

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE GLENN,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 252732

Wayne Circuit Court

LC No. 03-007713-01

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to life in prison without parole for the first-degree murder conviction, life in prison for the second-degree murder conviction, and two years in prison for the felony-firearm conviction. We affirm defendant's convictions and sentences as amended by the trial court's December 13, 2004, order.

I. Basic Facts and Procedure

Defendant was convicted for the murder and criminal sexual assault of Curtina Turner and the murder of Dunree Gibbs. The women were friends and Turner was defendant's girlfriend of six months. Each woman died as the result of a single gunshot wound to the head. Turner had also been beaten and strangled. The bodies of the two women were found lying in an open, abandoned garage. Defendant's DNA matched sperm found in Turner's mouth and on a stain left on the thigh of Gibbs' pants. The DNA of a different, unidentified male was detected in Turner's vagina and rectum. Defendant's handprint was also found on the dusty hood of an abandoned car in the garage where the bodies were found. On the night of the murders, witnesses had heard three voices, an altercation, and gunshots coming from the area of the garage and an adjoining vacant lot. One witness characterized the voices as those of two women and a man. A second witness thought she heard an older man, a younger man and a woman. The prosecutor presented testimony that Gibbs had a low voice which could be mistaken for that of a man.

Defendant initially filed a notice of alibi and planned to claim that he had not been with the women that night. He later recanted his alibi after the prosecution offered evidence of a

phone call made by defendant from jail to his brother. The call tended to bolster the prosecution's claim that the alibi was fabricated. Instead of presenting an alibi defense, defendant testified that he had accompanied the women to the vacant lot in a car driven by another man named "Mike." Defendant further testified that he and "Mike" fought and then "Mike" retrieved a gun and began shooting. Defendant fled the scene and learned of Turner's death the next day.

II. Brittany's Testimony

Defendant first argues trial court erred in allowing Turner's cousin, Brittany, to testify to inadmissible hearsay. Specifically, the trial court allowed Brittany to testify that, on the day before Turner was killed, Brittany overheard a phone conversation between Turner and defendant in which Turner sounded angry and said "she would never cheat on [defendant], and how can [defendant] believe someone else."

A. Standard of Review

This Court reviews a trial court's decision whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, preliminary questions of law regarding the application of a rule of evidence are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court may be said to have abused its discretion only when its apparent reasoning is palpably violative of fact and logic, or, when "an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Jackson*, 467 Mich 272, 277; 650 NW2d 665 (2002), citing *Spalding v Spalding*, 355 Mich 382, 384; 94 NW2d 810 (1959); *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001). Reversal is then warranted only if it is more probable than not that the error affected the outcome. MCR 2.613(A); MCL 769.26; *People v Young*, 472 Mich 130, 141-142; 293 NW2d 801 (2005).

B. Analysis

Defendant claims that Brittany's statements were improperly admitted under MRE 803(3). Although the prosecutor primarily argued that Brittany's statements were admissible under MRE 803(3), the prosecutor also argued that Brittany's statements were admissible as non-hearsay to prove motive and discord in the relationship. The trial court "allow[ed] the statements as non-hearsay."

The trial court did not abuse its discretion in admitting Brittany's statements as non-hearsay. "[N]umerous prior cases have upheld the admissibility of evidence showing marital discord as a motive for murder, or as circumstantial evidence of premeditation and deliberation." *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Evidence of motive is always relevant in a murder prosecution. *People v Sutherland*, 149 Mich App 161, 164; 385 NW2d 637 (1985). Further, the offender identity was at issue, and evidence relating to motive was particularly relevant. *Fisher, supra* at 450. Brittany's testimony that Turner had denied any infidelity tends to show that shortly before Turner's death there was discord between Turner and defendant. This evidence is not only highly relevant to defendant's motive for the crimes, but also provided circumstantial evidence of defendant's premeditation and deliberation. Brittany's

statements were properly admitted as non-hearsay and the trial court's decision to admit the statements did not constitute legal error.

Despite the trial court expressly "allow[ing] the statements as non-hearsay," defendant claims on appeal that the prosecutor solely relied Turner's statements as hearsay to "undermine the otherwise compelling defense argument that there was a second man on the scene ["Mike"], the man that must have killed the two women." At trial, defense counsel offered the following theory of the case:

There a fight – that's the scuffle that's heard – and [defendant] is shot at and he runs away, the other male, who we really only know as Mike shoots and kills Dunree Gibbs, Curtina Turner is beaten and raped, perhaps in the garage, perhaps that's coming from the scuffling sound heard here, we don't know for sure, but at a certain point she's put in the garage and that's where she's finished off, and Dunree Gibbs is dragged from wherever she is shot into the garage.

Even excluding Brittany's testimony, there was an adequate evidentiary basis for the prosecutor to maintain that Turner had not been sexually assaulted by "Mike" shortly before she was murdered. First, there was no evidence of any injuries to Turner's vagina or rectum. Thus, the semen found in vagina or rectum was likely the result of consensual sex, not rape. Second, there was evidence presented at trial indicating that little time had elapsed between the gun shots. When asked whether he heard any other shots, defendant replied yes, "[t]hat's when I was, I guess, at the corner," "[a] corner like to the big street." The brief period between the gunshots indicates a sexually assault was not likely, particularly when Turner was also beaten and strangled within that time. Thus, contrary to defendant's claim, the prosecutor did not necessarily rely on Brittany's testimony to establish that Turner had consensual sex with an unidentified man before arriving at the crime scene.

We further disagree that the admission of Turner's statements violated defendant's Sixth Amendment confrontation rights. US Const, Am VI. Defendant's objection during trial that the statements were hearsay did not preserve this constitutional claim for appellate review. MRE 103(a)(1); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). This claim is therefore reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *Coy*, *supra* at 12. To avoid forfeiture under the plain error rule, defendant must initially satisfy a three-part test. He must show: (1) there was an error; (2) the error was clear or obvious; and (3) the error impacted substantial rights by affecting the outcome of the proceedings. If these three prongs are satisfied, reversal is then warranted only if the error also resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, *supra* at 763.

The aim of the Confrontation Clause is to ensure the reliability of evidence by subjecting it to adversarial testing before the trier of fact. *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157; 111 L Ed 2d 666 (1990); *People v Pesquera*, 244 Mich App, 305, 309; 625 NW2d 407 (2001). "The right to confront one's accusers consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses'

demeanor.” *Pesquera, supra* at 309, citing *Craig, supra* at 846, 851. Here, Brittany’s testimony was properly admitted for the nonhearsay purpose of showing that she observed discord between Turner and defendant hours before Turner died. Thus, Brittany herself is the relevant witness. Brittany testified before the jury and defendant does not challenge her competency. Brittany was also cross-examined by defense counsel; she admitted both that she could not hear defendant’s side of the conversation and that she had not reported the argument to the police officer who initially interviewed her after the murders. Defendant also took the stand and attested that the conversation had been misconstrued. We therefore find that defendant has forfeited this issue because he has not satisfied the first two elements of the clear error standard; the trial court did not commit clear or obvious error when it admitted Brittany’s testimony, despite the unavailability of Turner as a witness. *Carines, supra* at 763.

III. Letter from Turner

Defendant’s next argues that trial court erred in excluding a letter he claimed was written to him by Turner two days before her death. Defendant specifically claims the letter was relevant to rebut Brittany’s characterization of his relationship with Turner. We disagree.

A. Standard of Review

This Court reviews a trial court’s decision whether to admit evidence for an abuse of discretion. *Katt, supra*.

B. Analysis

Defendant argues that a letter purportedly written, but not signed, by Turner two days before she was killed was relevant to “rebut the prosecution’s interpretation of the conversation described by Brittany Turner, and to put the conversation in context.” As previously stated, Brittany testified that she overheard a phone conversation between Turner and defendant in which Turner sounded angry and said “she would never cheat on him, and how can you believe someone else.” Defendant claims the letter rebuts this testimony by showing that Turner was “concerned that defendant was running around, growing apart from her, and not wanting to be around her.”

The trial court refused to admit the letter holding that it was not relevant, and that it could not be authenticated. Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

Defendant claims that the letter suggests that defendant was no longer interested in a relationship with Turner, and argues that it tends to establish a lack of motive. “Motive” is “[c]ause or reason that moves the will and induces action. An idea, belief or notion that impels or incites one to act in accordance with his state of mind or emotion.” Black’s Law Dictionary (6th ed); see also *People v Hoffman*, 225 Mich App 103; 570 NW2d 146 (1997). Turner’s infidelity is what is claimed to have moved or induced defendant to commit the crimes. Here, the writer’s *belief* that defendant was not committed to the relationship is simply not telling of defendant’s *actual* reaction to her infidelity. Further, the writer’s belief that defendant was losing interest in the relationship may just as well be considered evidence of further discord in

the relationship. A trial court's decision on a close evidentiary question generally cannot be an abuse of discretion. *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005). Here, we cannot conclude the trial court abused its discretion in determining that the letter did not tend to make more or less probable defendant's motive to commit the crimes. Moreover, even if relevant, the marginal relevance of the letter would be far outweighed by its potential to confuse the issue of motive. MRE 403.

In addition, even if the trial court had erred in refusing to admit the letter, the error was harmless given that defendant testified in regard to his relationship with Turner. Specifically, defendant testified that Turner was concerned that defendant was not taking their relationship seriously. Defendant also testified that he was not concerned that Turner had cheated on him, but rather Turner was concerned that defendant had cheated on her. For the same reasons, the letter's exclusion did not violate defendant's confrontation rights. The letter's content would not have challenged Brittany's testimony.

IV. Assistance of Counsel

Defendant next argues that reversal is required because his trial attorney was ineffective in failing to challenge the expert testimony of David Woodford. We disagree.

A. Standard of Review

The determination whether a defendant has been deprived of his right to the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). As in other contexts, the trial court's factual findings are reviewed for clear error and its constitutional determinations are reviewed de novo. *Id.* Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *Id.* at 578.

B. Analysis

To warrant reversal for a claim of ineffective assistance of counsel, defendant must show: (1) the representation fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for the attorney's error, the result of the proceedings would have been different; and, (3) the resulting proceedings were therefore fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

A defendant is entitled to have his counsel "prepare, investigate, and present all substantial defenses;" a substantial defense is "one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). To this end, "[c]ounsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Despite the normal deference afforded to counsel's strategic decisions, strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation. *Wiggins v Smith*, 539 US 510, 521; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Furthermore,

[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. [*Strickland, supra* at 691.]

Here, Woodford opined that DNA from sperm deposited in a living victim's mouth remains detectable for a "very brief period," "[b]arely a minute," or "just a very, very, short, short time." When the prosecutor asked "why is it that the semen in the mouth area only lasts for minutes," Woodford explained:

If you think about all the saliva that's moving around your mouth at any given point of time, if a body fluid such as semen was in your mouth, because of all the fluids moving around in your mouth, especially the digestive enzymes, it's going to take just a few minutes for that semen to disappear.

Further, when asked if "the source of the semen in the mouth, it could not have been there . . . for hours before her death, is that correct, Woodford replied, "[t]here's no way, no." Accordingly, Woodford opined that the sperm must have been deposited in this time frame just before Turner's death.

Defendant testified that he received oral sex from Turner in "Mike's" car some time between three and five minutes before "Mike's" retrieval of the gun when defendant left the scene. However, because of the narrow time frame presented by Woodford, and because Turner was then beaten and strangled, the prosecution repeatedly claimed that defendant's version of events was scientifically impossible. Further, the prosecutor was able to cast doubt on defendant's credibility by relying on Woodford's opinion:

The Prosecutor. And could you tell me, this quite a few minutes from when the oral sex took place, isn't that correct sir?

Defendant. Yes, Ma'am. It was about two or three minutes.

The Prosecutor. Well, two or three minutes sir, you indicated that you're not sure which loop it was that Dunree and this "Mike" was walking. Then you indicated that Dunree walked back, got onto the sidewalk, "Mike" stood in the front, there were words exchanged, you got out of the car, and you started fighting.

Defendant. And then you picked up a stick, is that correct?

The Prosecutor. Yes, Ma'am.

Defendant. And during this entire time, could you tell me is Miss Turner sitting in the back seat holding your semen in her mouth?

[Objection overruled]

The Prosecutor. Well, you heard the testimony from Mr. Woodford indicating that

Defense counsel never directly challenged Woodford's conclusions; he assumed Woodford was correct. Upon closing, counsel merely reminded the jury that defendant and Turner had been dating and counsel opined that "you should take the easiest explanation first . . . [which] is that there was an act of consensual sex . . . right before the situation got violent."

At a *Ginther*¹ hearing held upon remand from this Court, Dr. Marco Scarpetta opined that Woodford had "over reached." Scarpetta consulted with peers and referred to several published articles; he opined that semen and sperm have been found in the mouths of living victims up to three or six hours after being deposited. Woodford and the trial court challenged the bases of these studies. However, although Scarpetta and Woodford agreed that sperm is only found on oral swabs in a tiny percentage of cases, there was no dispute that no studies, or for that matter, science, suggested sperm was only detectable after a few minutes. They also agreed that swabs after assaults are generally not taken within this short of time, but rather within hours.

The prosecution primarily argues that trial counsel's failure to challenge Woodford's testimony is excusable because defendant maintained his alibi defense until the trial had begun. We find that, before trial, counsel reasonably focused on preparing the alibi defense and had little reason to anticipate that Woodford's testimony would establish such a narrow time frame. Thus, we agree, in part, with the prosecution that defendant's own actions preclude him from claiming that counsel was ineffective for failing to retain a rebuttal expert. Nonetheless, by the end of the prosecutor's opening statement, counsel had notice that precise timing could be at issue. The prosecutor specifically stated during opening argument that "You will hear from David Woodford who has looked at hundreds of semen samples, and he will tell you just how long semen can actually stay in a person's mouth when they are alive versus when they are dead – important testimony, ladies and gentlemen." Furthermore, although he did not have time to retain an expert, defense counsel could have challenged the anecdotal basis of Woodford's conclusions, and cross-examined him using reputable scientific resources pursuant to MRE 707. Dr. Scarpetta testified that the published articles on which he relied, for instance, were easily available on the internet.

Significantly, we disagree with the trial court's assessment that counsel enlisted a reasonable trial strategy by merely attempting to downplay Woodford's testimony. Moreover,

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

the trial court's assessment that the jury would not have given Scarpetta's testimony significant weight is irrelevant. Rather, Woodford's unchallenged testimony cast defendant's version of events as impossible; therefore, even a colorable challenge to Woodford's opinion would have, at a minimum, allowed counsel to argue that defendant's version was consistent with the physical evidence. Moreover, counsel himself admitted at the *Ginther* hearing that his trial strategy was not based on full information. Had he known opposing scientific information existed, he would have used it to cross-examine Woodford; he did not offer a reason for his failure to seek such information. Therefore, we find that counsel's representation fell below an objective standard of reasonableness; it unnecessarily allowed the defense's only theory to be cast as physically impossible.

However, for reversal to be required, defendant must have been deprived of a "substantial" defense, which has been described by this Court as "one that might have made a difference in the outcome of the trial." *Kelly, supra* at 526. We conclude that defendant was not deprived of a defense "that might have made a difference in the outcome of the trial."

Defendant maintained at trial that there was a fourth person at the crime scene, "Mike," who committed the crimes. Besides defendant's testimony, however, there was no evidence presented that four people were at the crime scene. Defendant admitted to being at the crime scene, and indeed a handprint on a dusty car places him inside the abandoned garage where the victims' bodies were found. The witnesses all heard only three voices. One witness testified that she heard one male voice and two female voices. A second witness testified that she heard two male voices and one female voice. The second witness, however, indicated that one of the male voices sounded like a "young boy" that could have been a female. There was testimony that Gibbs had a low voice for a female. In addition, the second witness testified to hearing the "young boy" plead for his life, a gunshot, and did not again hear the voice. The next morning, the second witness found the victims in the area where she had heard the gunfire. Further, the second witness also saw a car speed away after the gunfire. Unlike the car defendant claimed the unknown gunman drove, a Ford Escort, she claimed it looked like an unmarked police car. The prosecution presented overwhelming evidence that, regardless of when the oral sex act occurred, defendant was at the crime scene, had motive to commit the crimes, and was the only person to leave the crime scene alive.

