

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 11, 2014

v

JAYMEL PARTA WARD,

Defendant-Appellant.

No. 316764
Wayne Circuit Court
LC No. 12-010218-FC

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment for the first-degree felony murder conviction and two years' imprisonment for the felony-firearm conviction. His first-degree murder and armed robbery convictions were vacated by the trial court. We affirm.

This case arises from a shooting and robbery that occurred on September 9, 2012, in Detroit, Michigan. On the night of September 8, 2012, the victim and six of his friends went to a series of clubs in Detroit to celebrate his girlfriend, Ashley Ludy's, birthday. The full group of friends was comprised of the victim, Ludy, Justin Lockett, Diamond Miller, Joycelyn Allen, Jerricka Shivers, and James Ferguson. The group left their final stop, a strip club in Highland Park, at approximately 4:30 a.m. on September 9, 2012. The group, traveling in two vehicles, stopped at a gas station on McNichols Road at approximately 5:00 a.m. The victim was driving one of the vehicles, and exited his vehicle for the purpose of pumping gas into the other vehicle, owned by Ludy. After the victim finished pumping gas into Ludy's vehicle, he walked backward toward his own vehicle while talking to the occupants of Ludy's vehicle. As the victim attempted to enter his vehicle, the members of the group heard a gunshot. Ludy, Lockett, and Ferguson each saw the victim collapse on the ground, with defendant standing over him, holding the victim's left arm up. It appeared to Ludy, Lockett, and Ferguson that defendant was removing the victim's wristwatch, valued at approximately \$15,000, which the victim was wearing on his left wrist. Lockett approached the victim to investigate, and defendant pointed a handgun at him and stated, "what's up cuz? [sic]" Lockett retreated. Defendant fired another shot at the victim, and Ferguson saw defendant stoop down to go through the victim's pockets. Ashraf Rady, the clerk at the gas station, stated that defendant came into the gas station's store

for approximately 10 seconds before defendant displayed a handgun and exited the store toward the victim. Video surveillance footage from the gas station showed defendant display the handgun, exit the store, and shoot when he stepped outside.

After defendant fled the scene, Ferguson and Lockett loaded the victim into one of the vehicles and attempted to find a hospital. Highland Park police officers ultimately led the group to a nearby hospital, but the victim died from his injuries.¹ Defendant was arrested several days later; Ludy, Rady, Lockett, Ferguson, and Miller each successfully identified defendant as the shooter in independent photographic lineups conducted by police.

Defendant was charged, and on February 15, 2013, the trial court ordered that defendant undergo an evaluation for competency to stand trial by the Center for Forensic Psychiatry. The examiner concluded that defendant was competent to stand trial. In a competency report, the examiner stated that defendant had largely refused to cooperate during his competency evaluation, made threats against his examiner, and was determined to be malingering about his understanding of the charges against him. After a competency hearing, the trial judge found defendant competent to stand trial based on the examiner's report. Defendant requested an additional evaluation from an independent psychiatrist, and the trial court denied his request. The case proceeded to trial and defendant was convicted. Defendant now appeals.

Defendant first argues that his constitutional right to present a defense was violated when the trial court denied his request for an independent psychiatric examination to determine his competency to stand trial. We disagree.

A trial court's decision regarding whether to grant an indigent defendant's motion for the appointment of an expert is reviewed for an abuse of discretion. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003); MCL 775.15. An abuse of discretion occurs when a trial court selects an outcome that is not within the range of reasonable and principled outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006)

MCL 775.15 authorizes payment for an expert witness. If an indigent defendant is able to show "that there is a material witness in his favor . . . without whose testimony he cannot safely proceed to trial," the judge, "in his discretion," may grant funds for the retention of an expert witness. MCL 775.15; *Carnicom*, 272 Mich App at 617. "A trial court is not compelled to provide funds for the appointment of an expert on demand." *Carnicom*, 272 Mich App at 617. "To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert." *Id.* "It is not enough for the defendant to show a mere possibility of assistance from the requested expert." *Id.* Additionally, the defendant must show that the expert testimony would likely benefit the defense. *Tanner*, 469 Mich at 443.

The trial court did not abuse its discretion when it denied defendant's request for an independent psychiatric expert. Defendant was provided with a psychiatric examination for the purpose of determining his competency to stand trial. The examiner concluded that defendant

¹ An autopsy revealed that the victim was shot in his face and in his left back.

was competent to stand trial, and stated that defendant was uncooperative throughout the examination. Further, the examiner concluded that defendant was feigning incompetence and malingering throughout the examination.

Defendant has not made a sufficient showing of a nexus between the facts and the need for an expert. See *Carnicom*, 272 Mich App at 617. Defendant has submitted no evidence that he required a psychiatric evaluation, and a psychiatric examiner had already determined that defendant was competent to stand trial. In addition, defendant has not shown that his defense would have benefited from the appointment of an independent expert. See *Tanner*, 469 Mich at 443. Defendant makes no argument for how the expert would have benefited his position at trial, except to summarily state that insanity is a defense to a crime in Michigan. Defendant does not explain or present evidence to show that he was not competent to stand trial, or why the first psychiatric evaluation, in which he was deemed competent, was insufficient or incorrect. Based on the first evaluation, we are not convinced that a second psychiatric evaluation would have produced different results. For the same reasons, we do not agree that defendant was unable to proceed safely to trial without the appointment of an independent psychiatric examiner. MCL 775.15

Defendant suggests that the trial court denied his request for an independent psychiatric examiner because he was indigent and could not afford to pay for an expert witness. Our review of the record shows that the trial court considered defendant's request, and denied it based on defendant's conduct during the first psychiatric evaluation. The trial court found that defendant was attempting to delay and avoid the case by feigning a misunderstanding of the process. For that reason, the trial court further found that it would not be a valuable use of resources to appoint an expert witness, particularly given the fact that defendant was already examined by a psychiatrist. The trial court did not deny defendant's request solely because he was indigent. Therefore, we do not find that the trial court abused its discretion in denying defendant's request for an independent psychiatric evaluation. Because the trial court did not err in denying defendant's request, we further hold that defendant was not denied a fair trial or his constitutional right to present a defense.

Defendant next argues that prosecutorial misconduct during closing arguments violated his right to a fair trial because the prosecutor improperly elicited sympathy from the jury and denigrated defendant. We disagree.

A defendant's claim of prosecutorial misconduct must be met with a contemporaneous objection and a request to the trial court for a curative jury instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant failed to object to the prosecution's statements during closing argument. Accordingly, the issue is unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013). In addition, reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476.

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Claims of prosecutorial misconduct are reviewed case by case, "and this Court must examine the entire

record and evaluate a prosecutor's remarks in context." *Id.* at 64. "[P]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010). They have discretion over "how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). It is improper for the prosecutor to ask the jury to sympathize with the victim. See *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003); *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

During closing argument, the prosecution stated:

This is a particularly disturbing case. Typically when you have a case involving robbery, you have a defendant who approaches a victim, presents a weapon and says give me your stuff or else. This case you don't even have that.

The defendant didn't even give [the victim] a chance to turn over his goods. Not even a chance before the defendant gunned him down.

In this case the defendant was cold blooded. These were the acts of a stone cold killer.

When those kids went out that night they never could have imagined that the simple act of stopping for gas would end in such tragedy.

You heard Justin Lockett tell you that when he got out of the car and went to go see where his friend was and he sees the defendant leaned over the victim [], the defendant didn't even stop what he was doing. He took his sweet time in front of everyone going through [the victim]'s pockets and just looked up at Justin, pointed the gun at him and said what's up cuz [sic].

See, [the victim] wasn't a person to the defendant. He was a payday. He was easy money. And the only thing [the victim] did wrong was dress nicely, have money, and take his girlfriend and her friends and family out on her birthday, and ultimately he was killed for that.

Defendant argues that the prosecution's comments constituted misconduct. Defendant contends that during closing arguments, the prosecutor depicted the victim as a nicely dressed, well-mannered young man, while personally denigrating defendant, referring to him as a "stone cold killer" who only viewed the victim as a "payday." We are not convinced that the prosecutor's comments constituted misconduct. Prosecutors have discretion over "how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *Meissner*, 294 Mich App at 456. The prosecution's comments accurately described the facts and the prosecution's theory of the case, and while the prosecutor did not use bland terms to describe defendant and his actions, the prosecutor's arguments did not rise to a level constituting misconduct. In addition, while a prosecutor may not ask the jury to sympathize with the victim, we do not agree that the prosecutor's statements during closing arguments were meant to arouse sympathy for the victim. *Akins*, 259 Mich App at 563 n 16; *Watson*, 245 Mich App at 591. The prosecution's descriptions of the victim were a

reference to the prosecution's theory regarding defendant's motivation for the robbery and were based on evidence presented at trial. Moreover, the trial court instructed the jury that the lawyers' statements at trial were not evidence, and that only evidence could be considered. Reversal is not required "where a curative instruction could have alleviated any prejudicial effect." *Bennett*, 290 Mich App at 476. For these reasons, the prosecutor's comments during closing arguments did not constitute plain error.

Defendant also argues that he was denied the effective assistance of counsel in relation to his trial counsel's request for an independent psychiatric evaluation² and because his trial counsel failed to object to the prosecutorial misconduct. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request a *Ginther*³ hearing, our review of this issue is limited to errors apparent from the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207.

Counsel is not ineffective for failing to present a meritless argument. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). Because we hold that the trial court did not err in denying defendant's request for an independent psychiatric evaluation and that there was no prosecutorial misconduct, we further hold that defendant's trial counsel was not ineffective for failing to argue or object to these meritless issues during trial. Moreover, defendant was not prejudiced by the alleged ineffective assistance. Overwhelming evidence was presented at trial of defendant's guilt. Ludy, Rady, Lockett, Ferguson, and Miller each identified defendant as the person who murdered the victim. Further, security camera footage from the gas station showed defendant displaying a handgun, walking out of the store, and shooting. Defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood

² On appeal, defendant did not specify exactly what actions by his trial counsel in relation to the request for the independent psychiatric evaluation constituted ineffective assistance.

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).