

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JAMIE LEE PETERSON,

Defendant-Appellant.

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UNPUBLISHED

October 5, 2001

No. 216575

Kalkaska Circuit Court

LC No. 97-001707-FC

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), two counts of first-degree felony murder, MCL 750.316(1)(b), two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b, and one count of larceny in a building, MCL 750.360. He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of life imprisonment without parole for each of the murder convictions, life imprisonment for each of the CSC convictions, and thirty-two to forty-eight months' imprisonment for the larceny in a building conviction. Defendant appeals as of right. We remand for the ministerial task of modifying the judgment of conviction and sentence to indicate that defendant was convicted of one count of first-degree murder supported by two theories: premeditated murder and felony murder. *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998). In all other respects, we affirm defendant's convictions and sentences.

First, defendant argues that the evidence was insufficient to support his convictions because the DNA evidence found in the victim's vagina did not match defendant's DNA and there was no objective evidence either linking him to the crimes or showing that more than one perpetrator was involved. The test for determining the sufficiency of the evidence in a criminal case is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). As the Supreme Court explained in *Nowack*:

The standard of review is deferential; a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. "Circumstantial evidence and reasonable inferences arising from

that evidence can constitute satisfactory proof of the elements of a crime.”  
*People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

We once again caution reviewing courts that the prosecutor need not negate every reasonable theory consistent with innocence. *People v Konrad*, 449 Mich 263, 273, n 6; 536 NW2d 517 (1995). Instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. It is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the jury ‘in the face of whatever contradictory evidence the defendant may provide.’ [*Id.*]

To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a “second look.” These elements may be inferred from the circumstances surrounding the killing. *People v Graves*, 224 Mich App 676, 678; 569 NW2d 911 (1997), rev’d on other grounds 458 Mich 476 (1998). Premeditation and deliberation may be established by 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. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

Defendant confessed to beating and raping the victim, forcing her into the trunk of her car, shutting the trunk, and then starting the car and leaving it running with the garage door closed. These all involve intentional acts and demonstrate premeditation and deliberation. Indeed, defendant admitted he knew that a person left under these circumstances would die of gas poisoning. Defendant further admitted that, after putting the victim in the trunk of her car and starting the motor, he then went into the house and purposely “messed it up” so it would look like a robbery. He also took time to wipe the prints off the car. Viewing the evidence in the light most favorable to the prosecution, a reasonable jury could find defendant guilty of first-degree murder beyond a reasonable doubt.

The elements of larceny in a building are: (1) the actual or constructive taking of goods or property, (2) a carrying away or asportation, (3) the carrying away must be with a felonious intent, (4) the goods or property must be the personal property of another, (5) the taking must be without the consent and against the will of the owner, and (6) the taking must occur within the confines of the building. MCL 750.360; *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1988). Defendant admitted that he took thirty dollars from the victim’s wallet after he beat and raped her. He also admitted taking a candle from the house. Viewed in a light most favorable to the people, a reasonable jury could find that defendant was guilty of larceny from a building.

The elements of first-degree felony murder are: (1) the killing of a human being; (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result; (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316. Robbery and criminal sexual conduct are felonies

specifically enumerated in the statute. *People v Warren*, 228 Mich App 336, 346-347; 578 NW2d 692 (1998), modified on other grounds 462 Mich 415 (2000).

The evidence was sufficient to support convictions for felony murder and first-degree criminal sexual conduct. Defendant admitted that he raped the victim and then stole money from her after he locked her in the trunk and started the motor running. Again, viewing the evidence in the light most favorable to the prosecution, a reasonable jury could find that defendant was guilty of felony murder and first-degree criminal sexual conduct.

Although there was no scientific evidence directly connecting defendant to the crime, defendant gave several confessions admitting every element of the crimes charged. The validity and accuracy of these confessions was hotly debated below. It is not this Court's function to interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Nowack, supra*.

Defendant also argues that the verdict was against the great weight of the evidence. We review for an abuse of discretion a trial court's determination that a verdict was not against the great weight of the evidence. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

"A new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). "In general, conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial." *Id.* at 643. Rather, it is the province of the jury to determine questions of fact and assess the credibility of witnesses. *Id.* at 637, 642. Moreover, a judge may not repudiate a jury verdict on the ground that "he disbelieves the testimony of witnesses for the prevailing party." *Id.* at 636.

Here, defendant confessed to the crimes and told the police that an accomplice was involved. The prosecutor based much of its case on the theory that the DNA evidence was consistent with the theory of an accomplice. The victim's neighbor testified he saw someone who did not fit defendant's description in the victim's house at the time of the crimes, which, considered in conjunction with defendant's confessions, would support a two perpetrator theory. There was also evidence, based on several different theories, that defendant could have committed a sexual assault and not left identifiable semen. Defendant's confessions contained particularized knowledge of the case. He stated the police would not find his fingerprints, and that all the prints had been wiped clean. There is no indication that defendant was told ahead of time about the knife drawer, the thirty dollars that were taken, or the wound left by the victim's watch. It was the jury's province to determine whether the confessions were the result of the combination of defendant's psychological make-up and his adopting and incorporating information suggested to him by the police, or whether defendant was "playing games" with the police and actually was the perpetrator.

We conclude that the evidence does not preponderate heavily against the verdict. Defendant has failed to demonstrate that a serious miscarriage of justice would otherwise result if his convictions are allowed to stand. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Next, defendant argues that the prosecutor's remarks during closing argument denied him a fair trial. Ordinarily, we review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, because defendant did not object to the challenged remarks at trial, our review is limited to plain error (i.e., clear or obvious error) affecting defendant's substantial rights (i.e., outcome determinative). *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant argues that the prosecutor's remarks attacking the honesty and integrity of his expert witness were impermissible. We disagree. Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *Bahoda*, *supra* at 282. A prosecutor may not argue facts not supported by the evidence, but is free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Moreover, prosecutors may use "hard language" when it is supported by the evidence; they are not required to phrase their arguments in the blandest of all possible terms. *Bahoda*, *supra*; *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Emotional language may be used during closing arguments and is "an important weapon in counsel's forensic arsenal." *Id.* at 679. A prosecutor is also permitted to comment on the testimony and argue that a witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

Here, the prosecutor argued that defendant's expert was not credible because he relied on outdated testing and did not even know the tests were outdated. He also argued that defendant's expert was a "hired gun," who testified for money, labeling him a "traveling con man." These remarks, while harsh, constituted fair commentary of the evidence and inferences drawn therefrom. Defendant has failed to demonstrate that the remarks went beyond permissible bounds. Thus, plain error has not been shown.

Similarly, we find that the prosecutor did not improperly vouch for the credibility of the investigating police officers. A prosecutor may not vouch for the credibility of a witness or suggest that the government has some special knowledge that the witness is testifying truthfully. *Bahoda*, *supra* at 276. However, the mere statement of a prosecutor's belief in the honesty of a witness' testimony is not error requiring reversal where, as a whole, the remarks were fair.

Here, the challenged remarks by the prosecutor do not constitute impermissible vouching for credibility. The prosecutor did not suggest that he had some special knowledge that the police officers were testifying truthfully. Rather, the prosecutor commented on the officers' years of experience in investigating crimes and questioning suspects. Moreover, the remarks were made in response to defense counsel's arguments inferring that the police "inadvertently" gave defendant all the information that the perpetrator would know, thereby discrediting

defendant's confessions. The prosecutor stated that the police officers were not amateurs and knew what they were doing. Considered in context, defendant has not established plain error with respect to the prosecutor's remarks.

Next, defendant claims that the trial court erred as a matter of law and abused its discretion when it permitted the prosecutor's expert witness to testify on rebuttal about statements that defendant made to him. We disagree. A trial court's decision regarding the admission of rebuttal testimony is reviewed for an abuse of discretion. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996); *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997).

Rebuttal evidence is admissible to contradict, repel, explain, or disprove evidence produced by the other party and tending directly to weaken or impeach the same. *Figgures, supra*. The question whether rebuttal is proper depends on what proofs the defendant introduced and not merely what the defendant testified about on cross-examination. *Id.* The prosecution cannot introduce evidence on rebuttal unless it relates to a substantive rather than a collateral matter. *People v Losey*, 413 Mich 346, 351-353; 320 NW2d 49 (1982).

First, we agree that the trial court properly determined that the prosecutor could introduce defendant's statements to Dr. Shazer under MRE 801(d)(2)(A). Similarly, defendant's statements to his own expert, Dr. Abramsky, were not admissible under this rule because they would not be "offered against" defendant.

Second, we find no support for defendant's claim that the trial court gave the prosecutor *carte blanche* authority to present evidence on rebuttal. The record shows that the court did not permit the prosecutor's expert to testify about anything that defendant's expert had been proscribed from testifying about. We further find that the prosecutor's expert did not exceed the bounds of proper rebuttal testimony under *Figgures*. No new issues or evidence were injected into the case by his testimony, which was "properly responsive" to the evidence introduced and the theory developed by defendant's expert.

Next, defendant claims that the trial court abused its discretion by denying his motion for a change of venue, and by denying his posttrial motion for a new trial based on an unfair jury. A motion for change of venue is addressed to the discretion of the trial court. *People v Jendrzewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). The trial court's decision will not be disturbed on appeal unless there clearly appears a palpable abuse of discretion. *Id.*

Defense counsel moved for a change of venue prior to the selection of the jury. The court held the motion in abeyance to determine whether a fair jury could be selected. At the close of voir dire, defense counsel, without having exhausted all his peremptory challenges, stated on the record that he was satisfied with the jury.

To establish that he was entitled to a change of venue, it was incumbent upon defendant to show there either was a pattern of strong community feeling against and that the publicity was so extensive and inflammatory that jurors could not remain impartial when exposed to it, or that the jury was actually prejudiced or the atmosphere surrounding the trial created a probability of prejudice. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992), overruled in part on

other grounds, *People v Bigelow*, 229 Mich App 218, 221; 581 NW2d 744 (1998). The mere fact that this trial occurred in a sparsely populated community is not sufficient to support a change of venue. Where the trial court is familiar with the community and is able to determine that it had a fair and unbiased jury panel, the court does not abuse its discretion when it denies a change of venue. *Jendrzewski, supra* at 520.

Here, defendant has failed to demonstrate a pattern of strong community feeling against him or that the publicity was so extensive and inflammatory that it would be impossible to obtain an impartial jury. Nor has defendant shown that the jury was actually prejudiced or that there was a probability of prejudice. *Passeno, supra*. The jury pool was not so small that an unbiased jury could not be picked. Also, the record indicates that prospective jurors were questioned extensively about their biases and prejudices, and that the court gave the attorneys great leeway in questioning the jurors. Although there was some pretrial publicity, it was not sufficient to require a change of venue. The jurors stated under oath that they could be impartial. Further, defense counsel stated he was satisfied with the jury. Defendant has not demonstrated that a change of venue was warranted.

Also, defendant's affidavits from jurors detailing instances of intimidation by other jurors and other misconduct do not entitle defendant to a new trial. Jurors may not impeach their verdict by affidavits. Defendant has not submitted any evidence of "extraneous or outside errors." *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997); *Mandjiak v Meijer's Super Markets*, 364 Mich 456, 460; 110 NW2d 802 (1961); *People v Van Camp*, 356 Mich 593, 601; 97 NW2d 726 (1959). Accordingly, defendant has not demonstrated that the trial court abused its discretion in denying his posttrial motion for a new trial based on a biased jury.

Finally, the trial court did not err when it refused to allow a witness to be impeached by statements made by that witness' attorney at the witness' sentencing proceeding. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). This case is distinguishable from *People v Snyder*, 462 Mich 38, 44; 609 NW2d 831 (2000), upon which defendant relies. In *Snyder*, the impeachment evidence involved the complainant's own statements. Here, defendant was attempting to use statements made by the witness' attorney to impeach the witness. Furthermore, defendant wanted to use the evidence to show that the witness, contrary to his trial testimony, expected to receive a more lenient sentence because he had "turned in" defendant. However, the transcript of the witness' sentencing proceedings shows that even the witness' attorney acknowledged that the witness did not expect compensation for telling the police about defendant's inculpatory statements. Accordingly, we find that the trial court did not abuse its discretion by excluding the evidence.

Remanded for the ministerial task of modifying defendant's judgment of conviction and sentence. *Bigelow, supra*. In all other respects we affirm defendant's convictions and sentences. We do not retain jurisdiction.

/s/ Richard Allen Griffin  
/s/ Hilda R. Gage  
/s/ Patrick M. Meter