STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN DEVON WELLONS,

Defendant-Appellant.

UNPUBLISHED
April 16, 2013

No. 307526
Oakland Circuit Court
LC No. 2011-237516-FC

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b.[1] Defendant appeals by right, and we affirm.

Defendant's convictions arise from the shooting death of the victim, Craig Atkins. Defendant and the victim were romantically involved with the same woman. In a parking lot and in the presence of witnesses, the men exchanged words, and defendant pulled a gun and shot the victim. The victim was able to run, but collapsed and died from his injuries. Defendant raised a claim of self-defense, contending that he was aware that the victim had been convicted of murder and thought the victim was about to assault him. Despite defendant's testimony raising self-defense, the jury convicted him of second-degree murder and the firearm offenses.

First, defendant alleges that there was insufficient evidence to submit the offense of first-degree murder to the jury as a possible verdict. We disagree. A challenge to the sufficiency of the evidence is reviewed de novo. *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010). Conflicts in the evidence are resolved in favor of the prosecution, and circumstantial evidence and reasonable inferences arising from that evidence may constitute proof of the

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[1] Defendant was acquitted of the charge of first-degree premeditated murder, MCL 750.316. He was sentenced as a habitual offender, fourth offense, MCL 769.12, to 50 to 90 years' imprisonment for the second-degree murder conviction, 6 to 60 years' imprisonment for the felon in possession conviction, and 5 years' imprisonment the felony-firearm convictions.

elements of the crime. *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). In light of the absence of evidence of jury compromise or confusion, no error requiring reversal of the jury's verdict of second-degree murder occurred even if we assume that the trial court erred by submitting the first-degree murder charge to the jury. *People v Graves*, 458 Mich 476, 486-488; 581 NW2d 229 (1998). A defendant is not entitled to appellate relief when he is actually convicted of a charge that was properly submitted to the jury. *Id*. at 486-487. Here, defendant does not argue that the second-degree murder charge was improperly submitted to the jury. Therefore, this challenge is without merit.

Furthermore, there was sufficient evidence to submit the first-degree murder charge to the jury. The elements of first-degree premeditated murder are: (1) a death, (2) caused by the defendant, and (3) the killing was willfully committed with deliberation and premeditation. MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). With regard to the time element required to establish premeditation, sufficient time must elapse to allow the defendant to take a second look. *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008).

Viewing the evidence in the light most favorable to the prosecution and resolving conflicts in the evidence in favor of the prosecution, *Malone*, 287 Mich App at 654, there was sufficient evidence to establish that defendant acted with premeditation, *Bowman*, 254 Mich App at 151. According to witnesses, it was common knowledge that defendant and the victim were involved with the same woman, although defendant claimed that he learned of the relationship when the trial began. The victim and defendant's girlfriend left the scene together. Defendant learned that a witness was to supervise the children of defendant's girlfriend if defendant left the area. Defendant made a comment indicating that he had a gun and would strike his girlfriend. When the victim returned to the parking lot, the victim and defendant exchanged words. Other than defendant's testimony that he was scared, there was no evidence that the victim had a gun or acted in an aggressive manner toward defendant. Based on the record evidence including the prior acknowledgement of possession of a weapon and a threat against his girlfriend coupled with the verbal exchange with the victim, there was sufficient time during which defendant could have taken a second look. *Unger*, 278 Mich App at 229. Under the facts and circumstances, there was no error by submitting the first-degree murder charge to the jury.

Next, defendant asserts that he was deprived of due process of law and a fair trial when the prosecutor improperly questioned him regarding illegal activity and his income. We disagree. When issues of prosecutorial misconduct are preserved, appellate review is de novo to determine if the defendant was denied a fair and impartial trial. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id*. at 448-449. Where a curative instruction would have alleviated the prejudicial effect of any prosecutorial questioning or comment, error requiring reversal has not occurred. *Id*. at 449. When determining whether prosecutorial misconduct deprived a defendant of a fair and impartial trial, the defendant bears the burden of demonstrating that the conduct resulted in a miscarriage of justice. *People v*

Brown, 279 Mich App 116, 134; 755 NW2d 664 (2008). "A prosecutor may fairly respond to an issue raised by the defendant." *Id.* at 135.

"Evidence of poverty, dependence on public welfare, unemployment, underemployment, low paying or marginal employment, is not admissible to show motive." *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980). The probative value of such testimony is limited because it applies to a large segment of the total population, and its prejudicial impact is high because there is a risk that the jurors would view the defendant as a bad man because he was a poor provider. *Id.* However, under the facts and circumstances of a particular case, evidence of financial condition may be admissible such as when charged with crimes where motive is of minimal importance. *Id.* at 66-67. "A judge may, in the exercise of discretion, bar evidence of financial embarrassment when persuaded that it is insufficiently probative of need." *Id.* at 68.

On the record presented, we cannot conclude that the prosecutor engaged in misconduct. Rather, it appeared that the prosecutor was responding to the issues raised by defendant. Defendant testified that he feared the victim because of an exchange that occurred in a store two weeks earlier. His fear was further premised on the fact that the victim had been convicted of murder. He also stated that he reacted after the victim "creeped" up on him. Defendant fled the scene and intended to lay low until he could raise enough money to hire an attorney. The prosecutor raised the issues of income, illegal activity, and defendant's associates to counter defendant's contention that he had a valid fear of the victim, did not have relationships with dangerous individuals, and intended to come forward after he raised sufficient funds to retain a lawyer. *Brown*, 279 Mich App at 135. Under the circumstances, this issue does not entitle defendant to appellate relief.

Defendant contends that the trial court erred by rejecting his objection to the scoring of OV 3. We disagree. Pursuant to *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005), defendant was properly scored 25 points because the victim was personally injured during the course of the homicide. Defendant acknowledges the *Houston* decision, but contends that it was improperly decided. Our role as an intermediate appellate court is limited, and we cannot disregard clear Supreme Court precedent. *Tait v Ross*, 37 Mich App 205, 207; 194 NW2d 554 (1971). Accordingly, defendant must direct his argument to our Supreme Court.

In a Standard 4 brief, defendant contends that multiple evidentiary issues and the partial closure of the courtroom during the trial warrant reversal. We disagree. The decision to admit evidence is reviewed for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). The question of whether a tendered photograph will prejudice the jury also lies within the sound discretion of the trial court. *People v Eddington*, 387 Mich 551, 563; 198 NW2d 297 (1972) (further citation omitted). "Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions." *Id.* at 562. A photograph is more effective than an oral description, and the fact that it may excite passion or prejudice does not render it inadmissible as evidence. *Id.* at 563. On this record, we cannot conclude that the trial court abused its discretion by admitting the photograph at issue. *Id.* Although defendant contends that it was a photograph of the victim with his mother, and therefore, designed to elicit sympathy over the loss of a son, the photograph, in fact, depicted the victim with his sister. Moreover, in light of the fact that defendant characterized the victim as a

menacing and dangerous individual based on his criminal background and his size, we cannot conclude that the admission of the photograph was erroneous.

Next, defendant contends that he was deprived of the opportunity to question a witness regarding defendant being shot in retaliation for killing the victim. We disagree. This Court reviews a trial court's decision to exclude evidence for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). When the trial court's ruling excludes evidence, it is incumbent on the party seeking admission to make an offer of proof, and error may not be predicated on the exclusion of evidence unless a substantial right of the party is affected. MRE 103(a)(2); *People v Witherspoon*, 257 Mich App 329, 331; 670 NW2d 434 (2003). When a defendant fails to present evidentiary support, the theory is speculative, and the appellate court cannot conclude that plain error affecting substantial rights occurred. *Id*. at 331-332; *People v Hampton*, 237 Mich App 143, 154; 603 NW2d 270 (1999). Here, defendant failed to make an offer of proof, and therefore, plain error affecting substantial rights was not established. Furthermore, any evidence from the witness regarding defendant being shot in retaliation would have been hearsay. Finally, defendant was able to admit evidence that he was shot in retaliation for the killing of the victim when he testified on his own behalf. Therefore, this claim of error does not entitle defendant to appellate relief.

Defendant further contends that the trial court erred by allowing a witness to testify that she was uncomfortable because of someone present in the courtroom and for partially closing the courtroom to the public. We disagree. When a witness expresses fear in coming to court, the prosecutor may explore the matter. See *People v Kelly*, 231 Mich App 627, 639-640; 588 NW2d 480 (1998). The plain error standard applies to a forfeited claim asserting a violation of a right to a public trial. *People v Vaughn*, 491 Mich 642, 664; 821 NW2d 288 (2012). A partial closure requires only a substantial, rather than a compelling, reason to justify the closure. *People v Russell*, 297 Mich App 707, 720; 825 NW2d 623 (2012). In the present case, witness intimidation was an issue. The responding officer to the scene testified that witnesses claimed that they did not see the shooting, but it was apparent that they were not telling the truth. Indeed, the witnesses acknowledged that they initially lied and were hesitant to be seen conversing with the police. At trial, a witness stated that an individual present in the courtroom made statements indicating harm would come to her family. Under the circumstances, plain error affecting substantial rights cannot be established from the partial closure of the courtroom due to witness intimidation. *Id*.

The trial court did not err in providing the 911 recording to the jury. A review of the record reveals that the 911 recording was played for the jury, and the witness was present to identify her voice on the recording. When it was learned that the recording was not formally admitted as an exhibit due to oversight, the parties stipulated to its admission before the jury verdict was disclosed. Defendant does not allege that the recording was inadmissible as a matter of law. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). This claim of error is without merit.

Defendant also raises multiple claims of prosecutorial misconduct in his Standard 4 brief, alleging that the misconduct deprived him of a fair trial and defense counsel was ineffective for failing to object. He further alleges that defense counsel was ineffective for failing to call

witnesses to support his defense and to identify the victim's reputation on the street. We disagree. As previously stated, appellate review is de novo to determine if the defendant was deprived of a fair and impartial trial. *Mann*, 288 Mich App at 119. Where a curative instruction would have cured the alleged misconduct, error requiring reversal has not occurred. *Ackerman*, 257 Mich App at 449. The defendant bears the burden of proving that the prosecutor's conduct resulted in a miscarriage of justice. *Brown*, 279 Mich App at 134. Prosecutors have broad discretion regarding the argument presented from the evidence as well as reasonable inferences arising from the evidence and need not present the argument in the blandest terms possible. *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). It is presumed that defense counsel was effective, and a defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). We have reviewed the allegations of prosecutorial misconduct and determined that defendant failed to meet his burden of proof, *Brown*, 279 Mich App at 134; *Ackerman*, 257 Mich App at 449, or overcome the presumption that defense counsel was effective, *Johnson*, 293 Mich App at 90. The statements and arguments made by the prosecutor were within permissible bounds and did not constitute improper argument or vouching. Furthermore, defendant failed to meet the factual predicate to support the claim of ineffective assistance by identifying the witnesses and the substance of their testimony. *People v Ratcliff*, ___ Mich App ___; ___ NW2d ___ (2013), slip op p 3.

Lastly, defendant alleges that the cumulative effect of the errors raised warrant a new trial. We disagree. The cumulative effect of error may establish sufficient prejudice to require reversal when the prejudice of any one error, standing alone, would not. *People v Eisen*, 296 Mich App 326, 335; 820 NW2d 229 (2012). Having found no error, this claim fails.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood