

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRIK DELANO MCCLELLAN,

Defendant-Appellant.

UNPUBLISHED

May 25, 2004

No. 245097

Wayne Circuit Court

LC No. 02-003088

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced to life imprisonment for the murder conviction, two years' imprisonment for the felony-firearm conviction, and nineteen months to five years' imprisonment for the felon in possession conviction. Defendant appeals as of right, and we affirm.

Defendant argues that there was insufficient evidence of premeditation and deliberation to support his first-degree murder conviction. We disagree. Challenges to the sufficiency of the evidence in criminal trials are reviewed de novo to determine whether, in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). To establish first-degree premeditated murder, some time span between the initial homicidal intent and the ultimate action is necessary to establish premeditation and deliberation, and the interval should be long enough to afford a reasonable person time to take a "second look." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

Premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. [*People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999) (citations omitted).]

Absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). "This Court will not interfere with the role

of the trier of fact of determining the weight of the evidence or the credibility of witnesses.” *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003).

The relationship between the victim and defendant consisted of an argument between their two groups of friends inside a club that evening. There was circumstantial evidence to support an inference that, before the killing, defendant retrieved the gun and a jacket from a nearby vehicle. The medical examiner testified that the victim was shot four times through-and-through, and his body was in motion at some time between the first and last gunshots. After the homicide, defendant fled. Pursuant to *Abraham, supra*, this is sufficient evidence of premeditation and deliberation. The act of retrieving the gun was sufficient time to afford a reasonable person time to take a “second look.” *Gonzalez, supra*. Viewed in a light most favorable to the prosecution, the evidence presented at trial was sufficient to permit a rational jury to conclude that defendant committed first-degree murder. *Randolph, supra*.

Next, defendant argues that he was denied his right to a fair trial because the prosecutor made several remarks during his opening statement, closing argument, and rebuttal argument that constitute prosecutorial misconduct. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *Abraham, supra*. Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *Id.* at 272-273. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

First, defendant argues that the prosecutor’s remarks during his opening statement violated defendant’s Fifth Amendment right to remain silent. It is well established that a prosecutor may not comment on a defendant’s failure to testify or present evidence. *Abraham, supra*; *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). Evidence of flight from the scene of a crime, however, is admissible and “does not infringe a defendant’s privilege against self-incrimination[.]” *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). Furthermore, the prosecutor “is entitled to comment on the evidence of flight and the inferences that can be drawn therefrom.” *Id.* at 432-433.

We cannot conclude that improper commentary on the right to remain silent occurred. The prosecutor remarked that the members of defendant’s group would not testify. After objection, the prosecutor explained that none of the members of defendant’s group would be called as prosecution witnesses because most of them had disappeared before the police arrived at the scene of the crime. Furthermore, the trial court provided the proper jury instructions addressing a defendant not testifying, flight, the number of witnesses presented, the lawyers’ statements and arguments not being evidence, presumption of innocence, burden of proof, and reasonable doubt. The jury is presumed to follow the court’s instructions. *People v Lueth*, 253 Mich App 670, 687; 660 NW2d 322 (2002); *Schutte, supra*. After review of the prosecutor’s remark in context of his explanation that everyone in defendant’s group fled the scene of the crime, we conclude that the prosecutor’s remark was an appropriate comment on defendant’s flight from the scene of the crime. *Goodin, supra*; *Abraham, supra*. Moreover, in light of the instructions provided by the trial court, we conclude that defendant was not prejudiced by the prosecutor’s remark, and he was not denied a fair and impartial trial. *Abraham, supra*.

Next, defendant argues that the prosecutor argued facts not in evidence during his opening statement. During the prosecutor's opening statement, he stated that the one person from defendant's group who remained when the police arrived, had since disappeared and could not be located to testify at the trial. Defense counsel objected again, and a discussion was held off the record, after which the trial court overruled defendant's objection.

Opening statements are the appropriate time for a prosecutor to state the facts to be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). When a prosecutor, acting in good faith, states that evidence will be submitted to the jury, and the evidence is not presented, reversal is not warranted. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997); *Johnson, supra*, 187 Mich App 626. There was no evidence that the prosecutor made this comment in bad faith, and we cannot conclude that defendant was prejudiced by the prosecutor's remark or denied a fair and impartial trial. *Abraham, supra*.

Defense counsel failed to object to the prosecutor's statements that the witnesses had testified honestly, his characterizations of defendant, and his comment that the jury could bring a sense of justice to the victim's death. Because these three issues are unpreserved, we will review for plain error affecting defendant's substantial rights. *People v Jones*, 468 Mich 345, 382; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). "To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears 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." *Jones, supra*.

The prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). During cross-examination, defense counsel attacked the credibility of Richardson, Puriefoy, Simmons, and Mays. It appears that the prosecutor's statement was responsive to the attack on the credibility of the witnesses. Additionally, the trial court instructed the jury that the lawyers' statements and arguments are not evidence. Because the prosecutor did not imply that he had some special knowledge of the witnesses' truthfulness, and defense counsel attacked the credibility of several key witnesses, we conclude that the prosecutor's remark during his closing argument was an appropriate response. *Bahoda, supra*. The prosecutor's remark did not constitute outcome-determinative plain error. See *Jones, supra*; *Carines, supra*.

Moreover, this Court will not find any error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra*. If defense counsel had raised the issue at trial, any error could have been cured by a timely instruction. *Id.* Absent an objection, the "judge's instruction that arguments of attorneys are not evidence dispelled any prejudice." *Id.* at 721-722, quoting *Bahoda, supra* at 281.¹

¹ Additionally, we note that the prosecutor's argument regarding the testimony of the available witnesses, flight, and witness credibility was designed to address the theory of self-defense. Defense counsel alleged that a member of the victim's group had a club, which mysteriously disappeared from the scene. In order to present the theory of self-defense without testimony
(continued...)

Next, defendant argues that the prosecutor disparaged him during opening and closing argument by referring to him as a troublemaker, a bully, a jerk, and an idiot. Defense counsel did not object to these statements and referred to the prosecutor's comments in closing argument. After the defense comment, the prosecutor clarified in rebuttal that he referenced "jerks or idiots" encountered in every day life, and any conviction must be based on the evidence.

"A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995), citing *Bahoda, supra*, 448 Mich 266. Because the prosecutor addressed his characterization of defendant during his rebuttal argument and urged the jury to use the evidence to convict defendant, we conclude that the prosecutor did not "intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *Lee, supra*. The trial court properly instructed the jury regarding the presumption of innocence and reasonable doubt and that the lawyers' statements are not evidence. These instructions dispelled any prejudice arising from the prosecutor's comments, and the jury is presumed to follow the court's instructions. *Lueth, supra*; *Schutte, supra*. Even if inappropriate, the prosecutor's remarks did not constitute outcome-determinative plain error. See *Jones, supra*; *Carines, supra*.

Defendant also alleges that the prosecutor appealed to the jury's civic duty by arguing the jury decision could bring a sense of justice to the victim's death. A prosecutor may not urge the jury to convict the defendant as part of their civic duty. *Bahoda, supra*. A prosecutor's remarks must be reviewed in context to determine whether they constitute error, and civic duty arguments are prohibited because they inject into the trial issues that are broader than a defendant's guilt or innocence. *Id.* at 284-285.

Review of the prosecutor's remarks, in context, reveals that he urged the jury to use the facts, law, and common sense in reaching a verdict. Therefore, we conclude that the prosecutor did not inject into the trial "issues that are broader than a defendant's guilt or innocence" or attempt to appeal to the fears and prejudices of the jury. *Bahoda, supra*. The prosecutor's remark did not constitute outcome-determinative plain error. See *Jones, supra*; *Carines, supra*.

In the alternative, defendant alleges that he was denied effective assistance of counsel because trial counsel failed to object to the prosecutor's remarks during his opening statement, closing argument, and rebuttal argument. Because we have concluded, *supra*, that the prosecutor's remarks did not constitute improper vouching for the credibility of witnesses, disparaging of defendant, or appealing to the jury's civic duty, defendant's claim of ineffective assistance of counsel is meritless.

Next, defendant argues that the trial court's failure to properly instruct the jury on the order of deliberation constitutes error requiring reversal. We disagree. A party must object or request a given jury instruction to preserve the issue for review. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). Defense counsel's express approval of a given jury instruction constitutes "a waiver that *extinguishes* any error." *People v Carter*, 462

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from defendant or any member of his group, the defense had to attack the testimony of the prosecutor's witnesses.

Mich 206, 216; 612 NW2d 144 (2000) (emphasis in original). When asked if they had any objections to the jury instructions as given, both parties specifically stated that they did not. Because defense counsel expressly approved the jury instructions as given, we conclude that this issue has been waived and need not be considered by this Court. *Id.*

Alternatively, defendant argues that he did not receive effective assistance of counsel because his trial counsel failed to object to the given order of deliberation jury instruction. We disagree. “Jury instructions are to be read as a whole rather than extracted piecemeal to establish error.” *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). “Even if somewhat imperfect, instructions do not warrant reversal if they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.* In *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982), the Court stated that, when the trial court is providing instructions on lesser-included offenses, the jury “must be told to consider the principal charge first.” The trial court instructed the jury that they “should consider the crime of First Degree Premeditated Murder first.” The trial court also instructed that if an agreement could not be reached regarding first-degree premeditated murder the lesser offenses were to be considered. Defendant’s argument is without merit because the given instruction was consistent with *Handley, supra*, which provides that the jury may consider the lesser offenses after considering the principal offense. Moreover, the trial court properly instructed the jury on presumption of innocence, burden of proof and reasonable doubt, CJI2d 3.2, first-degree murder, CJI2d 16.1, second-degree murder, CJI2d 16.5, and voluntary manslaughter, CJI2d 16.9. After reading the jury instructions as a whole, we conclude that the trial court committed no error when it gave the order of deliberation instruction. *Kurr, supra*. Ineffective assistance of counsel did not occur based on the failure to object to the instructions given.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood