

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK DANIEL, a/k/a PATRICK C. DANIEL,
a/k/a PATRICK L. DANIEL, a/k/a PATRICK
LAWRENCE DANIEL, a/k/a PATRICK
COURTNEY DANIEL, a/k/a/ PATRICK LEE
DANIEL, a/k/a RICK DANIEL, a/k/a ROBERT
BRYAN, a/k/a STEVE JOHNSON, a/k/a KIRK
COURTNEY STEELE, a/k/a ALLAN MARK
MILLER, a/k/a STEPHEN BAKER, a/k/a
STEPHEN BRITTON,

Defendant-Appellant.

UNPUBLISHED
September 27, 2005

No. 251430
Washtenaw Circuit Court
LC Nos. 02-001041-FC
02-000552-FC

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of first-degree murder, MCL 750.316(1)(a), and one count of mutilation of a human body, MCL 750.160. The convictions were based on the strangling and dismembering of Becky Britton, defendant's girlfriend, and on the strangling of Robert Stanley Bilton, Jr., a man from whom he sought a new identity. Both bodies were found in defendant's car following a traffic stop in Utah. We affirm.

Defendant first asserts that the trial court erred in determining that the offenses were related as defined by MCR 6.120(B) and in failing to sever the offenses for trial. We disagree. This Court reviews de novo whether joined offenses are related as a matter of law and, thus, eligible for joinder. MCR 6.120(B); *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977).

MCR 6.120 addresses when multiple offenses charged against a single defendant may be joined for a single trial. However, MCR 6.120(B) notes that a trial court must sever multiple offenses for separate trials on a defendant's motion if the offenses are unrelated. MCR 6.120(B) explains that "two offenses are related if they are based on (1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan." While it was not argued that Britton and Bilton's deaths were the result of the same conduct (the deaths took place

months apart), the prosecutor maintained that their deaths were based on acts constituting part of a single scheme or plan, i.e., defendant's plan to start a new life.

Defendant argues that the length of time between the two killings, during which little was accomplished in defendant's desire to obtain a new identity, "virtually compels the inference that there was no preconceived single plan." We disagree. While a shorter length of time between the killings would have further strengthened the prosecutor's argument for joinder, the length of time alone is not a sufficient reason to find the crimes unrelated, given the evidence submitted during the preliminary examinations. The prosecutor's theory was that defendant committed both crimes as part of his plan to start a new life with his new girlfriend, Dusty Guinn, and the evidence supports this argument. There was witness testimony that, before Britton's death, defendant said he hated her and wanted to be rid of her so that he could start over and that defendant planned a new life with Guinn that would include a move to a new state with a new identity. There was also testimony that, after Britton's death, defendant moved in with Guinn and made a list of things to do that included finding a "subject" from whom he could obtain a new identity; this culminated in defendant's association with Bilton, a man from a Detroit shelter whose birth certificate was found in defendant's residence. Given this evidence, the trial court did not err in finding that the crimes were acts in furtherance of a common scheme or plan as defined under MCR 6.120(B); therefore, defendant was not entitled to severance of the offenses for separate trials.

Defendant next argues that the trial court abused its discretion in joining his offenses for trial in light of the factors – listed in MCR 6.120(C) – to be considered when making such a decision. Again, we disagree. If offenses are related pursuant to MCR 6.120(B) and, therefore, eligible for joinder, this Court reviews the trial court's decision regarding joinder for an abuse of discretion. MCR 6.120(C); *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.120(C) provides as follows:

On the motion of either party, except as to offenses severed under subrule (B), the court may join or sever offenses on the ground that joinder or severance is appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial. Subject to an objection by either party, the court may sever offenses on its own initiative.

We agree with defendant that the factors relating to the timeliness of the motion, the potential for harassment, and the parties' readiness for trial are not relevant in this particular case, because there is no indication that these factors were at issue for either party. However, we disagree with defendant's assertion that the trial court abused its discretion in granting the prosecution's motion for joinder.

First, several of the same witnesses were required to testify regarding both offenses, including the two troopers who arrested defendant, those law enforcement and forensic personnel

who conducted the search of the vehicle, and the medical examiner, all from Utah. Also, Guinn and her father, both from Nevada, had to testify regarding both offenses because their testimony related to the discovery of both bodies and to Guinn's relationship with defendant, which, according to the prosecution, was an important part of defendant's motive for both killings. Obviously, the state would save resources in paying for the witnesses' travel to Michigan once rather than twice, and it is far more convenient for the witnesses to testify once rather than twice.

Second, we agree with the trial court's determination that there was little potential for confusion. Defendant was charged with three distinct offenses and his defenses to each killing were likewise distinct – that Britton died accidentally from erotic asphyxia and that he killed Bilton in self-defense. Third, although defendant focuses on the potential for prejudice through joinder on appeal, noting in particular that the dismemberment of Britton's body would be prejudicial in the case against defendant regarding Bilton's death, he fails to note that Bilton was found with a computer cord still wrapped around his neck, evidence highly prejudicial by itself. Defendant also argues that the jury in the case against defendant regarding Britton's death could have given undue weight, based on sympathy, to the fact that Bilton was homeless; however, we fail to see how the plight of a homeless man could further prejudice a jury considering the plight of a woman found dismembered, parts of her packed in garbage bags in the trunk of a vehicle and other parts in a picnic cooler on the back seat.

In short, the nature of the evidence of both offenses was naturally prejudicial because of the nature of each offense; each crime was brutal and the evidence of each crime was, therefore, brutal. Thus, we do not believe the potential for prejudice *stemming from the joinder of his offenses for trial* was reason alone to deny joinder when the prejudicial effect of the evidence in each case was no greater than the other. Given the added evidence that joinder would increase the convenience to witnesses, save resources of the parties, and have little potential for confusion, the trial court did not abuse its discretion in granting the prosecution's motion for joinder in this case.

Defendant next asserts that he was denied a fair trial by the prosecutor's misconduct. We disagree. A claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). However, defendant's claims of prosecutorial misconduct that are not preserved are reviewed for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). When an unpreserved issue is reviewed for plain error affecting substantial rights, reversal is warranted only when a plain error "resulted in the conviction of an actually innocent defendant or . . . 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.'" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Furthermore, "we will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450,

454; 678 NW2d 631 (2004). “The propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Defendant first asserts that the prosecutor’s argument during closing remarks that Bilton was choked from behind was improper and unsupported by the evidence. Defendant did not object to this argument; therefore, this assertion is reviewed for plain error.

It is true that “[a] prosecutor may not make a statement of fact to the jury that is unsupported by evidence,” *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003); however, he is free to argue the evidence and all reasonable inferences that arise from the evidence and relate to his theory of the case. *Id.*; *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Both parties note the medical examiner’s testimony that jurors would see a depression on the front of Bilton’s neck from the ligature as well as angled marks on the sides of his neck. The prosecutor’s remarks were based on the *reasonable inference* that the depression on the front of Bilton’s neck was caused by pressure pulling from behind him rather than from the front. The prosecutor’s remarks were based on the evidence and in direct response to defendant’s claim that he killed Bilton in self-defense, pulling the cable from in front of Bilton as Bilton was on top of defendant trying to choke him. No misconduct occurred.

Defendant next asserts that the prosecutor committed misconduct during his cross-examination of defendant and his closing remarks by suggesting that Britton’s neck showed a “groove or furrow” similar to that on Bilton. While defendant objected to the prosecutor’s use of the word “furrow” when cross-examining defendant, he did not object to the prosecutor’s closing argument; therefore, the assertion that focuses on the prosecutor’s argument is reviewed for plain error.

Defendant testified that Britton died accidentally as a result of erotic asphyxia using a thin belt, and the medical examiner, Edward Leis, identified a diagonal mark on the right side of Britton’s neck. Leis testified that this mark, an abrasion, “would be, most likely, the result of a ligature and not the result of a manual strangulation,” noting that the use of a cord or small rope would likely leave some abrasion of the skin so that a marking is visible. The prosecutor later asked defendant if he saw the furrow on Britton’s neck after showing him a picture of her, to which defendant responded that he saw a mark around her neck. While defendant argues that “[t]here is no indication in [Leis’s] testimony that the abrasion on Ms. Britton’s throat was inconsistent with the testimony of Defendant regarding the manner of her death,” the prosecutor is not limited to making arguments only consistent with *defendant’s* testimony. In fact, he may argue from the facts and testimony of witnesses that defendant is not worthy of belief. *Thomas, supra* at 455. The prosecutor’s argument that the jury would see a mark on Britton’s neck and disbelieve defendant’s testimony is based on the reasonable inference, in light of the evidence, that the mark on Britton’s neck was made when defendant strangled her. This was not misconduct.

In his Standard 4 brief filed *in propria persona*, defendant asserts twenty-eight additional instances of prosecutorial misconduct. We disagree with defendant’s arguments related to each of the additional assertions, finding that the prosecutor’s challenged questions or arguments were either based on the prosecutor’s good faith effort to admit evidence, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), or based on the evidence and all reasonable inferences arising from the evidence as they related to his theory of the case. *Bahoda, supra* at 282.

Defendant next asserts that the trial court abused its discretion through the admission of several pieces of evidence also mentioned in his prosecutorial misconduct claims. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). “An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made,” *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is “so palpably and grossly violative of fact and logic” that it evidences a perversity of will or a defiance of judgment. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002) (internal citation omitted). We have reviewed the assertions of error identified by defendant in his Standard 4 brief and have found no abuse of discretion by the trial court in admitting the challenged evidence.

Defendant also argues that he was denied his right to a fair trial by the cumulative effect of the errors he asserts. We disagree. In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Prejudicial error has not been identified in this case, and, absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Finally, defendant asserts that he was denied the effective assistance of counsel in large part because his counsel failed to object to many instances of error he asserts on appeal. We disagree. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) “that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms”; (2) that there is “a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different”; and (3) that the resultant proceedings were “fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant’s claim fails in part because counsel is not required to advocate a meritless position. *Snider, supra* at 425. As noted *supra*, defendant has failed to show any prosecutorial misconduct or improper admission of evidence. Therefore, his trial counsel was not ineffective for failing to object to the assertions of error discussed above. Furthermore, regarding several assertions of ineffective assistance of counsel not related to the previous assertions of error, defendant has failed to show that trial counsel’s actions were not the result of trial strategy, *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004), or that, given the physical evidence admitted at trial against defendant, there exists a reasonable probability that, absent the asserted errors, the result of his trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette