STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLIAM MCGUFF,

Defendant-Appellant.

UNPUBLISHED
August 1, 1997

No. 192671
Recorder's Court
LC No. 95-005712

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorder's Court, defendant was convicted of first-degree murder, MCL 750.316; MSA. 28.548. Defendant was subsequently sentenced to the mandatory term of life in prison without the possibility of parole. Defendant appeals as of right and we affirm.

I

Defendant first raises several allegations of prosecutorial misconduct which he argues denied him a fair trial. Generally, absent an objection, our review of improper prosecutorial remarks is foreclosed because it denies the trial court an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996). An exception exists if a curative instruction could not have cured the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra* at 687.

Defendant argues that the prosecutor's analogy to Bonnie and Clyde made during jury voir dire denied him a fair trial. However, defendant did not object to the remarks, the remarks did not inject issues broader than defendant's guilt or innocence into the trial, and the trial court instructed the jury that the lawyers' statements and arguments are not evidence. Accordingly, these remarks did not deny defendant a fair trial.

Defendant also argues that the prosecutor impermissibly questioned Shannon Meridith whether she had been convicted in this matter as well. Meridith, the co-defendant, had been convicted in a

separate trial. Although it was improper for the prosecutor to elicit such testimony, see *People v Lytal*, 415 Mich 603, 612; 329 NW2d 738 (1982)[1] and *People v Standifer*, 425 Mich 543, 553; 390 NW2d 632 (1986)[2], defendant did not object to the prosecutor's question. Moreover, defense counsel brought out Meridith's exact conviction of felony murder, and that she hoped that the trial court would sentence her as a juvenile. Without an objection by counsel and considering his follow-up questions, we cannot conclude that the prosecutor's question resulted in a miscarriage of justice.

Last, defendant argues that the prosecutor's statement that defendant is a "cold-blooded killer" during closing argument denied him a fair trial. Defendant did not object to this statement. Further, a prosecutor need not state her argument in the blandest possible terms. *Ullah, supra*, at 678. We do not find that this statement was impermissible.

II

Defendant next argues that Detroit Police Sergeant Joann Kinney's testimony regarding an inculpatory statement made to Michelle DeJesus by Shannon Meridith was inadmissible hearsay.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion should be found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

At trial, the prosecutor examined Sergeant Kinney, in pertinent part, as follows:

> *Q.* Were they [Meridith, DeJesus and Rosemarie Guthre] sequestered, were they separated from each other?
>
> *A.* No. They were all sitting at the table in the Homicide Section. Then I went in and introduced myself to them. I took Shannon [Meridith] first. Shannon would not say very much, so I took her back. I brought out Michelle and started talking to Michelle.
>
> *Q.* Michelle DeJesus?
>
> *A.* Yes.
>
> *Q.* Did she say anything to you?
>
> *A.* Yes.
>
> *Q.* What did she say to you?
>
> *A.* She told me what happened.

Q. What did Michelle DeJesus tell you?

A. She told me - -

MR. CHEDRAUE [Defendant's counsel]: Excuse me. I believe that would be hearsay.

THE COURT: Why?

MR. CHEDRAUE: I think she can testify to what she heard and what she did with what she heard, but I think as to what Ms. DeJesus stated to her that's hearsay. I think they have to bring in Ms. DeJesus to say this is what I stated to Sergeant Kinney.

THE COURT: I'm going to overrule you on that for no other reason than it's all part of how she developed her investigation, who she talked to, and why she did what she did. I think as the investigating officer, it becomes important, you know, to know what information she had and what she did with it.

So, it's not being offered for the truth of the matter, but just in terms of what she did and why.

Thank you.

Proceed, please.

Q. (By Ms. Leonard, continuing): What did you learn from Michelle DeJesus?

A. Michelle DeJesus told me that Shannon and her boyfriend, James McGruff [sic], killed her uncle.

Q. Did she tell you - - did you learn where she had heard that?

A. She told me that Shannon told her.

Hearsay is defined as a statement, including an oral or written assertion or nonverbal conduct of a person intended to be assertive, other than one made by the declarant while testifying at the trial, offered into evidence to prove the truth of the matter asserted. MRE 801; *People v Spinks*, 206 Mich App 488, 491; 522 NW2d 875 (1994). Hearsay evidence is inadmissible unless it falls within a recognized exception to the prohibition against the admission of hearsay. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992).

Contrary to the trial court's ruling, and the prosecution's assertion that the evidence was admitted only to indicate what led up to defendant's arrest, we find that the evidence was impermissible hearsay. The prosecutor did not have to ask the investigating officer what DeJesus told her in order to

show what led up to defendant's arrest. We are unable to glean any other reason, other than to prove that Meridith and defendant killed the victim, regarding why the evidence would have been admitted.

However, we must consider whether the evidence constituted harmless error. Preserved, nonconstitutional error is reviewed for a miscarriage of justice. *People v Mateo,* 453 Mich 203, 221; 551 NW2d 891 (1996). In other words, reversal is required only if the error was prejudicial. This inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *Id.* at 215.

Where improperly admitted testimony only reiterated properly admitted testimony, the evidence admitted in error was mere cumulative evidence and its admission does not prejudice the defendant. *People v Rodriquez (On Remand),* 216 Mich App 329, 332; 549 NW2d 359 (1996). Here, at trial, DeJesus testified that Meridith had advised her that defendant had killed the victim. Consequently, Kinney's testimony was cumulative to evidence introduced during the course of the in-court examination of DeJesus. Further, defendant was able to effectively cross-examine DeJesus on this issue. Therefore, its admission through Sergeant Kinney was mere cumulative evidence which did not prejudice defendant.

III

Defendant last argues that there was insufficient evidence presented at trial to sustain his conviction for first-degree murder.

In determining whether evidence presented at trial was sufficient to sustain a conviction, viewing the evidence presented in a light most favorable to the prosecution, this Court must determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe,* 440 Mich 508, 515; 489 748 NW2d (1992), amended 441 Mich 1201 (1992).

Defendant contends that the jury must have relied on the in-court testimony of Meridith and Andrew Levert to convict defendant, and that both Meridith and Levert were incredible witnesses whose testimony was impeached. However, we do not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Palmer,* 392 Mich 370, 375-376; 220 NW2d 393 (1974). "Inherent in the task of considering the proofs in the light most favorable to the prosecution is the necessity to avoid a weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed. All such concerns are to be resolved in favor of the prosecution." *People v Herbert,* 444 Mich 466, 474; 511 NW2d 654 (1993).

Moreover, the evidence presented at trial supported defendant's conviction of first-degree murder. In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed his victim and that the act of homicide was premeditated and deliberate. *People v Anderson,* 209 Mich App 527, 537; 531 NW2d 780 (1995). The elements of premeditation and deliberation require that the defendant have had an opportunity to take a "second look" and may be inferred from the circumstances surrounding the homicide. *Id.* Moreover,

premeditation may be established by evidence of: (1) the prior relationship of the parties; (2) the defendant's actions prior to the killing; (3) the circumstances surrounding the killing itself; and, (4) the defendant's conduct following the killing. *Id.*

Viewing the evidence presented in a light most favorable to the prosecution, the victim died as a consequence of wounds inflicted by defendant. The elements of intent and premeditation and deliberation were shown by defendant's having stated his intent to kill the victim both to Meridith and Levert, defendant's preparation to effectuate the killing by helping to devise a plan by which the victim would voluntarily leave his residence and by securing possession of the murder weapons, and defendant's conduct in leaving the victim's body in an alley after inflicting the fatal wounds. Therefore, there was sufficient evidence of each element of the crime of first-degree murder to sustain defendant's conviction.

Affirmed.

/s/ Jane E. Markey
/s/ Kathleen Jansen
/s/ Helene N. White

[1] The conviction of another person involved in the criminal enterprise is not admissible at the defendant's separate trial.

[2] Where no consideration is offered, the prosecution may not offer evidence of the conviction by trial of an accomplice-witness.