

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EUGENE LEAMON, III,

Defendant-Appellant.

UNPUBLISHED

November 24, 1998

No. 201833

Cass Circuit Court

LC No. 95-008555 FC

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

After a jury trial, defendant, a sixteen year old juvenile at the time of the charged offense, was convicted as an adult of first-degree premeditated murder, MCL 750.316; MSA 28.548. He was sentenced as an adult to life imprisonment without parole. He appeals as of right. We affirm defendant's conviction and remand to allow the trial court to conduct a juvenile sentencing hearing pursuant to MCL 769.1(3); MSA 28.1072(3).

Defendant was convicted of killing Rebecca Lynn Stowe, who disappeared on July 13, 1993, shortly after she informed defendant that she was pregnant with his child and would not have an abortion. Rebecca Stowe's remains were found buried on defendant's uncle's farm on October 15, 1995. Defendant subsequently confessed to killing Stowe, but claimed it was an accident. Defendant also presented a diminished capacity defense at trial, which the jury rejected.

I.

Defendant first contends that the trial court erred in denying his motion for a directed verdict because the evidence was insufficient to show premeditation and deliberation, which are necessary elements of first-degree murder. We disagree. In determining whether sufficient evidence has been presented, this Court views the evidence in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Parcha*, 227 Mich App 236, 238-239; 575 NW2d 316 (1997). Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). It is

unnecessary for the prosecution to negate every reasonable theory consistent with the defendant's innocence. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

To establish the crime of second-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Gonzalez*, 178 Mich App 526, 531; 444 NW2d 228 (1989). The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Schollaert, supra*, 194 Mich App 170. Premeditation may be established through evidence of the following factors: (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. *Id.*; *Gonzalez, supra*, 178 Mich App 533.

Sufficient evidence was presented at trial to support a finding of premeditation and deliberation. It was undisputed that there was a prior relationship between defendant and the victim. When last seen together, defendant and the victim were involved in a heated argument concerning the fact that the victim was pregnant with defendant's child and did not want to have an abortion. As defendant drove away from the victim's home, he yelled, "You ruined my life." Shortly thereafter, defendant obtained two shovels and went with his cousin to his cousin's farm. Defendant dug a hole in a secluded spot on the farm, after which he remarked, "Oh, that bitch will fit in there." He then left the site, leaving a shovel behind near the hole. The next day defendant contacted the victim, picked her up, and drove her to the same spot where he had dug the hole. He ultimately killed her and buried her in the hole that he had dug the day before. Afterwards, he discarded the shovel in a dumpster and telephoned the victim's family and friends, claiming that he was looking for her. Later that same afternoon, defendant went back to his cousin's farm and told his cousin that the hole was filled and showed him where the victim had bitten his arm. Viewed most favorably to the prosecution, the foregoing evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant intentionally killed the victim with premeditation and deliberation.

Although defendant claimed that he was incapable of forming the requisite intent to commit first-degree murder because of post-traumatic stress disorder stemming from his abuse as a child at the Small World Day-Care Center, the jury apparently did not find this claim persuasive. This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

II.

Defendant next claims that he received ineffective assistance of counsel because counsel failed to adequately prepare a defense. Defendant claims that the post-traumatic stress defense was inadequately presented and was flawed because he had asserted that the killing was an accident and that he had no memory of any abuse at the Small World Day-Care Center. Because defendant did not request an evidentiary hearing on his ineffective assistance of counsel claim, our review of this issue is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To establish a claim of 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 but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). A defendant must overcome the presumption that the challenged action or inaction was trial strategy. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

Counsel's decisions regarding presentation of the post-traumatic stress disorder defense were a matter of trial strategy. Matters of trial strategy will not be second-guessed by this Court in reviewing claims of ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Moreover, the fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel. *Stewart, supra*, 219 Mich App 42. Defendant has failed to show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms or that, but for the presentation of the post-traumatic stress disorder defense, there was a reasonable probability that the results of the proceeding would have been different. We find nothing in the record indicating that defense counsel failed to prepare for trial. Thus, we conclude that defendant has not established a claim of ineffective assistance of counsel. *Effinger, supra*, 212 Mich App 69.

III.

Defendant next challenges several of the trial court's evidentiary rulings. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

First, for the reasons stated by the trial court on the record, we find that the trial court did not abuse its discretion in denying defendant's motion to admit certain Small World Day-Care Center documents that had been prepared by the state police, the Department of Social Services, the FBI, and other agencies, and that were compiled by Police Sergeant Podjan. Similarly, the trial court did not abuse its discretion when it denied defendant's motion to admit late-received copies of counseling notes from one of the alleged child victims at the Small World Day-Care Center. *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909, modified 450 Mich 1212 (1995); MRE 401 and 403.

Second, defendant challenges the trial court's decision to admit into evidence a newspaper advertisement in which parents of children who attended the Small World Day-Care Center, including defendant's parents, expressed their belief that their children had not been victimized or abused at the center. Although the trial court initially admitted this evidence, it later reversed itself and withdrew the document. We find that defendant was not prejudiced by the brief admission of the document, particularly where defendant's mother had earlier testified without objection that she and her husband initially supported the Barkmans, who ran the Small World Day-Care Center, and thought Richard Barkman was "one of the greatest guys there was." Furthermore, defendant's claim that the document permitted the prosecutor's expert witness, Dr. Clark, to render an opinion beyond his experience and

beyond the purpose of his testimony is without merit. Dr. Clark was an expert on the subject of sexual abuse of children and had focused his work on the validity of techniques used to investigate such allegations.

Finally, the trial court did not abuse its discretion in permitting the prosecutor to impeach Angie Snyder's testimony that defendant never hit her where Snyder gave other testimony for which her credibility was relevant to the case. *People v Kilbourn*, 454 Mich 677, 682-683; 563 NW2d 669 (1997).

IV.

Defendant next claims that the trial court abused its discretion when it admitted into evidence photographs and a videotape depicting the crime scene and excavation process. We disagree. The admission of photographic evidence is a matter within the discretion of the trial court. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Photographs are admissible if they are substantially necessary or instructive to show material facts or conditions. *People v Falkner*, 389 Mich 682, 685; 209 NW2d 193 (1973). Photographs are not inadmissible merely because they may be gruesome and shocking, but the trial court should exclude those that could lead the jury to abdicate its truth-finding function and convict on passion alone. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995).

Here, the photographs and videotape were admitted for a proper purpose. They were probative of the issue of intent, which was the critical issue in the case, in that they showed the secluded location of the body and the size of the grave. They also assisted in the testimony of the anthropologist, who excavated the body. The videotape and photographs were not calculated solely to arouse the passions of the jury. *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997). Therefore, we conclude that the trial court did not abuse its discretion in admitting the photographs and videotape into evidence.

V.

Defendant next contends that the prosecutor exceeded the bounds of proper closing argument in his remarks to the jury. However, defendant did not object to any of the challenged remarks at trial. Therefore, appellate review of this issue is precluded absent a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v McElhaney*, 215 Mich App 269; 545 NW2d 18 (1996).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Whether or not a prosecutor's remarks constitute reversible error is determined on a case-by-case basis after examining the context in which they are made. *McElhaney, supra*, 215 Mich App 283. The remarks must be evaluated in light of the relationship, or lack of relationship, they bear to the evidence admitted at trial. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Upon reviewing each of the challenged remarks in context, we conclude that defendant was not denied a fair and impartial trial. We find that the majority of the challenged remarks constituted proper argument. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Furthermore, the prosecutor may argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsberry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, any prejudice resulting from the remarks could have been cured by an instruction to the jury. Therefore, reversal is not warranted.

VI.

However, we do find that the trial court erred in sentencing defendant as an adult without conducting a juvenile sentencing hearing pursuant to MCL 769.1(3); MSA 28.1072(3), as it existed at the time the charged offense was committed. *People v Hana*, 443 Mich 202, 222-224; 504 NW2d 166 (1993); *People v Parrish*, 216 Mich App 178, 183; 549 NW2d 32 (1996). Plaintiff contends that a juvenile sentencing hearing was not required because MCL 769.1(1)(g); MSA 28.1072(1)(g), as amended by 1996 PA 247, provides that a juvenile convicted as an adult of first-degree murder "shall" be sentenced as an adult. However, 1996 PA 247, § 2 expressly states that "this amendatory act applies to offenses committed on or after its effective date." Because the offense in the instant case was committed before the effective date of 1996 PA 247, the amendatory act does not apply to the instant case. Therefore, pursuant to MCL 769.1(3); MSA 28.1072(3), as it existed at the time of the offense in the instant case, the trial court was required to conduct a juvenile sentencing hearing to determine if the best interests of the juvenile and the public would be served by sentencing defendant to juvenile probation or as an adult. While we believe that this is an exercise in futility under the circumstances of this case, we reluctantly vacate defendant's sentence and remand to the trial court for a juvenile sentencing hearing.

Defendant's conviction is affirmed. Remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald