STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID N. CHURCHILL,

Defendant-Appellant.

UNPUBLISHED
November 3, 2000

No. 212145
Oakland Circuit Court
LC No. 91-113194-FC

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

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316; MSA 28.548, and sentenced to life imprisonment without the possibility of parole. He appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by trial counsel's numerous failures to object to the prosecutor's misconduct. We disagree.

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *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 was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* After having reviewed the record, we conclude that defendant has failed to show that he was denied the effective assistance of counsel.

We agree that trial counsel should have objected when the prosecutor told the jury that the trial court had previously determined that defendant's statement was voluntary, and when the prosecutor asked defendant to comment on witnesses' credibility. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Gilbert*, 55 Mich App 168, 172-173; 222 NW2d 305 (1974). However, the trial court's instructions with respect to the confession were accurate and

dispelled any prejudice caused by the prosecutor's remarks concerning the *Walker*[1] hearing. *Gilbert*, *supra*, 173. Further, the trial court instructed the jury that the lawyers' questions, statements, and arguments were not evidence to be considered, and that it was the duty of the jury, alone, to determine the credibility of the witnesses.

We further find that trial counsel was not ineffective for failing to lodge an objection during the challenged portion of the prosecutor's cross-examination of defendant's former wife. It is not improper for a prosecutor to question a witness regarding prior inconsistent testimony. See, e.g., MRE 607, MRE 613 and MRE 801(d)(1)(a). Likewise, trial counsel was not ineffective for failing to object to the challenged portion of the prosecutor's questioning of an evidence technician where defense counsel had previously injected the issue of partiality into the case by suggesting that it was the evidence technician's job to assist the prosecution in proving its case. *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992). Defense counsel is not required to make frivolous or meritless objections. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

We also reject defendant's claim that trial counsel was ineffective for failing to object to the prosecutor's questioning of defendant regarding his diminished capacity defense. If "a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant." See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). A prosecutor may also comment on the defendant's failure to take advantage of available opportunities to pursue matters relevant to his defense, and is not prohibited from commenting on the improbability of the defendant's theory or evidence. *Id.* at 115-116; *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998). Moreover, the trial court instructed the jury that defendant was not required to offer any evidence or prove his innocence, and that plaintiff had the burden of proving each element beyond a reasonable doubt.

We acknowledge that, in support of his claim of ineffective assistance of counsel, defendant has submitted the affidavit of trial counsel wherein she essentially admits that she was ineffective for failing to object to the prosecutor's "egregious conduct." The mere filing of an affidavit by trial counsel, however, is not enough to warrant a new trial on the basis of ineffective assistance of counsel. Again, in order to prevail on a claim of ineffective assistance of counsel, a defendant must not only show that counsel's performance was below an objective standard of reasonableness, but that he was prejudiced as a result of the deficient performance. *Pickens*, *supra*. Moreover, having reviewed the record, we find that it is replete with objections by trial counsel, as well as other actions that undermine the claim that she was "simply overwhelmed" by this case. We conclude that defendant has failed to demonstrate that, but for counsel's action or inaction, the result of the trial would have been different. Therefore, defendant is not entitled to a new trial on the basis of ineffective assistance of counsel.[2]

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[1] *People v Walker (on Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] We decline to address defendant's general commentaries relating to trial counsel's failure to object to nonspecific prosecutorial misconduct, as well as those with no supporting argument or citation to the

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II

Next, defendant argues that there was insufficient evidence to sustain a conviction of first-degree murder because there was insufficient evidence of premeditation and deliberation. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998). Questions of credibility are left to the trier of fact. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

First-degree premeditated murder requires proof 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." *Id*. Premeditation and deliberation may be established by evidence of: "(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*. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of premeditation and deliberation. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *Wolfe, supra*, 524-526. In addition, although the brutal nature of a killing alone is insufficient to show premeditation, evidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a "second look." *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999); *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Defensive wounds suffered by a victim can also be evidence of premeditation. *Johnson*, *supra*; *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995).

It was undisputed that defendant inflicted the victim's injuries. The victim died from manual strangulation and blunt impact head injury. The victim had bruising on her forehead, left ear, chin, neck, and around both eyes, caused by blows from a wooden toy rifle, which was not previously in the victim's house, and by a bar of soap in a sock. The bruising on the back of the victim's head and neck indicated that she was struck from behind. The victim also had defensive wounds on her forearms, hands, thighs and shoulders. The severity of the beating made the victim incapable of defending herself against the manual strangulation. "From these methodical actions, the jury could reasonably infer that defendant had an opportunity to take a 'second look' before killing the victim." *Kelly*, *supra*, 642.

Further, following the killing, the victim's roommate saw defendant leaving the victim's house through a hole in the side of the house. Defendant told the victim's roommate that the victim would be

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record. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997). Further, to the extent that defendant is attempting to reargue his prosecutorial misconduct claims, this Court has already considered and rejected those issues. *People v Churchill*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 1997 (Docket No. 189648).

returning home in ten minutes. Defendant then left in a hurry in the victim's car, which he was not allowed to drive. The front door was bolted from the inside, and the back door was locked with a chair positioned in front of it. The telephone had been moved from its usual location and taken off the receiver, which suggested that defendant had anticipated the possibility that the victim might call for help. *Id*. In addition, a packed suitcase was found in defendant's camper on top of his bed. This evidence, viewed in a light most favorable to the prosecution, was sufficient for a rational trier of fact to find that the essential elements of first-degree murder were proved beyond a reasonable doubt.

III

Finally, defendant argues that the trial court erred in admitting his statement because it was rendered involuntary by the police misrepresentation that the victim was alive. We disagree. Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). Deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000); *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *Id*.

Statements of an accused made during custodial interrogation are inadmissible unless the accused has voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966). Whether a statement was voluntary is determined by examining police conduct, and considering the totality of the circumstances, such as the duration of the defendant's detention and questioning, the defendant's mental and physical state, and whether the defendant was threatened or abused, among other factors. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998).

The sole factor relied on by defendant in support of his claim that his statement was involuntary is the police misrepresentation that the victim was still alive. However, such conduct alone is insufficient to make a confession involuntary. Rather, withholding information of the victim's death is only one factor to be considered in determining whether the statement was voluntary. See *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990); *People v Allen*, 8 Mich App 408, 413; 154 NW2d 570 (1967). Although the police misrepresented the victim's condition, the misrepresentation did not constitute sufficient deception to overcome defendant's free will in making the statement. Having reviewed the record in its entirety, we are satisfied that defendant's statement was voluntary.

We also reject defendant's claim that his statement was inadmissible because he was not informed of the charge against him, pursuant to MCL 764.19; MSA 28.878, which requires that the police inform a person of "the cause of the arrest." The record indicates that defendant knew the facts and circumstances surrounding his arrest and was informed that he was being arrested for the incident that occurred at the victim's house. Indeed, when asked at the *Walker* hearing how badly defendant

thought he had hurt the victim, he replied: "I don't know, I was afraid she might-I leaned over and I heard her heart and everything but . . . " Accordingly, this claim does

not render defendant's statement involuntary. See *People v Suchodolski*, 22 Mich App 389, 394-395; 178 NW2d 524 (1970).

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell