STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2013
v IHAB MASALMANI, Defendant-Appellant.	No. 301376 Macomb Circuit Court LC No. 09-004832-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v IHAB MASALMANI, Defendant-Appellant.	No. 301377 Macomb Circuit Court LC No. 09-005144-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v IHAB MASALMANI, Defendant-Appellant.	No. 301378 Macomb Circuit Court LC No. 09-005244-FC

Before: JANSEN, P.J., and FITZGERALD and K. F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of 18 total charges, arising from three separate cases that were consolidated for trial. In LC No. 09-004832-FC, the jury convicted defendant of two counts of armed robbery, MCL 750.529, kidnapping, MCL 750.349, bank robbery, MCL

750.531a, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 15 to 50 years each for the bank robbery, armed robbery, and kidnapping convictions, to be served consecutive to four concurrent two-year terms of imprisonment for the felony-firearm convictions. In LC No. 09-005144-FC, the jury convicted defendant of carjacking, MCL 750.529a, receiving or concealing firearms, MCL 750.535b, and felony-firearm. The trial court sentenced defendant to concurrent prison terms of 15 to 50 years for the carjacking conviction, and 5 to 10 years for the receiving or concealing conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. In LC No. 09-005244-FC, the jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b), carjacking, conspiracy to commit carjacking, MCL 750.529a and MCL 750.529, kidnapping, conspiracy to commit kidnapping, MCL 750.349 and MCL 750.529, larceny from a person, MCL 750.357, and felony-firearm. The trial court sentenced defendant to concurrent prison terms of mandatory life without parole for the murder conviction, 25 to 50 years each for the carjacking, kidnapping, and conspiracy convictions, and 5 to 10 years for the larceny conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right in all three cases, and the appeals have been consolidated for this Court's consideration. We affirm defendant's convictions in all three cases, but vacate his mandatory life sentence for first-degree felony murder in Docket No. 301378 and remand for resentencing on that offense.

Defendant's convictions arise from three criminal episodes that occurred during a three-day crime spree from August 9, 2009, until defendant's arrest on August 11, 2009. The prosecutor's theory was that on the afternoon of August 9, 2009, defendant, acting in concert with codefendant Robert Taylor, both of whom were juveniles, carjacked and abducted Matt Landry from outside an Eastpointe restaurant, held Landry captive for several hours, stole his money by using his ATM card, and later murdered him by shooting him in the head and leaving his body at an abandoned burnt-out house in a drug-infested neighborhood. The next day, defendant, using Landry's vehicle and now acting alone, robbed a Flagstar Bank, during which he pointed a gun and threatened several people inside the bank, temporarily abducted customer Sarah Maynard, and stole money from both the bank and a customer before fleeing in Landry's vehicle. Defendant continued his crime spree on August 11, 2009, by carjacking David Hassroune at gunpoint in a Walmart parking lot before being arrested. Surveillance videotape from several locations depicted defendant committing many of the offenses. At trial, the defense focused on contesting the charges that defendant shot Landry and kidnapped Maynard.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his conviction for first-degree felony murder must be vacated because the evidence failed to establish that he was the person who shot and killed Landry and also failed to establish the necessary element of malice beyond a reasonable doubt. When ascertaining whether sufficient evidence was presented at trial to support a conviction, we 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). "[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).

A. IDENTITY

First-degree felony murder requires proof that the defendant killed the victim with malice 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). Identity is also an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967).

Defendant asserts that the prosecution failed to present credible evidence that he was the person who killed Landry. We disagree. Although there were no witnesses to the actual shooting, defendant's identity as the killer properly could be established through circumstantial evidence. The deferential standard of review "is the same whether the evidence is direct or circumstantial," and it is well established that "circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *Nowack*, 462 Mich at 400 (citation omitted); see also *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). The credibility of identification testimony is for the trier of fact to resolve and this Court will not resolve it anew. *Nowack*, 462 Mich at 400.

The defense did not dispute the evidence that defendant carjacked and kidnapped Landry outside a Quiznos restaurant in Eastpointe on the afternoon of August 9, 2009. Two witnesses, Lawrence Wata and Carol Santangelo, observed defendant and codefendant Taylor acting aggressively toward Landry during the initial contact. While Taylor, who Wata believed was armed with a weapon, acted as a lookout, defendant grabbed Landry by the neck, dragged him to the rear of his vehicle, and attempted to push Landry in the trunk. Defendant then forced Landry back inside the car, punched Landry, who had his hands up, and signaled for Taylor to join them. Defendant drove away in Landry's vehicle with both Landry and Taylor inside. Evidence was presented that over the next several hours defendant continued to drive Landry's vehicle, hold Landry captive, and steal money from Landry's bank account.

About an hour after defendant abducted Landry, defendant was captured on videotape using Landry's ATM card at a gas station on the east side of Detroit, making three separate withdrawals, totaling more than $300. Soon thereafter, in a Detroit neighborhood near the gas station, a resident viewed defendant and another male standing behind Landry's Honda and looking into the trunk. There was no sign of Landry. However, a cigarette butt later found in the truck revealed the presence of Landry's DNA. Defendant was thereafter captured on another Detroit area gas station security video, still driving Landry's green Honda, with Taylor and two women, and no sighting of Landry. Defendant was also captured on an Eastland mall clothing store's videotape, shopping with two other men and spending a large sum of money.

Seven hours after Landry was abducted, defendant and Taylor drove Landry's Honda to a heavily drug-infested area in Detroit where they parked outside a vacant, burnt-out drug house at 14703 Maddelein. According to Frederick Singleton, Taylor was driving the vehicle and defendant was in the back seat with Landry. Through Singleton, defendant arranged to purchase crack cocaine, after which defendant, Taylor, and Landry went inside the drug house. As defendant smoked the crack cocaine inside the house, Landry, who Singleton described as silent

and "out of place," sat motionless on the couch next to Taylor. When Singleton spoke to Landry, defendant referred to Landry as his "home boy" and stated, "He doesn't get high, don't worry about him." Defendant purchased and smoked another round of crack cocaine and, at one point, two males came to the house and gave defendant a gas can. According to Singleton, after defendant smoked the second round of crack cocaine, he began to "tweak," which Singleton described as becoming "very paranoid," "antsy," and "amped up." Landry was last seen alive at about 10:00 p.m. inside the vacant house with defendant and Taylor. The next day, defendant used Landry's Honda to commit a bank robbery. Defendant was armed during that offense, attempted to kidnap a patron, and threatened to kill the people inside the bank. Two days later, Landry's significantly decomposed body was found inside a vacant, burnt-out house at 14711 Maddelein, only a few houses from the location where Landry was last seen alive with defendant and Taylor. Landry had been shot in the back of the head and the bullet path was consistent with Landry having been shot while kneeling.

Viewed in a light most favorable to the prosecution, the evidence that (1) defendant, in conjunction with Taylor, brazenly and forcibly carjacked and kidnapped Landry, (2) defendant held Landry captive for at least seven hours, during which time he dragged Landry by the neck, punched Landry, stole money from Landry's bank account, and took Landry to a drug house where defendant smoked cracked cocaine to the point of becoming paranoid and amped up, (3) Landry was last seen alive with defendant and Taylor at the drug house, (4) Landry was shot in the back of the head, (5) Landry's body was found on the same street just a few houses from the location where he was last seen alive with defendant and Taylor, at which time defendant was described as "antsy," "paranoid," and "amped up," and (6) that the day after Landry was last seen alive, defendant was still in possession of Landry's car, which he used to commit another violent crime while armed with a firearm, was sufficient to enable a rational trier of fact to determine beyond a reasonable doubt that defendant was the person who killed Landry during the criminal episode.

Although defendant argues that there were other people at the vacant house who could have killed Landry, and that Singleton's testimony was not credible, these challenges are related to the weight of the evidence rather than its sufficiency. *People v Scotts*, 80 Mich App 1, 9; 263 NW2d 272 (1977). These same challenges were presented to the jury during opening statement, cross-examination, and closing argument. This Court may not interfere with the jury's role of determining issues of weight and credibility. *Wolfe*, 440 Mich at 514.

B. MALICIOUS INTENT

Defendant also argues that, even if his identity as the shooter was established, there was insufficient evidence that he acted with malice. "Malice is defined as 'the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.'" *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (citation omitted). Malice may be inferred from facts in evidence, including the use of a dangerous weapon. *People v Bulls*, 262 Mich App 618, 627; 687 NW2d 159 (2004). "[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).

Viewed in a light most favorable to the prosecution, the evidence that Landry was forcibly abducted, held captive for several hours, and shot in the back of his head in a manner consistent with an execution, after which his body was left inside a vacant, burnt-out house in a highly drug-infested area, was sufficient to permit a rational trier of fact to infer beyond a reasonable doubt that defendant possessed the requisite malicious intent for felony murder. Thus, the evidence was sufficient to support defendant's conviction of first-degree felony murder.

II. THE PROSECUTOR'S CONDUCT

Defendant next argues that misconduct by the prosecutor during closing and rebuttal arguments denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court will not reverse if the alleged prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction upon request. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

A. DENIGRATED DEFENDANT'S CHARACTER

Defendant argues that the prosecutor denigrated his character during closing and rebuttal arguments by comparing him to the gangster character "Tony Montana" from the movie *Scarface*. A prosecutor may not denigrate a defendant with prejudicial or intemperate comments. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, prosecutors have great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). They may argue the evidence and all reasonable inferences that arise from the evidence in relationship to their theory of the case, and they need not state their inferences in the blandest possible language. *Bahoda*, 448 Mich at 282; *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Relying on *Bahoda*, 448 Mich at 267, defendant asserts that the prosecutor injected the inflammatory references to Tony Montana with no apparent justification except to arouse prejudice. We disagree. During trial, Hassroune, the Walmart carjacking victim, testified that he observed several tattoos on defendant's hands while observing defendant holding a gun. Defendant had the word "Bad" tattooed on his left hand, and the word "Guy" tattooed on his right hand, and the number "5" was tattooed on each of his ten knuckles. The jury was shown photographs of defendant's hands depicting the tattoos. Police Detective Brian McKenzie testified that he asked defendant about the tattoos as he was photographing defendant's hands. Defendant stated that the tattoos "were a reference to the movie Scarface." Thus, the connection to "bad guy" Tony Montana from the movie *Scarface* originated from defendant himself, as opposed to the prosecutor making a baseless reference. Viewed in this context, the prosecutor's remarks do not rise to the level of plain error.

Moreover, a timely objection to the challenged remarks could have cured any perceived prejudice by obtaining an appropriate cautionary instruction. See *Watson*, 245 Mich App at 586. And even though defendant did not object, the trial court instructed the jury that the lawyers' statements and arguments are not evidence, that the jury was to decide the case based only on the

properly admitted evidence, and that the jury was to follow the court's instructions. These instructions were sufficient to dispel any possible prejudice and to protect defendant's substantial rights. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

B. VOUCHING FOR FREDERICK SINGLETON'S CREDIBILITY

Defendant next argues that the prosecutor improperly vouched for the credibility of Frederick Singleton by stating that "Singleton is a very credible witness." As defendant correctly notes, a prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But a prosecutor is free to argue from the facts and testimony that a witness is credible or worthy of belief. *Dobek*, 274 Mich App 66.

Here, the prosecutor did not suggest that he had some special knowledge that Singleton was credible. Rather, the prosecutor's remark was made in the context of providing reasons, grounded in the evidence, why Singleton should be believed. Defense counsel repeatedly asserted throughout the trial that Singleton was untrustworthy and not credible. In his closing argument, the prosecutor urged the jury to evaluate Singleton's testimony and demeanor, discussed the reliability of his testimony, and argued that there were reasons from the evidence to conclude that Singleton was credible. The prosecutor noted that Singleton made no effort to conceal his criminal and drug-related history. He further noted that Singleton could have exaggerated defendant's actions by stating that he observed him with a gun and observed him beating Landry, which clearly would have been more detrimental to the defense. Throughout closing and rebuttal arguments, the prosecutor explained several connecting events involving defendant, Landry, and Landry's vehicle, which supported Singleton's testimony. Because the prosecutor's remark was based on the evidence at trial, there was no plain error. Moreover, in its final instructions, the trial court instructed the jury that it was the sole judge of witness credibility, thereby protecting defendant's substantial rights. *Long*, 246 Mich App 582, 588; *Graves*, 458 Mich at 486.

For these reasons, defendant has not established any basis for relief based on the prosecutor's conduct at trial.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant alternatively argues that defense counsel was ineffective for failing to object to the prosecutor's comments. 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 first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial

strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Because the prosecutor's remarks were not improper, defense counsel's failure to object was not objectively unreasonable. 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. DEFENDANT'S SUPPLEMENTAL BRIEF

Defendant has filed a supplemental brief in which he seeks relief from his mandatory life sentence for his first-degree murder conviction. Defendant was a juvenile at the time he committed the felony-murder offense. Under *Miller v Alabama*, 567 US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and *People v Carp*, ___ Mich App ___; ___NW2d ___ (Docket No. 307758, issued November 15, 2012), lv pending, defendant's sentence of mandatory life imprisonment without parole violates the Eighth Amendment ban on "cruel and unusual" punishment. US Const, Amend VIII. Accordingly, we vacate defendant's mandatory life sentence for first-degree murder and remand for resentencing on that offense consistent with *Miller* and *Carp*.[1] See *Carp*, slip op at 24, 40.

Affirmed in part, vacated in part, and remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

[1] In *Carp*, slip op at 31-41, this Court provided guidelines for trial courts to follow until the Legislature adopts new sentencing standards for juvenile offenders. The trial court shall reconsider defendant's sentence for first-degree felony murder under those guidelines, rather than wait until the Legislature acts. *Carp*, slip op at 31.