

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE B. LARRY,

Defendant-Appellant.

UNPUBLISHED

March 3, 2000

No. 212114

Recorder's Court

LC No. 97-004713

Before: O'Connell, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and manslaughter for the wilful killing of an unborn quick child, MCL 750.322; MSA 28.554. Defendant was sentenced to life imprisonment for the first-degree murder conviction and ten to fifteen years' imprisonment for the manslaughter conviction. We affirm.

Defendant first contends that the prosecution failed to present sufficient evidence to prove the elements of premeditation and deliberation beyond a reasonable doubt. We disagree. In reviewing a challenge to the sufficiency of the evidence, this Court must examine the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

In *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998), this Court outlined the elements of first-degree murder:

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 require sufficient time to allow the defendant to take a second look. *Id.* The elements of premeditation and deliberation

may be inferred from the circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993), citing *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

In addition, “[p]remeditation 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.” *Anderson, supra* at 537. Although the brutal nature of a killing alone does not justify an inference of premeditation and deliberation, it can be considered as one of the factors to justify such a conclusion. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). Furthermore, defensive wounds on the victim can also be evidence of premeditation. *Anderson, supra* at 538.

In the instant case, Davon Jefferson, the victim’s eight-year-old son, testified that he entered his pregnant mother’s bedroom the night of the murder because he heard arguing. Jefferson testified that he observed defendant standing over the victim with a knife in his hand, holding down the victim’s leg with his free hand. Jeremy Fisher, the victim’s nine-year-old son, testified that he, too, entered the victim’s room that night. Fisher testified that he was carrying a plastic baseball bat to protect himself and his mother because he heard defendant and the victim arguing. He testified that defendant and the victim were arguing over defendant’s accusation that the victim had sexual relations with another man. Fisher further testified that he observed defendant trying to move the victim’s hands out of the way as she attempted to protect herself. Both boys testified that defendant subsequently left the victim’s bedroom. Jefferson testified that defendant left the house, while Fisher stated that defendant merely went into the basement. Both boys testified that the victim was still alive when defendant left the bedroom and they went to bed that night.

Fisher testified that he discovered the victim, covered in blood, when he entered her bedroom the following morning. Fisher testified that he observed blood on the bed, the walls and on the floor. The medical examiner testified that the victim died of multiple stab wounds to the neck and chest, and that the victim had various defensive wounds on both hands. The medical examiner opined that the victim bled to death, and that her fetus died as a result of the victim’s death. Defendant’s girlfriend, Javon Martin, testified that one or two days after the murder defendant told her that he had killed the victim and her baby. Martin testified that defendant indicated he had stabbed the victim, and that defendant stated he had killed the victim because there had been a man in the house.

Defendant’s actions before the killing clearly evidence his opportunity to take a second look before acting. Defendant was seen standing over his pregnant girlfriend with a knife in his hand, accusing her of having sexual relations with another man. His retreat, whether to the basement or actually out of the house, provided ample time for defendant to premeditate and deliberate. It can be reasonably inferred that defendant killed the victim after returning to the bedroom sometime after the victim’s sons left and went to bed. *Kelly, supra* at 642; *Hutner, supra* at 282. Furthermore, the brutal nature of the crime itself and the defensive wounds on the victim’s hands provide additional evidence of defendant’s ability to premeditate and deliberate. *Johnson, supra* at 733; *Anderson, supra* at 538. As the victim apparently bled to death, defendant could also have summoned help before her demise.

We hold that when viewed in the light most favorable to the prosecution, a rational trier of fact could conclude beyond a reasonable doubt that the evidence demonstrated that defendant acted with premeditation and deliberation in killing the victim. *Carines*, *supra* at 757.

Defendant next argues that the prosecutor made several remarks to the jury during her closing argument that constituted prosecutorial misconduct. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). After a thorough and contextual review of the record, we hold that the prosecutor's remarks were valid inferences stemming from evidence in the record and did not constitute misconduct. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Defendant was not denied a fair and impartial trial. *Paquette*, *supra* at 342.

Defendant also argues that the trial court erred when it gave supplemental instructions to the jury that were not favorable to defendant. Again, we disagree. During their deliberations, the jurors requested a chart created by the prosecution outlining the differences between first- and second-degree murder. The trial judge refused, stating that the chart was not evidence. Instead, the judge proposed that she reread the instructions on first- and second-degree murder. Defense counsel agreed to the court's proposal. Defendant now contends that the supplemental instructions were unbalanced in that they did not present any material favorable to defendant, i.e., a rereading of the alibi instruction. However, "[i]t is not an abuse of discretion for a trial court to fail to repeat instructions addressing areas not covered by a jury's specific request." *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998). The trial court repeated instructions based on a specific request from the jury. The court did not err in failing to read instructions favorable to defendant.

Defendant further argues that the trial court gave an insufficient and confusing instruction on the law of alibi. In order to preserve an issue regarding a jury instruction, a defendant must object on the record before the jury retires to consider the verdict. MCR 2.516(C). In the instant case, defendant did not object below. Accordingly, our review is limited to whether relief is necessary to avoid manifest injustice. *People v Gadomski*, 232 Mich App 24, 30; 592 NW2d 75 (1998). The trial court gave the following instructions with respect to defendant's alibi defense:

You have heard evidence that the defendant could not have committed the alleged crime because he was somewhere else when the crimes were committed. The prosecutor must prove beyond a reasonable doubt that the defendant was actually there when the alleged crime was committed.

The defendant does not have to prove that he was somewhere else if, after careful [sic] considering all of the evidence you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, you must find him not guilty.

The trial court's instruction follows the standard jury instruction regarding the law of alibi. See CJI2d 7.4. Although the Michigan Criminal Jury Instructions do not have the official sanction of the

Michigan Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), inasmuch as the issue was not properly preserved for appellate review and defendant concedes on appeal that the instructions given covered the essential points of the law pertaining to alibi, we hold that relief is not necessary to avoid manifest injustice.

Finally, defendant contends that defense counsel's failure to object to the asserted instances of prosecutorial misconduct, the unbalanced supplemental jury instructions, and the insufficient instruction with respect to the alibi defense amounted to ineffective assistance of counsel. We disagree.

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 that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Moreover, "the defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *Id.* at 687. Having found that the prosecutor's statements during her summation did not amount to prosecutorial misconduct, and that the trial court did not err in instructing the jury, we conclude that defendant's ineffectiveness claim is without basis. This Court does not require counsel to make futile objections. *People v Rodriquez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Affirmed.

/s/ Peter D. O'Connell

/s/ William B. Murphy

/s/ Kathleen Jansen