

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH CORNEL STINSON,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 241146

Genesee Circuit Court

LC No. 99-005194-FC

Before: Whitbeck, C.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant was originally charged with open murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Following two previous mistrials that ended with hung juries, a third jury trial was conducted and defendant was convicted of first-degree premeditated murder, MCL 750.316. Defendant was sentenced, as a third habitual offender, MCL 769.11, to life imprisonment without parole. Defendant now appeals as of right. We affirm.

Defendant first argues that the evidence was insufficient to sustain his conviction for first-degree murder. We disagree. This Court reviews a claim of insufficient evidence by viewing the evidence in the light most favorable to the prosecution and determining whether a rational trier of fact could find that each element of the offense was proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). “The standard of review is deferential: a reviewing 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). To convict a defendant of first-degree murder, the prosecutor must prove that the killing was intentional and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); See also *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998).

Viewing the evidence in the light most favorable to the prosecution, we find that the evidence was sufficient to establish that defendant killed the victim with premeditation and deliberation. Although defendant raises a number of claims in this issue, these arguments are flawed because they improperly rely on interpretations of the evidence that favor the defense, not the prosecution.

First, defendant argues that no direct evidence was presented and that the circumstantial evidence presented at trial was insufficient to sustain his conviction. Indeed, no direct evidence was presented to connect defendant to the crime because the murder weapon was not presented at trial and no testimony was presented that defendant was observed at the scene of the crime. However, “circumstantial evidence and reasonable inferences drawn from the evidence can constitute satisfactory proof of the elements of a crime.” *Nowack, supra* at 400; *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). The prosecution need not negate every reasonable theory consistent with innocence; instead, the prosecution is bound to prove the elements of the crime beyond a reasonable doubt. *Nowack, supra* at 400.

Here, the prosecution presented evidence that supported a reasonable inference that defendant was at the scene at the time of the murder. Evidence at trial established that defendant owned a small Dodge 1989 blue truck that was made in Japan by Mitsubishi with a manual transmission. A truck that matched the description of defendant’s truck was observed leaving the area at a high speed after gunshots were fired. Although defendant emphasizes the testimony of the other night patrolman, who testified that the make of the truck he observed on the night of the instant offense was another type of truck, this was a question of fact for the jury. “In a claim of insufficient evidence, all factual disputes must be weighed in the prosecution’s favor.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Similarly, the prosecution presented sufficient evidence of premeditation and deliberation. First, the victim’s daughter testified that defendant threatened her and her family at least two days before the murder and that he owned a gun matching the caliber of the bullet that killed the victim. Second, Terrance Rawls testified that defendant stated he killed the wrong person and he had someone sitting with him who was watching his back. Further, the jury could infer that defendant was waiting for the victim to return home because (1) evidence demonstrated that defendant’s truck was observed parked in the apartment complex while he and another person had a conversation, and (2) telephone records indicated that between 9:51 p.m. on July 5, 1999, and 2:01 a.m. on July 6, 1999, seven telephone calls were made from defendant’s mother’s home, defendant’s home telephone or defendant’s cell phone to the victim’s home telephone. The victim’s fiancé testified that he had two conversations with defendant on the telephone. The last incoming call to the victim’s home telephone was made from a Sunoco gas station that was one-quarter mile east of the apartment complex. Because the telephone call between defendant and the victim’s fiancé would have concluded at 2:08 a.m. or 2:09 a.m., a reasonable inference was established that defendant, after speaking with the victim’s fiancé, drove from the gas station to the apartment complex and waited for the victim to return. Third, testimony at trial indicated that three gunshots were initially fired, followed by a pause, which was followed by two gunshots. Lastly, if the bullets that killed the victim were *intended* for the victim’s daughter, the fact that defendant inadvertently killed the victim will not preclude a jury from convicting defendant of first-degree murder. *Plummer, supra* at 304-305 n 2 (the doctrine of transferred intent permits culpability for murder where the defendant intended to shoot someone other than actual victim). Any of this evidence, if accepted by the jury, was sufficient to establish first-degree murder and to establish that defendant had ample opportunity to take a second look

before he killed the victim. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).¹

Defendant also argues that the prosecution failed to meet its burden to refute defendant's alibi. Generally, "if an alibi defense is accepted by the jury, a defendant cannot be convicted." *People v Erb*, 48 Mich App 622; 629; 211 NW2d 51 (1973). "It is the duty of the prosecution to show beyond a reasonable doubt that the defendant did commit the crime and that, therefore, the defendant was at the scene of the crime at the time it was committed." *Id.* at 629-630. Here, in light of the jury's verdict, the jury rejected defendant's alibi as not credible. *Id.*

With respect to any conflicts in the victim's daughter's testimony and Rawls' testimony, this Court will not interfere with the function of the jury to listen to testimony, weigh the evidence and credibility of the witnesses, and decide questions of fact. *Wolfe, supra* at 514-515. Although defendant requests that this Court make credibility determinations in reliance on *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998) (this Court will only review a credibility determination if the evidence that the trier of fact relied on was completely lacking in probative value, contradicted indisputable physical facts or defied physical realities), we conclude that the extenuating circumstances necessary are lacking in the instant case. The victim's daughter's and Rawls' testimony was not so implausible that it was completely lacking in probative value, contradicted indisputable physical facts or defied physical realities to warrant application of the exception to the general rule regarding an appellate court's unwillingness to assess witness credibility.

Next, defendant argues that the prosecutor committed misconduct because (1) he failed to disclose a promise of leniency to Rawls, who testified against defendant and whose parole release date was scheduled within five days of testifying, and (2) Rawls committed perjury at defendant's second trial but he had not been charged. We disagree. This issue is unpreserved as defendant failed to timely and specifically object to Rawls' denials that he received a promise of leniency regarding his pending parole release date. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "[A]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). To avoid forfeiture under the plain error rule, defendant must show an error that was plain and affected defendant's substantial rights. *Carines, supra* at 763-764. The test for prosecutorial misconduct requiring reversal of the conviction is whether defendant was denied his right to a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

¹ We also note that there was sufficient evidence to support an aiding and abetting theory because there was evidence for a jury to reasonably infer that (1) defendant provided the means of transportation to the apartment complex, (2) he sat and waited in the parking lot of the apartment complex with the other occupant of the truck, and (3) defendant did not separate himself from the fleeing vehicle by exiting the truck, indicating that he needed assistance, or indicate that he was being held against his will when the driver of the truck was alluding Alfred Dingwell. See MCL 767.39; *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999).

In *People v Mumford*, 183 Mich App 149, 152-153; 455 NW2d 51 (1990), this Court provided:

Due to the undeniable relevance of evidence of a witness' motivation for testifying, the prosecutor must, upon request of defense counsel, disclose to the jury "the fact that immunity or a plea to a reduced charge has been granted to the testifying accomplice [or coconspirator]." [*People v Love*, 43 Mich App 608, 613; 204 NW2d 714 (1972)]; *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976); see, also, CJI2d 5.6. Defendant is "entitled to have the jury consider any fact which might have influenced an informant's testimony." *People v Monasterski*, 105 Mich App 645, 657; 307 NW2d 394 (1981), lv den 411 Mich 1017 (1981) (emphasis added) *Atkins, supra*, p 174. The disclosure requirement may be considered satisfied where the "jury [is] made well aware" of such facts "by means of . . . thorough and probing cross-examination by defense counsel." *Atkins, supra*, p 174, emphasis added. [Emphasis in original.]

In *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976), our Supreme Court addressed the prosecution's obligation to disclose understandings or reasonable expectations of leniency as follows:

The same requirement of disclosure should also be applicable if reasonable expectations, as opposed to promises, of leniency or other rewards for testifying resulted from contact with the prosecutor. It is also inconsistent with due process for the prosecutor not to correct the testimony of such a witness against the defendant, where the witness testifies that he has been promised no consideration for his testimony and the prosecutor knows this statement to be false.

However, it is one thing to require disclosure of facts (immunity or leniency) which the jury should weigh in assessing a witness's credibility. It is quite another to require "disclosure" of future possibilities for the jury's speculation The focus of required disclosure is not on factors which may motivate a prosecutor in dealing subsequently with a witness, but rather on facts which may motivate the witness in giving certain testimony. [Footnotes omitted.]

Here, the record on appeal establishes that any duty of disclosure was satisfied because the jury was informed of Rawls' possible motivations, through a probing cross-examination by defense counsel, for recanting his testimony against defendant at the second trial.² *Mumford, supra* at 152-153. Rawls' testimony established his individual hopes or expectations of leniency,

² In defendant's first trial, Rawls testified that defendant shot him. In defendant's second trial, Rawls recanted his testimony and indicated that defendant did not shoot him. In the instant trial, Rawls changed his testimony again and testified that defendant shot him. This Court affirmed defendant's conviction of assault with intent to commit great bodily harm less than murder, MCL 750.84, for the shooting of Rawls. *People v Stinson*, unpublished opinion per curiam of the Court of Appeals, released June 26, 2003 (Docket No. 229139).

which we will not impute to the prosecution, particularly where he initiated contact with the prosecution on three occasions and he affirmatively stated on the record that the prosecution made it perfectly clear that it was “not cutting” any deals. In light of defense counsel’s extensive cross-examination, the jury could have determined that Rawls may have had a motive for testifying in the third trial, or accepted that Rawls wished to provide the truth. Therefore, defendant has not established prosecutorial misconduct because there was no evidence that Rawls’ had a reasonable expectation of leniency from the prosecution or that he testified falsely when he indicated that the prosecution would not consider giving him any benefit in exchange for his testimony. *Atkins, supra* at 173-174; *Mumford, supra* at 152-153.

Next, defendant argues that the trial court improperly denied his two motions for a mistrial on the basis of improper testimony of two prosecution witnesses. We disagree. This Court reviews a trial court’s grant or denial of a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). A mistrial should be granted only when the error complained of is so egregious that there is no other way of removing its prejudicial effect. *Id.*

Here, the improper testimony was not solicited by the prosecutor in either instance, but instead, elicited by the defense on cross-examination. Consequently, an order granting defendant’s motions for mistrial was not warranted. Further, defendant’s complained of errors were not so egregious that a curative instruction could not have cured any perceived prejudice. An unresponsive, volunteered answer by a witness to a proper question, that injects improper evidence into a trial, generally is not grounds per se for a mistrial unless the prosecutor knew in advance that the witness would offer the unresponsive testimony or the prosecutor conspired with or encouraged the witness to offer that testimony.³ *People v Hackney*, 183 Mich App 516, 532; 455 NW2d 358 (1990).

³ In addition, we note that, arguably, with regard to Sakinah Morrow’s testimony the answer was responsive to defense counsel’s questioning. Specifically, the following exchange occurred while defense counsel was probing Morrow:

Q[.] Did drugs come into the picture? Did he [defendant] ask you to get off of drugs?

A[.] I wasn’t on drugs. He was selling ‘em, but I wasn’t on ‘em.

Defense counsel asked if drugs came into the picture, and the witness responded with her and defendant’s involvement, or lack thereof, with drugs. Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). A party waives review of the admission of evidence which he introduced, or which was made relevant by his own placement of a matter in issue. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Here, defendant concedes that generally, an unresponsive, volunteered answer to a proper question, particularly on cross-examination, is not grounds for the granting of a mistrial. However, defendant asserts that the prosecution must accept responsibility for the testimony of a police officer, who indicated that defendant had been in prison, because an exception applies to police officers' testimony. "[P]rosecutors and police witnesses have a special obligation not to venture into forbidden areas of testimony which may prejudice the defense." *People v McCarver (On Remand)*, 87 Mich App 12, 15; 273 NW2d 570 (1978). "When an unresponsive remark is volunteered by a police officer, this Court will scrutinize the statement in order to ensure that the officer has not ventured into a forbidden area that could prejudice the defense." *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

In our review of the police officer's testimony, we find no prejudice. The police officer did not provide the underlying charge or reasons why defendant was in prison and the trial court gave a curative instruction. Therefore, because the alleged irregularity did not deny defendant a fair trial or result in a miscarriage of justice, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). Additionally, because we concluded that that challenged testimony did not warrant granting a mistrial, we further find that defendant's argument that the cumulative effect of challenged testimony amounted to character assassination fails. See e.g., *Bahoda, supra* at 292 n 64 (only actual errors are aggregated to evaluate their cumulative error).

Lastly, we have reviewed defendant's claimed errors or prosecutorial misconduct. Viewing the prosecutor's remarks in context, we are persuaded that they do not rise to the level of error requiring reversal. *Id.* at 276-277. Further, defendant has failed to show that he was prejudiced. The trial court issued detailed and specific instructions cautioning the jury to carefully evaluate the witnesses' testimony in light of evidence regarding previous trials and conflicting testimony. Further, the trial court gave an instruction advising the jury of the prosecution's burden of proof and that the attorneys' arguments were not evidence. Accordingly, appellate relief is not warranted. *Launsburry, supra* at 361.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Jane E. Markey