STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v WILLIAM JAMES DIGNA, JR., Defendant-Appellant.	No. 249888 Wayne Circuit Court LC No. 02-013992-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v WILLIAM JAMES DIGNA II, Defendant-Appellant.	No. 249903 Wayne Circuit Court LC No. 02-013992-02

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant, William James Digna, Jr. (hereinafter "Bill"), and defendant, William James Digna II (hereinafter "Will"),[1] appeal as of right their jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a). The trial court sentenced each defendant to life in prison. We affirm.

Bill first argues that the trial court denied him his right to confront a witness by admitting Will's statement to a third party against him. This Court reviews a trial court's decision to admit

[1] Confusingly enough, this father and son duo have essentially the same name. To alleviate the confusion, the parties decided in the lower court to refer to defendant William James Digna, Jr., as Bill and to refer to his son, defendant William James Digna II, as Will. We shall continue this practice to limit confusion.

evidence for a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Bill challenges the admission of a statement made by Will to one of his friends. Bill argues that the statement is not admissible against him under MRE 804(b)(3) because Will merely shifts all blame to Bill making the statement not against Will's penal interest. Will's statement does not deny his participation in the murder. Will admitted that he slapped and wrestled the victim (his live-in fourteen-year-old girlfriend, Heather). He also admitted that he held her down while Bill punched her in the face. Will confessed that he blocked the victim's exit and would not let her leave the trailer. He admitted that he sent Bill back to deal with her when she fled to the rear of the trailer. Finally, Will admitted disposing of the body with Bill. This statement appears clearly to be against Will's penal interests and exposes him to liability for several crimes, including aiding and abetting in the murder. Will admits beating Heather and holding her in the trailer. This clearly demonstrates a willingness to assist Bill. Therefore, the statement is against Will's penal interest and admissible pursuant to MRE 804(b)(3).

But the question if the statement is admissible against Bill requires further inquiry. Admission of such a statement raises Confrontation Clause questions. *People v Washington*, 468 Mich 667, 671; 664 NW2d 203 (2003). The Michigan Supreme Court articulated a balancing test in evaluating the admission of these statements. The Court provided the following four factors favoring admission: 1) the statement was voluntarily given; 2) the statement was made contemporaneously with the referenced events; 3) the statement was made to a person the declarant would likely tell the truth, such as friends or family; and 4) the statement was made without prompting, it was spontaneous. *Id*. The Court also provided the following four factors, which potentially weigh against admission: 1) where the statement was made to a law enforcement officer or at the prompting of the listener; 2) where declarant shifts the blame to the accomplice; 3) where the statement was made to avenge the declarant or to curry favor; and 4) where the declarant has a motive to lie or distort the truth. *Id*. at 672-673.

Considering these factors, we find that the trial court did not abuse its discretion in admitting the statement against Bill. Will made the statement to a friend, in a non-custodial environment and without prompting. Further, the statement was made fairly contemporaneously to the crime. It was made prior to any arrest and prior to defendants fleeing the state. There is no indication that Will made the statement to curry favor or that he had motive to distort the truth. Rather, Will clearly implicated himself in several crimes including the murder. Weighing the factors surrounding the statement indicates that it is trustworthy. Given the sufficient indicia of trustworthiness, the Confrontation Clause concerns are overcome. *Washington*, *supra* at 673. The trial court did not abuse its discretion in admitting the challenged statement against Bill. *Id*. at 673-674.

Bill argues on appeal that the statement should not be admitted because Will shifts the blame for the crime onto him. But this is only one of the factors that a court should consider in evaluating admissibility. Considering this alone does not outweigh all indications of trustworthiness demonstrating reliability such as the facts that Will made the statement spontaneously to a friend. Further, Will does not totally shift the blame to Bill in this statement. Rather, Will implicates himself in the overall crime. Will admits keeping the victim in the trailer, hitting her, and holding her while Bill punched her in the face. Under the circumstances,

this lone factor does not weigh so heavily that it makes the statement untrustworthy. Therefore, the trial court did not abuse its discretion in admitting the statement.[2]

Next, both defendants contend that the prosecution presented insufficient evidence to convict them of premeditated murder. To determine if sufficient evidence existed for a conviction in a criminal proceeding, this Court must view the evidence in a light most favorable to the prosecution and decide if a reasonable juror could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). To prove first-degree premeditated murder, the prosecution must show: 1) defendants intentionally killed the victim; and 2) the act of killing was deliberate and premeditated. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Defendants only challenge the second element of the crime.

