendant spit on Hardiman's body; and (6) defendant attempted to run over Hardiman's body. The judge indicated that if this case arose prior to the legislative sentencing guidelines, he would have imposed a straight life sentence. The judge also indicated that the twenty-two-and-one-half-year cap on the sentencing guidelines range was not adequate because the guidelines did not take into account "shooting someone in the back, who is running away seven times" or the extraordinary acts of spitting and attempting to run over Hardiman. The judge stated, "That kind of disregard for life is breathtaking in its depravity" and justifies a "substantial increase over the guidelines."

We find that it was not clear error for the trial court to determine that defendant shot Hardiman in the back seven times while he was running away and that he spit on Hardiman and attempted to run over Hardiman's body. Both Marshall and Vernon testified that they saw defendant shoot Hardiman in the back while he was running away and that defendant spit on Hardiman and veered while he was driving away in an attempt to run over Hardiman. The medical examiner testified that Hardiman had seven bullet wounds in the head, back, thigh, and arm. Defendant's baseball cap was found at the scene, as were numerous spent bullets and bullet casings. From the evidence presented, it was not clear error for the trial court to find that these factors existed.

We additionally find that the factors that defendant shot Hardiman seven times from the back while Hardiman was running away, spit on Hardiman, and attempted to run over Hardiman's body were all objective and verifiable. In defining "objective and verifiable" this Court has stated that "the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant and others involved in making the decision, and must be capable of being confirmed." See *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The evidence presented showed actions and occurrences external to the minds of the decision makers that were verified by the testimony of witnesses or scientific evidence.

We find that those factors found to be objective and verifiable are also substantial and compelling. To be substantial and compelling, a reason "should 'keenly' or 'irresistibly' grab" the attention of the court. The reason should be of "'considerable worth' in deciding the length of the sentence." *Babcock, supra*, 469 Mich 257. The trial court noted the extraordinary nature of defendant's conduct after killing Hardiman. Shooting one's victim in the back, shooting one's victim six more times after he has fallen, spitting on the body of one's victim, and attempting to run over the body of one's victim are all reasons that "'keenly' or 'irresistibly' grab" a court's attention and are of "considerable worth" in determining whether a defendant's sentence is an appropriate length. We find that determining these factors to be substantial and compelling reasons for departure is an outcome within "the permissible range of outcomes" and therefore was not an abuse of discretion.

However, we must also determine if those reasons determined to be substantial and compelling were already taken into account in calculating the sentencing guidelines range. A substantial and compelling reason for departure cannot be a factor already taken into account in the sentencing guidelines unless the trial court finds that the factor has "been given inadequate or disproportionate weight." MCL 769.34(3)(b); *Babcock, supra*, 469 Mich 258 n 12.

MCL 777.37, which provides the standard for scoring OV 7, states:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. . . . . 50 points
>
> (b) No victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. . . . . 0 points
>
> * * *
>
> (3) As used in this section, "sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

To have fear and anxiety, to be subjected to pain or humiliation, or to suffer from torture or brutality, a person must be alive and conscious of those feelings.

It was not clearly erroneous for the trial court to determine that Hardiman was killed by the first bullet that hit him, because Marshall testified that Hardiman fell after the first shot, Vernon testified that Hardiman was not alive when he pulled him to the curb, and the medical examiner testified regarding the location of the bullet wounds on Hardiman's body. We find that because Hardiman was not alive when those factors comprising the substantial and compelling reasons occurred, those factors properly were not taken into account in calculating the sentencing guidelines range. Accordingly, they remained proper factors for departure.

However, we find that it was clear error for the trial court to find that Hardiman was unarmed when defendant shot him. Marshall testified that he handed Hardiman Vernon's gun. Marshall also testified that Hardiman used the gun to pistol whip defendant. Vernon testified that his gun was in the glove compartment of Hardiman's vehicle when they arrived at the Tippin' Lounge but that his gun was missing later that evening. The evidence does not support a finding that Hardiman was unarmed. It was clear error for the court to find that Hardiman was unarmed when he was shot by defendant, and that factor is not verified.

If the trial court relies on multiple substantial and compelling reasons in determining its departure, and any one of those factors is determined not to be a proper factor for departure upon this Court's review, we must remand for resentencing unless it is clear from the record that the improper factor did not influence the departure. *Babcock*, *supra*, 469 Mich 260-261. The trial court should explicitly state that it did not rely on the factor and would have sentenced defendant the same regardless of the factor. *Id*, 260 n 15. If not explicitly stated, it must be clear from the record that the sentence would have been the same regardless of the court's reliance on the factor. *Id.*

In departing upward from the sentencing guidelines range, the trial court relied on a factor that was not verified – the alleged fact that Hardiman was unarmed when he was shot by defendant. It is not at all clear from the record that the trial court would have departed from the sentencing guidelines range or departed to the same degree without relying on this factor. In fact, the trial court specifically stated, "This was the shooting of an unarmed man . . . if this were a sentence to be imposed prior to the legislatively mandated guidelines, I would impose a straight life sentence, without hesitation." As the trial court relied on an improper factor in sentencing defendant outside the sentencing guidelines range, we must remand for resentencing to allow the trial court to determine if it would depart to the same degree without relying on this factor.

Affirmed, but remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter