

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RECO G. JONES,

Defendant-Appellant.

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UNPUBLISHED

January 12, 2001

No. 212109

Wayne Circuit Court

LC No. 97-007299

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of five counts of first-degree murder, MCL 750.316; MSA 28.548. He was sentenced to five concurrent terms of life imprisonment. He appeals as of right. We affirm.

Defendant's convictions arise from the fatal stabbing of Yolanda Bellamy, her two young children, her niece and her nephew. The stabbings occurred in Bellamy's home. According to the medical examiner, the stab wounds were indicative of torture. Testimony indicated that defendant made statements to friends and the police admitting to being the perpetrator. At trial, however, the defense theorized that Maliaka Martin, a prosecution witness, committed the killings in a jealous rage.<sup>1</sup>

I

On appeal, defendant first argues that the trial court erred in admitting two photographs depicting the victims at the crime scene. Defendant contends that the photographs were irrelevant and unduly prejudicial. The decision to admit photographs is within the trial court's

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<sup>1</sup> Defendant testified on direct-examination that he was present when Martin committed the killings. On cross-examination, however, defendant denied being present and attributed his contrary testimony during direct examination to having a "script" that he was acting out. Defendant thereafter testified that Martin was not involved in the killings, but then later returned to his position that Martin was the perpetrator.

discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995). We will reverse a trial court's evidentiary ruling only if there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).<sup>2</sup>

Crime scene photographs should not be excluded merely because a witness can testify about the matters they depict. *Mills, supra*. Gruesomeness alone is not a basis for excluding photographs unless the probative value of the photographic evidence is substantially outweighed by unfair prejudice. *Id.*; see MRE 403. We conclude that the two photographs at issue were relevant and probative in regard to the issues of premeditation and deliberation. Premeditation and deliberation may be inferred from all the facts and circumstances, including the circumstances of the killing. *People v Plummer*, 229 Mich App 293, 300-301; 581 NW2d 753 (1998); see MRE 401. The photographs depict the location of the wounds and corroborate the medical examiner's testimony that the wounds were inflicted in a controlled and methodical manner to effect a slow death. This evidence is, therefore, relevant and probative of the perpetrator's intent to kill. The photographs also rebut the defense theory that a person of Martin's size and stature could have subdued all five victims. We are satisfied that the probative value of the two photographs at issue was not substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills, supra*. Thus, the trial court did not abuse its discretion by admitting them. *Id.*

## II

Defendant next argues that he was unfairly prejudiced by the trial court's exclusion of evidence supporting the defense theory that Martin was the real perpetrator of the killings. We disagree.

First, defendant claims that the trial court erred in excluding several letters written by Martin to defendant while defendant was in jail prior to the killings. Defendant claims that the letters established Martin was jealous of his relationship with Bellamy, thus giving her a motive to commit the killings. Defendant contends that the letters were admissible under MRE 803(3) because they contained statements of Martin's then-existing state of mind toward defendant and Bellamy.

Defendant failed to preserve his challenge based on MRE 803(3) with an appropriate offer of proof at trial. An offer of proof allows a trial court an adequate basis to pass on an objection and provides an appellate court a basis to evaluate a claim that the ruling was incorrect. *Orlich v Buxton*, 22 Mich App 96, 100; 177 NW2d 184 (1970). As the proponent of the

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<sup>2</sup> We reject defendant's claim that a de novo standard of review should be applied because he has framed the issue as implicating his due process right to a fair trial. Not every trial error violates due process. *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). Further, defendant did not object on the basis of an alleged due process violation in the trial court and, therefore, did not preserve such a claim for appeal, *In re Hildebrant*, 216 Mich App 384, 289; 548 NW2d 715 (1996), nor has he demonstrated a plain error of constitutional magnitude, *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Accordingly, we find no basis for departing from the traditional standard applicable to review of evidentiary issues. *Lukity, supra*.

evidence, defendant had the burden of showing that foundational prerequisites were satisfied. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989); see MRE 103(a)(2) and *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120 (1984). Further, defendant has not shown that the exclusion of the letters amounted to plain error affecting his substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Even if the letters could have been admitted under MRE 803(3), defendant's substantial rights were not affected by their exclusion because the record shows that defense counsel was afforded a full opportunity to cross-examine Martin about the letters, to quote from them during questioning, and to display the bundle of letters to the jury. Further, at trial, Martin admitted being jealous of defendant's relationship with Bellamy and admitted telling defendant she hated Bellamy. Thus, viewed in the context of the entire record, defendant was not prejudiced by the exclusion of the letters. Accordingly, defendant's newly raised claim based on MRE 803(3) provides no basis for relief.

We also reject defendant's newly raised claim that the exclusion of the letters amounted to error of a constitutional magnitude. Defendant has not shown that defense counsel was denied an opportunity to effectively cross-examine Martin about the letters. See generally *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999) and *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Nor has defendant shown that he was denied an opportunity to present his defense that Martin was the perpetrator. While the right to present a defense is a fundamental element of due process, an “accused must still comply with ‘established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.’” *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). We conclude that defendant has not established plain constitutional error, nor shown that his substantial rights were affected by the exclusion of the letters. *Carines, supra*.

Defendant next claims that the trial court erroneously applied MRE 404(b)(2) as a basis for excluding evidence of Martin's violence toward defendant in the past. The record does not support defendant's claim that the court excluded such evidence pursuant to MRE 404(b)(2). While the court's stated concerns may be viewed as falling within the ambit of its responsibility for deciding preliminary questions concerning the admissibility of evidence, MRE 104(a), they do not reflect reliance on, or consideration of, MRE 404(b)(2). The specific objection made by the prosecutor during defense counsel's cross-examination of Martin, which was sustained by the trial court, involved relevancy. Further, the trial court specified that it was willing to entertain an offer of proof on relevancy when defendant's mother, Janet Jones, was subsequently cross-examined by defense counsel about whether she was aware of a prior incident of violence between defendant and Martin.

Because defense counsel did not make an appropriate offer of proof during the testimony of Martin and Jones, or when an objection was again made by the prosecutor during defendant's testimony concerning alleged physical violence involving Martin, we conclude that defendant failed to preserve this claim of evidentiary error. MRE 103(a)(2). Without a proper offer of proof concerning the relevancy of the evidence, we also conclude that defendant has failed to establish plain error affecting his substantial rights. MRE 103(d); *Carines, supra*. We also reject defendant's argument that he should have been allowed to show under MRE 404(b)(1) that Martin had a violent temper. To be admissible, proffered evidence regarding prior acts must be

truly probative of something other than a propensity to commit a crime. *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998). Further, to the extent defendant claims constitutional error, we find no plain error because the right of confrontation does not include a right to cross-examination on irrelevant issues. *Adamski, supra* at 138. Moreover, while the due process right to present a defense includes a right to present exculpatory evidence, *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996), no violation of this right plainly appears.

Defendant further claims that the trial court erred in excluding evidence of Martin's interaction with children. This issue also was not preserved for appeal because defense counsel did not make an offer of proof at trial regarding any excluded evidence. Jones testified during cross-examination that she observed Martin act hostile toward two children. The prosecutor objected to defense counsel's line of questioning, whereupon the trial court requested an offer of proof. Defense counsel stated, "essentially that was the last question that I have in that area" and did not make any offer of proof. On this record, there is no basis for concluding that evidence was erroneously excluded. Thus, defendant has not shown any plain evidentiary or constitutional error affecting his substantial rights. MRE 103(d); *Carines, supra*.<sup>3</sup>

We have also considered defendant's alternative claim that he was denied effective assistance of counsel by his trial counsel's alleged failure to prepare and present the defense that Martin was the killer. To establish ineffective assistance of counsel, defendant must prove that: (1) trial counsel's performance fell below an objective standard of reasonableness; and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Reviewing the record pursuant to the standards set in *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), we conclude that defendant has not shown that his trial counsel rendered ineffective assistance. There is no indication that defendant was deprived of a substantial defense, which would have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

### III

Defendant next argues that his due process rights were violated because the prosecutor failed to disclose inculpatory evidence before trial. After two police officers testified that they observed a cut on defendant's hand following his arrest, defendant brought a motion for mistrial. Defendant's counsel claimed that the prosecutor never informed them of the cut and argued generally that, had they known of the cut, they would have presented different defenses.<sup>4</sup> The

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<sup>3</sup> Although defendant also mentions that the trial court prohibited his attorney from asking Martin whether her sexual relations with defendant resulted in pregnancies, we decline to consider whether that ruling constituted error because defendant has not included any argument challenging that ruling. The failure to brief the merits of an allegation of error is deemed an abandonment of the issue. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).

<sup>4</sup> Defendant's trial counsel declined to specify other defenses they would have presented. On appeal, defendant claims that the evidence of his injured hand undercut the argument that certain blood evidence left at the scene was not his. However, defendant testified at trial that he had a cut on his arm (not his hand) when he was arrested, thus providing the opportunity for his blood

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prosecutor claimed that, while the cut was not documented by the police, defense counsel was aware of the injury. The trial court found no violation of its discovery order and denied defendant's motion. We review the trial court's denial of the motion for mistrial for an abuse of discretion. *People v Ortiz-Kehoe*, 237 Mich App 508, 513-514; 603 NW2d 802 (1999). A mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights and impairs his ability to get a fair trial. *Id.* at 514.

There are three situations where a defendant's due process right to discovery may be implicated. *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997), citing *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). First, where the prosecution allows false testimony to stand uncorrected. Second, where the prosecution suppresses material evidence favorable to the defendant after the defendant requested discovery. Third, where the prosecution suppresses exculpatory evidence. *Tracey, supra*. Our Supreme Court has not definitively established whether a due process violation can occur when the prosecution fails to disclose *inculpatory* evidence. See *People v Elston*, 462 Mich 751, 762 (Corrigan, J.), 771 (Kelly, J., dissenting); 614 NW2d 595 (2000); see also MCR 6.201(B) (requiring the prosecutor, upon request, to provide the defendant: (1) any exculpatory information or evidence known to the prosecutor; (2) any police reports concerning the case; (3) any written or recorded statements by the defendant; (4) all search and seizure information; and (5) any plea agreements or immunity agreements in connection with the case).

The discovery order entered below provides that defense counsel shall be permitted to view any physical evidence in the custody of the police pertaining to the case. It is undisputed that the cut on defendant's hand was never documented by the police in any report, photograph, or otherwise. Defendant does not claim that his counsel was precluded from observing his physical condition while he was in police custody. Consequently, we cannot say that the prosecutor violated the court's discovery order when it did not disclose that police officers observed the cut. Moreover, the evidence at issue was not favorable to defendant and defendant's due process right to discovery was not implicated. *Tracey, supra*. Given the substantial evidence of defendant's guilt aside from evidence of his cut hand, defense counsel's alleged lack of knowledge of the cut did not cause defendant to be denied a fair trial. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for mistrial.

#### IV

Defendant next argues that his convictions for first-degree murder were not supported by sufficient evidence of premeditation. We disagree. When reviewing the sufficiency of evidence, "a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). The prosecution "need not negate every reasonable theory consistent with the defendant's innocence, but merely introduce evidence sufficient to convince a

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to have been left at the scene.

reasonable jury in the face of whatever contradictory evidence the defendant may provide." *People v Konrad*, 449 Mich 263, 273 n 6; 536 NW2d 517 (1995).

To premeditate is to think about beforehand. *Plummer, supra* at 300, quoting *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971). The circumstances of the killing itself, including the weapon used and the location of wounds, may properly be considered in determining if there was a premeditated murder. *Plummer, supra* at 300. Other relevant factors include the prior relationship of the defendant and the victim and the defendant's actions before and after the crime. *Id.* Although no specific time is required for premeditation, the interval between the initial thought and ultimate action must be sufficient for a reasonable man to subject the nature of his response to a "second look." *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979); *Plummer, supra* at 300.

Viewed most favorably to the prosecution, the evidence suggested that defendant and Bellamy had a tumultuous relationship and that defendant went to Bellamy's home and stabbed her and the four children numerous times in a manner requiring a controlled and methodical force, indicative of torture. The evidence further suggested that defendant called upon friends in an effort to destroy evidence. Regardless of whether defendant and Bellamy argued in the residence, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant committed five premeditated murders.

## V

Finally, defendant claims that the prosecutor's closing and rebuttal arguments deprived him of a fair trial. Because there was no objection to the challenged remarks at trial, we must determine whether they demonstrate plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000); *Carines, supra*. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Where there is no objection to a prosecutor's remarks, we may consider whether any prejudice could have been cured by a timely objection and request for a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Having considered each of the challenged remarks in context, we conclude that defendant was not deprived of a fair and impartial trial. In regard to defendant's claim that the prosecutor denigrated the defense, the crux of the challenged remarks was to attack defendant's credibility and the weakness of the defense. To this extent, the remarks were not plainly improper. *People v Fields*, 450 Mich 94, 115, 538 NW2d 356 (1995); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, any perceived prejudice could have been cured by a timely objection and request for a curative instruction, *Stanaway, supra*, and defendant's substantial rights were not affected by the prosecutor's remarks considering the overwhelming evidence that defendant was the perpetrator, *Carines, supra*.

In regard to defendant's claim that the prosecutor improperly appealed to the jury's sympathy, we conclude that the challenged remarks, examined in context, did not involve an appeal to sympathy, but rather, an argument that the physical evidence should be considered because the only eyewitnesses were killed. Also, in view of the circumstances surrounding the

killings, the prosecutor's characterization of the offense as a "slaughter" was neither plain error nor offensive to justice. Cf. *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Indeed, defendant's own attorney referred to the killings as a "slaughter" in his closing argument. Similarly, the prosecutor's characterization of the children as scared was a reasonable inference from the evidence and, therefore, not improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). To the extent that the prosecutor's reference to the children as "poor little lambs" and "beautiful children" involved an appeal to sympathy, see *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988), we are satisfied that the trial court's instruction to the jury that, "[y]ou must not let sympathy or prejudice for either side influence your decision," was sufficient to cure any prejudice caused by the remarks.

Defendant further claims that the prosecutor improperly vouched for his guilt when, at the end of rebuttal, he stated, "justice requires your verdict of guilty on this killer." Because the remark that defendant was the killer was preceded by a request that the jury make this determination based on the evidence, we find no basis for defendant's claim that the prosecutor improperly vouched for his guilt. The prosecutor did not express a personal opinion on guilt, or argue for a verdict based on personal knowledge or the authority of the prosecutor's office. See *Bahoda*, *supra* at 282-283, *People v McCoy*, 392 Mich 231, 240; 220 NW2d 456 (1974), and *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). In any event, an objection and curative instruction could have eliminated any prejudicial effect, *Stanaway*, *supra*, and defendant's substantial rights were not affected by the remark, *Carines*, *supra*.

Finally, limiting our review to the existing record, *Marji*, *supra*, we have also considered defendant's alternative claim that his counsel rendered ineffective assistance in failing to object to the prosecutor's remarks. Because defendant has not shown that the remarks deprived him of a fair and impartial trial, we conclude that his claim of ineffective assistance in connection with this issue cannot succeed. The outcome of the trial was not affected by the lack of objection to the prosecutor's remarks. *Kelly*, *supra*. Further, we are not persuaded that a remand for further proceedings on this issue is necessary. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998).

Affirmed.

/s/ Jeffrey G. Collins  
/s/ Kathleen Jansen  
/s/ Brian K. Zahra