STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAVONE DESHAUNE HILL,

Defendant-Appellant.

UNPUBLISHED
May 13, 2004

No. 246229
Wayne Circuit Court
LC No. 02-006685

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder convictions and two years' imprisonment for each felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first alleges that the prosecution presented insufficient evidence to support his first-degree murder convictions where the sole witness to the murders recanted his prior testimony. We disagree. Our review of a challenge to the sufficiency of the evidence is de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When examining the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

"In order 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). Review of the record reveals that the witness gave testimony, at the preliminary examination and in response to an investigative subpoena, that defendant threatened to shoot everyone on Keating Street approximately ten days before the shooting. The witness further testified that he was walking down Keating Street when he saw defendant and another man shoot the victims. This evidence was sufficient to satisfy the elements of first-degree murder. *Kelly, supra.*

Defendant alleges that this evidence was insufficient because the conviction was based on the testimony of a single witness who recanted his identification at trial. Indeed, after meeting

with defense counsel and defendant's aunt the day before trial, defendant recanted his prior testimony. Defendant indicated that he was "forced" to identify defendant as the perpetrator, and he did not know who shot the victims on Keating Street. He testified that he heard the shots fired, but ran and could not identify the shooters. In Michigan, an uncorroborated prior inconsistent statement can provide the sole support for a conviction. *People v Chavies*, 234 Mich App 274, 288-289; 593 NW2d 655 (1999).[1] Moreover, the trier of fact properly resolves questions of credibility and intent, and we do not resolve questions of credibility anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). In this case, the trier of fact was called upon to determine which of multiple statements given by the witness was credible and whether he was "forced" to give a statement implicating defendant by police. The jury accepted the witness' initial sworn statements and rejected the testimony at trial recanting the earlier statements. Thus, defendant's appellate challenge on this basis is without merit. *Avant, supra*.

Next, defendant argues that he was denied a fair trial by the prosecutor's remarks during trial. We disagree. Our review of allegations of prosecutorial misconduct is de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Claims of prosecutorial misconduct are reviewed case by case, examining the challenged remarks in context to determine whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267 n 7; 531 NW2d 659 (1995).

Defendant first contends that the prosecutor engaged in misconduct by questioning a witness regarding defendant's involvement in a prior shooting. Where improper questioning occurs by a prosecutor, we review the issue to determine if the beneficiary of the error can establish that the error is harmless beyond a reasonable doubt. *People v Knapp*, 244 Mich App 361, 383-384; 624 NW2d 227 (2001). There must be a reasonable possibility that the error contributed to the conviction. *Id*. However, under the circumstances where a trial judge acts swiftly in issuing an appropriate instruction, any error generally does not contribute to the conviction. *Id*.

In the present case, after the prosecutor completed his examination of the witness, defense counsel requested a sidebar to address the inquiry and testimony regarding another shooting. On the record and outside the presence of the jury, defense counsel requested a limiting instruction at that time. When the jury returned to the courtroom, the trial judge indicated that the testimony was to be stricken and not considered in any way in the case. Based on the defense request for relief and the trial court's swift compliance with the defense request, this error does not provide a basis for relief.[2] *Knapp, supra*. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). There is no indication that the prosecutor's inquiry deprived defendant of a fair trial.

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[1] Defendant requests that we not follow the *Chavies* decision, alleging that it incorrectly applied federal appellate precedent. On the contrary, *Chavies* adopted the majority view addressing this issue and did not solely rely on the decision of *United States v Woods*, 613 F2d 629, 636-637 (CA 6, 1980). Thus, defendant's challenge to the *Chavies* decision is without merit.

[2] We also note that the incident regarding the prior shooting was presented to the jury during the testimony of the sole, albeit recanting eyewitness.

Defendant also claims that the prosecutor attacked defense counsel during closing argument. We disagree. Defendant did not object to the prosecutor's statements and therefore, we review this issue for plain error. Defendant has the burden of establishing that "(1) error occurred, (2), the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). An error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutors are afforded great latitude in the argument phase of trial, and a prosecutor is free to argue the evidence and all reasonable inferences from the evidence related to the theory of the case. *Knapp, supra* at 381-381 n 6. A prosecutor's remarks are not examined in a vacuum, but read in context because an otherwise improper remark may not rise to error requiring reversal where the prosecutor was responding to the defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). A prosecutor may not personally attack defense counsel, *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003), and may not suggest that defense counsel is intentionally attempting to mislead the jury. *Watson, supra* at 592.

Following review of the record, we cannot conclude that the prosecutor's comments were designed to denigrate the defense or defense counsel or levied a personal attack. The key issue in the case involved which of the multiple accounts of the shooting given by the eyewitness was true. The defense alleged that the prior statements identifying defendant as the shooter were the result of pressing or "force" by police when the eyewitness was questioned regarding a drug offense. To counter that argument and allege that the initial statements of identification were true, the prosecutor noted that the eyewitness changed his testimony only after meeting with defendant's family and defense counsel. Thus, the prosecutor's argument was responsive to the defense theory of the case. *Kennebrew, supra*. The trial court instructed the jury that the statements of counsel were not evidence. Moreover, any alleged prejudice could have been cured by objection and a curative instruction. *Watson, supra*. Accordingly, this claim of error is without merit.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Karen M. Fort Hood