STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24 2001
v	No. 222120 Calhoun Circuit Court
WINSTON CORNELL BURT, Defendant-Appellant.	LC No. 99-000218-FC

Before: Griffin, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), arising out of a gang-related shooting. Defendant was sentenced to life in prison without parole for the murder conviction and a consecutive two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial when his attorney, while questioning a prosecution witness, elicited testimony that defendant had shot a rival gang member's car about ten days before the fatal shooting and had been present immediately after another person had "flashed" a weapon four days before the victim's death. Defendant claims no rational trial strategy could justify eliciting this testimony or failing to request a mistrial, and he was therefore denied effective assistance of counsel guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Defendant also argues that the trial court neglected its duty to limit evidence at trial to relevant and material matters. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). The admission of the evidence at issue, defendant further argues, resulted in manifest injustice. *City of Troy v McMaster*, 154 Mich App 564, 567-568; 398 NW2d 469 (1986). We disagree.

Because no objection was raised at trial to admission of the testimony that defendant now claims denied him a fair trial, the alleged erroneous admission of the testimony is reviewed for plain error. Under this standard, first, there must be an error; second, the error must be plain (i.e., clear or obvious); and third, the error must have affected substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999). The third requirement means that there must be

a showing of prejudice or that the error was outcome determinative. *Id.* It is the defendant's burden to demonstrate that an error resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999). In this case, plain error did not occur because the evidence at issue was relevant and material to defendant's defense and properly admitted.

A

The two prior incidents at issue were part of a month-long feud between defendant and codefendant, alleged members of one gang, and two friends of the victim, alleged members of another gang. There was no evidence at trial that the victim was a member of either gang. On the day he was killed, the victim was socializing at a street corner in Battle Creek with several friends who were alleged gang members. The codefendant, with defendant as his passenger, drove by the group standing at the corner. Both sides "flashed" gang signs. Defendant and codefendant drove past the group on the corner a second time after about ten minutes. Gang signs were "flashed" again, but this time the codefendant made a U-turn and drove back toward the group while defendant climbed out of the passenger window and began shooting at the group which included the victim.

Although at trial the alleged gang members on the corner denied having guns or shooting, other witnesses testified that weapons were fired at the car in which defendant was a passenger. Empty shell casings recovered at the scene indicated that at least three guns, most likely all semiautomatic pistols, were fired during the shoot-out: a .45 caliber pistol, a .380 pistol, and a nine-millimeter pistol. The victim was killed with a nine-millimeter bullet. Most witnesses testified defendant was firing two handguns, but defendant admitted firing only one, a .380 semiautomatic pistol, which he contended he fired only in self-defense. Defendant's theory of the case was that gang members had set up an ambush for him and codefendant and the victim died when hit by "friendly-fire" during the crossfire.

B

The record suggests that defense counsel elicited the testimony at issue to support the defense theory that defendant acted in self-defense in response to a gang ambush. The testimony provided a motive for the alleged gang members to ambush defendant and the codefendant. Thus, the evidence was logically relevant and material to defendant's defense because it made it more probable that defendant, who admitted shooting at the group, did so in self-defense. MRE 401; *People v Crawford*, 458 Mich 376, 388-389; 582 NW2d 785 (1998). Proof of motive is proper, where it is not used as improper propensity evidence. MRE 402; *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

C

Defendant's argument that the evidence was improper character evidence used in violation of MRE 404(b)(1) is misplaced. While MRE 404(b)(1) restates the general rule prohibiting the use of character evidence to prove action in conformity therewith on a particular occasion, it also emphasizes that the general rule does not prevent the admission of evidence for

other relevant purposes. *Rice, supra.* Evidence that is inadmissible for one purpose may be admissible, when it is used for a proper purpose that is not otherwise precluded. *Id.*

In this case, the prosecutor did not use the prior shooting incident to argue defendant acted accordingly on the day of the offense. It was not disputed that defendant shot at the people on the street corner. While the prosecutor mentioned that shots had been fired previously, he argued that the offense grew out of a feud between members of two gangs and that flashing gang signs sparked the shooting itself. The defense argued that the incident grew out of the macho gang frame of mind of, "you shoot me, I shoot you," which was the motive for the rival gang to ambush defendant and the codefendant.

The probative value of the evidence also exceeded the possible danger of unfair prejudice to either party because defendant, the codefendant, and almost all prosecution witnesses had criminal records and were alleged gang members. MRE 403; MRE 404(b); *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); *Rice, supra* at 441. Furthermore, because the defense introduced the testimony at issue, defendant may not claim on appeal that the evidence was prejudicial and denied him a fair trial. *People v Knapp*, 244 Mich App 361, 378; ___ NW2d ___ (2001); *McMaster, supra* at 567-568.

D

Defendant's argument that defense counsel was constitutionally deficient also fails. Under the two-pronged test adopted by our Supreme Court in *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994), defendant must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that the representation so prejudiced the defendant as to deprive him of a fair trial. See also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

In this case, defendant failed to make a record at a motion for new trial or evidentiary hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), and therefore this Court's review is limited to the record, *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). On this record, the performance of counsel for defendant was objectively reasonable.

It was critical for the defense to establish both that defendant acted in self-defense and that he did not fire the fatal bullet. See *People v Jackson*, 390 Mich 621; 212 NW2d 918 (1973) (killing an innocent bystander, even when acting in lawful self-defense may be manslaughter where the defendant's actions are reckless as to the victim); see also *People v Daniels*, 172 Mich App 374; 431 NW2d 846 (1988) (a mutual shoot-out that kills an innocent bystander may be second-degree murder or voluntary manslaughter). Thus, it was reasonable trial strategy to bring out evidence suggesting a motive for a gang ambush of defendant and the codefendant. The evidence not only supported defendant's claim of self-defense, but also supported the related defense theory that the victim's death may have resulted from "friendly-fire."

Furthermore, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will this Court assess counsel's competence with the benefit of hindsight. *Rice, supra* at 445. Counsel's decisions about what evidence to present and whether

to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Thus, defendant on appeal simply cannot overcome the strong presumption that his trial counsel was effectively pursuing a sound trial strategy. *Toma, supra* at 302.

II

For the same reasons, defendant's argument that trial counsel should have more aggressively cross-examined the codefendant, who testified pursuant to a plea agreement, is also without merit. For the most part, the codefendant's testimony was favorable to defendant. On many key points, the codefendant's testimony either supported or did not contradict defendant's version of events, especially that defendant only fired one gun in self-defense, a .380 semiautomatic pistol.

Nothing in the record overcomes the strong presumption defendant's trial counsel was pursuing a reasonable trial strategy and that defense counsel performed effectively. *Toma, supra* at 302.

III

Defendant's final claim is that the prosecutor denied him due process and a fair trial by improperly injecting sympathy for the victim into the trial with his argument that the victim was "in the wrong place at the wrong time" and by presenting the victim's grandmother as a witness who testified she found the victim "on the ground stretched out dead."

Review of alleged prosecutorial misconduct is precluded 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 Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Defendant's claim that he was deprived of a fair trial by prosecutorial misconduct lacks merit. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). When reviewing claims of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* The propriety of a prosecutor's remarks will depend upon the particular facts of each case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Furthermore, a prosecutor's 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 make a statement of fact to the jury that is unsupported by the evidence. *Stanaway, supra* at 686; *Schutte, supra* at 721. However, the prosecutor is free to argue the evidence and all reasonable inferences arising from the facts as they relate to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *Schutte, supra*.

In the present case the prosecutor's comment that the victim was "in the wrong place at the wrong time" was fully supported by the record. Not one witness testified that the victim was suspected of being a gang member. Nor did any testimony link the victim in any way to the feud between the two gangs. In this case, where nearly all the witnesses were gang members, suspected gang members, convicted felons or facing criminal charges, it was a reasonable inference to suggest from the lack of negative evidence concerning the victim that he was "in the wrong place at the wrong time" at the time of the shooting and his resulting death. Defendant was not denied a fair trial on this basis. *Schutte, supra; Paquette, supra*.

With respect to the victim's grandmother, most of her brief and limited testimony concerned matters relevant and material to the prosecutor's case, such as that the victim was shot and killed at a certain place and time. Also, her identification of the victim was relevant and material to the case for purposes of autopsy identification and affiliation or lack of affiliation with a gang. The prosecutor need not use the least prejudicial evidence available to establish facts that are at issue. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *Ullah, supra* at 678-679.

However, the testimony regarding the victim's funeral was not relevant or material to any issue at trial and appears to have been raised in an attempt to engender sympathy. Such evidence was therefore improper. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Nevertheless, the testimony is not grounds for a new trial because any prejudicial effect of the testimony could have been cured by a timely objection and instruction. *Swartz, supra* at 373. Also, given the overwhelming evidence of defendant's guilt, defendant has not sustained his burden of demonstrating that the error resulted in a miscarriage of justice. *Brownridge, supra* at 216.

IV

Defendant's supplemental brief raises two issues, neither of which merits relief.

A

Defendant first claims that the prosecutor presented insufficient evidence to support the elements of premeditation, deliberation, and intent to kill, beyond a reasonable doubt. We disagree and find from the record that defendant's argument must fail because sufficient evidence was presented at trial, when viewed in the light most favorable to the prosecution, for a rational trier of fact to have found all of the elements of the offense proven beyond a reasonable doubt, including the elements of premeditation, deliberation and intent to kill. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992).

The evidence established the following facts, when viewed in a light favorable to the prosecution and with inferences favorable to the jury verdict. *People v Nowack*, 462 Mich 392; 614 NW2d 78 (2000). On the day of the shooting, the codefendant and defendant had driven by the group, which included the victim, at least two times, flashing gang signs. After the second pass, the car made a U-turn and drove back toward the people on the street corner. Defendant positioned himself outside the car (actually sitting on the passenger side door window frame), driven by his long-time best friend, to be able to fire two handguns. Defendant fired numerous shots from the two handguns at the fleeing and scattering street-group. The victim was killed

when shot with a nine-millimeter bullet in the back of the head, while fleeing, and a survivor was shot in the back. Codefendant Hubbard testified he drove at the group so that defendant would be able get a better shot. On these facts, a rational jury could conclude beyond a reasonable doubt that defendant acted with deliberate intent to kill. *People v Tilley*, 405 Mich 38, 45-46; 273 NW 471 (1979).

The jury obviously rejected defendant's claim of self-defense, and the prosecutor presented ample evidence from which a rational factfinder could have concluded that all of the elements of first-degree murder, including a deliberate, premeditated intent to kill, were proven beyond a reasonable doubt. Because this Court must defer to the jury's reasonable inferences and resolve credibility conflicts in support of the jury verdict, defendant's claim of insufficient evidence fails. *Nowack, supra* at 400; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1998).

B

Defendant next argues that the trial court abused its discretion by permitting the prosecutor to present evidence during rebuttal regarding lack of bullet holes in the car in which defendant was a passenger. While defendant testified and presented additional evidence of other shooters to support his theory of self-defense, evidence in the prosecutor's case-in-chief also indicated the presence of shooters other than defendant, and therefore the prosecutor improperly introduced evidence in rebuttal that could have, but was not, introduced in his case-in-chief.

Defendant's argument on this issue fails because the testimony at issue was proper rebuttal, and even if the testimony was not proper rebuttal, admission of the testimony was not outcome determinative plain error. *Carines, supra* at 763; *People v Figgures*, 451 Mich 390, 406; 547 NW2d 673 (1996).

The rebuttal testimony at issue (that there were no bullet holes on the passenger's side of the rental car) responded to testimony of defendant and Carl Vines. Vines testified that a man ran south on Hubbard Street from north of Bernardo Place, shooting wildly. Vines could not say where the man was when the car with defendant passed. The rebuttal testimony also responded to defendant's testimony that while Hubbard was driving toward the group of people at the corner of Bernardo and Hubbard streets (coming from the store south of Bernardo with defendant sitting in the passenger's window), he heard shots being fired from in front of him and from behind him (defendant also pointed out on the diagram used at trial where he saw the gunmen).

Vine's testimony and defendant's testimony were obviously presented to support defendant's "crossfire" and "friendly-fire" theories (that someone shooting at defendant's back actually killed the victim). Hubbard testified that after driving south on Hubbard Street toward the store, he made a U-turn and drove back north toward the group on the corner and then turned left (which would have placed defendant's back facing the north side of Bernardo). Hubbard testified that shots were fired from the south side of Bernardo (where the group with the victim was), but he did not recall any shooting from the north side of Bernardo. Thus, any shots fired from the group on the corner would have been from the south side of Bernardo Place and would have struck the rental car, if at all, on the front or driver's side.

Therefore, the rebuttal testimony at issue properly responded to evidence introduced by defendant and a theory advanced by defendant in his case-in-chief. The testimony was thus proper rebuttal. Furthermore, given the overwhelming evidence of defendant's guilt and the prosecutor's concession in both opening statement and closing argument, that shots were fired at the car in which defendant was a passenger, any error in admitting the rebuttal testimony at issue was clearly not outcome determinative.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Helene N. White