

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

JONATHAN AARON KURTZ,

Defendant-Appellant.

No. 306772
St. Clair Circuit Court
LC No. 10-002938-FC

Before: SHAPIRO, P.J., and SERVITTO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of first-degree murder, MCL 750.316(1)(a), attempted murder, MCL 750.91, and conspiracy to commit murder, MCL 750.157a. Defendant was sentenced to prison for life on all convictions. Defendant appeals as of right. We affirm.

The victims were the adoptive parents of co-defendant Tia Skinner, who apparently decided to kill the victims when they tried to stop her from seeing defendant, her then boyfriend. The victims were viciously attacked while they slept in their bed. Tia's father was killed in the attack and Tia's mother suffered roughly 25 stab wounds. The police investigation revealed that the plan between Tia, defendant, and James Preston was to kill the victims. The investigation also led to discovery of a map of the neighborhood and a note containing tips on how to break into Tia's house and commit the murders. Cell phone records produced text messages between Tia, defendant, and Preston that indicated planning of the crimes. During his interview with police, defendant said that Tia offered him \$1,000 to hurt or kill her parents, which was to be split between himself and Preston. Defendant said that he and Preston snuck into the victims' house, went upstairs to their bedroom, and stabbed them, although defendant claimed he did not attack or kill Tia's father. Defendant gave a very detailed explanation of what he and Preston did, and defendant admitted stabbing Tia's mother. The jury found defendant guilty of first-degree murder, attempted murder, and conspiracy to commit murder. This appeal followed.

First, defendant argues that the prosecutor committed misconduct during closing by appealing to the jurors' sympathies. Defendant also argues that the prosecutor committed misconduct by denigrating the defense during rebuttal argument. We disagree.

This Court is precluded from reviewing prosecutorial misconduct “. . . unless the defendant timely and specifically objects, except when an objection could not have cured the

error, or a failure to review the issue would result in a miscarriage of justice.” *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (internal quotation marks and citation omitted). Unpreserved claims of prosecutorial misconduct are therefore reviewed for plain error affecting defendant’s substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Unger*, 278 Mich App at 235 (internal quotation marks and citation omitted).

Claims of prosecutorial misconduct must be evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Generally, a prosecutor has great latitude in their argument and conduct, and is free to argue any reasonable inference that may arise from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). And when arguing the inferences, the prosecutor does not have to use the blandest terms available. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Furthermore, the prosecutor is permitted to use emotional language. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Defendant argues that the prosecutor committed misconduct during closing argument by saying, “And as we spent the weekend over Father’s Day thinking I’m sure the Skinner family spent the weekend thinking about the father that they had . . . ” However, the prosecutor’s comments cannot be considered in isolation. See *Brown*, 279 Mich App at 135. Defendant’s argument does not consider the rest of the prosecutor’s position. The prosecutor finished this part of the argument with,

. . . the father that would do anything to protect them. The father that gave his life to save them. To save even the very person in his own household that had planned his murder. He didn’t run. He didn’t leave the room. He didn’t beg for his life. He fought. And when he overcame them, when they finally decided that they were not going to be able to complete their original plan to kill them both and sneak out of the house undetected they ran. And he chased them.

The comment about Father’s Day may have garnered sympathy, but in context with the rest of the argument it did not appear to be intended to serve that purpose. The prosecutor appeared to be painting for the jury a picture of Tia’s father as a loving family man who was willing to risk, and in fact did give, his own life for his family. This was not misconduct. *Bahoda*, 448 Mich at 282; *Dobek*, 274 Mich App at 66; *Ackerman*, 257 Mich App at 454.

The prosecutor’s portrayal of Tia’s father was based on reasonable inferences arising from the evidence. There was testimony establishing that Tia’s father was a protective husband and that he would “get [the attackers] out of [the] home or take care of what was going on.” There was also evidence that he was protective of the children because they were his life. Furthermore, there was evidence that both victims were very involved in the lives of their children. Based on the evidence, it was reasonable for the prosecutor to argue that the Skinner children would miss their father. When considered in its context, and in conjunction with the evidence, the prosecutor’s comment was “innocuous,” and “not of a degree that prejudiced

defendant's right to a fair trial" and, therefore, did not rise to the level of misconduct. *Bahoda*, 448 Mich at 272.

Defendant also argues that the prosecutor committed misconduct by denigrating the defense throughout the prosecutor's rebuttal argument. The only example defendant provides of this alleged misconduct is the following passage:

And it almost seems, and thank God the law isn't what had been explained to you by [defense counsel]. Thank God the law will be explained to you by the Judge. Because under that mindset of why can't defendant take credit for the fact that maybe [the father's] injuries were just bad luck. Maybe it's instead of saying, well, it's good luck for [the mother], defendant's not responsible for premeditated murder or forming that intent in trying to kill someone because she has good luck
...

A review of the prosecutor's closing and rebuttal arguments does not reveal the "other comments" that defendant alludes to. A party cannot leave this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959)(citations omitted). Moreover, the single passage cited by defendant as denigrating is not error.

Again, a prosecutor's comments must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Defense counsel was arguing that defendant was not guilty of first-degree premeditated murder because there was no evidence that defendant killed Tia's father or aided in the killing. Defense counsel went on to explain the defense theory on aiding and abetting and also argued that there was not sufficient evidence to establish defendant's intent for attempted murder. Finally, counsel argued that perhaps it was bad luck that Tia's father died and good luck that Tia's mother survived.

The prosecutor's comment was merely a response to defense counsel's argument. The prosecutor appeared to argue that the survival by one person and death of another based on luck (good or bad) was not the state of the law. In response to defense counsel's closing argument, the prosecutor argued from the evidence that defendant targeted the victims not by luck but by a planned attack. The evidence clearly supported the prosecutor's argument. The multiple text messages between defendant, Tia, and Preston—about the house creaking, what kind of clothes to wear, the weapons to be used, and the alibis that would be given—revealed that the attacks were planned in great detail.

In light of the evidence presented and defense counsel's arguments, the prosecutor was not denigrating the defense, but responding to defense's argument. *Brown*, 279 Mich App at 135. The prosecution's response was a reasonable inference based on the evidence and therefore was not misconduct. *Bahoda*, 448 Mich at 282.

Finally, defendant argues that counsel was ineffective for failing to object to the prosecutorial misconduct. We disagree.

Unpreserved claims of ineffective assistance of counsel are reviewed for errors apparent on the record. *Unger*, 278 Mich App at 253. Both the United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Generally, effective assistance is presumed and the defendant carries the heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show that counsel's performance fell below objective professional norms, and that but for counsel's ineffectiveness, the ultimate result would likely have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In addition, the defendant must show that the proceedings were fundamentally unfair or unreliable because of counsel's ineffectiveness. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). However, counsel is not required to make frivolous or meritless motions or objections. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

As discussed above, there was no prosecutorial misconduct that amounted to an error. Counsel is not ineffective for failing to make a meritless objection. *Fonville*, 291 Mich App at 384. Because there were no errors, counsel did not have to object and defendant has failed to demonstrate that counsel was ineffective.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Deborah A. Servitto
/s/ Amy Ronayne Krause