

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CYNTHIA GARDNER,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 240854
Wayne Circuit Court
LC No. 01-009576-01

Before: O’Connell, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right her conviction following a jury trial for second-degree murder, MCL 750.317. The trial court sentenced defendant to twenty-five to forty-five years in prison. We affirm.

Defendant first argues that the trial court erroneously failed to give sua sponte a cautionary instruction regarding jailhouse-informant Tina Shoulders’ credibility because Shoulders stood to benefit from her testimony. But because defendant agreed to the trial court’s proposed jury instructions, she waived this issue and eliminated any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant also argues that the prosecutor made several improper remarks that warrant her conviction’s reversal, including comments on defendant’s failure to testify, statements that vouched for Shoulders’ credibility, and arguments that parroted false testimony and intentionally misled the jury. Because defendant failed to object to the prosecutor’s conduct during trial, defendant forfeited this issue. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). In order to avoid forfeiture of an unpreserved claim, a defendant must demonstrate plain error that affected the defendant’s substantial rights. *Id.* at 763.

The law does not require a prosecutor to use the least prejudicial evidence or state inferences in the blandest terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A prosecutor may not comment on a defendant’s failure to testify, *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999), but may respond to arguments advanced by the defense. *Schutte, supra* at 721. Prosecutors must also refrain from personally vouching for their witnesses, *id.* at 722, but “[n]o error requiring reversal

will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721.

Contrary to defendant's assertions, the prosecutor never addressed defendant's failure to testify. Instead, the prosecutor merely explained that a dearth of eye-witnesses prevented him from presenting a detailed account of events. Because the prosecutor's comments rebutted defendant's arguments that the lack of details inferred defendant's innocence, the explanation did not constitute an impermissible argument. *Id.* Likewise, the prosecutor did not impermissibly vouch for Shoulders, because he did not suggest to the jurors that he possessed personal information beyond the evidence. Instead, the prosecutor merely indicated that common sense required them to recognize the significance of Shoulders' information and review it carefully. *Id.* at 722.

Defendant's argument that the prosecutor intentionally misled the jury regarding Shoulders' inducement to testify also lacks merit. During his closing, the prosecution repeated Shoulders' interpretation of how little benefit she expected to receive in her federal criminal case for providing testimony in defendant's state case. Because the issue related to Shoulders' credibility, the prosecutor properly argued Shoulders' perspective regarding her ability to receive leniency. *Id.* at 721. The prosecutor did not suggest that a federal court would actually show indifference to her state court testimony, and refrained from speculating about how Shoulders' testimony might affect her federal sentence. Furthermore, a timely objection to these remarks would have gained defendant a limiting instruction that would have cured any misperception caused by the prosecutor's conduct, so defendant's assertions of prosecutorial misconduct necessarily fail. *Id.*

Next, defendant claims that her trial counsel provided ineffective assistance to her. She contends that her counsel failed to research Shoulders' prior convictions. Knowledge of the undisclosed convictions would not have assisted defendant, however, because the inadmissible convictions did not contain elements of theft or dishonesty. MRE 609(a). Defendant also argues that her trial counsel failed to properly request a jury instruction regarding Shoulders' inherent incredibility. But the credibility instructions given by the court adequately informed the jury, so failing to request a customized instruction did not render defense counsel's performance unconstitutionally deficient. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Finally, defendant claims that her counsel provided inadequate assistance by failing to object to the prosecutor's misconduct. Because the prosecutor did not commit misconduct, however, defense counsel correctly refrained from objecting. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that the trial court violated her constitutional right to confrontation by impermissibly limiting her cross-examination of Shoulders. We disagree. Defendant did not specifically raise the "right to confrontation" issue below, so she forfeited it. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Because the issue relates to defendant's ability to pursue irrelevant cross-examination regarding unrelated information Shoulders gathered against other inmates, it does not merit our review. *Carines, supra* at 763.

Defendant also argues that the trial court erred in failing to conduct a hearing regarding a threat of prosecution communicated to prosecutor witness Reginald Williams. We disagree. Because defendant did not request the hearing below, she forfeited this issue. *Id.* at 762-763.

Defendant fails to draw any connection between the warning Williams' sister sent him in a letter and action by the prosecutor. Thus, the trial court did not commit plain error when it failed to hold sua sponte a hearing regarding the threat. *Id.* at 763.

Defendant next argues that the prosecutor failed to present sufficient evidence to support her conviction for second-degree murder. We disagree. For sufficiency of the evidence claims, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the prosecutor proved the essential elements of the crime beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A prosecutor may rely on circumstantial evidence and the evidence's reasonable inferences to prove the crime's elements. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

"The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice means the intent to kill or do great bodily harm and also includes the intent to do an act despite the likelihood that death or great bodily harm may naturally result from the act. *Id.*

Here, a police investigator and Shoulders both testified that defendant admitted stabbing the victim numerous times. Defendant also admitted to Shoulders that she stabbed the victim because the victim caught her going through his belongings. So a rational factfinder could find that defendant intentionally inflicted the victim's sixteen stab wounds because of a confrontation rather than self-defense and conclude that the prosecutor proved the essential elements of second-degree murder beyond a reasonable doubt.

Finally, defendant contends that the cumulative effect of these errors denied her a fair trial. We disagree. Several relatively minor errors may warrant reversal if their cumulative effect sufficiently prejudices a defendant. *People v Leblanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). However, "only actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). Because defendant failed to reveal any errors, she cannot show prejudice. *Id.*

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood