STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2000
v	No. 195891 Ingham Circuit Court
RICHARD RAYMOND, Defendant-Appellant.	LC No. 95-069404-FC

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549.[1] He was sentenced to twenty to thirty years' imprisonment. Defendant now appeals as of right.

Defendant's conviction resulted from the stabbing death of Rodney Johnson during a drug transaction gone bad. The victim, whom witnesses testified was unarmed, suffered a non-fatal stab wound to his abdomen and a fatal stab wound to his inner right thigh.[2] Additionally, the victim had cuts on the fingers of his right hand that appeared to be defensive wounds.

During the incident, defendant was overheard to say, "I told you don't f[uck] with me" and, "That'll show you." Subsequently, defendant told a friend that during a drug transaction with the victim, the victim attempted to steal defendant's marijuana. Defendant told his friend that he stabbed the victim in the stomach and leg. Defendant did not mention having to defend himself during the incident. In fact, defendant was heard to say that he "got the nigger."[3] Another friend testified that he was with defendant when defendant threw the knife used to stab the victim into the river.

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[1] Defendant was originally charged with open murder. However, he was convicted of second-degree murder.

[2] This wound caused excessive blood loss.

[3] Defendant told other friends that the victim was poking him with an umbrella and that he stabbed the victim to defend himself.

At trial, defendant testified that he picked up the victim in order to trade some home-grown marijuana for crack cocaine. Twice the victim directed defendant to a location where the victim left with the marijuana and returned with crack cocaine, which the two men then smoked together. Defendant wanted more crack cocaine, so they went to defendant's house to retrieve more marijuana to trade with, whereupon the victim made a telephone call and said that he could arrange another trade. The victim then directed defendant to another location and left with the marijuana as before. Subsequently, defendant began to look for him. The victim, when spotted by defendant, began to run. Defendant pursued the victim. The chase ended at defendant's car. The victim threw the marijuana to the ground near the rear bumper. Defendant testified that as he reached to pick it up, the victim stabbed at him with an umbrella. Defendant then took out his knife and the victim laughed, saying, "Oh, you got a knife." The victim then tried to kick defendant in the groin but defendant brought his arm down to defend himself, stabbing the victim in the leg. Defendant asserted that the victim then came at him again and when defendant pushed him away, he stabbed him in the side. Defendant then said to the victim, "[D]on't ever come back to my house, because I'll fix you." Defendant claimed that he did not intend to kill the victim and that he threw the knife in the river because he was afraid.

As above indicated, the jury found defendant guilty of second-degree murder. Before trial, however, an issue arose regarding whether defendant would be allowed to present evidence of his mental disorders to show that he was very susceptible to provocation and to explain his behavior after the stabbing. The issue of defendant's mental condition first arose when defense counsel requested an adjournment of trial so that defendant could receive medications in the jail that would enable him to testify without suffering a panic attack. Defense counsel indicated that, although defendant was not asserting an insanity or diminished capacity defense, defendant might submit evidence of a mental condition in order to explain his behavior after the stabbing.

On the day trial was scheduled to begin, the prosecutor moved to strike defendant's expert witnesses, arguing that they would testify regarding defendant's purported mental condition and that the prosecutor should be given an opportunity to have defendant examined. Defense counsel explained that the testimony of two psychologists would be offered to show that defendant suffered from bipolar disorder, anxiety disorder, and panic disorder. According to defense counsel, this testimony would be used for two purposes: (1) to explain defendant's behavior after the stabbing, such as his excitedness, and (2) to demonstrate that defendant was more susceptible to provocation than a mentally healthy person. Defense counsel stressed that, because defendant was not asserting defenses of insanity or diminished capacity, the prosecutor was not entitled to perform a forensic psychological evaluation of defendant.

The trial court compared defendant's provocation argument to a diminished capacity defense, in that defendant was arguing that the jury should take his mental disorders into account. The court stated that if defendant was offering the testimony only to explain his post-incident behavior, then the prosecutor could simply respond with rebuttal testimony. However, where the proffered testimony went to the heart of the incident itself, the court considered it to be evidence of diminished capacity and required that the prosecutor be given an opportunity to evaluate defendant's mental condition. The court signed a standard form order for a criminal responsibility evaluation. It ordered defendant to undergo an evaluation, relating to a claim of insanity or diminished capacity, at the Center for Forensic Psychiatry.

Defendant moved for reconsideration, arguing that he was not raising either an insanity or a diminished capacity defense and, therefore, should not be required to undergo an evaluation. Defendant also moved for a protective order to exempt him from answering any questions about the specific facts of the case during the evaluation. The court held that if defendant put his mental condition at issue, the prosecutor must be given an opportunity to evaluate defendant in order to challenge the assertion that he suffered from a mental disorder. Defense counsel asked for a different order than the standard criminal responsibility evaluation order. The court indicated that it did not "have a big problem with that." Defendant's motion for reconsideration was denied. No alternative order was ever prepared by or presented to the trial court.

On the first day of trial, the prosecutor moved to exclude any evidence of defendant's mental condition because defendant had refused to comply with the court's order to undergo an evaluation. In response, defense counsel listed the reasons for which the evidence would be offered: (1) to explain defendant's excited state when he discussed the event, (2) to explain defendant's failure to surrender, (3) to explain defendant's demeanor while testifying, and (4) to justify an argument that the standard for adequate provocation should be based on defendant's subjective mental state, not an objective reasonable-person standard. The prosecutor argued that all these purposes assumed that defendant, in fact, suffered from a mental condition, which assertion the prosecutor indicated he was unable to rebut effectively without an evaluation. The court agreed with the prosecutor, noting that defendant's witnesses would testify based on a fact that the prosecutor would be unable to impeach. The court stated that the prosecutor should be allowed to challenge whether defendant even suffered from a mental disorder. Therefore, the court precluded defendant from introducing any evidence that he suffered from a mental disorder. However, the court held that defendant would be allowed to introduce evidence from family members or friends that defendant was an excitable person who was easily provoked, as long as they did not "pin any labels on him."

After defendant's conviction and appeal to this Court, he requested that this Court remand the matter to the trial court for an evidentiary hearing to expand the record. Defendant sought to refute assertions in the prosecutor's brief on appeal that he "sandbagged" the trial court and the Forensic Center by refusing to undergo an evaluation. This Court granted defendant's motion to remand. Thereafter, an evidentiary hearing was held. At the evidentiary hearing, the trial court noted that it had been agreeable or at least unopposed to defendant submitting to an evaluation which was more focused than a criminal responsibility evaluation. Dr. Stephen Norris, a clinical psychologist at the Center for Forensic Psychiatry, testified that he received the court's order that defendant be evaluated for criminal responsibility.[4] When defendant arrived, however, he advised Dr. Norris that his attorney told him not to submit to the evaluation. Dr. Norris contacted defense counsel who explained that the defense was not insanity or diminished capacity and that he did not want the criminal responsibility evaluation performed. Dr. Norris also testified that defense counsel did not specifically ask for a more limited evaluation.

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[4] According to Dr. Norris, he would have been required to ask defendant questions about the facts of the case in order to conduct a criminal responsibility evaluation.

The trial court made written findings on remand. The court found that, although it had signed a standard form order that referred to a criminal responsibility evaluation, the pretrial hearings "make clear that everyone understood that the Court's order was not intended to determine criminal responsibility in the traditional sense." The court also noted that, had defendant requested, the court would have signed an alternative order, but "[n]o such order was ever requested on the record or presented." The court noted that it was never its intention to require defendant to answer questions about the facts of the case. Defense counsel, however, never offered to draft an alternate order and did not inform the forensic examiner that defendant would be willing to undergo an evaluation that did not include questions about the facts of the case. The court made the following conclusions based on its factual findings:

> 1) That [the court] never imposed any requirement that Defendant must discuss the facts of the case in the course of a mental evaluation. This Court would have signed an alternative order which would not have required Defendant to discuss the facts of the case.
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> 2) That defense counsel did not discuss with the forensic examiner how his client could undergo a psychological evaluation to determine whether he suffered from mental illness where the facts of the case were not discussed. More importantly, counsel never tendered an order which would have allowed such an evaluation because his client was opposed to any mental examination.
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> 3) Neither the testimony on remand nor the argument at the pretrial hearings of January, 1996 supports a reading of this Court's ruling on the Motion for Reconsideration that would foreclose substitution of an order different than the one calling for the standard forensic evaluation.

On appeal, defendant first argues that the trial court lacked authority to order defendant to undergo a criminal responsibility evaluation and that the trial court abused its discretion by excluding evidence of defendant's mental disorders from trial. Defendant claims that evidence of his mental disorders would have been offered to explain defendant's behavior after the stabbing, as well as to demonstrate that he was more susceptible to provocation than an average person. With regard to defendant's claim that the trial court lacked authority to order him to undergo an evaluation, we disagree. By seeking to have the jury consider his mental condition at the time the crime was committed in deciding whether there was sufficient provocation from defendant's perspective, the defendant was, in essence, seeking to present a back-door diminished capacity defense. Therefore, the court had authority to order defendant to undergo an evaluation. *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978). Furthermore, because defendant refused to submit to the examination, the court properly barred defendant's experts' testimony regarding his alleged mental disorders. MCL 768.20a(4); MSA 28.1043(1)(4).

In any event, even if the trial court erred in excluding the evidence, the error was harmless. Defendant's main purpose for introducing evidence of his alleged mental disorders was improper. Defendant argues that, because of his mental disorders, he was more susceptible to provocation than an ordinary person and that the jury should have been instructed to evaluate the adequacy of the provocation by a subjective standard. Defendant is mistaken. In *People v*

Sullivan, 231 Mich App 510, 519-520; 586 NW2d 578 (1998), aff'd 461 Mich 986; 609 NW2d 193 (2000), this Court held that a defendant's special traits, including mental disorders, may not be considered in determining the adequacy of the provocation. Rather, a reasonable person standard governs. *Id.* Additionally, as defendant acknowledges, the defense presented at trial was self-defense, not diminished capacity. Moreover, the other purposed for which defendant offered the mental disorder evidence was to explain his behavior after the stabbing. This is not a defense, but rather an issue of the weight and effect of defendant's post-homicide behavior. Under these circumstances, we hold defendant was not prejudiced by the trial court's decision to disallow the evidence.[5]

Next, defendant claims that the trial court erred in refusing to give a special jury instruction indicating that the prosecutor had the burden of proving, beyond a reasonable doubt, that defendant did not act out of passion or anger. This instruction was necessary, according to defendant, because the instructions given to the jury on the definition of voluntary manslaughter might have allowed the jury to conclude that it was defendant who bore the burden of proving that he acted out of the heat of passion.[6] Claims of instructional error are reviewed de novo. *People v Reid,* 233 Mich App 457, 466; 592 NW2d 767 (1999). The instructions are reviewed as a whole to determine whether any error requiring reversal exists. *People v Bartlett,* 231 Mich App 139, 143; 585 NW2d 341 (1998). "Even if somewhat imperfect, instructions do not create error if they fairly present to the jury the issues tried and sufficiently protect the defendant's rights." *Id* at 143-144. Here, the instructions given sufficiently protected defendant's rights. The substance of defendant's special instruction was covered by the trial court's instruction to the jury that, in order to convict defendant of murder, the *prosecutor* must prove that the killing did not occur under circumstances that would reduce it to a lesser offense. The court also instructed the jury that murder could be reduced to manslaughter under certain circumstances. The court then set forth those mitigating circumstances for the jury. Therefore, viewed as a whole, the instructions informed the jury that it was the prosecutor, not defendant, who was required to prove that the mitigating circumstances did not occur. Under these circumstances, defendant's special instruction was unnecessary.

Next, defendant claims that the trial court erred by failing to instruct the jury on the definition of great bodily harm. Defendant failed to request that such an instruction be given to

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[5] Moreover, although defendant now claims that he would have submitted to a psychological evaluation if a more narrow order had been entered which did not require him to discuss the facts of the case, defendant never requested that such an order be entered even though it is clear from the record that the trial court was willing to enter the more restrictive order. Nor can we say that defense counsel's failure to present a more restrictive order constituted ineffective assistance of counsel. Defendant has not overcome the strong presumption that defense counsel's refusal to allow defendant to submit to a mental health evaluation was a matter of trial strategy. *People v Henry,* 239 Mich App 140, 146; 607 NW2d 767 (1999).

[6] Because defendant objected to the instruction given and requested a supplemental instruction, this issue is preserved for appellate review. *People v Gomez,* 229 Mich App 329, 332; 581 NW2d 289 (1998); *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996).

the jury. Therefore, this issue is forfeited unless defendant demonstrates plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 767; 597 NW2d 130 (1999). Defendant does not cite any authority to support his argument that the term "great bodily harm" is a term of art that must be specifically defined for a jury. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, the term "great bodily harm" is not obscure or difficult to understand, and defendant does not indicate how the proceedings would have been affected had the jury been given a specific definition of "great bodily harm." He has not demonstrated plain error that would have affected the outcome of the proceedings. This issue, therefore, is forfeited. *Carines, supra,* 460 Mich at 763.

Defendant also argues that the trial court's instruction to the jury on the defense of accident constitutes error requiring reversal. Defendant did object to the jury instruction regarding the defense of accident. Therefore, this claim is preserved for appellate review. *People v Gomez*, 229 Mich App 329, 332; 581 NW2d 289 (1998). However, we find that it is without merit. The trial court instructed the jury that "[i]f the Defendant did not mean to kill, or did not realize that what he did would probably cause the death or cause great bodily harm then he is not guilty of murder." Defendant states in his brief on appeal that "this instruction permitted the jury to find malice from the mere fact of a stab wound to [the victim's] leg, if it found that that amounted to great bodily harm, without finding that [the] resulting death must have been foreseeable to [defendant]." Thus, defendant seems to argue that, even if defendant knew that great bodily harm would result, the murder was accidental because he did not know that death would result. Defendant provides no authority to support this proposition. *Kelly, supra*, 231 Mich App 641. In any event, it is legally incorrect. To accept defendant's argument would vitiate the elements of second-degree murder. One who, with malice and without justification or excuse, causes the death of another person is guilty of second-degree murder. *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.*, p 464. A specific intent to kill or harm is not required. *Id.*, p 466. Rather, "[t]he intent to do an act in obvious disregard of life-endangering consequences is a malicious intent." *Id.* Thus, it would be improper to excuse homicide as accidental where the defendant disregarded the likelihood of great bodily harm, merely because the defendant did not foresee or intend that death would result.

Defendant also claims that the trial court erred by denying his motion for a directed verdict on the charge of first-degree murder. We disagree. First-degree premeditated murder is defined in MCL 750.316(1)(a); MSA 28.548(1)(a) as a "willful, deliberate, and premeditated killing." A conviction of first-degree, premeditated murder thus requires proof "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *Kelly, supra*, 231 Mich App at 642. These elements may be inferred from the circumstances surrounding the killing. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). "Premeditation and deliberation require sufficient time to allow the defendant to take a 'second look.'" *Kelly, supra*, 231 Mich App at 642. However, "[o]ne cannot instantaneously premeditate a murder." *People v Plummer*, 229 Mich App 293, 305; 581 NW2d

753 (1998). Rather, there must be "substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill." *Id.* at 301. A non-exhaustive list of factors which may be considered to establish premeditation includes: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *Id.* at 300.

In this case, viewing the evidence presented by the prosecutor up to the time the motion for a directed verdict was made in the light most favorable to the prosecution, as we are required to do, *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998), we find that a rational trier of fact could have found that the essential elements of first-degree murder were proven beyond a reasonable doubt. There was sufficient evidence from which a reasonable jury could conclude that defendant had an opportunity to take a "second look" before carrying out his intention to kill the victim. The prosecutor presented evidence that defendant looked for and chased down the unarmed victim. He then stabbed the victim at least twice and told him "That'll show you," and "I told you don't f[uck] with me." After the stabbing, defendant told a friend that he "got the nigger." Thus, defendant's actions before and after the crime indicate that the killing was premeditated. *Plummer, supra*, 229 Mich App at 300. Moreover, the circumstances of the killing itself, including the location of the wounds inflicted, demonstrates premeditation. *Id.* Although the use of a knife, alone, does not raise an inference of premeditation, *People v Oster*, 67 Mich App 490, 497; 241 NW2d 260 (1976), the victim suffered defensive wounds. This can be evidence of premeditation. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). In sum, viewing the evidence presented up to the time of defendant's motion in the light most favorable to the prosecutor, we conclude that the trial court did not err by denying defendant's motion for a directed verdict.

Furthermore, contrary to defendant's contention on appeal, the evidence presented at trial was clearly sufficient to support defendant's conviction for second-degree murder. Second-degree murder is defined by statute as all kinds of murder other than first-degree murder. MCL 750.317; MSA 28.549. "The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Goecke, supra*, 457 Mich at 463-464. Malice means "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id. at* 464. In this case, defendant admitted causing the victim's death, so the first and second elements were met. The third element, malice, may be inferred from defendant's use of a knife—a deadly weapon. *Carines, supra*, 460 Mich at 760; *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). Moreover, viewing the evidence in the light most favorable to the prosecutor, defendant's claim of self-defense is overcome by the evidence that instead of just leaving the scene, defendant looked for the unarmed victim, chased him down, and stabbed him at least twice. The evidence was sufficient to support the second-degree murder conviction.[7]

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[7] Having found that the evidence was sufficient to support defendant's conviction of second-degree murder, we need not address defendant's claim that the verdict was against the great weight of the evidence.

Next, we reject defendant's claim that the trial court erred by refusing to instruct the jury on imperfect self-defense under an excessive force theory. Such an instruction is simply not warranted under Michigan case law. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992); *People v Amos*, 163 Mich App 50, 56-57; 414 NW2d 147 (1987). Defendant also asserts that the trial court should have instructed the jury on imperfect self-defense. However, defendant failed to request this instruction and has not demonstrated outcome-determinative plain error; therefore defendant has forfeited review of this issue on appeal. *Carines, supra*, 460 Mich at 763.

We also reject defendant's claim that the trial court erred by refusing to give defendant's special jury instruction on reasonable doubt. "To pass scrutiny, a reasonable doubt instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden that was placed upon the prosecutor and what constituted a reasonable doubt." *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). "[T]he instruction must convey to the jurors that a reasonable doubt is an honest doubt based upon reason." *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). This Court has repeatedly held that CJI2d 3.2(3), the instruction given in this case, is an adequate reasonable-doubt instruction. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999); *Hubbard, supra*, 217 Mich App 487-488. Indeed, the standard jury instruction is almost identical to the instruction requested by defendant. It merely lacks the "moral certainty" language. The failure to incorporate such language in a reasonable-doubt instruction, however, is not error. *Jackson, supra*, 167 Mich App at 390-391. The jury was adequately instructed that a reasonable doubt is an honest doubt based on reason. *Id.* at 391.[8]

Next, defendant argues that the prosecutor impermissibly injected race into the trial. We disagree. This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, because defendant failed to object to the alleged impropriety, this issue is reviewed for plain error. *Carines, supra*, 460 Mich at 752-753, 764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, to avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *Carines, supra*, 460 Mich at 763-764; *Schutte, supra*, 240 Mich App at 720. Defendant has failed to show plain error. Prosecutors are free to argue all reasonable inferences from the evidence. *Bahoda, supra*, 448 Mich at 282; *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The prosecutor's

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[8] Additionally, we note that, contrary to defendant's claim on appeal, the prosecutor did not denigrate the burden of proof, but merely responded to defense counsel's characterization of the concept of reasonable doubt. A prosecutor's comments must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). The prosecutor did not attempt to give the jury a definition of reasonable doubt, but simply asked the jury to listen to the judge's definition. This was not improper and did not constitute prosecutorial misconduct.

comments about the role racism played in the murder were permissible in light of the evidence presented at trial, including defendant's comments to his friend that "he got the nigger."

Defendant also claims that the prosecutor improperly vouched for the credibility of prosecution witnesses. Again, defendant failed to object to the alleged impropriety; therefore, this issue is reviewed for outcome-determinative plain error. *Carines, supra,* 460 Mich at 752-753, 764; *Schutte, supra,* 240 Mich App at 720. Although a prosecutor may not vouch for the credibility of a witness nor imply that the prosecutor has some special knowledge that the witness is testifying truthfully, a prosecutor may argue from the facts that the witness is credible. *People v Howard,* 226 Mich App 528, 548; 575 NW2d 16 (1997). Some of the complained of comments may properly be characterized as argument relating to witness credibility; hence, these remarks were not improper. *Id.* As to the comments that arguably seem to imply some special knowledge on the part of the prosecutor, those comments were brief. Moreover, the trial court instructed the jury that the attorneys' statements and arguments were not evidence. This instruction dispelled any prejudice under the circumstances of this case. *Bahoda, supra,* 448 Mich at 281. Defendant has not demonstrated outcome-determinative plain error. *Carines, supra,* 460 Mich at 763.

Defendant next asserts that his twenty-year minimum sentence, which exceeded the sentencing guidelines range of four to fifteen years' imprisonment, was disproportionate and constituted an abuse of discretion. We disagree. Sentencing issues are reviewed by this Court for an abuse of discretion by the trial court. *People v Coles,* 417 Mich 523, 550; 339 NW2d 440 (1983); *People v Sabin (On Second Remand),* ___ Mich App ___; ___ NW2d ___ (Docket No. 187226, issued 9/26/00), slip op at 3. "A trial court abuses its discretion when it imposes a sentence that is not proportional to the seriousness of the circumstances surrounding the offense and the offender." *Sabin, supra,* ___ Mich App ___, slip op at 3. See also *People v Merriweather,* 447 Mich 799, 806; 527 NW2d 460 (1994); *People v Milbourn,* 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A trial court may sentence outside the guidelines when it finds that the range imposed by the guidelines is disproportionate to a defendant's prior record and the seriousness of the crime. MCR 6.425(D)(1); *Milbourn, supra,* 435 Mich at 657. However, the test is not whether a sentence is within the guidelines range, but whether the sentence reflects the seriousness of the matter. *People v Houston,* 448 Mich 312, 320; 532 NW2d 508 (1995); *Milbourn, supra,* 435 Mich at 661.

In this case, the trial court sentenced defendant to a term of imprisonment of twenty to thirty years. The statutory penalty for second-degree murder is life or any term of years. MCL 750.317; MSA 28.549. Thus, defendant was not sentenced to the most severe penalty allowed under the law. Moreover, although defendant's twenty-year minimum sentence exceeds the sentencing guidelines recommended range, defendant committed a very serious offense; he caused the death of another person. Additionally, as the trial court voted, defendant had ample opportunity to walk away from this situation but chose instead to pursue the victim, defendant inflicted serious wounds on the victim, but did nothing to assist the victim or to bring the situation to the attention of someone who might render aid, and defendant purposefully attempted to cover-up his involvement in this matter. In light of these circumstances, we cannot conclude

that the sentence constituted an abuse of discretion.[9] The sentence was commensurate with the seriousness of the offense defendant committed.

Defendant also makes various claims of alleged instances of ineffective assistance of counsel. Effective assistance of counsel is presumed, and defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To justify reversal, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Because no evidentiary hearing was held regarding defendant's claims of ineffective assistance of counsel, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). We have reviewed the record and conclude that defendant has failed to show that counsel's performance was objectively unreasonable and that he was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997).

We also reject defendant's claim that the trial court abused its discretion by excluding evidence of the victim's prior convictions and reputation for stealing. The evidence of the victim's reputation for theft would not tend to show that the victim was the aggressor. Rather, it would only demonstrate that the victim was attempting to steal defendant's marijuana, a fact not disputed by the prosecutor at trial. As to the evidence of the victim's prior convictions, including a conviction for armed robbery, they would tend to show that he had a violent character and was the aggressor. Thus, the convictions would be admissible under MRE 404(a)(2). *People v Harris*, 458 Mich 310, 315; 583 NW2d 680 (1998). However, where a character trait is admissible, proof of that character trait is limited to reputation or opinion evidence—evidence of specific instances of conduct is not allowed. MRE 405(a). The only proffered evidence of the victim's alleged violent character was the victim's prior convictions. These were specific instances of conduct; therefore, the trial court did not abuse its discretion by excluding evidence of the victim's prior convictions.

Next, defendant argues that the trial court, through a preliminary instruction to the jury before trial began, expressly foreclosed the possibility of having testimony reread during deliberations. Jury instructions of any sort must be objected to in order to preserve claims of instructional error. *Carines, supra*, 460 Mich at 767. Defendant's failure to object to the trial court's instruction forfeits this claim unless defendant demonstrates outcome-determinative plain error. *Id.* at 763. He has failed to do so. A trial court may not foreclose all possibility of having

[9] As to defendant's claim that the trial court erred in scoring the guidelines, defendant argued below that offense variable three should be reduced from twenty-five points to ten points, which would result in a guidelines' range of four to fifteen years. The trial court agreed, although not for the reasons asserted on appeal, scored the offense variable at ten, and accepted defendant's guidelines range of four to fifteen years. Therefore, defendant's alternate grounds for reducing offense variable three from twenty-five to ten points is moot. The trial court accepted defendant's recommended scoring of the guidelines and this Court would be unable to grant any relief because defendant already received what he sought – a guidelines range of four to fifteen years.

testimony reread to the jury. MCR 6.414(H); *People v Smith*, 396 Mich 109, 110-111; 240 NW2d 202 (1976).

This case does not involve a decision whether to grant the jury's request to have certain testimony reread, since the jury never made such a request. Rather, defendant claims that the trial court effectively prevented the jury from requesting to have testimony reread. We disagree. The trial court's instruction did not completely foreclose the rereading of testimony.[10] Rather, it simply conveyed to the jurors the importance of paying close attention to the evidence presented at trial. This was not improper.[11] Moreover, the comment was made before trial began, not at the time of final jury instructions or following a request to have certain testimony reread. Under these circumstances, defendant has failed to demonstrate outcome-determinative plain error. *Carines, supra*, 460 Mich at 767.

Defendant also claims that the prosecutor purchased the testimony of Jeffrey Hayward. Again, unpreserved claims of prosecutorial misconduct are reviewed for outcome-determinative plain error. *Carines, supra*, 460 Mich at 752-753, 764; *Schutte, supra*, 240 Mich App at 720. Defendant's claim that the prosecutor purchased Hayward's testimony is a mischaracterization of the record. There is no indication in the record that the prosecutor paid Hayward in exchange for his testimony. In fact, Hayward specifically testified that *Crime Stoppers* paid him two hundred dollars for "coming forward" with information, not for his testimony. Therefore, we reject defendant's claim of prosecutorial misconduct in this regard. Without any record support for his charges of impropriety, defendant has also failed to demonstrate that defense counsel was ineffective for failing to raise this claim in the trial court.

Lastly, defendant claims that he was denied a fair trial by cumulative error. We disagree. The test to determine whether reversal is required for cumulative error is not whether there are some irregularities but whether defendant was denied a fair trial. *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987). The cumulative effect of a number of errors may in some cases require reversal, even where no single error, standing alone, would warrant reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). However, "only actual errors are aggregated to determine their cumulative effect." *Bahoda, supra*, 448 Mich at 292, n 64. Where, as here, no actual errors occurred, or where any arguable errors were of little

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[10] In its preliminary jury instructions before trial began, the trial court made the following remarks: "I do not believe that it is desirable or helpful for you to take notes during this trial. If you take notes you may not be able to direct your full attention to the evidence, so please do not take any notes while you're in the courtroom. I would also indicate that while we're taking down these proceedings it is virtually impossible for us to have a transcript available for you to read at the end of this trial, so it is imperative that you all pay very close attention to the evidence as it is presented, to the arguments of counsel, and the Court's instructions; although, at the end of the trial you will receive a copy of the Court's instructions in this matter."

[11] Because the trial court's preliminary instruction was not improper, defense counsel was not ineffective for failing to object to it. Counsel need not make meritless objections. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

consequence, reversal is not warranted. *Cooper*, *supra*, 236 Mich App at 660; *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Michael J. Kelly
/s/ William C. Whitbeck
/s/ Jeffrey G. Collins