STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 18, 2000
v	No. 210565 Washtenaw Circuit Court
ROGER CURTIS WASHINGTON, Defendant-Appellant.	LC No. 96-006619 FC

Before: Jansen, P.J., and Hood and Wilder, JJ.

PER CURIAM.

Defendant was charged with open murder, MCL 767.71; MSA 28.294, and convicted, following a jury trial, of second-degree murder, MCL 750.317; MSA 28.548. He was sentenced to life imprisonment. Defendant appeals as of right, and we affirm.

Defendant first argues that his confession was inadmissible because it was obtained without benefit of *Miranda*[1] warnings while he was a voluntary in-patient in a psychiatric unit of a hospital. We disagree. Whether a person is in custody for purposes of *Miranda* presents a mixed question of law and fact that must be answered independently after de novo review of the record. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Following the murder, defendant voluntarily checked himself into the locked psychiatric ward of St. Joseph's Hospital. Police officers received an anonymous tip that defendant was at the facility. Police officers arrived at the hospital, only to learn that they could not see defendant without a court order unless defendant consented to the visit. Upon learning of the visit, defendant attempted to contact his psychiatrist, but was unable to reach him. Defendant then consulted with a friend and agreed to speak to the officers. The officers were required to surrender their weapons and were escorted to the psychiatric ward by security officers. Defendant's psychiatrist, Dr. Herman, learned of the officers request to see defendant, but did not attempt to stop the visit. Rather, he believed that defendant, although medicated, was able to decide whether to meet with officers. Defendant spoke to police officers and admitted the murder.

In *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997), the defendant allegedly placed a bomb outside an occupied home. When the bomb did not detonate, the defendant retrieved the bomb. The bomb exploded in the car, and the defendant was severely injured. The

defendant asserted that statements made by her to police must be suppressed because police officers did not provide her with *Miranda* warnings. The defendant had made statements to police officers during three interviews in her hospital room after the incident. This Court held that *Miranda* warnings were not required:

> Defendant had not been arrested at the time of these statements. An officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody, meaning that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest. "It is axiomatic that *Miranda* warnings need only be given in cases involving custodial interrogations." Thus, the trial court properly refused to suppress the statements on the basis of the officers' failure to give *Miranda* warnings because defendant had not been arrested at the time of the interviews and no formal restraint had been placed on her freedom of movement. [*Id.* at 197-198 (citations omitted).]

In the present case, defendant had not been placed under arrest, and the officers had not placed any restraints on defendant's freedom of movement. Accordingly, the officers were not required to give defendant *Miranda* warnings prior to any discussion at the psychiatric ward.

Defendant contends that it is irrelevant how the environment became custodial, and the combined efforts of police and hospital staff warranted *Miranda* warnings. However, in *Zahn, supra*, we held that *Miranda* attaches only when a person is in custody, which meant formal arrest or a restraint of freedom of movement associated with a formal arrest. This holding implies that the appropriate focus is determining whether it is police conduct that creates a custodial environment. Furthermore, in *Grand Rapids v Impens*, 414 Mich 667, 670; 327 NW2d 278 (1982), our Supreme Court examined whether a signed statement given to a private security guard could be admitted into evidence against the defendant when *Miranda* warnings were not given. The Court noted that *Miranda* warnings were directed toward *police conduct* and was an attempt to prohibit lengthy interrogations by police in a custodial setting. Therefore, statements made to private security guards need not be proceeded by *Miranda* warnings in order to be admissible as evidence. *Id.* at 677-678. Accordingly, defendant's contention, that the custodial environment created by hospital personnel invoked *Miranda* warnings, is without merit.

Defendant next argues that he was denied a fair trial when the prosecution introduced evidence that defendant invoked his right to remain silent and his right to an attorney as well as introduced evidence that defendant was taken to jail after the police interrogation. We disagree. Review of the trial transcript reveals that police officers were asked questions which required a "yes" or "no" response. Instead, Sergeant Butler responded that defendant declined to provide a written statement after orally confessing because he wished to speak to an attorney. Then, Sergeant Butler added that he made arrangements to transfer defendant to jail. Reversal is not required because the comment was not a studied attempt by the prosecutor to place the matter before the jury. *People v Truong*, 218 Mich App 325, 335-337; 553 NW2d 692 (1996). Furthermore, we note that the answers given by Sergeant Butler were not objected to by defense counsel. It appears from our review of the record that the failure to object was purposeful. That is, defense counsel argued that the circumstances surrounding

defendant's confession indicated that any statement was involuntary or fabricated. A party may not waive objection to an issue at trial and then raise it as error on appeal. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998).

Defendant next argues that he was denied his constitutional right to be represented by counsel of choice when the trial court refused to allow an adjournment of the sentencing hearing in order to retain counsel. We disagree. The decision regarding substitution of counsel and a request for an adjournment is left to the sound discretion of the trial court which will not be overturned on appeal absent an abuse of that discretion. *People v Flores*, 176 Mich App 610, 613-614; 440 NW2d 47 (1989). "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998). An indigent defendant is constitutionally guaranteed the right to counsel, but not entitled to the appointment of the attorney of his choice. *Flores*, *supra*. A defendant is entitled to have assigned counsel replaced upon a showing of adequate cause, provided that the substitution of counsel will not unreasonably disrupt the judicial process. *Id.* On the record available, we cannot conclude that the trial court abused its discretion in denying the request for an adjournment to retain new counsel to appear at sentencing. Furthermore, defendant has failed to demonstrate prejudice as a result of the denial of the adjournment. *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990).

Defendant next argues that improper scoring of the guidelines led to a disproportionate sentence. We disagree. The proportionality of a sentence is reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). "A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Where a sentence is proportionate, there is no basis for relief from the scoring of the sentencing guidelines on appeal. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). A life sentence for second-degree murder is proportionate. In any case, we affirm a scoring decision if evidence to support the score exists. *People v Hoffman*, 205 Mich App 1, 24; 518 NW2d 817 (1994). In the present case, the murder victim was struck over the head with a frying pan with such force that it broke. Defendant also took a knife and inflicted two fatal stab wounds to the victim's neck and chest. Despite these injuries, defendant obtained a third weapon, a barbecue fork, and inflicted over ninety puncture wounds to the victim's body, some of which punctured the victim's organs. Under the circumstances, the scoring of OV 4 at forty points for torture or sadism was proper.

Defendant next argues that there was insufficient evidence to support his second-degree murder conviction and insufficient evidence to allow a first-degree murder charge to be presented to the jury. We disagree. "In reviewing the sufficiency of the evidence presented at trial in a criminal case, we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In order to convict a defendant of first-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 Anderson, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from the circumstances surrounding the killing and merely require sufficient time to allow the defendant to take a second look. *Id.* Evidence of the following may establish premeditation: (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.*

In the present case, defendant and the victim were involved in a two-day drug binge. Defendant funded the drug binge, and the victim helped defendant purchase the drugs. Defendant told two different individuals that the victim owed him $40. Defendant told Willie Perry, the victim's roommate, that the victim was stealing some of the drugs. Prior to the killing, defendant attempted to collect the debt in the presence of another person, but the victim would not be paid for another week. Defendant left with the other person, but returned to the victim's apartment alone. While defendant asserted that the victim assaulted him, there was no justification for his responsive assault, which included striking the victim with a frying pan with such force that the pan broke, two major stab wounds, which proved to be fatal, and over ninety puncture wounds with a barbecue fork to her body. Based on the above facts, defendant had the opportunity to take a second look. After unsuccessfully attempting to collect the debt, defendant returned to the victim's apartment. Under the circumstances, the jury could have concluded that the murder was committed with premeditation and deliberation. A trial court is required to give requested instructions only if supported by the evidence or the facts of the case. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). Whether a jury instruction is applicable to the facts of the case is a determination within the sound discretion of the trial court. *Id.* In light of the evidence, the trial court properly instructed the jury regarding first-degree murder.

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996). Viewing the evidence in the light most favorable to the prosecution, *Terry*, *supra*, defendant caused the death of the victim when he used a frying pan, knife, and barbecue fork to inflict numerous injuries to the victim's body. Accordingly, defendant's argument is without merit.

Defendant next argues that the prosecution failed to establish the corpus delicti prior to the admission of his confession. We disagree. The corpus delicti of murder merely requires proof of a death and of some criminal agency that caused the death. *People v McMahon*, 451 Mich 543, 548; 548 NW2d 199 (1996). The purpose of the rule is to exclude other possible explanations for a person's disappearance, such as death by accident. *Id.* at 549. In the present case, there was no dispute that the victim died because she was found brutally murdered in her bed. Furthermore, Dr. Michael Caplan testified that the death was due to criminal agency, specifically, the infliction of various stab and puncture wounds. Accordingly, the corpus delicti rule for murder was satisfied. *Id.*

Defendant next argues that it was reversible error to admit photographs of the victim. We disagree. The admission of photographic evidence is reviewed for an abuse of discretion. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). Where evidence of premeditation and deliberation is at issue, photographic evidence is relevant provided that the photographs do not lead the

jury to abdicate its truth-finding function and convict on passion alone. *Id.* In the present case, the trial court did not abuse its discretion in admitting the photographs where intent was an issue.

Defendant next argues that trial counsel was ineffective for various reasons. We disagree. There is a presumption in favor of effective assistance, and a defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Id.* The alleged deficiency must be prejudicial to the defendant, and the defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Where defendant fails to move for a *Ginther*[2] hearing below, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). Defendant has failed to overcome the presumption that the alleged "errors" were sound trial strategy or that the outcome of the proceedings would have been different.

Affirmed.

/s/ Kathleen Jansen
/s/ Harold Hood
/s/ Kurtis T. Wilder

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).