STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2012
v	No. 298696 Wayne Circuit Court
GERALD EDWARD SIMS, Defendant-Appellant.	LC No. 10-000588-FC

Before: METER, P.J., and FITZGERALD and WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), assault with intent to rob while armed, MCL 750.89, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the murder conviction, 25 to 50 years for the assault conviction, and one to five years for the felon-in-possession conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from the December 13, 2009, shooting death of Frederick Burrell in southwest Detroit. Burrell was in a parked car on the street with Ashley Myers, who was performing a sexual act for money, when someone opened the car door, pointed a gun at Burrell, and demanded money. As Burrell attempted to drive away, he was shot in the back of the head and died. The principal evidence against defendant was Myers's testimony. Myers identified defendant as the person who shot Burrell and also testified that defendant was the person who arranged her "date" with Burrell. At trial, defendant presented an alibi defense. Defendant and his girlfriend both testified that they were together at another location at the time of the shooting. Defendant further argued that Myers's testimony was inconsistent and not credible.

Defendant appeals as of right from his convictions.

I. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that there was insufficient evidence to establish the required malice to support his felony-murder conviction. We disagree.

In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury's verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of felony murder are (1) the killing of a human being, (2) with malice, meaning the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of a felony specifically enumerated in MCL 750.316(1)(b). *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). The facts and circumstances of a killing may give rise to an inference of malice, and the required intent may be inferred from the use of a dangerous weapon. *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999). "[M]inimal circumstantial evidence will suffice to establish the defendant's state of mind . . . ." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

At trial, Myers testified that defendant held a loaded handgun to the back of Burrell's head while repeatedly and loudly demanding money. This coupled with the fact that Burrell was shot in the back of the head when he attempted to escape was sufficient circumstantial evidence to permit a rational trier of fact to reasonably infer that defendant possessed the required malicious intent for felony murder. Although defendant testified at trial that he was not the shooter and argued that Myers's testimony was not credible, the credibility of the witnesses' testimony was for the trier of fact to resolve. *People v Harverson*, 291 Mich App 171, 179; 804 NW2d 757 (2010).

Defendant argues on appeal that even if Myers's testimony was credible, it at most supports a conclusion that the shooting was accidental. Defendant relies on the following portion of Myers's direct examination testimony:

> *Q.* And then when the car starts in motion, when does the shot occur?
>
> *A.* Um, right when he—when he puts the car into drive, and it jolts forward, I remember the—the door slammed and hit [defendant's] arm, and that's when the gun went off.
>
> *Q.* Okay. It hit [defendant's] arm?
>
> *A.* (Nodding)
>
> *Q.* How do you know that?
>
> *A. Well, I don't know.* I figured it would, 'cause it jolted forward—

Q. (Interposing) Tell us what you saw and tell us what you heard.

A. All's I know is when the car—when the car jolted forward, that's when the gun went off, when we tried to pull off.

Q. The gun went off.

A. Yes. [Emphasis added.]

Contrary to what defendant suggests, Myers did not observe the gun accidentally discharge or even see the door hit defendant's arm. Myers specifically testified that she observed defendant pointing a gun at the back of Burrell's head, as he directed Burrell to "[r]un [his] pockets." Defendant directed Myers to "look out the window," and after Burrell hurriedly put the car in drive and stomped on the gas pedal in an attempt to escape, Myers *heard* a gunshot. Even if Myers *thought* the door might have hit defendant's arm, there is no requirement that a jury arrive at the same supposition as a witness. Further, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). As a result, the evidence was sufficient to support the malice element of the felony-murder conviction.

II. JURY INSTRUCTIONS

Defendant also argues that the trial court erred by failing to sua sponte instruct the jury on accident as a defense to murder, CJI2d 7.1, and that defense counsel was ineffective for failing to request the instruction. Again, we disagree.

A trial court is required to instruct the jury on the applicable law, the issues presented by the case, and, if a party requests, that party's theory of the case. MCR 2.516(B)(3); *People v Anstey*, 476 Mich 436, 451-452; 719 NW2d 579 (2006). Thus, although a trial court may be required to sua sponte instruct on a central issue in the case, the court is not required to give an instruction on a defense theory unless the defendant requests it and evidence supports it. *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Here, defendant did not request an instruction on accident, so the trial court was not obligated to provide it sua sponte.

Defendant alternatively argues that defense counsel was ineffective for failing to request an instruction on accident. Because defendant did not raise an ineffective assistance of counsel claim in the trial court, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceeding would have been different but for counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

The Use Note for CJI2d 7.1 provides that the "instruction is designed for use where the defendant alleges that the act itself was entirely accidental." The defense of accident was never a primary defense theory in this case, nor was it argued as a central issue in the case. It is apparent that defense counsel's strategy was to argue that defendant had an alibi and did not participate in the crime in any way, and that the prosecution had not met its burden of proof. Defense counsel presented this theory, not accident, in opening statement, during his questioning of the defense witnesses, and in closing argument. Both defendant and his girlfriend testified that they were together inside a house at the time of the shooting. A third defense witness testified regarding Myers's poor reputation for truthfulness. Myers testified at trial that she did not call 911 after the shooting, that she used drugs on the night of the shooting, and that she did not identify defendant as the shooter until her second police interview. Defense counsel highlighted these circumstances during closing argument to attempt to undermine Myers's credibility.

Considering the defense theory and the evidence adduced at trial, defense counsel's failure to request an accident instruction was not objectively unreasonable. One significant problem with requesting such an instruction is that the evidence of accident was scant at best. But more importantly, it is reasonable to not have the jury consider two disparate defense theories at the same time. Presenting to the jury that defendant was not present at the scene of the shooting and even if he was present, it was an accident, would only have likely caused the jury to discount evidence related to defendant's innocence. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

III. PROSECUTOR'S REMARKS

Next, defendant argues that the prosecutor improperly appealed to the jurors' sympathy and emotions by asking them to imagine themselves as victims of crime. We disagree. Because defendant did not object to the prosecutor's comments, we review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 752-753, 763-764. As such, this Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

"When reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Further, the remarks are to be evaluated in light of any defense arguments and the relationship they bear to the evidence admitted at trial. *Id.* But "[a]ppeals to the jury to sympathize with the victim constitutes improper argument." *Watson*, 245 Mich App at 591.

During rebuttal argument, the prosecutor stated the following:

> If you go out to lunch, break for lunch, and go over to Greektown and you will see the parking lot, and you go up to the 6th or 7th floor and somebody comes out from behind the post, give me a while—give me your purse. You can

> tell their race, their sex, general body, big man, if he has facial hair, you are being confronted as a victim. You are a mark. You see the gun. Here, take my wallet, take my purse. Go. You are overtime.
>
> My last point, thank you, a person hits the stairs. You are hysterical. Go call the police, blah, blah, blah. Next Tuesday, you come down to Greektown, you are out on a break. You see the man or woman at Pegasus, dang it, that is him. Oh, my God. When you recognize it, this is the person that robbed me in the parking lot. Emotional reaction. You know it is him. You know it is her. Guess what, you are here in the trial and you testify in front of a jury pool, we don't have DNA, we don't have videotape. Do you want to believe? Then believe.

Here, the prosecutor did not ask the jury to convict defendant based on emotions or sympathy. *People v Cooper*, 236 Mich App 643, 653; 601 NW2d 409 (1999). Rather, viewed in context, the prosecutor was responding to defense counsel's argument that Myers's testimony was not credible. The prosecutor's remarks, although a bit inartfully phrased, seemingly urged the jurors to use their common sense in considering Myers's failure to immediately identify defendant and in considering her behavior in relation to seeing defendant after the shooting. That is, the prosecutor was asking the jurors to consider the circumstances from Myers's perspective in evaluating the credibility of her testimony. Accordingly, the remarks were not clearly improper.

Further, any error could have been cured by an appropriate cautionary instruction. See *id.* at 586. Indeed, the trial court did instruct the jury that the lawyers' statements and arguments were not evidence and that it was not to let sympathy or prejudice influence their decision. Because it is well established that jurors are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the court's instructions were sufficient to dispel any possible prejudice, *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

In a related claim, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's remarks. But because the remarks were not improper, defense counsel's failure to object was not objectively unreasonable. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) ("Counsel is not ineffective for failing to make a futile objection."). Further, because the trial court's jury instructions were sufficient to dispel any possible prejudice, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

IV. EVIDENCE OF PRIOR FELONIES

We also reject defendant's claim that defense counsel was ineffective for failing to object to the prosecutor's use of a 1986 conviction (breaking and entering an occupied dwelling with the intent to steal) and a 1988 conviction (unarmed robbery) to impeach defendant's credibility. Again, our review of this unpreserved issue is limited to mistakes apparent on the record. *Sabin*, 242 Mich App at 659.

MRE 609 allows for the impeachment of a witness with evidence of a witness's conviction for a crime with an element of theft, as long as the conviction was subject to imprisonment in excess of one year, occurred within the past 10 years, and the court determines that the evidence is probative on the issue of credibility without being unfairly prejudicial. *People v King*, ___ Mich App ___; ___ NW2d ___ (Docket No. 301793, issued July 31, 2012), slip op, p 5 n 1. However, a conviction is considered to have occurred within the past 10 years (1) if 10 years have elapsed since the date of the conviction itself or (2) if the witness was released from the confinement imposed for that conviction within the past 10 years. MRE 609(c). Clearly, the 1986 and 1988 convictions, both of which contained an element of theft, occurred more than 10 years before defendant testified at the 2010 trial. But there is nothing in the record to indicate when defendant was released from imprisonment for these crimes.[1] Furthermore, because the past crimes involved elements of theft, it is not clear that evidence of these convictions lacked significant probative value on the issue of credibility. Also, any prejudicial effect was lessened because the past crimes were dissimilar to the charged crimes since the past offenses did not involve the use of a firearm or deadly force and they occurred over 20 years ago. Therefore, because the record is inadequate to demonstrate that the convictions were too "stale" to be admissible and because the record is inadequate to demonstrate that the convictions were not probative or unduly prejudicial, we cannot conclude that defense counsel's failure to object fell below an objective standard of reasonableness.

Moreover, even if defense counsel's failure to object did fall below an objective level of reasonableness, defendant cannot establish that, but for defense counsel's failure to object, the outcome would have been different. First, as noted above, it is doubtful that defense counsel's objection would have been successful. Second, even if defense counsel was successful in keeping the evidence of the convictions from being admitted, we cannot conclude that there was a reasonable probability that the jury would have come to a different verdict. Myers's testimony was not just a typical eyewitness identification of a stranger, which the United States Supreme Court has characterized as "proverbially untrustworthy." *United States v Wade*, 388 US 218, 228; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). On the contrary, she already knew defendant, which coupled with the fact that she said that defendant set up her meeting with Burrell was extremely damaging for defendant. As a result, defendant cannot establish that he was denied the effective assistance of counsel.

V. DEFENDANT'S SUPPLEMENTAL BRIEF

After substitute counsel was appointed for defendant, this Court permitted new counsel to file a supplemental brief, raising additional issues. We will address them here.

[1] We note that Michigan's Offender Tracking Information System indicates that defendant was sentenced to serve 5-1/2 to 15 years' imprisonment for the 1986 conviction and 5 to 15 years' imprisonment for the 1988 conviction. On appeal, the prosecutor indicates that defendant completed serving his sentence for the 1988 conviction on November 6, 2002, which meets the 10-year timing requirement. The prosecutor, though, was unable to identify when defendant completed serving his sentence for the 1986 conviction.

A. PROSECUTOR'S QUESTIONS

Defendant argues that he is entitled to a new trial because the prosecutor improperly impeached defense witness Christopher Farish with prior convictions that were not admissible under MRE 609, improperly bolstered Myers's credibility with prior consistent statements, and improperly questioned defendant about his unemployment status and receipt of public funds. Because defendant did not object to the prosecutor's questioning or conduct, we will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction. *Watson*, 245 Mich App at 586.

All of defendant's arguments relate to the prosecution's efforts in eliciting various testimony. But "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Here, defendant's arguments instead simply focus on how the evidence was allegedly inadmissible under the rules of evidence. Regardless of the admissibility of the evidence, defendant wholly failed to argue, let alone establish, that the prosecutor's efforts to get the evidence admitted were done in bad faith. Therefore, defendant failed to establish the existence of any prosecutorial misconduct, and he is not entitled to any relief.

In a related claim, defendant argues that defense counsel was ineffective for failing to object to the prosecutor's questions. Because the prosecutor's questioning of Pauley and Investigator Clemons was not clearly improper, defense counsel's failure to object was not objectively unreasonable. Further, because any misconduct in questioning Farish about his prior convictions and in cross-examining defendant about his financial status was not prejudicial, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

B. PHOTOGRAPHIC EVIDENCE

Defendant next argues that the trial court abused its discretion in admitting a graphic photograph, which depicted the single entry wound in back of Burrell's head. We disagree. The decision to admit photographic evidence is within the sole discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Mills*, 450 Mich at 76; *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998).

Photographs that are calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The question is whether a photograph is relevant under MRE 401 and, if so, whether its probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, 450 Mich at 67-68. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "A trial court admits relevant evidence to provide the trier of fact with as much useful information as possible." *People v Cameron*, 291 Mich App 599, 612; 806 NW2d 371 (2011).

Here, the photograph was admissible to corroborate Meyers's and the medical examiner's testimony. *Mills*, 450 Mich at 71. The photograph was instructive in depicting the location, nature, and proximity of the wound, which was relevant to show that defendant had a malicious intent when he shot Burrell. *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). As discussed in section I, *supra*, malice is an essential element of felony murder. *Gayheart*, 285 Mich App at 210. Contrary to defendant's suggestion, the fact that he did not dispute that Burrell was shot does not render the photograph inadmissible. See *Mills*, 450 Mich at 71.

Moreover, a relevant photograph is not inadmissible merely because of its gruesome or shocking nature. *Id.* at 76. Here, the photograph depicted the presence of a single entry wound in the back of the deceased victim's head, but it depicted little other graphic detail and is not overtly gruesome. It is apparent from the record that the trial court weighed the probative value of the photograph against its potentially prejudicial nature. See *People v Herndon*, 246 Mich App 371, 413-414; 633 NW2d 376 (2001). Therefore, we conclude that the trial court did not abuse its discretion in admitting the photographic evidence.

C. THE JURY'S REQUEST TO REVIEW TESTIMONY

Defendant also argues that the trial court erred by refusing to grant the jury's request to review testimony, and that the trial court's instruction in response to the jury's request requires reversal. We disagree. This Court reviews a trial court's decision regarding a jury's request to review testimony for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). But because defendant did not object to the trial court's responsive jury instruction, that issue is not preserved. Therefore, our review of the instructional issue is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

A defendant does not have an absolute right to have a jury review testimony. *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000). MCR 6.414(J) requires that the trial court "exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request." The rule also provides that the court may order the jury to continue deliberations without the requested testimony, "so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed." *Id.*

In this case, the trial court did not abuse its discretion by initially refusing to provide the requested testimony. The request was unreasonable because it was made less than 90 minutes after the jury began deliberations. Further, the trial court's instruction in response to the jury's request did not foreclose the possibility that the testimony could be reviewed later. The trial court stated that "[*a*]*t this time*, I am going to say no," and "[*a*]*t this point*, I am going to say no." (Emphasis added.) Because the request was made on a Friday and the stenographer was not present on that day, it was not unreasonable to explain that a transcript would not even be available until the following Wednesday or Thursday at the earliest. Therefore, defendant failed to establish the existence of any error.

For the same reasons, we reject defendant's related claim that that defense counsel was ineffective for failing to object to the trial court's denial of the jury's request for testimony. *Frazier*, 478 Mich at 243.

D. CUMULATIVE EFFECT OF ERRORS

Lastly, we reject defendant's argument that the cumulative effect of several minor errors denied him a fair trial. Here, defendant failed to establish the existence of any error. Because there are no errors to cumulate, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). Accordingly, defendant's claim fails.

Affirmed.

/s/ Patrick M. Meter
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder