STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JAMES BURNS,

Defendant-Appellant.

UNPUBLISHED
January 28, 2000

No. 207320
Hillsdale Circuit Court
LC No. 0-217718

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree, premeditated murder, MCL 750.316(a); MSA 28.548(a). He was sentenced to life in prison without the possibility of parole. Following an evidentiary hearing, defendant's motion for a new trial based on ineffective assistance of counsel was denied. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to call a toxicologist to testify and because his trial counsel argued inconsistent defenses. We disagree.

In order to establish a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 446 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, the decision whether to call certain witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In order to overcome the presumption of sound trial strategy and thus prevail on the issue of ineffective assistance of counsel, "the defendant must show that

his counsel's failure to call [the] witnesses deprived him of a substantial defense that would have affected the outcome of the proceeding." *Id.*

In this case, we find no merit to defendant's claim that trial counsel presented inconsistent defenses and that one defense, that the killing was committed in the heat of passion, seriously undermined the other, more important defense of intoxication. Our review of the record reveals that defendant's trial counsel vigorously argued that defendant was too intoxicated to form the requisite intent to sustain a conviction for first-degree murder. He then argued that a conviction for voluntary manslaughter, as opposed to second-degree murder, might be appropriate because, even though it was unclear as to what triggered defendant's conduct, there was evidence that defendant was highly excited and agitated at the time of the killing. This argument was appropriate. A defendant may present more than one theory. See *People v Heflin*, 434 Mich 482, 503-504; 456 NW2d 10 (1990). Moreover, if defendant hoped to be convicted of voluntary manslaughter instead of first- or second-degree murder, his counsel had to make the argument about which he now complains. There is no evidence that defendant's trial counsel undermined the intoxication defense or offered inconsistent defenses that prejudiced defendant.

Defendant next argues that his trial counsel was ineffective for failing to call a toxicologist to describe the severity of his intoxication and explain what behavior a highly intoxicated person is capable of, specifically whether a highly intoxicated person is capable of rational thought. We disagree that defendant's trial counsel was ineffective. Our review of the record demonstrates that the jury heard testimony from numerous witnesses that defendant was intoxicated and had consumed a large quantity of beer. There was also evidence that defendant had marijuana in his system. Moreover, a stipulation was placed on the record that defendant's blood alcohol level was .11 or .12 three hours after being taken into custody and, defense counsel obtained testimony that defendant's blood alcohol level would have been .165 or .18 between 2:30 a.m. or 3:00 a.m., which, according to the testimony, was around the time of the killing.[1] In addition, the trial court, as a frame of reference, instructed the jury that the legal blood alcohol limit for driving a car is .10. The record indicates that defense counsel obtained ample testimony from which to argue that defendant was too intoxicated at the time of the actual killing to have formulated the specific intent necessary to support a first-degree murder conviction. While a toxicologist may have added to defendant's case and provided more information regarding the abilities of an intoxicated person to act rationally, we do not find that the failure to call a toxicologist deprived defendant of a substantial defense. Thus, we find that defense counsel was not ineffective for failing to call a toxicologist in this case.

On appeal, defendant next argues that there was insufficient evidence to support a conviction for first-degree murder. We disagree.

When 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 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A challenge to the sufficiency of the evidence is resolved by considering all of the evidence presented up to the time that the defendant moved for a

directed verdict. *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988), citing *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). Here, defendant moved for a directed verdict at the close of the prosecution's proofs.

In order to convict a defendant of first-degree, premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and the act of killing was premeditated and deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1980).

> Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from circumstances surrounding the killing. [*Id.*]

Minimal circumstantial evidence is sufficient to prove an actor's state of mind. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

In this case, the prosecution presented evidence that, shortly before defendant began beating the victim, he told the mother of an ex-girlfriend that he had a lot of anger and needed to get it out. Later the same evening, he ordered the victim into the bathroom. Defendant thereafter followed the victim and closed the door. Defendant's roommate then heard smacking sounds coming from the bathroom. There was a struggle between defendant and the victim, during which defendant left the bathroom to go to the kitchen for beer and cigarettes and, he ordered the victim to clean up the blood while he was gone. The beating then resumed. Later, it stopped and defendant again ordered the victim to clean himself. Defendant even gave the victim a clean shirt. When the victim attempted to flee, defendant pursued him outside where the beating continued. Defendant subsequently carried the victim back into the house. Defendant then paced the room and mumbled about being in trouble. After pacing for at least a minute, during which he ordered the victim to stop making noise, defendant started jumping and stomping the victim to death while yelling "die" and "mother fucker." After the killing, defendant understood that he was going to prison. He stated this to his roommate before the police arrived. He also covered the victim's head with a garbage bag and moved the victim's pick-up truck out of the driveway. This evidence, if believed, was sufficient to support a first-degree murder conviction.

Defendant argues, however, that he was too intoxicated to formulate the requisite intent and that he did not know what he was doing. He claims that he did not have the capacity to premeditate the murder; he essentially requests that we conclude that the evidence of intoxication negates the evidence of premeditation and deliberation. We refuse to do so. Voluntary intoxication is a defense to first-degree murder, *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995), if the intoxication precluded the defendant from having the capacity to form the specific intent required to commit the crime. *People v Hughey*, 186 Mich App 585, 590; 464 NW2d 914 (1990). The issue of defendant's intent and whether defendant's intoxication rendered him incapable of forming the requisite intent is, however, an issue for the jury. *Id.* at 590-591; see also *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). We will not interfere with the jury's determinations on issues of credibility. *Id.* Moreover, we note that a review of the sufficiency of the prosecutor's evidence does not permit a review of the weight of the defendant's evidence. In order to have the weight of the evidence reviewed, defendant would have had to move for a new trial below. *People v Winters*, 225 Mich App 718, 729;

571 NW2d 764 (1997). He did not do so. Viewing the evidence in favor of the prosecution, there was sufficient evidence to support the elements of first-degree murder.

Defendant next argues that the prosecutor engaged in misconduct, which deprived him of a fair trial. We disagree. While the record evidences that the prosecutor badgered defendant during his cross-examination, the record also reveals that defense counsel timely objected to the badgering and the trial court put an end to the conduct. Thus, we find that defendant was not denied a fair and impartial trial. *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant also argues that the prosecutor improperly questioned one of its witnesses and attempted to inject sensationalistic testimony into the trial. We disagree. The prosecutor asked a witness, after she described defendant's act of stomping the victim, whether she had seen "wrestling on television." Defense counsel immediately objected and the trial court instructed the witness only to describe what she saw. While defendant claims that this question was so inflammatory and prejudicial that a new trial should be granted, we disagree. The trial court limited any prejudice that could have occurred and the witness did not answer the question. Thus, we do not find that defendant was denied a fair trial because of this isolated question.

Defendant also argues that the prosecutor improperly argued facts not in evidence during his closing and rebuttal arguments. This issue is not preserved because defendant failed to object at trial. *People v Slocum,* 213 Mich App 239, 241; 539 NW2d 572 (1995). Our review is therefore precluded absent a miscarriage of justice. *Id.* Here, after reviewing the record, we find that no miscarriage of justice will result from our refusal to review defendant's unpreserved claims of prosecutorial misconduct.

Finally, on appeal defendant claims that the trial court's conduct deprived him of a fair trial. He argues that the trial court unduly influenced the jury to his detriment. He claims that the trial court belittled and demeaned his counsel, cut his questioning of witnesses short, and made comments indicating that it was impatient with the trial. These issues are not preserved for appeal because they were not raised in the trial court. Generally, issues not raised before and considered by the trial court are not preserved for appellate review. *People v Conner,* 209 Mich App 419, 422; 531 NW2d 734 (1995). We note, however, that upon review, we do not find that the trial court's conduct unduly influenced the jury to the detriment of defendant. *People v Ross,* 181 Mich App 89, 90; 449 NW2d 107 (1989). In addition, our review of these unpreserved claims does not lead to a determination that the trial court's conduct amounted to plain error, which affected defendant's substantial rights. See *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). Thus, there is no error requiring reversal.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald

[1] We note that defendant argues that his trial counsel focused on defendant's blood alcohol level at the wrong time when he focused on the 2:30 a.m. to 3:00 a.m. time frame. We disagree. While the evidence showed that the beating began after midnight, the evidence demonstrated that the killing occurred shortly before the police arrived. The police arrived sometime between 2:30 a.m. and 3:00 a.m. Thus, it was appropriate for trial counsel to focus on defendant's blood alcohol level around 2:30 a.m. or 3:00 a.m. and not at the time the beating began.