

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN GREENAWALT,

Defendant-Appellant.

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UNPUBLISHED

May 13, 2003

No. 231227

Wayne Circuit Court

LC No. 00-003673

Before: Hoekstra, P.J., and Smolenski and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of life without parole for the murder conviction and ten to twenty-five years each for the assault convictions, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion to suppress his custodial statement. Defendant claims that the statement was improperly admitted because he had invoked his right to counsel before giving the statement.

We review a trial court's factual findings on a motion to suppress for clear error. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001); *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). A finding is clearly erroneous when, after reviewing the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

In this case, conflicting evidence was presented as to whether defendant made an unequivocal request for counsel. *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001). Defendant testified that he either requested counsel or asked if he should talk to a lawyer. In contrast, the officer who took defendant's statement testified that defendant did not make a request for counsel. The trial court found that the officer was more credible. Giving

deference to the trial court's resolution of this credibility dispute, we find no clear error in the court's decision denying defendant's motion to suppress. *Attebury, supra*.

## II

Next, defendant argues that he was prejudiced by the court's conduct during jury voir dire and that the court erred in denying his motion for a mistrial. The grant or denial of a mistrial is within the sound discretion of the trial court. There must be a showing of prejudice to the defendant's rights in order for there to be error requiring reversal. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). "The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice." *Id.*

Defendant moved for a mistrial because of comments made by the trial court during voir dire. We note that defendant failed to object to the court's comments when they were made, but waited until the end of voir dire to move for a mistrial. *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998).

A defendant is entitled to a trial before a neutral and detached magistrate. *People v Conyers*, 194 Mich App 395, 398; 487 NW2d 787 (1992). While the court has wide discretion and power in the matter of trial conduct, its discretion is not without limits. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). "A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* Judicial comments made during the course of a trial that are either critical or disapproving of, or even hostile to, the attorneys, the parties or the case cannot generally be relied on to show partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996). Partiality also may not be established by displays of impatience, dissatisfaction, annoyance or anger, if within the bounds of what imperfect individuals sometimes display. *Id.*

We disagree that defendant was prejudiced by the trial court's refusal to allow a juror, who was a physician, to answer her cellular telephone or make a telephone call. The court's comments were not so harsh so as to prejudice the jurors against defendant. Moreover, even if the specific juror was offended by the court's remarks, defendant was not prejudiced because the juror was not selected to serve on the jury.

Defendant also complains that the court made another juror cry. However, the record does not show that it was the court's questioning that caused the juror to cry. Further, even if the juror found the court's questions intimidating, the juror did not serve on the jury, so defendant was not prejudiced. Nor are we convinced that other jurors who observed the incident may have been intimidated by the court, to defendant's detriment. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *Wells, supra*.

## III

Defendant next argues that the evidence was insufficient to support his conviction for first-degree murder and that the trial court should have granted his motion for a directed verdict. We find no merit to defendant's claims.

An appellate court's review of the sufficiency of the evidence to sustain a conviction should not turn on whether there was any evidence to support the conviction, but whether there was sufficient evidence to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). The evidence must be reviewed in a light most favorable to the prosecution. *Id.* at 515.

In order to convict a defendant of first-degree murder, the prosecution is required to prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberated. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* This Court has explained:

The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (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. [*Anderson, supra* (citations omitted).]

Generally, where a killing results from a fight, there must be evidence of a "thought process undisturbed by hot blood" in order to prove first-degree murder. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of the crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

Here, the evidence presented by the prosecution, viewed most favorably to it, was sufficient to enable the jury to find beyond a reasonable doubt that defendant shot at the van with a premeditated and deliberated intent to kill the occupants. During an earlier confrontation with the women, defendant threatened to shoot them. When the women returned a few hours later, defendant retrieved his gun and proceeded to follow through on his earlier threat, even though the van was driving away and did not pose a threat to defendant at that time. Defendant subsequently hid the shotgun under a mattress to avoid arrest. Defendant's argument concerning the sufficiency of evidence fails. Further, because the evidence was sufficient to support a conviction of first-degree murder, the trial court did not err in denying defendant's motion for a directed verdict. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Furthermore, we find no merit to defendant's claim that the court applied an incorrect legal standard in deciding defendant's motion.

#### IV

Defendant next argues that the trial court erred in refusing to instruct the jury on the lesser offenses of voluntary manslaughter and careless, reckless or negligent discharge of a firearm, resulting in death. We disagree.

Both of these offenses are cognate lesser included offenses to first-degree murder. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001); *People v Cheeks*, 216 Mich App 470, 479;

549 NW2d 584 (1996). Recently, in *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002), our Supreme Court held that MCL 768.32 does not permit instruction on cognate lesser offenses. See also *People v Alter*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (2003), slip op at 3-4, n 1. Because these instructional matters were preserved at trial and this case was pending on appeal when *Cornell* was decided, the decision in *Cornell* applies to this case. See *Cornell supra* at 367. Accordingly, the trial court did not err in refusing to instruct the jury on either voluntary manslaughter or careless, reckless or negligent discharge of a firearm.

Furthermore, because defendant did not request instructions on involuntary manslaughter or manslaughter resulting from a weapon intentionally pointed, but without malice, the court did not err in failing to instruct on those offenses.

## V

Next, defendant argues that misconduct by the prosecutor requires a new trial. We disagree.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267 and nn 5-7; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Here, however, because defendant did not preserve any of his claims of alleged misconduct with an appropriate objection at trial, he must show that plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Defendant has the burden of demonstrating that he was prejudiced by a plain error, i.e., that the outcome was affected. *Carines, supra* at 763. Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *Schutte, supra* at 721.

A prosecutor is afforded great latitude during closing argument and is permitted to argue the evidence and reasonable inferences arising therefrom to support his theory of the case. *Bahoda, supra* at 282. Although prosecutors must refrain from making prejudicial remarks, *id.* at 283, prosecutors may use "hard language" when it is supported by the evidence and they are not required to phrase their arguments in the blandest of terms, *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant argues that the prosecutor improperly vouched for the credibility of his witnesses when he stated to the jury that "we charged" defendant with first-degree murder, in reference to the police. While a prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge about the witnesses' truthfulness, *Bahoda, supra* at 276, the reference here, viewed in context, did not involve an attempt to bolster the credibility of the prosecution's witnesses. It did not amount to plain error.

We also reject defendant's claim that the prosecutor improperly denigrated defense counsel. When the challenged comments are read in context, it is apparent that they were made in response to defense counsel's closing remarks. Where a prosecutor's comments are responsive,

they must be considered in light of the defense arguments raised. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal where the remarks are made in response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Considered in this context, the prosecutor's remarks do not constitute plain error.

Next, the prosecutor's comments about defendant owning a gun and being a deer hunter did not constitute unsworn testimony. The comments were supported by the evidence at trial and reasonable inferences drawn from the evidence.

Lastly, the prosecutor's argument that defendant's conduct in hiding the gun after the shooting was evidence of his guilt was not erroneous. Testimony regarding guilty behavior properly can be considered as evidence of the defendant's consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 401, 404-405; 504 NW2d 666 (1993).

## VI

Defendant next argues that the trial court denied him his constitutional right to cross-examine a witness. We disagree.

Pursuant to both the federal and state constitutions, a defendant has the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. However, there are limits on this right.

If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). Yet, there are limits to this right to confront witnesses. The Confrontation Clause "guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *People v Bushard*, 444 Mich 384, 391; 508 NW2d 745 (1993) (BOYLE, J.), quoting *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985). Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). [*Ho, supra* at 189-190; emphasis in original.]

At trial, defendant attempted to ask the officer in charge about a prior statement characterizing the shooting as accidental. The trial court disallowed the questioning because it sought improper opinion testimony.

Witnesses, even expert witnesses, are not allowed to opine or interpret the facts where the opinion invades the province of the jury or includes matters within the common knowledge of the jurors. *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 123; 559 NW2d 54 (1996); *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980). A witness therefore cannot opine on the criminal responsibility of the accused, particularly if that witness is not an expert. *Drossart, supra*. Because the challenged line of questioning pertained to the officer's

opinion about defendant's guilt, not the officer's personal knowledge, the trial court did not err in refusing to allow the questioning. Furthermore, because the trial court's ruling was a reasonable limitation on the cross-examination of this witness, defendant's right to confront the witness was not violated. *Ho, supra*.

## VII

Defendant further argues that, even if a single error does not warrant reversal, he is entitled to a new trial due to the cumulative number of errors. Because we have not found that any substantive errors occurred, reversal is not warranted due to cumulative error. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

## VIII

In a pro se supplemental brief, defendant argues that trial counsel was ineffective. Because defendant did not raise this issue in an appropriate motion in the trial court, our review of this issue is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Defendant first argues that his attorney was ineffective for failing to call a firearms expert as a witness. Whether to call an expert witness involves a matter of trial strategy. *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). Defendant asserts that he advanced his attorney \$5,000 for the purpose of hiring an expert and conducting an investigation. However, there is no indication in the record that defense counsel failed to consult with experts or investigate this matter, or that his decision not to call an expert was unsound trial strategy. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987). Furthermore, defendant has not established that failure to call a firearms expert prejudiced his defense. *Pickens, supra*.

Defendant also argues that his attorney was deficient for failing to present an intoxication defense. A defendant is entitled to have his counsel prepare, investigate and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is defined as one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The decision whether to pursue an intoxication defense is a matter of trial strategy, which this Court will not second-guess. *People v Henry*, 239 Mich App 140, 148; 607 NW2d 767 (1999).

An intoxication defense is available only if the facts would allow the jury to find that the defendant's intoxication was so great as to render him unable to form the requisite intent. *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998).

Here, a review of the available record reveals that an intoxication defense would not have been successful. Specifically, the circumstances surrounding the shooting did not suggest that defendant was incapable of forming the requisite intent for first-degree murder. Defendant has not shown that counsel was ineffective for not pursuing an intoxication defense. Furthermore, contrary to what defendant argues, counsel's alleged trial notes do not demonstrate that he was unprepared for trial.

We also reject defendant's claim that counsel was ineffective for failing to bring to the trial court's attention that some jurors appeared to be sleeping at trial. According to defendant, his attorney was aware that jurors were sleeping, but apparently chose not to pursue the issue as a matter of strategy. Because the record does not indicate whether jurors were actually sleeping, whether counsel was aware of the situation, or what counsel's reasons may have been for deciding not to pursue the issue at trial, defendant has not sustained his burden of showing that counsel was ineffective.

To the extent defendant requests that this matter be remanded for an evidentiary hearing on this issue, we decline to do so. Defendant's offer of proof in support of his claims is insufficient to justify further development of the record.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Michael R. Smolenski

/s/ Karen Fort Hood