S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 263892 Washtenaw Circuit Court
ANTONIO MARTEZ WILLIAMS, Defendant-Appellant.	LC No. 04-001359-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227(b). The trial court sentenced defendant to 20 to 50 years' imprisonment for second-degree murder and two years' imprisonment for the felony-firearm conviction. Defendant appeals by right. We affirm.

On the night of July 30, 2004, an altercation arose at an outdoor party. One of the aggravators brandished a gun and fired shots into the air and toward the crowd. Defendant, who was not involved in the initial altercation, subsequently pulled out his own gun, approached the original shooter, and shot him from behind at close range. Defendant then proceeded to shoot the victim three more times as he lay dying on the ground. Defendant admitted to shooting the victim, but he claimed he did not harbor the intent to kill and that he was adequately provoked.

I

On appeal, defendant argues that the trial court erred in admitting certain evidence at trial. We review a trial court's ruling regarding the admission of evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003).

First, defendant contends that certain rap lyrics, which were found in defendant's duffle bag in the room where he was staying, were inadmissible. Defendant mistakenly argues that rap lyrics are MRE 404(b) "other acts" evidence that should not have been admitted because of their extreme prejudice. MRE 404(b) prohibits the admission of evidence of other crimes, wrongs, or acts in order to prove the character of someone to show action in conformity therewith. The rap lyrics, however, are not MRE 404(b) evidence. They are not a crime, wrong, or an act under MRE 404(b). Rather, the lyrics are a written statement; consequently, we find that the rules of

hearsay apply. MRE 801(d)(2) provides that when a "statement is offered against a party" and is "the party's own statement" or is "a statement of which the party has manifested an adoption or belief in its truth," it is not hearsay. Written statements are included in this definition. MRE 801(a); *People v Cetlinski*, 435 Mich 742, 747-748; 460 NW2d 534 (1990). Therefore, the lyrics were admissible if their probative value outweighed the danger of unfair prejudice to defendant. MRE 403.

Here, the lyrics were offered as evidence of defendant's motive and intent. The lyrics refer to many of the circumstances surrounding this crime. The lyric "I got ragged hollow tips that's gone spit at yo dome" is poignant because defendant initially shot Pfeiffer in his head ("dome".) Further, the lyrics mention "fake niggas," which is reminiscent of witness accounts that defendant loudly proclaimed the original shooter to be a "fake-ass Eminem ass nigger." Also, the lyrics state, "when I come through you hood, you ain't no good," and defendant himself testified that he was not at a location familiar to him when the shooting occurred. The evidence revealed that the location was where the victim was often found. The probative value of the lyrics, which helped to illuminate defendant's motive and intent, were not outweighed by the danger of unfair prejudice to defendant.

Defendant also argues that evidence of three firearms, which were seized at the home of defendant's grandfather, should not have been admitted into trial. There is no dispute that the guns seized at defendant's grandfather's house had no connection to the crime. The jury was informed several times that the three firearms had no relation to the shooting in question. The prosecution argued that photos of the weapons were relevant to the case because they showed the "thoroughness of the police investigation." But, the thoroughness of the police investigation was never at issue in this case. At issue was defendant's motive and intent, not whether he was the one who actually pulled the trigger. Therefore, we conclude that the challenged evidence pertaining to the guns was irrelevant to any issues of consequence at trial. MRE 401. Accordingly, admitting the photographs of the three guns into trial was an abuse of discretion. Nevertheless, in *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999), the Court ruled that a preserved, nonconstitutional error justifies reversal of a conviction only if it is "more probable than not" that the evidence was outcome determinative. Here, considering the overwhelming evidence of defendant's guilt, including two eyewitness accounts, damaging ballistics evidence, and defendant's own admissions, the error was harmless.

II

Defendant next argues that the prosecutor committed prosecutorial misconduct. We review unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This requires a showing of prejudice, which can be established by demonstrating that a clear error affected the outcome of the trial court proceedings. *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003).

This Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Each claim is decided on a case-by-case basis, and the prosecutor's remarks must be reviewed in context. *Id.* The alleged misconduct is considered in light of all of the facts of the case and in the context of all of the prosecutor's remarks. *Id*. The prosecutor's comments are

also examined in light of the defendant's arguments and the evidence presented at trial. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Improper remarks may not require reversal if they are raised in reply to issues introduced by the defense. *Id.*, citing *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Defendant argues that the prosecutor improperly referred to the "murder" of the victim and stated, "I would love for this jury to know everything that we possibly have heard from various people in this case, your Honor, but it's not proper." Defendant also contends that it was misconduct for the prosecution to state that defense counsel was about to "open a door I'll walk through." Defendant believes the combination of these improper remarks deprived him of a fair trial.

Prosecutors may use "hard language" when it is supported by evidence; they 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). A single reference to "murder" during a trial that lasted for five days likely caused no prejudice in a case where the charge defendant faced was murder. Accordingly, we find that the prosecutor's single use of the word murder did not deny defendant a fair trial.

The other two disputed prosecutor remarks, when viewed in context, were not prejudicial to defendant. The comment, "he's about to open a door that I will walk through," was made after the prosecutor objected to defense counsel questioning. The trial court determined that if defense counsel continued asking certain questions, it would have opened the door for the prosecutor to raise defendant's history of violence. If the jury were to learn of defendant's history of violent conduct, his case would have been prejudiced. Therefore, the prosecution's objection and subsequent explanation did not prejudice defendant. In fact, they assisted him.

We also find that the prosecutor's following statements do not require reversal.

> Ms. Taylor: It's hearsay as to what might have been suggested to him. *I would love for this jury to know everything that we possibly have heard from various people in this case, your Honor,* but it's not proper. It's not proper to admit it and I'll ask the Court –
>
> Mr. Strouss: - now, if she wants to talk about that, I'd love for them to learn about Mr. Pfeiffer too, Judge, if we're going to get into trading information.
>
> Ms. Taylor: - but, that's my point, your Honor. That's why we have rules.

A prosecutor may not intentionally inject into trial inflammatory arguments with no apparent justification except to arouse prejudice. *People v Bahoda*, 448 Mich 261, 271; 531 NW2d 659 (1995). However, here it was not the prosecutor who first mentioned inadmissible character evidence. It was defendant who first suggested the existence of negative information. The prosecutor responded by explaining her hearsay objection. While she editorialized during her explanation, she did not imply that the information would be harmful to defendant. The jury did not learn anything from the prosecutor's comment except that both sides had information that

the rules precluded. Thus, even if the comment were improper, it does not necessitate reversal. Moreover, we note that the challenged comments were brief in the context of the trial and were not so inflammatory as to cause unfair prejudice. See *Watson, supra* at 591.

III

Defendant asserts that he was denied the effective assistance of counsel. Defendant failed to move the trial court for an evidentiary hearing or a new trial based on ineffective assistance of counsel, and therefore, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed, and the defendant has a heavy burden of proving otherwise. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Defendant claims that failing to object to the word "murder" constitutes ineffective assistance of counsel. On the record before us, we cannot conclude that defense counsel's conduct was "objectively unreasonable." The court in *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995), maintained:

> [t]rial strategy supports counsel's decision not to object. Objecting would have invited an overruling by the trial judge and risked jury disapproval. At best, trial counsel might have obtained a direction to the prosecutor to rephrase his summary, or a charge that the lawyer's arguments were not evidence. Trial counsel had to balance this meager benefit against the potential that the jury would believe defense counsel did not want them to hear the prosecutor's analysis of the evidence. Trial counsel's failure to object was a quintessential example of trial strategy.

The holding in *Reed* is applicable to the current situation. At worst, the judge would have overruled the objection because the prosecutor was not prohibited from referring to crimes by their common name. At best, the objection would have been sustained, and the prosecutor would have rephrased and reemphasized her point without using the term "murder." Therefore, defendant cannot overcome the presumption that counsel made a sound strategic decision by not drawing attention to the term "murder."

In addition, defendant believes his counsel's own use of the terms "murder" and "crime" at trial constituted ineffective assistance. Defense counsel used the word "murder" once, and the term "crime" four times. Yet looking at the context of all five of the challenged references, they do not appear to be prejudicial. In each context, the focus was not on the word "crime" or "murder," but rather on the ballistics' and weapons' evidence that was being discussed. Further, defendant has not shown how the use of these terms affected the outcome of his trial. Throughout the course of a five-day trial, the use of the word "murder" once and word "crime" four times was not so substantial as to alter the outcome. A trial has to be fair, not perfect.

People v Mosko, 441 Mich 496, 503; 495 NW2d 534 (1992). Statements are not held prejudicial if they are made in good faith, and, when fairly construed, they did not deny the accused a fair and impartial trial. *People v Lawton,* 196 Mich App 341, 353-355; 492 NWW2d 810 (1992).

IV

Defendant finally argues on appeal that the prosecution presented insufficient evidence to support his convictions. We review a challenge to the sufficiency of the evidence in a jury trial by viewing the evidence in a light most favorable to the prosecution and determining whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). We are required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of the crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

To sustain a conviction for second-degree murder, the prosecution must prove four elements beyond a reasonable doubt: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. *People v Goecke,* 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id*. at 464. When viewed in a light most favorable to the prosecution, the evidence supported defendant's conviction of second-degree murder.

The evidence establishes that upon witnessing the victim pull out a gun, defendant became scared. But, instead of running away from the man with the gun, defendant snuck around some cars and approached him from behind. Standing behind him, defendant fired a shot from approximately eight inches away, into the victim's head. As the victim lay on the ground, defendant shot him three more times. The evidence supported beyond a reasonable doubt that defendant acted with malice and caused a death.

Neither was there any evidence to justify or excuse the shooting. Defendant argues that the victim provoked the crime, so he did not act out of malice. The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason. *People v Pouncey,* 437 Mich 382, 389; 471 NW2d 346 (1991).

> "The law does not excuse actors whose behavior is caused by just any . . . emotional disturbance . . . Rather, the law asks whether the victim's provoking act aroused the defendant's emotions to such a degree that the choice to refrain from crime became difficult for the defendant. The legal doctrine reflects the philosophical distinction between emotions that only cause choice and emotions so intense that they distort the very process of choosing." [*Id*., quoting Moore, *Causation and the excuses*, 73 Cal L R 1091, 1132 (1985).]

Here, defendant's actions are not the behavior of one who has lost the ability to choose. In fact,

the evidence shows that defendant made a calculated decision to sneak up behind and kill the victim. He then decided to make sure the victim was dead by firing three additional shots. All of this evidence was sufficient to convict defendant of second-degree murder.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder