

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL PANNELL,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 237024

Wayne Circuit Court

LC No. 00-009498-01

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of life imprisonment without the possibility of parole for the murder conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

The evidence at trial indicated that defendant and a codefendant, Kevin Robinson, entered the victim's house together late one evening. Shortly thereafter, the victim was killed by a gunshot wound to the head. Although no eyewitnesses observed the shooting, Robinson's fiancée, Brandi Brewer, testified that, earlier on the day of the shooting, defendant had been angry with the victim and threatened to kill him, and that, after the shooting, defendant made several statements admitting responsibility for shooting the victim. In a statement to the police, defendant alleged that Robinson shot the victim.¹

I

Defendant first alleges various defects in the trial court's instructions to the jury. Because defendant failed to object at trial to any of the allegedly erroneous instructions, and thus

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

¹ Defendant and his codefendant, Kevin Robinson, were tried jointly, with a jury determining defendant's guilt and the court determining Robinson's guilt. The court convicted Robinson of second-degree murder.

failed to preserve these issues for appeal, this Court reviews the assertedly improper instructions only to determine whether any plain error affected defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

A

Defendant first suggests that the trial court diminished the prosecutor's burden of proof by advising the jury that defendant was entitled to a not guilty verdict unless the jury was *satisfied* of his guilt beyond a reasonable doubt. However, the trial court's instruction closely tracked CJI2d 3.2, which describes a criminal defendant's presumption of innocence, and the prosecutor's burden of proving a defendant's guilt beyond a reasonable doubt. Even the word "satisfied," on which defendant's argument principally relies, appears within the model instruction, which this Court has repeatedly cited with approval. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). The trial court also subsequently instructed the jury that to prove the charges against defendant, the prosecutor had to prove beyond a reasonable doubt each of the elements of the charged offenses, and advised the jury that it "must decide whether the testimony and evidence you believe proves beyond a reasonable doubt that the defendant is guilty." We conclude that the trial court's instructions leave no doubt that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt. *Hubbard, supra* at 488.

B

Defendant next argues that the trial court's aiding and abetting instructions confused the jury by suggesting that defendant could aid and abet himself in committing a crime, and erroneously failed to inform the jury that both himself and codefendant Robinson must have entertained the specific intent to kill in order to be found guilty of first-degree premeditated murder under an aiding and abetting theory. Our review of the record reflects that the trial court appropriately instructed the jury with respect to an aiding and abetting theory according to CJI2d 8.1, the relevant standard jury instruction, because more than one person was involved in the charged crime, and, according to his statement to the police, defendant's role may have been less than direct participation in the wrongdoing. *People v Bartlett*, 231 Mich App 139, 157; 585 NW2d 341 (1998). Furthermore, the trial court properly expressed the necessary elements, including the requisite intent element, to sustain defendant's conviction pursuant to an aiding and abetting theory. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Tanner*, 255 Mich App 369, 418-419; 660 NW2d 746 (2003); *People v Karst*, 138 Mich App 413, 415; 360 NW2d 206 (1984). Taken together, the court's aiding and abetting instructions and its other, repeated instructions regarding the specific intent and other elements necessary to establish a first-degree premeditated murder, plainly did not omit the specific intent element, as defendant argues.

C

Defendant further claims that the trial court coerced the jury's guilty verdict by neglecting to apprise the jurors that they had the option of returning no verdict as a "hung jury." We find no hint of coercion within the court's instructions. A review of the instructions demonstrates that, while the court did not specifically explain to the jurors their prerogative to

conclude defendant's trial as a "hung jury," the court plainly explained the unanimity requirement and that the jurors had to reach verdicts individually, without abandoning their honest opinions solely to facilitate the reaching of a unanimous verdict. The instructions derived from CJI2d 3.11, which our Supreme Court explicitly approved and directed trial courts to read to juries in *People v Pollick*, 448 Mich 376, 386; 531 NW2d 159 (1995), and defendant offers no authority criticizing or disavowing these instructions.²

D

In his last allegation of instructional error, defendant claims that the trial court misstated the law when it suggested that the jury *should* not consider an alleged pretrial statement by defendant that the jury ultimately concluded he in fact did not make. According to defendant, the court instead should have instructed the jury that it *must* not consider a prior statement that defendant did not actually make.

Defendant's argument, which seizes on one appearance of the word "should" within the court's instructions, simply ignores the entirety of the language of the instructions, which plainly caution the jury that it *must* find that defendant made the out-of-court statement before it may give the statement any consideration, and further that it *must* then find the statement to be truthful before considering it as evidence. Defendant cites no authority supporting his suggestion that "[a] statement purportedly made by the defendant which was in fact not made by him is the equivalent in legal effect to an involuntary confession." A defendant may not merely announce his position without explanation and citation of supporting authority and then leave it to this Court to discover a legal basis for the position. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).³

II

Defendant also raises several alleged instances of misconduct by the prosecutor during his closing and rebuttal arguments. Defendant did not object at trial to the nine alleged instances of misconduct and, consequently, failed to preserve his claims of misconduct for appellate review. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

² Furthermore, the record contains absolutely no indication that the jurors reached a deadlock or point of impasse during deliberations, as occurred in the cases cited by defendant.

³ The cases defendant cites regarding the inadmissibility of involuntary confessions are inapposite to the issue of the propriety of the trial court's instruction regarding the jury's consideration of his statement to the police. The voluntariness of a defendant's statement to the police represents a determination of fact for the trial court. *People v Walker (On Rehearing)*, 374 Mich 331, 337-338; 132 NW2d 87 (1965); *Snider, supra* at 403. In this case, after a *Walker* hearing, the trial court denied defendant's motion to suppress his statements to the police on the basis of their involuntary nature, and defendant does not challenge that ruling on appeal. Accordingly, even assuming error in the trial court's instructions, the jury did not, as defendant suggests, consider any statements that he involuntarily provided.

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000)(citations omitted).]

This Court reviews unpreserved claims of prosecutorial misconduct only for plain error affecting the defendant's substantial rights. *Id.* at 720.

A

Defendant asserts that the prosecutor misstated the law by remarking that premeditation and deliberation could occur within a split second. While the prosecutor did at one point employ the terms "split second" in discussing premeditation and deliberation, we conclude that the entirety of the prosecutor's description of premeditation and deliberation was consistent with well-established case law defining these elements. See *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993); *People v Gonzalez*, 178 Mich App 526, 531; 444 NW2d 228 (1989); *People v Culpepper*, 59 Mich App 262, 268; 229 NW2d 407 (1975). Even assuming some error in the prosecutor's description of premeditation and deliberation, it did not affect defendant's right to a fair trial because (1) the prosecutor repeatedly urged the jury to listen to the trial court's instructions, (2) the trial court instructed the jury that the attorneys' statements and arguments did not constitute evidence, and (3) the court twice correctly defined the concepts of premeditation and deliberation in instructions modeled after CJI2d 16.1. *People v Grayer*, 252 Mich App 349, 357-359; 651 NW2d 818 (2002).

B

Defendant further suggests that the prosecutor improperly attacked his character by calling him a "liar," and improperly expressed his personal belief in defendant's lack of credibility. However, after carefully reviewing the challenged portions of the prosecutor's arguments, we find that they reflect his appropriate comments that defendant lacked credibility on the basis of the evidence introduced at trial showing that defendant (1) acknowledged to Brewer that he shot the victim, (2) subsequently disclaimed to the 911 operator and the police knowledge of or participation in the victim's death, and tried to deflect responsibility for the shooting to Robinson, and (3) told the police that he could not breathe before running speedily away from them. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (observing that a prosecutor may argue from the facts that a witness including the defendant is not worthy of belief, and need not state inferences and conclusions in the blandest possible terms). All of the challenged portions of the prosecutor's arguments derive from the evidence produced at trial and the reasonable inferences arising therefrom, and we detect no hint of any

suggestion by the prosecutor that he had some special knowledge regarding the credibility of defendant or any other matters presented to the jury. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Dane*, 59 Mich 550, 552; 26 NW 781 (1886); *Schutte*, *supra* at 721.

C

Defendant lastly characterizes as improper several comments by the prosecutor involving the credibility of, and a prior inconsistent statement made by, Dushawn Walker, who observed two individuals park in front of the victim's house and bang on his front door shortly before the shooting. The first challenged comment concerning Walker's credibility appropriately embodied the reasonable inference, on the basis of the evidence presented at trial, that Walker, initially a suspect in the victim's shooting death, unlikely would have signed his statement to the police without first reviewing it. *Schutte*, *supra* at 721; *Launsburry*, *supra* at 361.

With respect to the remaining contested comments, defendant argues that these represent the prosecutor's improper suggestions that the jury consider as substantive evidence Walker's prior, out-of-court statement to the police that he observed the passenger of the vehicle (defendant, on the basis of other witness' trial testimony) with something shiny in his hand, which the court admitted exclusively for impeachment purposes. Our review of the record reveals that most of the prosecutor's discussion of Walker's prior inconsistent statement to the police correctly conveyed the fact that the prior statement constituted impeachment evidence of Walker's trial testimony, not substantive evidence. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).⁴

We located only one instance in which the prosecutor referred to defendant's possession of the shiny object with no accompanying clarification of the exclusive impeachment nature of the evidence. Even assuming the impropriety of the prosecutor's final challenged comment regarding the shiny object, we cannot conclude that the error affected defendant's right to a fair and impartial trial in light of (1) the trial court's repeated clarifications that the jury should not consider Walker's prior statement as substantive evidence, but only for impeachment purposes; and (2) the overwhelming evidence of defendant's guilt in the form of his self-inculpatory statements to Brewer after the victim was killed. *Watson*, *supra* at 586.

III

Defendant further contends that the prosecutor improperly called Walker as a trial witness for the sole purpose of impeaching him with his prior inconsistent statement to the police, which suggested that defendant had a shiny object when he exited the vehicle in front of the victim's house. Because defendant offered no objection at trial alleging that the prosecutor improperly elicited Walker's trial testimony for the sole purpose of impeaching him with his prior inconsistent statement, he failed to preserve this issue for appellate review. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). This Court reviews

⁴ Although Walker acknowledged having made a prior statement to the police, he denied at trial that he recalled seeing anyone in possession of a shiny object on the night the victim was shot, and also denied having relayed such an observation to the police.

unpreserved claims of evidentiary error only to determine whether any plain error affected the defendant's substantial rights. *People v Spanke*, 254 Mich App 642, 644; 658 NW2d 504 (2003).

We initially note defendant's incorrect assertion, made on the basis of dated case law, that a party may not impeach his own witness. Since its amendment in 1991, MRE 607 has plainly and unambiguously provided to the contrary that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness."

Defendant's argument relies on a principle revisited by our Supreme Court in *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997).

Under the current provision of MRE 607 the government can impeach its own witness. The general rule is that evidence of a prior inconsistent statement of the witness may be admitted to impeach a witness even though the statement tends directly to inculcate the defendant. *United States v Miller*, 664 F2d 94 (CA 5, 1981). *People v Stanaway*[, 446 Mich 643; 521 NW2d 557 (1994),] provided an exception to this rule: A prosecutor cannot use a statement that directly tends to inculcate the defendant under the guise of impeachment when there is no other testimony from the witness for which his credibility is relevant to the case.

* * *

The rule set forth in *People v Stanaway* is that the impeachment should be disallowed when (1) the substance of the statement purportedly used to impeach the credibility of the witness is relevant to the central issue of the case, and (2) there is no other testimony from the witness for which his credibility was relevant to the case.

This is a very narrow rule and does not apply in the instant case

Walker's prior statement that the passenger of the vehicle (defendant) had something shiny in his hands, which the prosecutor used for impeachment purposes, did have relevance to the central question of defendant's guilt. *Kilbourn, supra* at 683-684. However, Walker offered testimony other than the substance of the impeachment statement for which his credibility had relevance to the case. Walker was the sole eyewitness to the events immediately preceding the victim's shooting death. Although Walker could not positively identify either defendant or his codefendant, he recalled observing a car approximating the appearance of Robinson's Chevrolet park in front of the victim's house and two men exit the car and approach the victim's house, whereupon one of the men reached into his pants, and then the men began pounding on the victim's front door. Shortly thereafter, Walker heard a gunshot and saw the victim's front door standing open. This testimony tended to corroborate and make more probable Brewer's testimony concerning defendant's self-incriminating admissions. MRE 401. Walker's testimony also established the further relevant facts that the police had detained him as a suspect in the victim's death, and tested him for gunshot residue, but dismissed him as a suspect after receiving the test results.

Accordingly, the prosecutor did not call Walker as a witness for the sole purpose of eliciting his prior inconsistent statement inculcating defendant, and the trial court properly admitted Walker's relevant testimony to the events surrounding the charged crime.

IV

Defendant lastly argues that trial counsel was ineffective by failing to object to each of the alleged foregoing instances of error. However, defense counsel need not have objected to any of the trial court's proper instructions, appropriate comments by the prosecutor, or the properly admitted trial testimony by Walker. *People v Riley*, 468 Mich 135, 141-142; 659 NW2d 611 (2003). To the extent that any instance of prosecutorial misconduct occurred, it did not affect defendant's receipt of a fair trial. Consequently, defense counsel's failure to object to the alleged misconduct similarly did not render defendant's trial unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Affirmed.

/s/ William B. Murphy

/s/ Jessica R. Cooper