STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGGIE CORNELIUS WELCH,

Defendant-Appellant.

UNPUBLISHED
June 28, 1996

No. 172980
LC No. 93-007691-FC

Before: Hoekstra, P.J., and Saad and S. J. Latreille,* JJ.

PER CURIAM.

Although defendant was initially charged with first-degree murder, the jury convicted him of second-degree murder, MCL 750.317; MSA 28.549; as well as felony firearm, MCL 750.227b; MSA 28.424(2), and possession of a short-barreled shotgun, MCL 750.224b; MSA 28421(1). The court sentenced defendant to concurrent prison terms of life with an opportunity for parole for the second-degree murder conviction, and three to five years for possession of a short-barreled shotgun. He was also sentenced to a consecutive two-year sentence for felony-firearm. Defendant appeals by right and we affirm.

Defendant, aged nineteen, shot and killed his seventeen-year-old girlfriend, Damarius Cooper, on Sunday morning, April 18, 1993. Defendant and Damarius had been dating for an extended period and had a son named Reggie, Jr. However, Dwayne Jackson testified that, by mid-April, 1993, *Dwayne* had been dating Damarius for a couple of months. Trouble started when defendant found out about Dwayne.

The Friday night before the murder, defendant and several of his friends, including Anthony Hunt, visited Damarius' neighbor's home. Damarius and Dwayne were both there, and defendant grabbed Damarius, took her outside and questioned her about her relationship with Dwayne. Initially, Damarius insisted that Dwayne was there with another female. After defendant checked with the other female, who denied involvement with Dwayne, defendant again grabbed Damarius and pulled her

* Circuit judge, sitting on the Court of Appeals by assignment.

outside. He admitted slapping her with his hands, grabbing her and shaking her, and hitting her for two or three minutes after she fell. He stopped hitting her when the neighbor left to call the police. The neighbor testified that she heard defendant threaten to kill Damarius.

On Saturday, Damarius stayed home with her mother until the evening, when she went to meet defendant, along with several mutual friends, at Anthony's mother's home. According to defendant, he and Damarius watched television, laughed, played and had sex that evening.

Sunday morning, Anthony's mother arose at 8:15 and found defendant and Damarius lying side by side, asleep on the floor in her home, before she left. Shortly thereafter, Anthony, defendant and Damarius woke up, and defendant began to ask Damarius questions about Friday night, and about her relationship with Dwayne. When Damarius was evasive, defendant said that if she did not tell the truth, he was going to get the gun and stick it in her mouth. Defendant then retrieved a gun from Anthony's room, and pointed it at Damarius' lower body. Anthony testified that defendant then tripped Damarius, causing her to fall face first onto the floor. Defendant then positioned himself behind her, looked over at Anthony, smiled, and shot her. (Damarius died from a shotgun wound to the back of her head, fired from about nine to twelve inches away.) Defendant became hysterical, and called 911. Defendant asked Anthony to lie for him, and defendant initially lied to the police, claiming that a "man in black" shot Damarius. Defendant told police and claimed at trial that he did not know that the gun was loaded. He raises several issues on appeal.

I.

Defendant asserts that his second-degree murder conviction should be reversed where the prosecution failed to establish the necessary intent element. A death caused by the defendant with malice and without justification or excuse is second-degree murder. *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Malice is the intent to kill, the intent to do great bodily harm, or the wanton and wilful disregard of the likelihood that the natural tendency of defendant's behavior is to cause death or great bodily harm. *People v Goecke*, 215 Mich App 623, 629; 547 NW2d 338 (1996). One acts with malice if one entertains one of three possible intents: the intent to kill, the intent to inflict great bodily harm, or the intent to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm is the probable result. *Id.* Malice can be inferred from the facts and circumstances of the killing. *People v Harris*, 190 Mich App 652, 659; 476 NW2d 767 (1991).

Defendant contends that the testimony about events following Friday evening, and prior to the Sunday morning killing, shows that he and Damarius had reconciled, and that he did not know that the shotgun was loaded when he pulled the trigger with the gun pointed at the back of her head. Although there is testimony from witnesses other than defendant to support this, a reasonable trier of fact could have found otherwise. Here, defendant admitted that, two days before the murder, he had found Damarius with another man, and had slapped her in the face, shook her violently and beat her with punches to her body for two or three minutes. Anthony and another witness testified that defendant

threatened at that time to kill Damarius. On Sunday morning, when defendant brought up the subject of Friday night, defendant threatened that if she did not tell the truth he was going to get the gun, and stick it in her mouth. He then retrieved the gun, tripped her, cocked the gun and shot her. Defendant did not deny that he pulled the trigger with the gun pointed at the back of Damarius' neck, and he could not give an explanation for why he had retrieved the shotgun in the first place. A police forensic scientist testified that someone firing that shotgun would have been able to see the shell in the chamber before firing. When the police arrived, defendant lied about who had shot Damarius, and defendant later told his mother that he had shot Damarius only after she grabbed the barrel of the shotgun. This was adequate evidence from which a reasonable trier of fact could find beyond a reasonable doubt that, when defendant pulled the trigger, he did so with malice; that is, intent to kill, or intent to do great bodily harm, or intent to create a high risk of death or bodily harm, with knowledge that such is the probable result. *Neal*, 201 Mich App at 654; 506 NW2d 618.

II.

Defendant next argues that the trial court abused its discretion in admitting into evidence an autopsy photograph of Damarius, because the photograph was highly prejudicial and unnecessary where it was undisputed that defendant had indeed pulled the trigger. If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994).

The trial court did not abuse its discretion in admitting this photograph, even though defense counsel admitted that defendant shot and killed Damarius, and testimony of the police officers had already established the location of the wound. Defendant was being tried for first-degree murder. The photograph showed the point of bullet entry to the back of Damarius' head, and it confirmed that the shotgun was fired at very close range. The prosecution sought to prove that the shooting was purposeful and not an accident, and that the location of the wound showed intent. Because the photograph was instructive on a material point, the trial court did not abuse its discretion in admitting the photograph.

III.

Defendant argues that the trial court abused its discretion in admitting testimony about defendant's assault of, and threats toward, Damarius, made on Friday evening, because the testimony was not relevant, or alternatively because it was unfairly prejudicial. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

The testimony was relevant to defendant's motive for shooting Damarius, and its admission was not unduly prejudicial. Defendant testified that he did not know the gun was loaded and the shooting

was an accident. However, the testimony about defendant's jealous assault and threat to kill Damarius on Friday night was offered to prove absence of mistake, as well as defendant's intent on Sunday morning.

Defendant alternatively argues that even if the threat to kill Damarius was relevant, the testimony about a physical assault was not. We disagree. The testimony about defendant's physical attack was relevant to indicate the rage he felt upon finding Damarius with another man. This rage may have re-ignited two days later when he began discussing the events of Friday just before he killed her. Because the evidence of physical contact was also relevant to prove intent, we do not believe that the trial court abused its discretion by admitting this evidence. Although the evidence was prejudicial, the prejudice was outweighed by its probative value, and the court gave a limiting instruction. *People v Vandervliet,* 444 Mich 52, 75; 508 NW2d 114 (1993).

IV.

Defendant argues that the trial court erred in prohibiting a defense witness, Clois Bell, from testifying to statements made by defendant to Clois, concerning defendant's feelings about the Friday night confrontation. According to defendant, these statements were not hearsay, but rather fell within the "then-existing mental, emotional or physical condition" exception to the hearsay rule, MRE 803(3). However, this basis for admission of the evidence was not raised at trial. An *objection* based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage,* 202 Mich App 28, 30; 507 NW2d 778 (1993). By analogy, a party does not preserve an argument for appeal by citing a different basis for *introduction* of evidence on appeal than it did at trial.

At trial, the prosecution introduced testimony about the events of Friday evening (see issue III), to prove absence of mistake when defendant killed Damarius two days later. Therefore, defendant's mental or emotional condition would have been relevant to determining defendant's intention. However, defense counsel sought admission of these statements only "to show the nature of the conversation," rather than on the basis of MRE 803(3) – the basis asserted on appeal. Therefore, although it appears that the trial court could have acted within its discretion in admitting the testimony based upon this exception, it was not an abuse of discretion to have denied the request to admit such evidence when the only ground actually raised was not a meritorious exception to the hearsay rule. Furthermore, there was testimony by defendant, which was corroborated by Anthony and his mother, that defendant and Damarius reconciled on Saturday night. Therefore, Clois' testimony about defendant's statements of regret over the events of Friday evening would likely have been cumulative. Because there is no prejudice from the exclusion of the evidence, there is no manifest injustice.

V.

Defendant next asserts that he was denied a fair trial due to prosecutorial misconduct. Specifically, defendant argues that the prosecutor: (1) improperly cross-examined Clois, a non-alibi witness, about why Clois did not come forward with information to the police, (2) exhorted the jury to

convict defendant based upon the prosecutor's personal belief that defendant and Clois were lying, (3) asked improper questions and made statements in closing that were designed to evoke an emotional reaction from the jurors, and (4) improperly asked defendant about the credibility of the prosecution's witnesses. However, defense counsel *failed to object* to any of these issues at trial. Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is thereby deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); cert den sub nom *Michigan v Caruso*, ___ US ____; 115 SCt 923; 130 LEd2d 802 (1995). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

A.

A non-alibi witness may be impeached on the basis of his failure to come forward only if the witness possessed "information of such a nature that the witness would have a 'natural tendency to come forward with it.'" *People v Perkins*, 141 Mich App 186, 196; 366 NW2d 94 (1985). The record is unclear about what defendant's friend, Clois, knew prior to trial about the charges against defendant. Clois was at least aware that defendant was charged with shooting Damarius with the particular shotgun that Clois claims that he and defendant and others were playing with, *unloaded*, on Friday evening. Thus, even with only this basic information, given that defendant and Clois were friends, it seems unreasonable that Clois did not come forward, even if only to verify the unimportance of his information.

However, even if we believed that the evidence that Clois possessed was not such as to impose a "natural tendency to come forward," defendant would still not be entitled to reversal, where there was no objection to the challenged cross-examination at trial. Had such an objection been lodged, the foundation could have been further explored, and if the foundation was found wanting, the court could have instructed the jury that no negative inferences could be drawn from the witness' failure to come forward. Because any error could have been cured by a cautionary instruction from the court, had one been requested, we find no miscarriage of justice.

B.

Defendant also claims that the prosecutor: (1) stated his personal opinion that defendant and Clois were lying and (2) indicated that he personally believed that defendant was guilty. A prosecutor may argue the credibility of the witnesses and the guilt of the defendant but may not support the argument with the authority or prestige of the prosecutor's office or the prosecutor's personal knowledge. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). However, the prosecutor may ask the jury to view the defendant's testimony as untruthful. *People v Coddington*, 188 Mich App 584, 603; 470 NW2d 478 (1991). Here the prosecutor did not invoke the prestige of his office nor did he refer to any personal knowledge; rather, he merely asked the jury to view defendant's testimony as untruthful. The arguments were not improper.

C.

Defendant also argues that the prosecutor improperly attempted to evoke an emotional response from the jury, both in questioning defendant and in closing argument. Having carefully reviewed the record, and considering the questions and closing argument in their entirety, we find no error. The leading questions on cross-examination, although provocative, were relevant to the central issue of the case – defendant's intent. The prosecutor's closing argument, although it may have actually appealed to the sympathy of the jury, was nonetheless proper to explain defendant's conduct as consistent with the intent to kill. In any event, had there been any error resulting from the prosecutor's comments, it could have been cured by a timely requested cautionary instruction.

D.

Defendant also argues that the prosecutor improperly asked defendant about the credibility of (prosecution witness) Anthony's testimony, and that reversal is therefore appropriate. The prosecution concedes on appeal that this portion of the prosecutor's questioning of defendant was improper, but asserts that such error did not amount to manifest injustice. It is indeed improper for the prosecutor to ask the defendant to comment on the credibility of prosecution witnesses, because the defendant's opinion of their credibility is not probative. *People v Buckey,* 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Loyer,* 169 Mich App 105, 116-117; 425 NW2d 714 (1988). Here, however, any error was harmless. Had a timely objection been lodged, any prejudice could have been cured, either by precluding such further questioning or by obtaining an appropriate cautionary instruction. Therefore, we find no manifest injustice on this issue. We have considered defendant's cumulative error argument, and find no merit to it.

VI.

Defendant next raises several challenges to his sentence. Defendant argues that the trial judge misstated the law, improperly referred to his own experiences when he sentenced defendant, and then abused his discretion in sentencing defendant to a life sentence, which was an upward departure from the sentencing guidelines.

The sentencing judge did not misstate the law. As the prosecution correctly states in its brief: "[d]efendant is straining credulity when he suggests that the prosecution must demonstrate that a defendant *knew* that a gun was loaded – before placing it at the base of another's skull and firing it – in order for the intent necessary for second-degree murder to be established." At a minimum, such action presents a jury question on whether defendant acted with "wilful and wanton disregard of the likelihood that the natural tendency of defendant's behavior" would be to cause death or great bodily harm – one alternative prong of the malice requirement for second-degree murder. *People v Goecke,* 215 Mich App 623, 629; 547 NW2d 338 (1996).

Similarly we find no merit to defendant's argument that the trial judge's comment about his own loss of a child indicated that the court was biased or that it considered an improper factor when

imposing sentence. Viewed in the context of the entire sentencing proceeding, it is evident that the court did not believe that defendant comprehended the magnitude of his crime, and therefore the court was attempting to impress upon defendant the ramifications of what he had done. By referring to the court's own loss, the court was attempting to remind defendant of Damarius' parents' pain. The judge was also trying to personalize the loss, by suggesting how defendant might feel if anything happened to defendant's own son, Reggie, Jr.

Defendant's final contention is that the life sentence (the statutory maximum) imposed for the second-degree murder conviction is disproportionate within the meaning of *People v Milbourn*, 435 Mich 639; 461 NW2d 1 (1990). The guidelines sentence recommended for defendant's second-degree murder conviction was ten to twenty-five years. Under *Milbourn*, the "key test" of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

At sentencing, the court noted that defendant (age nineteen) had a previous record (retail fraud, no operators license, and fleeing and eluding). The court then sternly lectured defendant, referring more than once to the epidemic of violence and the glorification of guns, as well as the fact that defendant had severely beaten Damarius – the mother of his child -- before taunting her and shooting her in the back of her head. The court properly concluded that the guidelines did not adequately consider the violence visited upon Damarius in this case, or the whole culture of glorification of guns. We find that the trial court focused upon factors which were specific to defendant and to this offense: the senselessness of the crime, the relationship between the defendant and the victim, the fact that defendant had severely beaten the victim only two days previously, and defendant's seeming inability to appreciate what he had done. Defendant's life sentence does not violate the principle of proportionality.

VI.

Defendant finally asserts that he was denied the effective assistance of counsel, primarily because of counsel's failure to object to certain alleged judicial errors. Although no motion for new trial was filed and no *Ginther*[1] hearing was held, the record is clear and we can therefore review the alleged errors without an evidentiary hearing. We have carefully reviewed the record, and conclude that the alleged errors in defendant's trial counsel's performance could be interpreted as decisions based on sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant was thus not denied effective assistance of counsel.

We therefore affirm defendant's convictions and sentences.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Stanley J. Latreille

[1] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).