

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 17, 2014

v

ANDRE DEMETRIUS COLLINS,
Defendant-Appellant.

No. 313769
Wayne Circuit Court
LC No. 11-012158-FC

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree premeditated murder, MCL 750.316(1)(a), possession of a firearm by a felon (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to life imprisonment without parole for the first-degree premeditated murder conviction, three to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. For the reasons stated in this opinion, we affirm.

I. FELON-IN-POSSESSION CHARGE

On appeal, defendant first argues that informing the jury of his prior felony conviction violated his right to due process and a fair trial, and he requests that this Court fashion a new procedure for handling felon-in-possession charges.

Defendant did not raise any objection regarding the felon-in-possession charge during trial; therefore, this issue is unpreserved. *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). Moreover, defendant stipulated, in front of the jury, to his prior felony conviction. "A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) (citations omitted). Thus, while we need not address defendant's argument on appeal, we conclude that the procedure adhered to by the trial court regarding defendant's felon-in-possession charge did not infringe on defendant's due process right to a fair trial.

"This Court has explained that adequate safeguards can be erected to ensure that a defendant charged with both felon-in-possession and other charges arising from the same

incident suffers no unfair prejudice if a single trial is conducted for all the charges.” *Id.* (citations and internal quotation marks omitted). Accordingly, informing the jury that a defendant is charged with felon-in-possession does not necessarily constitute error and we need not formulate a new procedure for handling such charges.

Safeguards that may be erected are:

(1) the introduction by stipulation of the fact of the defendant’s prior conviction, (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment, and (3) a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge. [*Id.* at 691-692 (citation omitted).]

In *Green*, the defendant similarly argued that the felon-in-possession charge should have been severed from the other charges against him. *Id.* at 690. After recognizing the safeguards that were in place, the Court stated:

In this case, the fact of Green’s prior felony conviction was introduced by stipulation, the specific nature of Green’s prior conviction was not mentioned apart from the initial remark to the prospective jury panel, and the trial court instructed the jury that defendants were entitled to a separate determination regarding each of the charges against them. Although the trial court did not give a specific instruction that the stipulation was to be considered only as it related to Green’s felon-in-possession charge, Green never requested such an instruction. Because adequate safeguards were in place at trial, manifest injustice will not result from our failure to review this issue. [*Id.* at 692 (citation omitted).]

In this case, defendant stipulated that he had a prior felony conviction and was not eligible to possess a firearm on October 17, 2011. The specific nature of the prior conviction was not mentioned. In addition, the trial court instructed the jury as follows:

On Count 2, as to Defendant Andre Collins. The defendant is charged with having possessed a firearm in this state, after having been convicted of a specified felony. To prove this charge, the Prosecutor must prove each of the following elements, beyond a reasonable doubt:

First, that the defendant possessed a firearm in this state.

Second, that the defendant was previously convicted of a specified felony, which has been stipulated by all parties.

Accordingly, the safeguards in place were that the fact of defendant’s prior conviction was introduced by stipulation and the specific nature of the conviction was not mentioned to the jury. *Id.* at 691-692; *Mayfield*, 221 Mich App at 660. The only safeguard not utilized was that the trial court did not instruct the jury that it should give separate consideration to each count or that the stipulation should only be considered as it related to the felon-in-possession charge. However, defendant never requested such instructions. *Green*, 228 Mich App at 692. Under these circumstances, we find no plain error affecting defendant’s substantial rights. *People v Roscoe*,

__ Mich App __, __; __ NW2d __ (Docket No. 311851, issued January 14, 2014) (slip op at 2) (holding unpreserved alleged constitutional errors are reviewed for plain error affecting substantial rights).

II. DEFENDANT’S MOTION FOR A MISTRIAL

Next, defendant contends that he was denied a fair trial by the trial court’s denial of his motion for a mistrial following comments made by the trial court during the testimony of a witness.

“We review for an abuse of discretion a trial court’s decision regarding a motion for a mistrial. This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes.” *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010) (citations omitted).

“A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *Id.* (citation and internal quotation marks omitted). This issue concerns the testimony of witness Terrell Truitt. Truitt testified that after he heard shots, he looked outside his door. The following exchange then occurred between the prosecutor, Truitt, defense counsel, and the trial court:

Q. And when you looked out, what did you see? Tell the jury what you saw.

A. Well, I saw -- I saw old boy, you know, I seen him running from around the bush --

Q. When you say old boy, who are you referring to? Can you point to him and tell us what he’s wearing?

A. Well, I can’t say for sure, you know what I’m saying, but I’m going to say this -- right there.

MR. HARRIS: Objection. Can’t have him speculate on this. He can’t guess.

THE WITNESS: Okay --

MR. HARRIS: He either saw it --

THE WITNESS: -- okay --

MR. HARRIS: Or he didn’t see it. Judge, there’s an objection --

THE COURT: Hold on just a moment.

MR. ANDERSON: Just hold on, Mr. Truitt.

MR. HARRIS: He can’t speculate. Either he saw it or he didn’t see it.

THE WITNESS: Yes, I seen --

MR. HARRIS: But he can't guess as to who he saw.

MR. ANDERSON: Just hold on, Mr. Truitt.

THE COURT: Hang on just a second. That's correct.

MR. HARRIS: My objection would be speculation.

THE COURT: In the beginning he seemed very sure. I believe he was wavering because he doesn't want to implicate someone he knows. But -- .

Defendant objected to the last statement made by the trial court. The trial court agreed that it should not have made that statement, but found that it did not "actually say [defendant]; I said someone he knows." The trial court ruled that a curative instruction would alleviate the issue. The trial court instructed the jury as follows:

And just before we excused the jury into the jury room, I made a comment that I really had no personal knowledge of. And so I'm going to strike my last comment.

And merely state that I'm going to overrule the objection.

But I'm going to instruct the witness -- and you're not to consider that last statement that I made, in your deliberations.

And I'm going to instruct the witness to please just answer the question directly, and not give an 'I guess', or whatever.

If you know, you know; if you do not, then say so.

On appeal, defendant contends that the trial court's statement helped prove the prosecution's case and showed bias in favor of the prosecution. "[A] defendant in a criminal trial has a right to a neutral and detached judge." *People v McDonald*, __ Mich App __, __; __ NW2d __ (Docket No. 311412, issued December 17, 2013) (slip op at 7). "A trial court may not assume the prosecutor's role with advantages unavailable to the prosecution." *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). "The test is whether the judge's questions and comments *may* well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, . . . and whether partiality *quite possibly could* have influenced the jury to the detriment of defendant's case." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992) (citations and internal quotation marks omitted; emphases in original). "However, the court's comments are subject to a harmless error test." *Weathersby*, 204 Mich App at 110. "The fact that a trial court's comments are partial does not necessarily mean that the court appears biased to the jury or that the jury was prejudiced by the comments." *Id.*

Even assuming the trial court's statement was partial, any prejudice was cured by the trial court's instruction to the jury not to consider its statement. "[J]urors are presumed to follow

their instructions.” *Roscoe*, __ Mich App at __ (slip op at 5). Further, Truitt subsequently identified defendant as the person he saw. There were also two other witnesses, Terrence Collins and Latasha Henderson, who testified that defendant admitted to shooting the victim.¹ In light of the curative instruction and the additional evidence identifying defendant, the trial court’s statement did not prejudice defendant or deprive him of a fair trial. See *Schaw*, 288 Mich App at 236. Accordingly, the trial court did not abuse its discretion by denying defendant’s motion for a mistrial. See *id.*

III. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he was denied a fair trial because the prosecutor improperly disparaged defense counsel and suggested that defendant was intentionally trying to mislead the jury. Defendant also contends that defense counsel was ineffective for failing to object to the prosecutor’s statements. We disagree.

The alleged misconduct occurred during the prosecutor’s rebuttal closing statement. The prosecutor stated:

Now, let’s talk about cousin Terrence. Terrence, Defense says, “Terrence Collins leaves after this killing. He runs because he thinks he’s a suspect.” Never mind [sic] that there is no evidence on the record of that. We’ll talk about that later. No evidence at all.

He flees to Chicago, because he thinks he may be arrested, or he may be a suspect. What sense does that make because -- that makes no sense because he’s the one who came back and got in touch with the police himself.

Don’t be deceived. Look at the evidence that came from the stand. Not the possibility -- Mr. Harris talks about what’s possible. And isn’t this possible? Anything’s possible.

You remember when I asked you the question about the pie, or little pie scenario? Who ate it? It was possible anybody could have ate [sic] the pie. Aliens could have came [sic] down and entered the window and ate the blueberry pie.

The neighbors could have came [sic] in and ate the blueberry pie. They could have -- friends, countrymen, anybody. But it’s not reasonable.

Anything is possible. But you can’t just throw something against the wall, and hope it sticks. You’ve got to have evidence on the stand. And we have none implicating Terrence Collins in anything.

¹ According to Henderson, defendant did not say the victim’s name.

That's a smoke screen. Hoping you don't see the truth behind that smoke screen. Because the truth behind that smoke screen, is this man, here, shooting Brad Stewart.

“In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error.” *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object to the prosecutor's comments. Therefore, defendant's claim of prosecutorial misconduct is unpreserved. “Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights.” *Id.* “Defendant must show that the error affected the outcome of the lower court proceedings, and reversal is only warranted if the defendant is actually innocent or if the error seriously affected the fairness, integrity, or public reputation of the proceedings.” *Roscoe*, __ Mich App at __ (slip op at 2).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context.” *Id.* at 382-383 (citations omitted). “[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.” *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001) (citation and internal quotation marks omitted). “A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury.” *Id.* at 592.

The prosecutor may not question defense counsel's veracity. When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality. [*People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (citation and internal quotation omitted).]

Even assuming the prosecutor's comments telling the jury not to be “deceived” and stating that defense counsel hoped the jury did not see “the truth behind that smoke screen” suggested defense counsel was lying or intentionally deceiving the jury, “an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.” *Watson*, 245 Mich App at 593 (citation and internal quotation marks omitted). In this case, the statements were made during rebuttal and the prosecutor was clearly responding to defense counsel's argument that it was possible that Terrence Collins was involved in the murder.

Moreover, the trial court instructed the jury that “[t]he lawyers' statements and arguments, and any commentary are not evidence,” and “[y]ou should only accept the things lawyers say that are supported by the evidence, or by your own common sense and general knowledge.” See *Unger*, 278 Mich App at 238. “Further, because a timely objection and curative instruction could have alleviated any prejudicial effect the improper prosecutorial comments may have had, [there was] no error requiring reversal.” *Id.*

Defendant also argues that defense counsel was ineffective by failing to object to the prosecutor's comments. Because no *Ginther*² hearing was held, our review of defendant's claim of ineffective assistance of counsel is "limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To prove defendant received ineffective assistance of counsel, he must show: (1) that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and (2) that there is a reasonable probability the outcome of the trial would have been different but for counsel's performance. There is a presumption of effective assistance of counsel and the burden is on defendant to prove otherwise. An appellate court should neither substitute [its] judgment for that of counsel on matters of trial strategy, nor . . . use the benefit of hindsight when assessing counsel's competence. [*Roscoe*, ___ Mich App at ___ (slip op at 4) (citations and internal quotation marks omitted).]

Defense counsel did not object to the prosecutor's statements. "It is well settled that counsel is not ineffective for failing to advocate a meritless position or make a futile objection." *People v Brantley*, 296 Mich App 546, 559 n 1; 823 NW2d 290 (2012). Given that the prosecutor's statements were made in response to defense counsel's arguments, an objection would have been futile.

Moreover, defense counsel's decision not to object during closing arguments is consistent with a reasonable trial strategy. *Unger*, 278 Mich App at 242 ("declining to raise objections, especially during closing arguments, can often be consistent with sound trial strategy."). We do not second guess defense counsel's chosen strategy during trial on appeal. *Id.* at 242-243. Thus, we conclude that defendant has failed to overcome the presumption that defense counsel's performance was the product of reasonable trial strategy. *Id.* at 243.

Finally, defendant cannot demonstrate prejudice in this case because the trial court's instructions to the jury cured any error. Thus, there is no reasonable probability that the outcome of the trial would have been different but for counsel's performance. See *Roscoe*, ___ Mich App at ___ (slip op at 4).

IV. SUFFICIENCY OF THE EVIDENCE

Defendant contends that there was insufficient evidence to support his conviction of first-degree premeditated murder.

"We review de novo a defendant's challenge to the sufficiency of the evidence." *People v Kosik*, 303 Mich App 146, 150; 841 NW2d 906 (2013).

In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. However, we do not interfere with the factfinder's role of determining the weight of the evidence and the credibility of witnesses. It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be afforded to the inferences. The prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide. Circumstantial evidence and the reasonable inferences that arise from that evidence can constitute satisfactory proof of the elements of the crime. We resolve all conflicts in the evidence in favor of the prosecution. [*Id.* at 150-151 (quotations and citations omitted).]

“The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation.” *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). “It is well settled that the intent to kill may be inferred from any facts in evidence. Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient to establish a defendant's intent to kill.” *Unger*, 278 Mich App at 223 (citations omitted).

The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. Some time span between the initial homicidal intent and the ultimate killing is necessary to establish premeditation and deliberation. However, the time required need only be long enough to allow the defendant to take a second look. Circumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation. [*Id.* at 229 (citations and internal quotation marks omitted).]

Defendant first argues that there was insufficient evidence that he shot and killed the victim. We conclude that there was sufficient evidence to prove that defendant was the person who shot and killed the victim. The medical examiner testified that the manner of death was homicide and the victim had four gunshot wounds. See *id.* at 223 (noting manner of death was homicide). There was evidence, in the form of eyewitness testimony from Truitt, that after gunshots were heard, defendant ran from 19662 Coventry, which is where the victim's body was found. Although Truitt did not identify defendant in the line-up, he identified him at trial. There was also evidence that, before the crime, defendant told Terrence that “Lo wanted him to kill Brad.” Further the evidence showed that, after the crime, defendant told Terrence that he killed the victim. Henderson also heard defendant tell defendant's brother, Antonio Collins, that he killed a drug dealer. The description of the crime by Terrence and Henderson were similar to one another and consistent with the medical examiner's testimony that the victim was not shot in the back. Finally, defendant's letters and the recording of the conversation were evidence of defendant's consciousness of guilt. “A jury may infer consciousness of guilt from evidence of lying or deception.” *Id.* at 227.

Defendant specifically argues that the victim's telephone records showed that the victim was alive after defendant left the scene. However, the fact that there was a call does not mean that the victim was alive at that time. The call may have been incoming or someone else may have had possession of the victim's phone. The victim's wife, Anitra Stewart, testified that the victim's phone was not in the truck the victim had been driving when she arrived. Defendant also argues that there were several people with motive to kill the victim. However, "[t]he prosecution need not negate every reasonable theory of innocence, but must only prove its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *Kosik*, 303 Mich App at 151 (citation and internal quotation marks omitted). Defendant further argues that his mere presence did not lead to proof beyond a reasonable doubt. However, there was evidence beyond defendant's mere presence in the area when the shooting occurred, as discussed above. Finally, defendant argues that there was no weapon found. Although no weapon was found, shots were heard and defendant was seen running from the house where the victim was found. In addition, shell casings were found, a suspected bullet was found under the victim, and the victim had four gunshot wounds. "[M]inimal circumstantial evidence is sufficient to establish a defendant's intent to kill." *Unger*, 278 Mich App at 223 (citations omitted). Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant was the individual who shot and killed the victim. See *Kosik*, 303 Mich App at 150.

Defendant also argues that there was no evidence of premeditation and deliberation. However, the evidence showed that the victim was shot four times on the front of his body. "The nature and number of a victim's wounds may support a finding of premeditation and deliberation." *Unger*, 278 Mich App at 231.

Further, Terrence also testified that defendant told him that "Lo wanted him to kill Brad." The fact that defendant talked to Terrence about killing the victim before the murder occurred suggested that he had time for premeditation and deliberation. Moreover, according to Henderson, as defendant was preparing to shoot the victim, he could not get the gun to cock. Thus, the time period from when defendant had trouble with gun to when the victim was killed, was "long enough to allow the defendant to take a second look." *Id.* at 229. Thus, we conclude that the circumstances of the killing and defendant's actions are sufficient to establish premeditation and deliberation. See *id.*

On appeal, defendant argues that Henderson and Terrence had serious credibility issues, as Henderson expressed bias against defendant and Terrence was a drug user and gave inconsistent and incredible testimony. However, "questions concerning the credibility of [witnesses] and the weight to be accorded to their testimony were solely for the jury to determine." *Id.* at 228.

The jury is free to believe or disbelieve, in whole or in part, any of the evidence presented at trial. This Court does not weigh the competing evidence; that is the jury's function. We afford deference to the jury's special opportunity to weigh the evidence and assess the credibility of the witnesses. [*Id.* at 228-229 (citations and internal quotation marks omitted).]

Therefore, we conclude that viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that defendant acted with premeditation and deliberation. See *Kosik*, 303 Mich App at 150.

V. ADMISSION BY PARTY-OPPONENT

Finally, defendant contends that the trial court erred by admitting the recorded conversation between defendant's former attorney, David Dunn, and Henderson under MRE 801(d)(2)(D). Henderson met with Dunn two times after defendant wrote her a letter encouraging her to speak with his attorney. The second time Henderson met with Dunn she wore a wire that police hooked up to record the conversation. On the recording, Dunn encourages Henderson to change her testimony. The recording was played for the jury over defendant's objection after Dunn exercised his Fifth Amendment right to remain silent and the trial court declared him unavailable.

"We review preserved evidentiary issues for an abuse of discretion. An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011) (citations omitted).

MRE 801(d)(2)(D) provides that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

We conclude that the trial court did not abuse its discretion by admitting the recording pursuant to MRE 801(d)(2)(D). The recording was offered against defendant. Dunn was defendant's attorney when the conversation took place and, thus, the statements were made by defendant's agent or servant during the existence of the attorney-client relationship. Dunn's statements were made during a meeting with a witness, Henderson, regarding her testimony at defendant's trial. Accordingly, the statements concerned a matter within the scope of the employment. Defendant argues that Dunn was committing a felony and, accordingly, his statements were not within the scope of the agency or employment. However, there was evidence that defendant was participating in the commission of the felony. In his letter to Henderson, defendant told Henderson to lie and instructed her to see his lawyer, who would coach her. Thus, we cannot conclude that the trial court's decision was outside the range of reasonable and principled outcomes.³ See *Mahone*, 294 Mich App at 212. Also, contrary to defendant's assertion that the recording was not relevant, the recording, which involved lying and deception, was relevant to showing consciousness of guilt. See *Unger*, 278 Mich App at 227.

³ Moreover, the trial court also found the recording admissible under MRE 801(d)(2)(C) and MRE 804(b)(3). Defendant does not challenge these rulings. Accordingly, even if not admissible under MRE 801(d)(2)(D), the recording was admitted under other rules.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher