

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS RALPH JACKSON,

Defendant-Appellant.

UNPUBLISHED

October 11, 2005

No. 254768

Oakland Circuit Court

LC No. 2003-193005-FC

Before: Fitzgerald, P.J., and Cooper and Kelly, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree felony murder, MCL 750.316(b), first-degree premeditated murder, MCL 750.316(a), armed robbery, MCL 750.529, unarmed robbery, MCL 750.530, assault with intent to commit murder, MCL 750.83, and five counts of felony-firearm, MCL 750.227b. The trial court sentenced defendant to concurrent terms of life in prison without parole for the felony murder conviction, life in prison without parole for the premeditated murder conviction, fifteen to fifty years in prison for the armed robbery conviction, fifty-seven months to fifty years in prison for the unarmed robbery conviction, and fifteen to fifty years in prison for the assault with intent to commit murder conviction. The trial court also sentenced defendant to two consecutive years in prison for each of the felony-firearm convictions. We affirm in part, vacate in part, and remand for correction of defendant's judgment of sentence.

Defendant first argues that the trial court abused its discretion when it granted plaintiff's motion to introduce other acts, MRE 404(b) evidence concerning the events that led up to his being fired by the Troy Holiday Inn, the site of the alleged crimes. We disagree. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such crimes,

wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Sabin (On Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).

The prosecutor sought to introduce evidence that, six months before the charged crimes occurred, defendant assaulted a fellow employee and was consequently fired by the hotel. Plaintiff sought to introduce this evidence, in part, to show motive. This is a purpose listed in MRE 404(b) as proper. Accordingly, plaintiff offered this evidence for a proper purpose.

The evidence is also relevant. It provides a potential motive, namely for defendant to get revenge for the hotel's termination of his employment, and possibly to get revenge against a specific former employee. In a prosecution for murder proof of motive is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

Furthermore, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. "Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury." *Id.* at 441. This evidence showed that defendant had a reason to want revenge against the hotel, knew that only one staff member would be working the midnight shift, and knew that the particular staff member responsible for his termination generally worked the midnight shift. Moreover, the challenged testimony was the only testimony the prosecution introduced showing that defendant knew that the person responsible for his termination worked the midnight shift and that he knew that only one person worked the midnight shift. Accordingly, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. Therefore, we conclude that the trial court did not abuse its discretion in admitting this evidence.

Defendant next argues that the prosecutor violated his due process right to a fair trial by making improper closing and rebuttal arguments. We disagree.

Generally, preserved claims of prosecutorial misconduct are reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Defendant preserved this issue for appellate review as to the second challenged statement, but failed to preserve this issue for appellate review as to the first challenged statement.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Prosecutors are generally accorded great latitude regarding their arguments and conduct. *People v Bass (On Remand)*, 223 Mich App 241, 251; 581 NW2d 1 (1997).

Defendant asserts that the prosecutor improperly argued that the jury need not worry about whether it was making the right decision in finding defendant guilty because defendant could appeal the verdict. Such an argument, were the prosecution to have made it, would have been improper. *People v Staggs*, 85 Mich App 304, 312; 271 NW2d 211 (1978). However, viewing this statement in context we conclude that it was not improper. The prosecutor was merely pointing out differences between the treatment the victim received and the treatment defendant received. The prosecutor's statement that the victim did not get a chance to appeal, viewed in this context, was merely a continuation of his argument that defendant was the victim's judge, jury, and executioner. Such an argument was not improper, particularly because a prosecutor "may use emotional language during closing argument." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Defendant also argues that the prosecutor improperly shifted of the burden of proof to him. While it is improper for the prosecutor to make "burden shifting arguments," it is not improper for the prosecutor to comment on the weakness of a defendant's theory or observe that the evidence against the defendant is "uncontroverted" or "undisputed" even if defendant is the only one who could have contradicted the evidence or has failed to call witnesses in support of his theory. *People v Fields*, 450 Mich 94, 114-115; 538 NW2d 356 (1995). Viewing the prosecutor's statement in context, it appears that the prosecution was suggesting that if one of the co-defendant's committed the murder, as defendant theorized, there would have been some evidence to support that theory. The prosecutor's commentary on the weakness of defendant's theory did not rise to the level of improperly shifting the burden of proof.

Finally, defendant argues that the trial court violated his right to be free from double jeopardy when it convicted him of, and sentenced him for, both first-degree felony murder and armed robbery. We agree.

The double jeopardy provisions of the United States and Michigan Constitutions protect citizens from multiple prosecutions for the same offense. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). Our Supreme Court has held that it is a violation of double jeopardy protections to convict a defendant of both first-degree felony murder and the predicate felony because the evidence necessary to prove first-degree felony murder requires proof of the underlying lesser-included felony. *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). Our Supreme Court has further held that where one offense is a necessarily included lesser offense of the other, conviction of and sentence for both violates double jeopardy. *Id.* at 343-344. Larceny is a necessarily lesser-included offense of armed robbery. *People v Chamblis*, 395 Mich 408, 425; 236 NW2d 473 (1975), overruled in part on other grounds in *People v Cornell*, 466 Mich 335 (2002). Because defendant was convicted of both armed robbery and first-degree felony murder having the predicate offense of larceny, defendant's right to be free from double jeopardy was violated. The appropriate remedy is to affirm the conviction of the higher charge and vacate the conviction of the lower charge. *Herron, supra* at 609. Therefore, defendant's conviction of, and sentence for, armed robbery must be vacated.

We further note, although it was not raised on appeal, that defendant was convicted of both first-degree premeditated murder and first-degree felony murder for the death of Michelle Eberhard. This Court has held that "Where dual convictions of first-degree premeditated murder and first-degree felony murder arise out of the death of a single victim, the dual convictions violate double jeopardy." *People v Adams*, 245 Mich App 226, 241-242; 627 NW2d 623 (2001).

Accordingly, defendant's judgment of sentence should be corrected to indicate one first-degree murder conviction supported by the two theories of premeditation and felony murder and one sentence for first-degree murder. *Id.* at 242.

We vacate defendant's armed robbery conviction, affirm his other convictions, and remand this case to the trial court for entry of a corrected judgment of sentence. We do not retain jurisdiction.

/s/ E Thomas Fitzgerald

/s/ Jessica R. Cooper

/s/ Kirsten Frank Kelly