STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN HENRY SIMPSON,

Defendant-Appellant.

UNPUBLISHED
March 14, 1997

No. 175778
Genesee Circuit Court
LC No. 94-049942

Before: Doctoroff, P.J., and MJ Kelly and Young, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of murder in the first degree (felony murder), MCL 750.316; MSA 28.548, breaking and entering an occupied dwelling with intent to commit a felony, MCL 750.110; MSA 28.305, breaking and entering a building with intent to commit a felony, MCL 750.110; MSA 28.305, unlawfully driving away an automobile, MCL 750.413; MSA 28.645, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life without parole for the first-degree felony murder conviction, ten to fifteen years for the breaking and entering an occupied dwelling conviction, six to ten years for the breaking and entering a building conviction, forty to sixty months for the unlawfully driving away an automobile conviction, to be served concurrently. The court also imposed the two year mandatory term for the felony-firearm conviction to be served preceding and consecutive to the other sentences. We affirm in part and vacate in part.

Defendant first argues on appeal that the trial court erroneously admitted the testimony of Shawn Brown and Duane Rowley because it was more prejudicial than probative. We disagree. The decision to admit evidence is within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *People v Davis*, 199 Mich App 502, 516-517; 503 NW2d 457 (1993); *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989).

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114, modified 445 Mich 1205; 520 NW2d 338 (1993), the Michigan Supreme Court set forth a new four-pronged analysis applicable to requests for the admission of similar acts evidence: (1) the evidence must be relevant to an issue other

than propensity as required under MRE 404(b) to protect against the introduction of extrinsic act evidence offered solely to prove character; (2) the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue or fact of consequence; (3) the trial court should conduct the balancing test of MRE 403, i.e., whether the danger of undue prejudice substantially outweighs the probative value of the evidence; and (4) the trial court shall, upon request, instruct the jury that similar acts evidence is to be considered only for the proper purpose underlying its admission pursuant to MRE 105. *VanderVliet, supra*.

Defendant concedes that the trial court satisfied the first two prongs of the *VanderVliet* test, and that the trial court gave a proper limiting instruction to the jury. Attacking prong three of the test, defendant argues that the probative value of the evidence was substantially outweighed by its prejudicial effect. We conclude that the probative value of the evidence was not outweighed by its prejudicial effect.

After hearing an offer of proof as to the substance of both witnesses testimonies, the trial court stated that it thought that the evidence was admissible to demonstrate opportunity, intent, preparation, scheme or plan. Brown's testimony regarding defendant's alleged admission of burglarizing Rowley's residence was relevant to defendant's opportunity to access a weapon, namely, a Smith & Wesson, model 61, .22 caliber pistol, which Kent Gardner, a firearms expert, testified was one of four models possibly used to kill decedent. Rowley's testimony that he was missing his Smith & Wesson, model 61, .22 caliber pistol, located in the same area where his sports cards were kept, was also relevant to defendant's opportunity to access a weapon.

The trial court specifically stated that it was receiving this evidence for a limited purpose and would so instruct the jury, which it did. The trial court also specifically found that it did not think that the evidence would be more prejudicial than probative. Such determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony by the trial judge. *People v Ullah*, 216 Mich App 669, 675; 550 NW2d 568 (1996). Considering the facts on which the trial court acted, we hold that the trial court did not abuse its discretion in admitting Brown's and Rowley's testimony.

Defendant next argues that he was denied a fair and impartial trial due to the prosecutor's questions on cross-examination. No objection was raised against the prosecutor's cross-examination of defendant. Hence, appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). 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*. Prosecutorial misconduct issues are reviewed on a case by case analysis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id*. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.*

Defendant contends that the prosecutor improperly asked a defendant to comment on the credibility of prosecution witnesses, as prohibited by *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). We disagree. Defendant's defense was that Nathan Barton, a prosecution witness, was involved in decedent's death. On direct examination, defense counsel asked defendant if he ever told anyone that he was going to rob decedent, to which defendant responded negatively. Once that door was opened, cross-examination was proper since four prosecution witnesses testified that defendant had spoken with them regarding robbing and harming or killing decedent. *People v Bettistea*, 173 Mich App 106, 116; 434 NW2d 138 (1988). Further, we conclude that a timely objection and curative instruction would have cured any prejudice. *Stanaway*, *supra* at 687.

Defendant's final argument on appeal is that his convictions and sentences for both felony murder and the predicate felony of breaking and entering an occupied dwelling violate his right against double jeopardy. We agree. Double jeopardy is a question of law, and is reviewed de novo on appeal. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

The double jeopardy guarantee protects defendants against (1) a second prosecution for the same offense after an acquittal, (2) a second prosecution for the same offense after a conviction, and (3) multiple punishments for the same offense. Const 1963, art 1, § 15; *People v Robideau*, 419 Mich 458, 468; 355 NW2d 592 (1984)(citing *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969)). Since defendant was convicted of both felony murder and the underlying felony, the proper remedy is to affirm defendant's felony murder conviction and vacate defendant's conviction and sentence for breaking and entering an occupied dwelling, *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993), (Brickley, J.); *Id*. at 735 (Cavanagh, C.J.).

Thus, we remand to the lower court for the limited purpose of vacating defendant's conviction and sentence for breaking and entering an occupied dwelling, and affirm in all other respects.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Robert P. Young, Jr.