

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOE B. THOMAS,

Defendant-Appellant.

UNPUBLISHED
December 19, 1997

No. 194263
Recorder's Court
LC No. 95-002061

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

P.J. KENNETH JEFFERSON,

Defendant-Appellant.

No. 194295
Recorder's Court
LC No. 95-002061

Before: Michael J. Kelly, P.J., and Cavanagh and N. J. Lambros*, JJ.

PER CURIAM.

Defendants Jefferson and Thomas were tried jointly with a single jury. Defendant Jefferson was convicted of first-degree murder, MCL 750.316; MSA 28.548, and was sentenced to life imprisonment without parole. Defendant Thomas was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), for which he was sentenced to life imprisonment without parole and two years' consecutive imprisonment, respectively. Defendants filed separate appeals as of right, which were consolidated for our review. We affirm.

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

Defendant Jefferson first argues that he was denied a fair trial when the trial court admitted codefendant Thomas' statement to the police. The admission of a nontestifying codefendant's unredacted confession that incriminates the defendant deprives the defendant of his Sixth Amendment right of confrontation. *Bruton v United States*, 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968); *People v Etheridge*, 196 Mich App 43, 47; 492 NW2d 490 (1992). However, a redacted statement which removes all references to the nonconfessing defendant along with an instruction to the jury that limits applicability of the statement to the codefendant is permissible. *Richardson v Marsh*, 481 US 200; 107 S Ct 1702; 95 L Ed 2d 176 (1987); *Etheridge, supra*.

Codefendant Thomas' statement was redacted prior to admission; all references to defendant Jefferson were removed. The parties agreed to its admission. The trial court properly instructed the jury at the time of its admission that it only applied to codefendant Thomas. Thus, the trial court did not err in allowing its admission.

Defendant Jefferson next argues that the murder conviction was not supported by sufficient evidence of premeditation and deliberation. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v McKenzie*, 206 Mich App 425, 428; 522 NW2d 661 (1994).

One of the essential elements of first-degree murder is premeditation and deliberation. *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). Although there is no specific time requirement, sufficient time must have elapsed to allow the defendant to take a "second look." *Id.*; *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). The time required for a "second look" can be as short as a few seconds depending on the circumstances surrounding the homicide. *People v Conklin*, 118 Mich App 90, 93; 324 NW2d 537 (1982); *People v Meier*, 47 Mich App 179, 191; 209 NW2d 311 (1973).

There were two eyewitness accounts of the murder. Both confirm that the victim had no weapon, that after the victim raised his arms defendant Jefferson reversed the car and moved closer to the victim, that defendant Thomas leaned out of the window and shot the victim as the victim turned and ran, and that after the victim was shot, defendant Jefferson was prepared to leave the car with the gun to make sure that the victim was dead. We conclude that the prosecution presented sufficient evidence of premeditation and deliberation.

Defendant Jefferson next argues that the trial court gave erroneous instructions on the element of premeditation and deliberation and on the elements of aiding and abetting. Defendant did not object to either instruction at trial and therefore failed to preserve it. *People v Dunham*, 220 Mich App 268; 559 NW2d 360 (1996). This Court will grant relief only if the failure to do

so would result in manifest injustice. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). After carefully reviewing the trial court's instructions, we conclude that they correctly reflected the law on premeditation and deliberation and on the elements of aiding and abetting. We therefore find no manifest injustice.

Defendant Jefferson next claims that several of the prosecutor's remarks during closing arguments constituted prosecutorial misconduct. Defendant Jefferson did not object to the prosecutor's remarks at trial and therefore did not preserve this issue for appeal. *People v Wise*, 134 Mich App 82, 105; 351 NW2d 255 (1984). The failure to object generally precludes review of the issue. This Court reviews the issue, however, if a curative instruction at trial would not have eliminated the prejudicial effects of the remark or if the failure to review would result in a miscarriage of justice. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

With regard to many of the comments complained of by defendant, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, a prosecutor is not required to frame his arguments in the blandest possible terms. See *Ullah*, *supra* at 669. Our review of the record does indicate that the prosecutor made several definitive statements about defendants' guilt. However, our failure to provide further review will not result in a miscarriage of justice because any possible prejudice could have been cured by a timely instruction. See *People v Mitchell*, 223 Mich App 395, 400; 566 NW2d 312 (1997).

Defendant Jefferson argues that he was denied a fair trial when the trial court gave an instruction to the jury on insanity and diminished capacity. This claim is without merit. The trial court allowed the admission of testimony from an expert witness who had performed a criminal responsibility and diminished capacity examination on defendant Thomas at the request of defendant Thomas' first attorney. Although defendant Thomas was not raising either of these defenses, the trial court admitted the testimony as relevant to the issue whether defendant suffered from a condition that made it less likely that he premeditated the death of the victim. During the course of explaining the purpose of the testimony, the trial court explained the defenses of insanity and diminished capacity and noted that defendant Thomas was not raising either of these defenses. None of this implicated defendant Jefferson in any way. We find no error requiring reversal.

Finally, defendant Jefferson argues that he was denied the effective assistance of counsel at trial. Because defendant failed to move for a *Ginther*¹ hearing or a new trial based on ineffective assistance of counsel, this Court's review is limited to errors apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). We have already determined that the instruction on aiding and abetting was proper and that codefendant Thomas' statement to the police was

properly admitted. Defense counsel was not required to raise meritless objections. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Because the evidence of guilt is overwhelming, defendant Jefferson has not met his burden of showing that, but for counsel's failure to object to the prosecutor's remarks during closing arguments, the result of the proceeding would have been different. *Pickens, supra*.

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Defendant Thomas argues that the trial court erred in admitting his statement to the police. This Court determines whether a defendant's statement is knowing, intelligent, and voluntary by reviewing the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27; 551 NW2d 355 (1996). A trial court's findings of fact following a suppression hearing will not be disturbed by an appellate court unless the findings are clearly erroneous. *People v LoCicero*, 453 Mich 496, 500; 556 NW2d 498 (1996).

Here, the trial court noted that a question of credibility was involved and resolved it in favor of the police sergeant rather than defendant Thomas. Questions of the credibility of the witnesses are for the trier of fact. *People v Velasquez*, 189 Mich App 14, 16; 472 NW2d 289 (1991). After reviewing Sergeant Kinney's testimony, we cannot conclude that the trial court clearly erred in finding that defendant Thomas's statement was knowingly, intelligently, and voluntarily made.

Affirmed.

/s/ Michael J. Kelly
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

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