

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALBERT HAMBRICK,

Defendant-Appellant.

UNPUBLISHED

March 15, 2007

No. 266910

Wayne Circuit Court

LC No. 05-003808-01

Before: Cooper, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree murder, MCL 750.316(1)(a), felony murder (murder committed in the perpetration of an armed robbery), MCL 750.316(1)(b), and armed robbery, MCL 750.529. Defendant was sentenced to life in prison for the first-degree murder and felony murder convictions, and 18 years, 9 months to 47 years in prison for the armed robbery conviction. We affirm in part, vacate in part, and remand for correction of defendant's sentence.

Defendant first argues that a conviction and sentence for both felony murder and the underlying felony violate double jeopardy protections. In addition, multiple convictions and punishments for both first-degree premeditated murder and first-degree felony murder, relating to the death of a single individual, violate double jeopardy. We agree.

Double jeopardy is an issue of constitutional law, and therefore, it is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). The United States and Michigan Constitutions both contain clauses that prohibit putting a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *Herron*, supra, p 599. The double jeopardy clause protects a defendant from both multiple prosecutions and multiple punishments for the same offense. *Herron*, supra, p 599. This case involves the prohibition of multiple punishments for the same crime.

The Supreme Court of Michigan has considered the double jeopardy implications of this precise situation where a defendant committed a felony that resulted in the death of a single victim. *People v Williams II*, 475 Mich 101, 103; 715 NW2d 24 (2006). If the defendant is convicted of first-degree premeditated murder, first-degree felony murder, and the underlying felony, the trial court may indicate one conviction and sentence supported by the two theories of premeditated murder and felony murder, but must vacate the conviction for the underlying

felony.¹ *Id.* See also *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). In the event that the felony murder conviction is reversed on grounds that only affect the felony murder, this Court may direct the entry of a judgment of conviction of armed robbery. *Williams II*, *supra*, pp 104-105.

The trial court stated on the record that it accepted the recommendation of the prosecutor that defendant receive one conviction and sentence for first-degree murder supported by two alternate theories. However, the judgment of sentence indicates two first-degree murder convictions and two sentences; on remand, it must be corrected to reflect the actual sentence. In addition, pursuant to *Williams II*, defendant's conviction and sentence for armed robbery are vacated. The final judgment of sentence should indicate one conviction and one sentence for first-degree murder supported by two separate theories. *Id.*, p 103.

Defendant's next argument is that the prosecutor made several comments during the opening statement and closing argument that were designed to improperly sway the jury emotionally, through inflammatory argument and appeals to civic duty. Defendant also claims that the prosecutor also denigrated defense counsel, attacked defendant's character, and injected into the proceedings material not relevant to the jury's duty. We disagree. Defendant failed to preserve this issue at trial because he did not object to the prosecutorial remarks, thereby depriving the trial court the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "Generally, a claim of prosecutorial misconduct is a constitutional issue reviewed de novo." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, unpreserved claims of constitutional error are reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In general, "[p]rosecutors are accorded great latitude regarding their arguments and conduct" and are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). Claims of prosecutorial misconduct are reviewed on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court examines the record and evaluates the remarks in context, taking into consideration defendant's arguments. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may fairly respond to an issue raised by the defendant. *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995).

Defendant claims that the prosecutor made several improper remarks during the opening statement and closing argument. Defendant argues that the prosecutor's statement that "there is a murderer in our midst" was improper, and that the prosecutor improperly called defendant a liar, stating that "[h]is life is a lie." Defendant also complains of the prosecutor's statement that

¹ The prosecution properly points out that the Supreme Court has already granted leave to consider whether convictions of felony murder and the underlying felony of armed robbery violate double jeopardy in another case when it decided *Williams II*. *People v Smith*, 475 Mich 864; 714 NW2d 310 (2006). However, the Court declined to hold *Williams II* in abeyance pending the decision in *Smith*. *Williams II*, *supra*, pp 105-106. Therefore, this Court must follow the precedent set in *Williams II*.

defense counsel “played fast and loose with the facts,” and the question he posed to the jury, “[w]hose [sic] trying to snow who?” Defendant argues that the prosecutor’s appeals to the jury that “the People didn’t want Mr. Cooper to be murdered” and to “give to Mr. Hambrick what he gave to Mr. Cooper” were improper. Finally, defendant argues that it was improper for the prosecutor to argue that defendant and Ashley Austin, defendant’s girlfriend and the victim’s roommate, were actively communicating with each other from February throughout the trial.

The prosecutor’s theory of the case was that defendant killed Nathan S. Cooper before leaving the house on February 1, 2005, contrary to defendant’s contention that Cooper was alive but ready to pass out when he left. The prosecutor’s reference to defendant as a murderer is a reasonable inference from the evidence presented as it relates to the prosecutor’s theory, taking into consideration defendant’s arguments. *Bahoda, supra*, p 282; *Thomas, supra*, p 454. The evidence showed that Cooper was not standing by the door as he customarily did when Bridget O’Neill, the mother of Cooper’s children, picked up defendant and his girlfriend, Ashley Austin, the night in question. Bridget never heard from Austin or defendant the next afternoon when they said they would call her for another ride. On her way home, Bridget could see the back of Cooper’s house and noticed the light was on in the upstairs bathroom, which was not normal.

The estimated time of death was one to two days prior to when Cooper’s body was found, placing it possibly during the time between when Bridget last spoke to Cooper and when defendant left the house. There was no sign of forced entry into the home. There was blood on the door casing that led into the first-floor bathroom. A chrome barbell was in one of the bathroom sinks, and there was what appeared to be blood that was washed off the barbell in the sink and in the basin. A smudge of blood was found on the wall in the upstairs bathroom, along with some very small bloodstains on the top of the toilet and the blinds, and diluted blood in the sink. Footprints that matched defendant’s shoes were found in both bathrooms, and footprints that matched Cooper’s shoes were found in the first floor bathroom. Cooper had just cashed his pension check and always kept his money in his right front pocket, but there was no money found on or near Cooper’s body.

The police arrested Austin and defendant in the room of their third hotel in only a few days, and defendant stated, “I knew it was just a matter of time until you caught up with me.” As the police arrested Austin, defendant requested to “get it in writing that she had nothing to do with it.” A pair of defendant’s pants found in the bathtub of the hotel room soaking in bleach water tested presumptively positive for bloodstains in ten areas, and a shirt tested positively in five areas. A pair of shoes had six areas that tested presumptively positive for bloodstains. The areas that tested presumptively positive could not be confirmed but were “most likely” blood. The bleach could have degraded the blood and impacted the testing.

Finally, defendant wrote out a statement that he had argued with Cooper and tried to choke him with an extension cord. When that did not work, defendant took a dumbbell that was on the floor and hit Cooper on the head two or three times. Then he took the money that was in Cooper’s pocket and his wallet from the headboard, pulled the blanket off the bed and put it over Cooper. Austin did not know what defendant did to Cooper. Based on all this evidence, the inference that defendant murdered Cooper was more than reasonable.

The prosecutor’s repeated references to defendant as a liar are more questionable, because in this case they border on injecting personal opinion into the argument. We would

caution prosecutors to carefully consider their wording when calling the veracity of a defendant's testimony into question. However, given the facts here, particularly that defendant's testimony about the events of the night of Cooper's murder differed from the testimony of Austin as to those same events, the prosecutor's statements were reasonable because a prosecutor may argue that a witness is or is not worthy of belief based on the facts. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). "[T]he prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant's guilt or innocence turns on which witness is believed." *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). In addition, defendant admitted to previous felony convictions involving theft and dishonesty, in which he had also confessed his guilt.

The prosecutor's comments regarding defense counsel were in response to defense counsel's closing argument, in which he claimed that the answer to the homicide was under the fingernails of Cooper, who scratched his attacker. This Court examines the record and evaluates the remarks in context, taking into consideration defendant's arguments. *Thomas, supra*, p 454. Defense counsel's argument was directly contradicted by the evidence that there were no defensive wounds, and that there was only one person's blood under Cooper's fingernails, most likely his.

The next statements at issue are, "the People didn't want Mr. Cooper to be murdered" and "give to Mr. Hambrick what he gave to Mr. Cooper." The first statement was made during the prosecutor's explanation in the opening statement to the jury that the trial could be lengthy, and there would be numerous witnesses, but the prosecutor had no choice regarding the witnesses. The second comment seems to be asking the jury to give defendant the conviction he deserves because it was made in the context of asking for a first-degree murder conviction. Viewing these comments in context, it would be unreasonable to conclude that they affected defendant's right to a fair and impartial trial. *Watson, supra*, p 586.

Defendant next contends that it was improper for the prosecutor to argue that defendant and Austin were actively communicating with each other from February throughout the trial. Defendant correctly asserts that there is no evidence on the record to support this contention. However, this comment was reasonable when taken in context. The prosecutor commented on an inconsistency between Austin's testimony and that of defendant, suggesting that they planned their testimony. To support this argument, the prosecutor commented on an incident that happened in the courtroom, where the jury could observe, in which defendant wrote "love" on his knuckles and showed it to Austin while she was on the stand. Based on defendant's conduct, it was reasonable to infer that defendant had been trying to influence Austin's testimony.

Finally, the court instructed the jury regarding what was included in the evidence, that the jury alone was the finder of facts, including determining the credibility of the witnesses, and that it must not let sympathy or prejudice influence its decision. Therefore, any possible error was dispelled by the court's instruction and would not have affected the outcome of the trial. *Bahoda, supra*, p 281. Defendant was not deprived of a fair trial by the prosecutor's remarks during the opening statement and closing argument.

Defendant's final argument is that the trial court erred in providing the jury with instructions regarding flight, destruction of evidence, and a false exculpatory statement. We

disagree. Defendant objected to the jury instructions regarding the destruction of evidence and the false exculpatory instruction, thus preserving the issue for review. Issues of law arising from jury instructions are reviewed de novo, but determination whether an instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

Defendant waived this claim regarding the modified flight instruction. “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Carines, supra*, p 763, quoting *Olano, supra*, p 733. Defendant never objected to the flight instruction. Before giving the jury instructions, the trial judge asked the parties if they were “satisfied with the exception of the objections that were voiced earlier as to the composition of the instructions,” and defense counsel replied that he had nothing new. This affirmation constitutes a waiver on the part of defendant regarding jury instructions, and therefore, precludes appellate review.

Jury instructions are reviewed in their entirety to determine if error occurred requiring reversal. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Reversal is not required where the instructions “fairly presented the issues to be tried and sufficiently protected the defendant's rights.” *Id.* In viewing the instructions as a whole, this Court must balance the general meaning of the instructions “against the potential misleading effect of a single sentence isolated by a defendant.” *People v Freedland*, 178 Mich App 761, 766; 444 NW2d 250 (1989).

Even if defendant had not waived the issue regarding flight, there was no error in its instruction. The flight instruction defendant objects to is the following:

Now, in this case there has been some evidence that the Defendant ran away or tried to hide after the crime was committed. The evidence does not prove guilt. A person may run or hide for innocent reasons, such as panic, mistake or fear. However, a person may also run or hide because of a consciousness of guilt. You may consider, you may decide, you must decide whether the evidence is true, and if true, whether it shows that the Defendant had a guilty state of mind.

The evidence supports the conclusion that defendant ran away or tried to hide. As discussed *supra*, there was sufficient evidence to reasonably infer that defendant killed Cooper before leaving the house February 1, 2005. Defendant and Austin claimed to leave the house because they did not want to be around Bridget’s children when they were using drugs. However, neither offered an explanation for not calling Bridget the following day to get the rest of their things. In addition, there was testimony from defendant, Austin, the cab driver, and a police officer that defendant and Austin stayed in three different hotel rooms over the course of four days and registered using Bridget’s name. When the police arrested defendant in the hotel room, he stated, “I knew it was just a matter of time until you caught up with me.” As the police arrested Austin, defendant requested to “get it in writing that she had nothing to do with it.”

The second instruction defendant objects to is:

Here the prosecutor has introduced evidence of exculpatory statements which it claims were made by the Defendant to witnesses and which it claims were false. Such statements if made and if false may be considered by you as circumstantial

evidence of guilt. Before you may consider any such statement as evidence against the Defendant you must, No. 1 determine whether the statement was made by the Defendant. No. 2, determine whether the evidence has shown any of the statements to be false, and No. 3, if you determine that any of these statements were made and were false, you must determine whether that statement relates to the elements of the crime charged. Proof of a false exculpatory statement may then be used by you to determine the guilt or innocence of the Defendant to the charges contained in the information.

This instruction was made regarding defendant's statement that Cooper was alive and in the living room when he left. Defendant argues that there was no conclusive evidence that Cooper was dead at this time. However, the statement requires the jury to determine whether defendant's statement was false rather than directing the jury that the evidence is conclusive. There was sufficient evidence to reasonably infer that defendant killed Cooper before leaving the house February 1, 2005, so the trial court did not abuse its discretion in giving the jury this instruction.

Finally, defendant objects to the following instruction:

The prosecutor has also introduced evidence that the Defendant attempted to destroy evidence. Such an attempt, if made, may be considered by you as circumstantial evidence of guilt. Before you consider any attempt to destroy evidence as evidence against the Defendant, you must determine whether an attempt to destroy evidence was made by the Defendant.

If you determine that the Defendant – if you determine that an attempt to destroy evidence was made by the Defendant, then you may consider the attempt as circumstantial evidence of a consciousness of guilt on the part of the Defendant, and it may be used by you to determine that guilt or innocence of the Defendant of the charged offenses.

There was sufficient evidence that defendant tried to destroy evidence. A pair of defendant's pants found in the bathtub of the hotel room soaking in bleach water tested presumptively positive for bloodstains in ten areas, and a shirt tested positively in five areas. The areas that tested presumptively positive could not be confirmed but were "most likely" blood. The bleach could have degraded the blood and impacted the testing. For the same reason, the DNA testing was also inconclusive for these items. This jury instruction was warranted based on the evidence, especially considering one of defense counsel's arguments was the lack of DNA evidence linking defendant to the crime. Viewing the jury instructions as a whole, there was no error requiring reversal.

We affirm defendant's conviction and sentence for first-degree murder, supported by the two alternate theories of premeditated murder and felony murder, and vacate defendant's

conviction and sentence for armed robbery. We remand so that the judgment of sentence may be corrected accordingly. We affirm in all other respects. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter