STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 29, 2013
v	No. 310310 Saginaw Circuit Court
PERVELL OLIVER JONES, Defendant-Appellant.	LC No. 12-036880-FC

Before: SERVITTO, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court imposed the mandatory two-year prison sentence for the felony-firearm conviction, to be served consecutive to a term of 230 months to 60 years for the murder conviction. We affirm.

I. BACKGROUND FACTS

On September 30, 2011, the victim, who was defendant's cousin, visited with defendant at defendant's home. According to testimony from both defendant and prosecution witnesses, the cousins argued over money that evening. Defendant confessed to the police that he punched the victim once and rendered him unconscious, and that he then smoked a cigarette and drank some beer, then retrieved a gun from his room and shot the victim twice in the head. At trial, defendant testified that he had retrieved the gun in the course of the argument but before the physical altercation, and that he panicked and shot the victim in the course of the fight. The evidence established that defendant then dragged the victim's body out of his apartment and next door to an abandoned house and left the body in the basement, where it was discovered by the police and members of the victim's family. The victim's wallet and cell phone were discovered in a bag in a closet in defendant's apartment.

II. JURY INSTRUCTIONS

Appellate counsel argues that the trial court erred in instructing the jury on the alternative charges of first-degree premeditated murder and first-degree felony murder, and in declining a defense request for an instruction on voluntary manslaughter. A trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of

discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, this Court reviews unpreserved issues for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, reversal is appropriate only where the error "seriously affected the fairness, integrity, or public reputation of the proceedings or when the defendant shows actual innocence." *Pipes*, 475 Mich at 283 (internal quotation marks omitted).

The trial court denied the requested instruction on manslaughter on the ground that no rational finder of fact could find that the shooting took place in the heat of passion, noting the evidence that defendant left the room to retrieve his gun before then returning and shooting the victim. We agree with the trial court.

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). In order to prove voluntary manslaughter, the prosecution must show that: "(1) the defendant killed in the heat of passion; (2) the passion was caused by adequate provocation; and (3) there was no lapse of time during which a reasonable person could have controlled his passions." *People v Tierney*, 266 Mich App 687, 714; 703 NW2d 204 (2005). In this case, defendant told police officers that after a protracted argument, he tried to persuade the victim to leave his apartment, but the victim instead grabbed him, the two wrestled, and defendant struck the victim with sufficient severity as to render him unresponsive. Defendant asserted that he then left the victim and walked around his apartment, drank beer, and consumed a cigarette before he went to his room to retrieve his gun and then shot the victim twice. In this version of the events, there is no suggestion that defendant was caught up in the heat of passion when he shot the victim, but indeed elected to retrieve his gun only after the victim had been incapacitated for a significant time.

Defendant's trial testimony likewise did not support his argument that the crime was motivated by passion rather than malice. Defendant testified that he was "scared" and "overwhelmed" from the conflict, and so "picked the gun up and . . . shot two times aimlessly." In this version of the incident, defendant suggested that he had the gun while he was fighting with the victim and shot him before any pause in the physical altercation. However, even if there was no pause between the fight and the shooting, defendant's account of being "scared," despite having knocked the victim to the floor and thus placing himself out of the range of any immediate physical danger, was not sufficient to persuade a reasonable finder of fact to conclude that there was adequate provocation to arouse the passion that could cause a reasonable person to kill someone. See *Tierney*, 266 Mich App at 714. For these reasons, the trial court did not abuse its discretion by determining that the evidence presented in this case did not justify an instruction on manslaughter.

Appellate counsel additionally argues that the evidence presented at trial did not justify submitting charges of first-degree premeditated murder or felony murder to the jury, and that the result of the error may have been that the jury convicted him of second-degree murder out of compromise. Appellate counsel relies on *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998), where this Court stated, "When the evidence establishes a fight and then a killing, there must be a showing of a thought process undisturbed by hot blood in order to

establish first-degree, premeditated murder." *Id.* at 301 (internal quotation marks and citation omitted). Appellate counsel suggests that, at the time in question, defendant lacked the "capacity" to premeditate. However, in his confession to the police, defendant stated that after knocking the victim unconscious, he walked around his apartment, drank some beer, and finished a cigarette before he retrieved his gun from a different room and then shot the still-unconscious victim. The decision to retrieve the gun inferred an intent to kill that was not formed in the heat of passion. Although the jury did not convict defendant of first-degree premeditated murder, the evidence clearly supported this charge.

Appellate counsel also argues that the evidence did not show that defendant shot the victim in the course of stealing his wallet and cell phone, and thus that the felony murder instruction was improper. Appellate counsel notes that no evidence was presented that he took money from the wallet, or that he had used the cell phone or planned to keep it. But first-degree felony murder is the killing of a person with malice while committing, or attempting to commit, any of several crimes set forth in MCL 750.316(1)(b). See *People v Ream*, 481 Mich 223, 241; 750 NW2d 536 (2008). Among those listed crimes is "larceny of any kind."

A police detective testified that he found the victim's wallet and cell phone in defendant's living room closet, and defendant's neighbor testified that he saw the cell phone in defendant's possession after the victim went missing. Appellate counsel argues that the prosecution needed to show that defendant took money from the victim's wallet or used his cell phone in order to prove that defendant intended to steal those items. But appellate counsel cites no authority for the proposition that a larceny for purposes of felony murder requires that the offender intended to put the items taken to any meaningful use.

Nor is there any indication in the record that the jury was confused about the nature of the charges against defendant, or that its verdict of guilty of second-degree murder was the result of compromise. But even if the jury did compromise, it was not the result of defendant's being overcharged, but rather an exercise of mercy or other prerogative that remains with a jury's inherent powers. See *People v Cazal*, 412 Mich 680, 687; 316 NW2d 705 (1982). "That the verdict may have been the result of compromise, or of a mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matters." *Id.* at 688 (internal quotation marks and citations omitted). Instead, the inquiry is whether the verdict upon which the jury did agree is supported by the evidence. *Id.*

Further, a criminal defendant "has no room to complain when he is acquitted of a charge that is improperly submitted to a jury, as long as the defendant is actually convicted of a charge that was properly submitted to the jury." *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998).

For these reasons, we reject appellate counsel's claims of instructional error.

III. SENTENCING GUIDELINES

Appellate counsel next challenges the scoring of two offense variables under the sentencing guidelines, and requests resentencing under the corrected range for defendant's minimum sentence for murder. This argument has already been accepted, and the requested

remedy provided, by the circuit court. Where a subsequent event renders it impossible for this Court to fashion a remedy, an issue becomes moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). "As a general rule, an appellate court will not decide moot issues." *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). This issue demands no further consideration.

IV. PROSECUTORIAL MISCONDUCT

Defendant, in his Standard 4 brief, claims that he was denied a fair trial by improper prosecutorial commentary and questioning. This Court reviews de novo preserved claims of prosecutorial misconduct, viewing the prosecutor's conduct in context to determine whether the defendant was denied a fair and impartial trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). However, the prosecutorial arguments that defendant challenges as misconduct drew no objections at trial. This Court reviews an unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. *Id*. at 460-461. Review of unpreserved issues of prosecutorial misconduct is precluded unless a failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

Defendant makes issue of following statements in closing arguments:

> Frankly, it's kind of a sad commentary on the criminal justice system. Part of the defense to a murder is that the life of a victim isn't worth your consideration. Because that's just what [defense counsel] asked you to find, that the life of Edward Thomas doesn't mean anything. God help us if our system ever comes down to where we don't value the individual.

Defendant argues that these statements were improper because they were made in an attempt "to inflame the jury[']s passion and fear's [sic]" and to "appeal to the jury's civic duty and religious duty." Defendant also asserts that the comments inaccurately characterized defense counsel's argument.

This Court must consider allegations of prosecutorial misconduct "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "A prosecutor is afforded great latitude regarding his or her arguments and conduct at trial." *Fyda*, 288 Mich App at 461. However, "it is improper for a prosecutor to appeal to the jury's civic duty by injecting issues broader than guilt or innocence or encouraging jurors to suspend their powers of judgment." *Thomas*, 260 Mich App at 456-457.

In this case, the prosecuting attorney's statement that defense counsel's argument was a "sad commentary on the criminal justice system" touched on a broader issue than the case at bar. But the comments were offered in reasonable response to defense counsel's statements during closing arguments that the victim had a reputation for violence along with "a crack problem." Further, the prosecuting attorney did not dwell on this point, and we think the comments geared toward emphasizing the value of the victim's life specifically, rather than urging the jury to strike a blow for the criminal justice system in general, or to send a message to society on the sanctity

of life, with a guilty verdict. For these reasons, the trial court did not commit plain error for having declined to constrain, or attempt to remedy, this commentary sua sponte.

Defendant also argues that the prosecuting attorney attempted to shift the burden of proof to defendant when he argued that the actions of defendant after the shooting showed premeditation and deliberation. Defendant draws this argument from the following comments:

> And really, what shows premeditation, what shows the deliberation that the defendant went through are the pretty elaborate steps that he went to cover up this crime. He made a decision that he wasn't going to tell anybody. He wasn't going to call the police, wasn't going to do anything to try and assist Mr. Thomas to try and save his life . . . .
>
> Didn't do anything to try to help him; instead, goes in the dark of night, drags the body down the stairs . . . . Drags him, puts him in the abandoned house and tries to clean up the crime. That's trying to get away with it. That's what he's charged with.

A prosecuting attorney "may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *Fyda*, 288 Mich App at 463-464. Nor may a prosecuting attorney "comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *Id.* at 464.

Defendant argues that, with the challenged comments, the prosecuting attorney urged a mischaracterization of the evidence upon the jury, where the evidence in fact only showed that defendant was ashamed of what he had done and afraid to have his family learn of it. But prosecuting attorneys are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant's disagreement on how to interpret the evidence does not bring to light an attempt to shift the burden of proof. The comments at issue reflected the evidence presented, and suggested neither that defendant needed to provide an explanation for his actions nor that he should have presented additional evidence.

Defendant further asserts that his trial attorney was ineffective for failing to object to the prosecutorial commentary discussed above. But declining to raise a futile objection, or otherwise advance a meritless position, does not constitute ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Finally, defendant argues that the prosecuting attorney committed misconduct when he "impermissibly interjected opinion testimony" during his direct examination of defendant's aunt. The latter testified that she did not confront defendant at his apartment about blood she had seen outside because she had known defendant to "get angry a lot" and she was afraid of him. The prosecuting attorney asked her which of defendant or the victim was more prone to violence. Defense counsel objected on the ground that answering that question required psychiatric expertise. The court allowed the witness to answer as a layperson, and she testified that

defendant was likely "[t]o have an attitude quicker" than was the victim. This questioning was not improper, given the defense strategy throughout the trial.

Defendant placed the character of the victim into issue when he testified that he was afraid of him and that he had previously assaulted defendant with a baseball bat. Under MRE 404(a)(2), where self-defense is at issue, the prosecuting attorney may rebut evidence of the victim's character for aggression. Because defendant introduced such evidence, it was proper for the prosecuting attorney to rebut it with lay opinion testimony. See MRE 701 (a lay witness may offer opinion testimony that is "rationally based on the perception of the witness"). Moreover, "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003).

For these reasons, we must reject defendant's claims of prosecutorial misconduct.

Affirmed.

/s/ Deborah A. Servitto
/s/ William C. Whitbeck
/s/ Donald S. Owens