The element of premeditation requires sufficient time for defendants to take a second look at their actions. *Kelly*, *supra* at 642. Deliberation and premeditation may be inferred from the facts and circumstances surrounding the killing. *Id*. Because the jury cannot read defendants' minds, minimal circumstantial evidence is sufficient to prove defendants' state of mind. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). Factors that may be considered to judge premeditation include: 1) the relationship between the parties; 2) the defendants' actions before and after the crime; and 3) the circumstances of the killing itself, including the weapon used. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Where the evidence establishes a fight and then a killing, there must be a showing of a thought process, which is not disturbed by "hot blood." *Id*. at 301.

The facts of this case are sufficient to prove premeditation on the part of both defendants. With regard to Bill, the evidence showed that he had made a previous threat to kill the victim if she ever threatened to turn Will in for rape. Bill also stated that he would skip town after the murder. This is exactly what happened in this case. The victim threatened to turn Will in for raping her, Will and Bill killed the victim, they dumped the body, and eventually skipped town to run from the consequences. This evidence is sufficient to establish premeditation. *Plummer*, *supra* at 300-301. Further, premeditation can be inferred from the weapon used or the manner of death. *Id*. The evidence indicated that Bill strangled the victim with a dog leash. A medical examiner testified that it would take a considerable amount of time to strangle a person to death. She stated that it takes three to five minutes for strangulation to cause death. Given the fact that Bill slowly choked the life out of the victim over the course of several minutes, the manner of death suggests a cool head and premeditation. *Id*.

[2] We also note that admission of the challenged statements was not contrary to the United States Supreme Court's decision in *Crawford v Washington***,** 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), because the challenged statements from Will to a friend were not testimonial in nature. See *People v Geno*, 261 Mich App 624, 630-631; 683 NW2d 687 (2004). "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . ." *Crawford*, *supra* at 52. Because Will's statements to a friend were nontestimonial and qualified under our MRE 804(b)(3) hearsay exception, the admission of the statements was not contrary to *Crawford*, *supra*.

The evidence, when viewed in the light most favorable to the prosecution, also supports a finding of premeditation against Will. The record supports that the victim attempted to flee the trailer after Will and Bill attacked her, but Will would not let her. The evidence also showed that the victim fled to the back of the trailer. The victim's attempts to leave the trailer gave Will the opportunity to end any confrontation, but he chose not to do so. Instead, the record supports, that Will sent Bill to the back of the trailer to deal with the victim, which resulted in her death. Given that Will had ample opportunity for reflection on his actions, sufficient evidence existed for a reasonable juror to find premeditation. *Kelly*, *supra* at 642.

Will's actions after the killing also support a finding of premeditation. A defendant's actions before and after the killing are proper considerations in judging premeditation. *Plummer*, *supra* at 300. There was evidence supporting that after Bill strangled the victim to death, Will and Bill wrapped her body up in blankets and tied her down with straps. This included a strap around her neck. There was also evidence supporting that Will and Bill then drove the body deep into Point Mouillee State Game Area and dumped it in tall weeds and cattails, where they left the body to rot. Will and Bill then both fled the area, stayed in a Hotel that night and moved from place to place there after, and eventually wound up on the run in Louisiana. In all, the circumstances surrounding the killing and Will's actions after the killing present sufficient evidence for a reasonable juror to find the element of premeditation beyond a reasonable doubt. *Id*.

Next, both defendants raise several claims of prosecutorial misconduct. Defendants failed to preserve these issues by objecting in the trial court. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Therefore, this Court reviews for a plain error that affected defendants' substantial rights. Reversal is warranted only if this Court determines that the plain error actually caused an innocent defendant to be convicted or if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Bill argues that the prosecution committed misconduct by appealing to the jury's sympathy for the victim. Appeals to the sympathy of the jury constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But the prosecution is not required to use the blandest language possible. The prosecution can use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Emotional language is an important tool in the prosecution's arsenal. *Id*. at 679. In this case, the prosecution used somewhat emotional language to make clear to the jury the hard facts of this case. The prosecution merely mentioned the cold hard facts of this case, that a fourteen-year-old girl was brutally strangled to death and dumped in the wild, reducing her life to a mere autopsy report. The prosecution had no duty to sugarcoat the truth, and is allowed to use emotion in its closing. *Id*. Therefore, the comments do not amount to prosecutorial misconduct.

Will argues that the prosecution committed misconduct and denied him his right to confront a witness by urging the jury to use hearsay statements made by Bill, which were limited as evidence only to Bill, against Will. Will first points to a statement during closing where the prosecution stated: "These people [defendants] have proven throughout this trial to be liars." Will argues this statement encourages the jury to disregard the Court's limiting instructions and apply hearsay statements made by Bill against Will. But when reviewed in context, this is not true. Immediately after the statement about the defendants being liars, the prosecution speaks of

the evidence presented at trial that Will initially told his friend that the victim left with some Arab friends and that he did not know where she was. Will later recanted this and confessed to his friend what really happened. The record must be read as a whole and the allegedly impermissible statements judged in the context they were made. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). Reading the prosecution statement in full and in context of the evidence presented reveals that the prosecution was not encouraging the jury to disregard the limiting instructions. Therefore, challenged comments do not amount to misconduct. *Id*.

Will next points to the prosecution's mention of Bill's statement where he stated that he would kill the victim if she threatened Will with statutory rape. Will contends that the prosecution encouraged the jury to use this statement against him. While the prosecution mentions Bill's statement in its rebuttal closing, it made no argument that this statement should apply to Will as well Bill. The prosecution did not state or even apply that this statement should apply to Will. Therefore, Will's argument is without merit.

Will also claims that the prosecution committed misconduct by referring to his counsel's closing arguments as red herrings. Will argues that this disparaged his counsel. The prosecution's comments were a fair reply to defense counsel's closing argument. Will's counsel argued that large holes existed in the physical evidence and all that the prosecution had were confused second-hand statements. The prosecution asks the jury to concentrate on the evidence offered and its sufficiency and to ignore the distractions pointed to by defense counsel. After the red herring statement, the prosecution attempted to tie the loose ends of its case together in response to defense counsel's argument. Judging the challenged statement in its proper context, it does not amount to misconduct. *Reed*, *supra* at 398. Further, the comments were isolated in nature. Such isolated comments do not require reversal, especially when there is significant evidence of defendant's guilt. *People v Launsburry*, 217 Mich App 358, 361-362; 551 NW2d 460 (1996).

Further, reversal based upon an unpreserved claim of prosecutorial misconduct is only warranted where a curative instruction could not have alleviated the prejudicial effect. *Ackerman*, *supra* at 448-449. This Court has stated a trial court's careful and explicit instructions to a jury that it is required to decide the case only on the evidence and that the lawyer's arguments are not evidence would cure any prosecutorial misconduct in closing arguments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). The trial court gave such instructions, and also instructed the jury not to let sympathy influence its decision. Thus, defendants are not entitled to relief on the above discussed issues. *Id*. at 693; see also *Thomas*, *supra* at 454, 456.

Next, Bill argues that the jury should have received further instruction on aiding and abetting. A court must properly instruct the jury so that it may correctly and intelligently decide the case. *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996). Jury instructions must include all material issues, case theories and defenses that the evidence supports. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). In this case, the evidence did not support giving an aiding and abetting instruction regarding Bill. The evidence indicated that Bill was directly responsible for the murder. The jury instructions allowed the jury to correctly and intelligently decide Bill's case, and therefore, no error existed. *Clark*, *supra* at 583.

Will argues that the trial court should have instructed the jury on the lesser offense of voluntary manslaughter in this case. This Court reviews the determination of whether a jury instruction is applicable to the facts of a case for an abuse of discretion. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). A requested jury instruction on a necessary included lesser offense is proper if the charged greater offense requires the jury to find a disputed element that is not part of the lesser offense and a rational view of the evidence supports giving the instruction. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Voluntary manslaughter is a necessary included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). The trial court stated that it would not give a manslaughter instruction because the evidence did not support it.

In order to mitigate homicide to manslaughter, defendant must act out of passion rather than reason. *People v Pouncey*, 437 Mich 382, 389; 471 NW2d 346 (1991). The victim must arouse such an emotion in the perpetrator that it distorts the very process of rational choice. *Id*. quoting Moore, *Causation and the excuses*, 73 Cal L R 1091, 1132 (1985). Generally, words alone do not provide adequate provocation for an assault and battery let alone voluntary manslaughter. *Id*. at 391. The provocation must be one that would make a reasonable person lose control. *Id*. at 389.

Will argues that the victim's threat to turn him in for statutory rape constituted adequate provocation. A threat of proper legal action is not enough to arouse such a passion in a reasonable person that they would be unable to make a rational decision. The mere words alone are not enough to demonstrate passion rather than reason. Further, the evidence demonstrated that Will had a chance to cool off his emotions when the victim attempted to leave the trailer and fled to the back bedroom. Defendants could have ended the confrontation there, but instead they choose to kill the victim. A sufficient cooling off period will negate any mitigating factors. *Pouncey, supra* at 392.

Further, the actions must be judged on a reasonableness standard. The threat of turning a person in for a crime cannot meet this reasonableness standard. Allowing the threat of legal action to constitute reasonable provocation would allow every defendant to fly into a rage and kill every victim of his past crimes and still be innocent of murder. This would encourage the feigned rage specifically feared and denounced by the Michigan Supreme Court. *Pouncey, supra* at 389 n 7, quoting Loewe, *Culpability, dangerousness, and harm: Balancing the factors on which our criminal law is predicated*, 66 NC L R 283, 302-303 (1988). We simply cannot allow Will to blame the victim for this murder. The victim's wish not to be raped anymore simply does not mitigate Will's crime.

Next, Bill argues that the trial court violated the corpus delicti rule when it admitted his statements. A defendant is required to preserve a corpus delicti rule claim by objection below. *People v Ish*, 252 Mich App 115, 116; 652 NW2d 257 (2002). Bill failed to raise an objection below, and therefore, this issue is unpreserved. *Id*. Because Bill failed to preserve his issue on appeal, this Court reviews the issue for plain error. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If a defendant satisfies these requirements, the Court must still decide whether to reverse. The case warrants reversal if the plain error resulted in the conviction

of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the defendant's innocence. *Id*.

The purpose of the corpus delicti rule is to prevent the prosecution from using a defendant's statement to convict him for a crime that did not occur. *Ish*, *supra* at 116. The prosecution must present direct or circumstantial evidence, other than the defendant's statement, that the crime occurred and that some criminal agency was the source of the injury. *Id*. For murder, the prosecution is required to prove a death and some criminal agency causing that death. *People v McMahan*, 451 Mich 543, 549; 548 NW2d 199 (1996).

In this case, the victim's body was found badly decomposed and dumped out in a state game area. The body was wrapped in a sleeping bag and a blanket, which were tied around the body with straps and electrical cords. The manner in which the body was wrapped and dumped demonstrates that Heather did not die of natural causes or suicide. The medical expert testified that it was her expert opinion that the condition of the body demonstrated that this could not be a natural death. She also opined that the condition was inconsistent with a drug overdose. The condition of the victim's body when found is clearly circumstantial evidence that some criminal agency was the cause of death. This is all that is required of to satisfy the corpus delicti rule. *Ish*, *supra* at 116; *McMahan*, *supra* at 549.

Bill essentially argues that direct evidence is required to establish the exact cause of death before his statement could be admitted. But this is not the requirement of the corpus delicti rule. The prosecution must merely prove, by circumstantial evidence, that some criminal agency causing the death occurred. *McMahon*, *supra* at 549. The prosecution need not prove every element of the crime before a defendant's statements may be admitted. *Ish*, *supra* at 116-117. The evidence presented at trial satisfied this standard. Therefore, no plain error requiring reversal occurred in admitting Bill's statements at trial.

Finally, Will contends that he received ineffective assistance of counsel because his trial counsel failed to request separate juries and failed to object to comments made by the prosecution during closing arguments.

To establish ineffective assistance of counsel, a defendant must show (1) that his attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Will has not established either prong of this test.

Will first argues that he received ineffective assistance of counsel because his attorney failed to request separate juries once the case reached the trial court. In order for counsel's failure to request separate juries or trials to amount to ineffective assistance, defendant must be entitled to a separate trial. *People v Daniel*, 207 Mich App 47, 59; 523 NW2d 830 (1994). That is, the defendant's and his codefendant's defenses must be antagonistic. *People v Hurst*, 396 Mich 1, 6; 238 NW2d 6 (1976). There is a strong policy in favor of joint trials. *People v Hana*, 447 Mich 325, 341; 524 NW2d 682 (1994), quoting *People v Schram*, 378 Mich 145; 142 NW2d 662 (1966). The party requesting a separate trial must demonstrate affirmatively a prejudice to his substantial rights. *Id*. "[S]everance should be granted only if there is a serious risk that a joint trial would compromise a specific trial right . . . or prevent the jury from making a reliable

judgment about guilt or innocence." *Id*. at 346, quoting *Zafiro v United States*, 506 US 534; 113 S Ct 933; 122 L Ed 2d 317 (1993) (internal quotation marks omitted; ellipses in original). To warrant severance, the two defenses must be so different that the jury could only believe one defense or the other. *Id*. at 349.

On appeal, Will argues that his defense meets these criteria. Will claims that his defense was that Bill actually committed the murder and he was not involved in that aspect of the crime. But this was not his defense at trial. It is clear from opening statements and closing argument that Will's main focus of his defense was that insufficient evidence existed to convict of premeditated murder. Counsel discussed the lack of physical evidence and the lack of intent to kill. Counsel also spoke of lack of premeditation and deliberation on the part of Will. Under the circumstances, Will's defense was not so antagonistic to Bill's that the jury could only believe one. The jury could have believed that Will had no intent to kill Heather but was merely in a physical altercation with her while still believing Bill's defense that insufficient physical and testimonial evidence existed to convict him of premeditated murder. Because the defenses are not totally antagonistic, defendants did not warrant separate trials. *Hana*, *supra* at 346, 349. Thus, Will's trial counsel was not ineffective in failing to request separate trials or juries. *Daniel*, *supra* at 59.

Will next argues that his counsel was ineffective in failing to object to the prosecutor's misconduct during closing argument. As discussed, *supra*, when judged in context, the prosecutor's remarks did not amount to prosecutorial misconduct. *Reed*, *supra* at 398. Therefore, any objection would have proven futile. Counsel is not ineffective for refusing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). And, even if the comments did amount to prosecutorial misconduct, they did not prejudice Will given that the trial court's proper instructions to the jury cured in potential error. *Green*, *supra* at 693; see also *Thomas*, *supra* at 454, 456. Further, the decision to object during closing argument is a matter of trial strategy. *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). "Certainly there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). This Court will not substitute its judgment for counsel's on matters of trial strategy, this includes when that trial strategy ultimately fails. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Under the circumstances, counsel's failure to object may have been trial strategy and defendant has not overcome the presumption of sound strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Accordingly, we reject defendant's claim that trial counsel was ineffective.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood