

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUENTON JAUNELL DEBERRY,

Defendant-Appellant.

UNPUBLISHED

July 24, 2007

No. 267263

Saginaw Circuit Court

LC No. 05-025682-FC

Before: Murphy, P.J., and Talbot and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to 38 to 60 years' imprisonment for the murder conviction, 3 to 10 years' imprisonment for the felon-in-possession conviction, and 2 years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction of second-degree murder. Defendant's argument focuses mainly on the claim that the evidence supported, at most, a finding of voluntary manslaughter but not second-degree murder, where the evidence showed that he acted in the heat of passion caused by adequate provocation.

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007), our Supreme Court, citing *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), stated that "the elements of

second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death.”

With regard to the mitigating circumstances that distinguish murder from manslaughter, our Supreme Court stated in *People v Mendoza*, 468 Mich 527, 535; 664 NW2d 685 (2003), that “to show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control his passions.” Accordingly, to support the second-degree murder conviction, we examine whether there was sufficient evidence to show the contrary, which would be that defendant committed the killing without adequate provocation, without being in the heat of passion, or under circumstances in which there was a lapse of time during which a reasonable person could have controlled his passions.

There was testimony which indicated that defendant began the confrontation with the victim by calling him a derogatory name and thereafter running over to the victim and punching him. There was also testimony that after the altercation escalated, the victim attempted to leave the scene, but defendant jumped on the victim’s car and kicked out a window. Additionally, there was testimony that defendant asked and yelled for a gun numerous times while going back and forth from his vehicle to across the street repeatedly. This evidence would reasonably support a conclusion that the prosecution established beyond a reasonable doubt either (1) that defendant had not suffered adequate provocation with regard to killing the victim because defendant was actually the aggressor in the incident and/or (2) that the lapse of time related to defendant repeatedly asking for a gun and traversing back and forth from his vehicle to across the street was sufficient for a reasonable person to control his or her passions. Viewing the evidence in a light most favorable to the prosecution, as well as resolving all evidentiary conflicts in favor of the prosecution, we hold that there was sufficient evidence to support the conviction of second-degree murder.

Defendant next argues that the trial court improperly disparaged a witness, resulting in him being denied a fair trial. Defendant failed to preserve this issue; therefore, our review is for plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764. A criminal defendant is entitled to a fair trial. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). In that regard, a trial court is required to act impartially, and this Court has held that a defendant was denied a fair trial when the trial court’s questions and comments were clearly improper and negatively affected the defendant’s case. *People v Ross*, 181 Mich App 89, 91, 93; 449 NW2d 107 (1989); *People v Moore*, 161 Mich App 615, 616-619; 411 NW2d 797 (1987). We first note that the majority of the witness’s testimony essentially supported the prosecutor’s theory. Regardless, even if the jury viewed the witness as favorable to defendant, the trial court did not act improperly but merely told the witness that he had to answer verbally, which is entirely proper. Specifically, after the witness answered the prosecutor on eight occasions by either nodding or shaking his head, the trial court stated:

You have to answer. You -- we can’t -- I’m telling you this politely, we can’t hear your head rattle, so you got to make sure you answer verbally so she can get your response down. Thank you.

Contrary to defendant's assertion, the trial court was not indicating to the jury that the witness had "rocks in his head," but rather was informing the witness that a verbal response was necessary in light of his failure to provide one on numerous occasions. Accordingly, this argument fails because no error, let alone plain error, occurred.¹

Defendant next argues that there was insufficient evidence to show that the killing was premeditated; therefore, counsel was ineffective for failing to move for a directed verdict of acquittal on the first-degree murder charge and the court erred by instructing the jury on first-degree murder.

An ineffective assistance of counsel claim is a mixed question of fact and constitutional law that we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to jury instructions, they must include all the elements of the charged offense and must not exclude material issues, defenses, and theories that are supported by the evidence. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). However, a court must refuse to give a requested instruction if there is no evidence supporting it. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995).

¹ In his supplemental brief, defendant also argues that counsel was ineffective for failing to object to the court's statement. Because there was nothing improper regarding the court's statement, counsel was not ineffective for failing to raise an objection as it would have been futile. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

We conclude that trial counsel's performance was not deficient for failing to move for a directed verdict regarding first-degree murder, nor did the court err by instructing the jury on first-degree murder, as there was evidence supporting the charge. Moreover, the fact that the jury acquitted defendant of first-degree murder rendered harmless any claimed error associated with allowing the jury to consider the charge. *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998); *People v Johnson*, 427 Mich 98, 116 n 15; 398 NW2d 219 (1986).

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* at 370-371. Stated another way, some time span between the initial homicidal intent and ultimate action is necessary to establish the elements of premeditation and deliberation. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). The interval between the initial thought and ultimate action must be long enough to afford a reasonable person time to take a second look. *Id.*

Here, there was sufficient evidence introduced to show that the murder was premeditated. Specifically, there was testimony that defendant, as he was walking around the area, asked for his gun numerous times before receiving it while claiming in the interim that he was going to kill the victim. Ultimately, defendant retrieved his gun and started firing at the victim. Given this testimony, there was sufficient evidence to indicate premeditation and deliberation, where the interval between the initial thought of wanting to kill the victim and the killing itself was long enough to afford defendant time to take a second look. Therefore, it was proper for the jury to consider the charge as soundly instructed by the trial court. Furthermore, defense counsel cannot be deemed ineffective for failing to make a futile motion for a directed verdict. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant next argues that the prosecutor made several statements to the jury during closing arguments that were not supported by the evidence. There were no objections to the claimed instances of misconduct; therefore, review is for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. Reversal is warranted only if such plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* 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 may not make a factual statement to the jury that lacks evidentiary support, but "he or she is free to argue the evidence and all reasonable inferences arising from it." *People v Dobek*, 274 Mich App 58, 66; ___ NW2d ___ (2007).

While it is arguable that some of the cited statements made by the prosecutor were not supported by the evidence, it is equally arguable that the statements represented reasonable inferences arising from the trial testimony. Regardless, assuming a lack of evidentiary support, reversal is unwarranted because the trial court instructed the jury that the attorneys' statements could not be used as evidence, *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001), and any prejudicial effect of the prosecutor's comments could have been cured by a contemporaneous curative instruction, *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Moreover, defendant has not established that his substantial rights were affected or that any assumed error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Defendant next argues that he was denied a fair trial because the prosecutor allowed a witness to testify untruthfully. Whenever a witness lies under oath, a prosecutor is constitutionally obligated to report it to the defendant and to the trial court. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Further, a “prosecutor may not knowingly use false testimony to obtain a conviction, and . . . a prosecutor has a duty to correct false evidence.” *Id.* at 277. Our review of the record fails to clearly reveal any false testimony; rather, there were explainable nuances between the trial testimony and prior statements and preliminary examination testimony that could have been explored on cross-examination. Moreover, there is no indication that the prosecutor knowingly used false testimony.

Defendant finally argues that defense counsel was constitutionally ineffective for failing to object to the trial court’s questioning of a witness, which questioning defendant describes as sarcastic.

Under MRE 614(b), a trial court may question a witness. In that regard, a trial court is free to question a witness to assist in the search for truth, including “when a witness is difficult or is not credible and the attorney fails to adequately probe the witness or if a witness becomes confused.” *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The court’s questioning, however, may not pierce the veil of judicial impartiality. *Id.*

When the witness testified, in response to questioning by the court, that he did not ask defendant what happened to him on the night of the crime, nor cared about what happened, the court followed up, asking:

Q. Your friend got beat up and you didn’t ask what happened?

A. I didn’t ask him what happened, no, I did not.

We perceive nothing improper about the above questioning. It is clear that the trial court was simply further probing the witness about his knowledge of the events surrounding the shooting. Because the trial court was properly acting within its discretion, defense counsel was not ineffective for failing to object because an objection would have been futile. *Thomas, supra* at 457. Additionally, there was certainly no prejudice to defendant. *Carbin, supra* at 599-600.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Deborah A. Servitto