STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2012
v	No. 303879 St. Joseph Circuit Court
DOUGLAS HARRIE STEWART, Defendant-Appellant.	LC No. 10-016574-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of premeditated first-degree murder, MCL 750.316(1)(a), and conspiracy to commit first-degree premeditated murder, MCL 750.157a. The trial court sentenced defendant to concurrent terms of life in prison. Defendant appeals by right. We affirm.

This case involves the disappearance of Venus Stewart, defendant's wife. In April 2010, Venus, along with the couple's two daughters, lived with Venus's parents in Colon, Michigan. Defendant lived in Newport News, Virginia. Ricky Spencer, who met defendant over X-Box Live, testified that when he visited defendant in April 2010, defendant indicated that there was a good chance that he could get away with killing Venus. Defendant asked Spencer to be his alibi, i.e., to live in his apartment and pretend to be him. Spencer pretended to be defendant on April 15 and 16, 2010. According to Spencer, during the morning of April 16, defendant called him and said the plan was off because he had been pulled over by a police officer in Ohio. Spencer then pretended to be defendant on April 25 and 26, 2010. Spencer testified that he received a telephone call from defendant around 8:30 a.m. on April 26, and defendant told him, "Okay, dude, it's done." Defendant explained to Spencer that he pretended to be a mailman delivering a package and that when Venus came outside to open the front gate, he placed Venus in a headlock. Venus's body has not been found.

On appeal, defendant argues that he was denied due process because Michael Fisher provided expert testimony after the prosecutor stipulated that he would not. Fisher, an FBI electronics and forensic examiner, testified he obtained data from Spencer's global positioning system (GPS) unit and translated the data into a readable format. Fisher's "translations" were admitted into evidence as exhibits 174 and 175. We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An

abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217.

Pursuant to the prosecutor's stipulation, Fisher was not qualified as an expert witness. Thus, the issue is whether Fisher provided expert testimony. The distinction between lay and expert testimony is that lay testimony "result[s] from a process of reasoning familiar in everyday life" and expert testimony results from "a process which can be mastered only by specialists in the field." *Donlin v Philips Lighting North America Corp*, 581 F3d 73, 81 (CA 3, 2009) (citations omitted). Expert testimony concerns matters that are not within the knowledge of a lay person. *People v Ray*, 191 Mich App 706, 708; 479 NW2d 1 (1991).

Fisher testified that the data stored in the GPS unit was in binary code, which is not readable by him or others, and that exhibits 174 and 175 were a "translation" of the actual data stored inside the GPS unit performed by software programs designed for that purpose. But, Fisher's testimony does not suggest that Fisher himself translated or interpreted the data that was stored inside the GPS unit nor that getting the software programs to run required any specialized knowledge or training. Thus, the trial court did not err in allowing him to offer lay testimony. Defense counsel still had the opportunity to cross-examine Fisher on his apparent lack of knowledge as to how the software actually worked and, could perhaps have challenged admission of the results of the software process as unreliable and lacking in foundation, but elected not to do so. Therefore admission of exhibits 174 and 175 into evidence was not error. *Unger*, 278 Mich App at 216.[1]

Defendant also argues that he was denied a fair trial when his motion to disqualify the trial judge was denied. According to defendant, the trial judge engaged in an improper ex parte communication with the prosecutor. After defendant's motion to disqualify was denied, defendant moved this Court for leave to appeal the order, and we denied leave "for lack of merit in the grounds presented." *People v Stewart*, unpublished order of the Court of Appeals, entered November 24, 2010 (Docket No. 300783). While the application for leave was brought on an interlocutory basis, the issue was one for which the record was fully developed and where the court understood that the issue had to be conclusively determined before trial and thus properly issued an order on the merits. There has been no change in the law, and there are no facts that were not known when we denied the application. Accordingly, the prior decision constitutes the

[1] Even if we were to conclude that Fisher provided expert testimony and the trial court abused its discretion in admitting exhibits 174 and 175, the error would not require reversal of defendant's convictions. Exhibits 174 and 175 were not the only evidence that corroborated Spencer's testimony. The testimony of numerous witnesses, including that of Spencer's parents, an Ohio state trooper, employees of the law firm of Wilson & Wilson, a computer forensic examiner, and the night transportation supervisor for defendant's employer, as well as defendant's bank records and the telephone records of three TracFones corroborated Spencer's testimony. Based on all the evidence that corroborated Spencer's testimony, it does not affirmatively appear that it is more probable than not that any error in the admission of exhibits 174 and 175 was outcome determinative. *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001).

law of the case and we will not exercise our discretion to revisit the question. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002).

Next, defendant claims that the trial court erred in denying his motion for a mistrial after Spencer testified without objection that defendant said he would go on a rampage and cause harm to jurors if Venus injured their children. We review a trial court's decision on a motion for mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). A trial court should grant a mistrial only when an irregularity occurs that is so prejudicial that it impairs the defendant's right to a fair trial and can be cured in no other way. *Id.*; *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

Defendant moved the trial court for a mistrial on the ground that Spencer testified that defendant threatened the jury; however, as the trial court stated in denying defendant's motion for mistrial, defendant's statement to Spencer was not a threat to his jury. Spencer testified that defendant said that he believed his wife Venus was harming his children and that if defendant did nothing and then learned his children were in fact harmed, he would go on a rampage killing people, including Venus, her family and the lawyers, prosecutors, and jury. But nothing happened to defendant's children, and the statement was made in the furtherance of the alleged conspiracy long before defendant's jury was empanelled. No reasonable person could construe defendant's statement to Spencer about going on a rampage as a threat against defendant's jury.

In addition, we find no merit to defendant's argument that Spencer's testimony about defendant's statement of going on a rampage was not relevant and unfairly prejudicial and therefore should not have been admitted under MRE 403. All relevant evidence is prejudicial to some extent. *People v Murphy (On Remand)*, 282 Mich App 571, 582; 766 NW2d 303 (2009). Here, the testimony provided the context for highly relevant evidence of motive for murder. See *Unger*, 278 Mich App at 223 ("evidence of motive in a prosecution for murder is always relevant"). Evidence is unfairly prejudicial only when a danger exists that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The danger that the jury would unfairly infer a threat directed at them was slight or nonexistent. Moreover, to the extent the testimony was subject to confusion, the trial court offered to provide the jury a cautionary instruction, which defendant declined. Curative instructions cure most trial errors because jurors are presumed to follow the court's instructions. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). We conclude there is no danger that the jury would give undue or preemptive weight to defendant's statement. Accordingly, the trial court's decision to deny defendant's motion for mistrial was not an abuse of discretion. *Schaw*, 288 Mich App at 236; *Horn*, 279 Mich App at 36.

Defendant claims that he was denied due process when the prosecutor vouched for the credibility of the lead investigator, Michael Scott, during closing arguments. To preserve a claim of prosecutorial misconduct for appellate review, a defendant must make a contemporaneous objection and request a curative instruction. *People v Callon*, 256 Mich App 312, 329, 662 NW2d 501 (2003). Because defendant did not object and request a curative instruction when the prosecutor allegedly vouched for Scott's credibility, defendant's claim of prosecutorial misconduct is unpreserved. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *Id.*

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge of the witness's truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). But the prosecutor is free to argue the evidence and the reasonable inferences that arise from it. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

In rebuttal argument, the prosecutor argued that Scott "said there has been no evidence to make him believe that Venus Stewart is alive." The prosecutor's argument was merely a restatement of Scott's testimony that there was no evidence to suggest that Venus was alive. Because a prosecutor may argue the evidence, the prosecutor's argument was proper. There was no prosecutorial misconduct.

Finally, defendant argues that the trial court erred when it supplemented the standard jury instructions on first-degree premeditated murder with the instruction that Venus's body need not be recovered if the evidence convinced the jury beyond a reasonable doubt that Venus was dead. We review de novo claims of instructional error. *Dobek*, 274 Mich App at 82. A trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *Id.* We review jury instructions in their entirety to determine whether error occurred. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003).

A trial court must instruct the jury on the applicable law. *Dobek*, 274 Mich App at 82. Therefore, the instructions must include all the elements of the charged offenses and any material issues, defenses, and theories that are supported by the evidence. *Id.* "[I]t is well established that trial courts are not required to use the Michigan Criminal Jury Instructions, which do not have the official sanction of the Michigan Supreme Court." *People v McFall*, 224 Mich App 403, 414; 569 NW2d 828 (1997). It follows that a trial court may provide the jury with supplemental instructions that fairly and accurately apply the law to material issues in the case and the theories of the parties that are supported by the evidence. *Dobek*, 274 Mich App at 82.

As defendant concedes, the supplemental instruction was an accurate statement of the law. See *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992), where this Court stated that a victim's body is not always necessary to establish the corpus delicti of homicide. Defendant also makes no argument that the supplemental instruction did not apply to the facts of the case. Rather, defendant claims that the fact that Venus's body was never found was an important consideration for the jury in determining whether a murder occurred and whether he committed the murder. The supplemental instruction, he argues, encouraged the jury to disregard the fact that the prosecutor failed to present proof of Venus's death. We disagree.

The supplemental instruction drew the jury's attention to the fact that Venus's body was not found; however, the supplemental instruction did not lessen the prosecutor's burden of proof or encourage the jury to disregard the lack of a body. The supplemental instruction, while stating that Venus's body need not be recovered, reiterated that the prosecutor was required to prove beyond a reasonable doubt that Venus was dead. Thus, when the instructions for first-degree premeditated murder are read in the entirety, the instructions required the jury to find beyond a reasonable doubt that Venus was dead, regardless of whether her body was recovered, and that she died as a result of an act of defendant. Because the supplemental instruction accurately

stated the law, was applied, and did not lessen the prosecutor's burden of proving that Venus was dead as a result of an act of defendant, we conclude there was no instructional error.

We affirm.

/s/ Jane E. Markey
/s/ Douglas B. Shapiro
/s/ Amy Ronayne Krause