Moreover, as previously discussed, defendant's testimony that "Mike" had committed the crimes was dubious, at best. The jury had several reasons to doubt defendant's version of events. Indeed, defendant admitted at trial to attempting to fabricate an alibi defense using the perjured testimony of family members. Further, defendant did not report to police "Mike's" identity even after he was arrested for the crime. Therefore, we conclude that reversal is not warranted.

V. Prosecutorial Misconduct

Defendant next argues the prosecutor made improper references to defendant's character, and that trial counsel's failure to object to the prosecution's misconduct constituted ineffective assistance. We disagree.

A. Standard of Review.

Defendant did not object to the prosecutor's remarks at trial; his claim of prosecutorial misconduct is therefore reviewed for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

B. Analysis

We conclude that any error did not affect defendant's substantial rights. Accordingly, reversal is not required either because of any misconduct or as a result of the ineffective assistance of counsel.

After defendant testified, he threw a crumpled piece of paper over his shoulder while the jury was still present. He also responded disrespectfully to the trial judge and later, outside the presence of the jury, he was found to be in contempt of court. The prosecution noted during its closing argument that the infliction of Turner's extensive injuries was "consistent with someone who was angry and has a short fuse" and "consistent with [d]efendant's demeanor" at trial. The prosecution also stated: "You, ladies and gentlemen, saw that short fuse when we were in court on Thursday. You saw the real [defendant] when he sat down in that chair, crumpled up a piece of paper and threw it in your direction."

"This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *Id.* Once a defendant has decided to take the stand, his credibility may be attacked like that of any other witness. MRE 608; *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). Furthermore, to evaluate credibility, a jury may generally consider the demeanor of a witness while testifying. CJI2d 3.6(3)(c). However, evidence of a defendant's character may not generally be admitted or used to argue to that he acted in conformity therewith in committing the crimes charged. MRE 404(a); *People v Knox*, 469 Mich 502, 512-513; 674 NW2d 366 (2004).

Here, the prosecution argued that defendant was likely to have committed the crime because he had acted in conformity with the "angry" character he displayed in the courtroom. These comments went beyond permissible argument that defendant is insolent, disrespectful, otherwise of poor character. Moreover, the comments made during the prosecution's rebuttal argument may not be excused as responses to defense counsel's arguments. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Indeed, defense counsel responded to the prosecution's commentary on defendant's behavior by attempting to explain that defendant's courtroom behavior was caused by stress

However, any misconduct by the prosecution did not impact defendant's substantial rights or affect the outcome of the proceedings. *Carines, supra* at 763. The jury witnessed the entire episode, and therefore could arrive its own assessment of defendant's character without relying prosecution's interpretation of defendant's behavior. Furthermore, in the instant case much doubt had already been cast on defendant's character by his own decision to abandon his alibi during trial. Finally, although the prosecutor impermissibly commented on defendant's behavior, it was not the prosecutor who injected the behavior into the proceedings. Even absent the prosecutorial misconduct, defendant had already done most of the damage by giving the jury fodder to make inferences about his character. Under these circumstances, the outcome of the

proceedings was not like affected by the prosecution's comments, and therefore, defendant has forfeited this issue. *Carines, supra* at 763; *Aldrich, supra* at 110.

For similar reasons, reversal is not warranted based on the ineffective assistance of counsel. Counsel was aware the remarks were arguably improper, but he reasonably chose to avoid "annoy[ing] the jury" and thought it better to give an alternative explanation of defendant's behavior. Moreover, the failure to object did not affect the outcome of the proceedings given that the misconduct was unlikely to have affected the verdict.

VI. Double Jeopardy

Defendant's next argument on appeal concerned double jeopardy violations which were remedied by the trial court upon remand by this Court. Defendant was originally convicted of both first-degree premeditated murder and felony murder, MCL 750.316(1)(b), of Turner as well as first-degree criminal sexual conduct against Turner, MCL 750.520b(1)(e). In a December 13, 2004, order, the trial court amended its judgment to accurately reflect a single sentence of life without parole for the murder of Turner. The court also vacated the CSC I conviction involving Turner in light of the felony murder conviction. Defendant's double jeopardy concerns are therefore moot and need not be addressed by this Court. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra