STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR GARCIA, JR.,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 183252
Oakland Circuit Court
LC No. 94-132548 FC

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to open murder. Following a degree hearing held pursuant to MCL 750.318; MSA 28.550, the trial court found defendant guilty of first-degree premeditated murder, MCL 750.316; MSA 28.548, and sentenced him to natural life in prison. Defendant appeals as of right. We affirm.

Late in the evening on March 26, 1994, defendant went to the victim's home looking for the victim's daughter, with whom defendant had been romantically involved. After being told by the victim that her daughter was not there, defendant reluctantly left. Later, defendant returned, somehow gained access to the victim's home, and then attacked the victim in her bedroom. After severely beating the victim, defendant placed duct tape over her mouth and nose, completely obstructing her air passages. The victim died of asphyxiation within a few minutes. Defendant then dragged the victim out of the house, across the backyard, and down a hill to a location in an alley where he had parked his car. After first trying to place the victim in his car, defendant eventually left her lying face down on the ground. Defendant asserted that he was so intoxicated on the night of the offense that he blacked out and did not remember anything that happened.

Defendant first raises a three-prong attack to the validity of his plea of guilty to open murder. Defendant argues that he should be allowed to withdraw his plea because: (1) the trial court did not comply with the requirements of MCR 6.302(B)(2); (2) due to defense counsel's ineffective assistance, the plea was not knowing and voluntary ; and (3) there was an insufficient factual basis for the plea, given that the prosecution failed to offer evidence to refute his intoxication defense.

MCR 6.311(C) states in pertinent part:

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

Because defendant did not move in a timely manner to withdraw his plea, defendant has failed to properly preserve the issue for appellate review. MCR 6.311(A).[1] Furthermore, we find no merit in any of the arguments put forth by defendant.

Defendant next argues that there was insufficient evidence presented to establish that he acted with the requisite intent to be found guilty of first-degree premeditated murder. We disagree. "In reviewing the sufficiency of the evidence in a criminal case, 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 proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 97, 111; 570 NW2d 146 (1997).

"To convict of first-degree [premeditated] murder, the prosecution was required to prove beyond a reasonable doubt that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Youngblood*, 165 Mich App 381, 386-387; 418 NW2d 472 (1988). "The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident, including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself." *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995) (citations omitted). "[B]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998) (citation omitted). Accord *Youngblood, supra* at 387.

Viewed in a light most favorable to the prosecution, we conclude that there was sufficient evidence of defendant's state of mind to sustain his conviction. Defendant's intent to kill can be inferred from the brutality of the beating inflicted on the victim and the placement of the duct tape over her nose and mouth, which cut off all means of respiration. *People v Warren (After Remand)*, 200 Mich App 586, 588-589; 504 NW2d 907 (1993). That the killing was deliberate and premeditated can also be inferred from this evidence. The number of blunt force wounds, as well as the severity of the external and internal wounds inflicted, give rise to the reasonable inference that, during the course of the beating, defendant had time to reflect on and comprehend what he was doing. See *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Further, evidenced adduced at trial indicated that the duct tape placed over the victim's air passages was similar to duct tape found in defendant's car. This gives rise to the reasonable inference that defendant purposefully brought the tape with him into the victim's house. The medical examiner who performed the autopsy on the victim testified that it takes a person a couple of minutes to die of asphyxiation. It is reasonable to infer that this time interval afforded

defendant the opportunity "to take a second look at the nature of his actions." *Plummer, supra* at 305.

Additionally, the victim's daughter (defendant's former girlfriend) testified that defendant had threatened her mother, and that her mother had come to disapprove of her daughter's relationship with defendant after learning of defendant's abuse of her daughter. This history between the parties established that defendant had a motive for the killing. See *Youngblood, supra* at 387. Finally, given that the prosecution produced sufficient evidence to establish beyond a reasonable doubt that defendant possessed the requisite specific intent, defendant's intoxication defense is necessarily negated. See *People v Cannoy*, 136 Mich App 451, 455; 357 NW2d 67 (1984) ("The findings of the trial court clearly establish that defendant had the specific intent to commit felonious assault, thus negating the asserted [intoxication] defense.").

Next, defendant argues that evidence of defendant's prior assaultive acts was improperly admitted into evidence. Initially, we note that defendant failed to raise a timely objection to the testimony now challenged. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997).[2] Defendant's failure to raise a timely objection means that he has "waived appellate review in the absence of manifest injustice." *People v Turner*, 213 Mich App 558, 585; 540 NW2d 728 (1995). We see no manifest injustice in this case. Under MRE 404(b), "[e]vidence of other crimes, wrongs, or acts . . . may . . . be admissible for . . . purposes . . . such as proof of motive [and] . . . intent." See *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205; 520 NW2d 338 (1994). In this case, because the challenged evidence was probative of the issues of intent and motive, see discussion *infra*, it was relevant to matters other than propensity. Further, given that the trial judge sat as the trier of fact at the degree hearing, and given that a trial judge is presumed to understand the limitations surrounding the admissibility of other acts evidence, see *People v Butler*, 193 Mich App 63, 66; 483 NW2d 430 (1992), we do not believe the probative value of this evidence was "substantially outweighed by the danger of unfair prejudice." MRE 403.

Next, we find that defendant's claims of ineffective assistance of counsel were waived by his valid unconditional nolo contendere plea. *People v Bordash*, 208 Mich App 1, 2; 527 NW2d 17 (1994); *People v Vonins (After Remand)*, 203 Mich App 173, 175-176; 511 NW2d 706 (1993); *People v Nunn*, 173 Mich App 56, 58-59; 433 NW2d 331 (1988).

Finally, defendant asserts that the trial court improperly relied upon speculative testimony by the psychologist who examined defendant pursuant to the trial court's order for criminal responsibility examination. Defendant argues that reversal is required because the facts underlying the witness's opinions were not in evidence. Defendant's assertion, however, is not supported by the record. Under MRE 703,[3] an expert witness may base his or her opinion on the mental condition of a defendant on both firsthand observations and secondhand data collected by others that is presented to the expert. *People v Dobben*, 440 Mich 679, 695; 488 NW2d 726 (1992). When and if those observations and data will be disclosed at trial is at the discretion of the trial court. MRE 703. The record makes clear that the bases of the psychologist's opinion testimony were disclosed during the course of her testimony. In that testimony, the psychologist described in detail the procedures she followed during her examination of defendant, including the documentary material she accessed and the standard diagnostic

tests she administered. She also recounted the results of her interview with defendant. Further, several times during the course of her testimony—including during cross-examination by defense counsel—the witness made specific reference to the findings contained in her report. Thus, defendant's argument is without merit.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey
/s/ William C. Whitbeck

[1] Defendant's guilty plea was entered before the November 1994 amendment of Const 1963, art 1 § 20, and the subsequent December 1994 amendments of both MCL 770.3; MSA 28.1100 and MCR 6.311. At the time of the plea, MCR 6.311(A) read:

> **(A) Motion to Withdraw Plea**
>
> (1) A motion to withdraw a plea may be filed within 42 days after entry of the judgment.
>
> (2) If a claim of appeal has been filed, a motion to withdraw a plea may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
>
> (3) If the defendant fails to file a timely claim of appeal, the defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal.
>
> (4) If the defendant is no longer entitled to appeal by right or leave, the defendant may seek relief in accordance with the procedure set forth in subchapter 6.500.

Defendant did not satisfy the requirements of any of the above four subrules. He did not file a motion to withdraw his plea within the 42 day time limit established in MCR 6.311(A)(1). He did not file within the 56 day time limit applicable to postjudgment motions brought pursuant to MCR 7.208(B). MCR 6.311(A)(2). Defendant did file a timely motion to remand with this Court pursuant to MCR 7.211(C)(1), but the Court's denial of that motion means that the issue has not been preserved under this procedure. *People v Hernandez*, 443 Mich 1, 21; 503 NW2d 629 (1993) (observing that "[t]he remand procedure is necessary for only those issues that are preserved, but still requires additional proceedings in the trial court before being resolved"). Because he filed a timely claim of appeal, subrule (C)(3) is inapplicable. Finally, defendant has failed to "seek relief in accordance with the procedures set forth in subchapter 6.500." MCR 6.311(A)(4).

[2] In the trial transcript cited by defendant on appeal, the prosecutor posed twelve questions to defendant's sister about her knowledge of the violent nature of defendant's relationship with the victim's

daughter. Defendant's objection came at the conclusion of the last question and answer. After defense counsel stated the grounds for the objection, the prosecutor voluntarily dropped the matter. No further such questions were posed by the prosecution.

[3] MRE 703 reads:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those *perceived by or made known to the expert* at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence. [Emphasis added.]