

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN J. MOORE,

Defendant-Appellant.

UNPUBLISHED

June 19, 2003

No. 236015

Wayne Circuit Court

LC No. 00-005882-01

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, arising from the shotgun shooting death of twenty-year-old Hyshanti Johns. He was sentenced to concurrent terms of life imprisonment for the first-degree murder conviction and three to five years' imprisonment for the felon in possession conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues on appeal that there was insufficient evidence of premeditation and deliberation to convict him of first-degree murder. In considering this issue, this Court must review the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Oliver*, 242 Mich App 92, 94-95; 617 NW2d 721 (2000). The standard of review is deferential and this Court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Griffin*, 235 Mich App 27, 31; 597 NW2d 176 (1999).

To prove first-degree murder, the prosecutor must prove "that a defendant's intentional killing of another was deliberate and premeditated." *People v Coddington*, 188 Mich App 584, 599; 470 NW2d 478 (1991). Premeditation and deliberation may be inferred from the facts and circumstances established on the record, including the defendant's actions before and after the crime, the weapon used, and the location of the wounds inflicted. *Id.*

Here, the evidence indicated that defendant took a shotgun with him when he drove away with the decedent. He disposed of the weapon and the van after the decedent was shot, and also left town. He told different versions of the killing to his girlfriend and to the police, claiming

that he either shot the decedent because she was a witness to another crime or that she attempted to rob him and he shot her in “self-defense” as she was running away. The evidence disclosed, however, that the decedent was shot four times by a shotgun, twice in the back and twice in the front of her body, and possibly a fifth time resulting in a grazing wound. The shotgun had to be pumped between each shot. Viewed most favorably to the prosecution, the evidence was sufficient to enable a rational trier of fact to find that the essential elements of first-degree murder, including premeditation and deliberation, were proven beyond a reasonable doubt. *Oliver, supra*.

Defendant next argues that he was denied a fair trial because of remarks by the prosecutor during closing and rebuttal arguments.

Prosecutorial misconduct issues are decided case by case. *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000). This Court considers the prosecutor’s remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). However, because defendant did not preserve this issue with an appropriate objection to the challenged remarks at trial, appellate relief is precluded absent plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *Schutte, supra*. Error requiring reversal will not be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction. *Id.*

A prosecutor is afforded great latitude in closing argument. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). He is not required to use the “blandest possible terms” when stating his inferences and conclusions. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). On the contrary, he may use strong and emotional language in making his arguments, so long as it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996).

Defendant challenges several of the prosecutor’s remarks, alleging that they amounted to improper “testimony” that was intended to fill “gaping holes” in the prosecutor’s theory. We disagree. Our review of the challenged remarks reveals that they were proper comments on the evidence and reasonable inferences drawn therefrom. The remarks did not constitute plain error.

Defendant also argues that the prosecutor improperly vouched for his witnesses, and “negatively vouched” for defendant and his girlfriend. A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge regarding the witness’ truthfulness. *Bahoda, supra*. Here, to the extent it was inappropriate for the prosecutor to suggest that the testimony of defendant’s girlfriend was “unimpeachable” and “unassailable,” a cautionary instruction upon timely objection could have cured any prejudice. *Schutte, supra*. Therefore, this unpreserved issue does not warrant appellate relief. It was not improper for the prosecutor to argue that defendant’s statements about the offense were not credible. *People v Buckley*, 424 Mich 1, 14-15; 378 NW2d 432 (1985).

We are not convinced that the prosecutor made an improper appeal to the jurors’ civic duty. The challenged remarks focused on defendant’s identity as the perpetrator of the charged crime; they were not directed at the “broader issue of crime” rather than the facts of this case. *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999). Further, to the extent some of

the prosecutor's remarks could be characterized as an improper appeal to the jurors' fears, a cautionary instruction could have cured any perceived prejudice.

Next, defendant argues that it was improper for the prosecutor to comment that only he and the decedent knew the motive for the killing. We agree that the prosecutor's remark was improper, *People v Stacy*, 193 Mich App 19, 36; 484 NW2d 675 (1992), but conclude that this unpreserved issue does not warrant appellate relief. In light of the evidence presented at trial, including defendant's admission that he killed the decedent, and the trial court's instructions that "[t]he prosecutor must prove each element of the crime beyond a reasonable doubt" and "[a] defendant is not required to prove his innocence or to do anything[,]" we are not convinced that the error affected defendant's substantial rights. *Carines, supra*.

Defendant next argues that the trial court erred in denying his motion to suppress his statement to the police. Defendant argues that the statement was improperly obtained after he invoked his right to counsel. We review the trial court's findings of fact at a suppression hearing for clear error and its application of the law to the facts is reviewed de novo. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001).

When an accused invokes his right to counsel during a custodial interrogation, the accused is not subject to further interrogation by the police until counsel has been made available, unless the accused initiates further communication, exchanges, or conversations with the police. *People v Adams*, 245 Mich App 226, 237; 627 NW2d 623 (2001), citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

Here, the evidence indicated that defendant gave a phone number to a Detroit police officer and asked him to call it. It was apparently the number to a lawyer's office. The officer called the number and informed defendant that he had reached an answering service or answering machine. Defendant responded, "Okay." According to defendant, the officer said they would book him and that he "would be here until they got an attorney present and all of that." Defendant said that the officer never told him he could not have an attorney. Defendant stated that, at some point, he told the officer that he wanted to make a statement and that, subsequently, he gave a statement. The trial court determined that, although defendant initially requested counsel, the challenged statement was made only after defendant initiated further conversation with the police. We find no clear error in this factual determination. Under the circumstances, the statement was properly obtained. *Adams, supra*. Accordingly, the trial court did not err in denying defendant's motion to suppress.

Finally, defendant argues that the trial court erred in instructing the jury on the defense of intoxication where he did not present an intoxication defense at trial. The record discloses that the parties discussed the matter of jury instructions in chambers before closing arguments. The prosecutor subsequently stated for the record that he was objecting to an instruction on the defense of intoxication. Defendant did not address that instruction on the record. Although defendant now asserts that he was prejudiced by the intoxication instruction, it seems unlikely that the trial court would have given the instruction absent a request by defendant. In any event, defendant did not object to the instruction at trial and, therefore, failed to preserve this issue. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *Carines, supra; People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). While we agree there was little evidence to support the intoxication instruction, we fail to see how

defendant was prejudiced by the fact that the instruction was given. Because any error in giving this instruction did not affect defendant's substantial rights, this unpreserved issue does not warrant reversal.

Affirmed.

/s/ Richard Allen Griffin
/s/ William B. Murphy
/s/ Kathleen Jansen