STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2001
v	No. 223323 Oakland Circuit Court
JAMES FIELD SUMMERVILLE, Defendant-Appellant.	LC No. 98-162217-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, unlawfully driving away an automobile (UDAA), MCL 750.413, and unlawful possession of a financial transaction device, MCL 750.157n. He was sentenced to concurrent terms of life imprisonment without parole for the first-degree murder conviction, one to two years' imprisonment for the UDAA conviction, and one to four years' imprisonment for the unlawful possession of a financial transaction device conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from an incident that occurred at the victim's apartment, during which defendant killed his former boyfriend, Mikael Ellis, by stabbing him in the chest and back in excess of forty-six times. The prosecutor's theory was that the killing was premeditated and deliberate because defendant had been infected by the victim with the human immunodeficiency virus (HIV), was experiencing financial difficulties, and was on the verge of losing his job and health care coverage. Defendant did not deny killing the victim, but claimed that he "snapped" while in a rage, and, therefore, was guilty only of voluntary manslaughter.

On appeal, defendant first claims that insufficient evidence of premeditation and deliberation existed to support his first-degree murder conviction. The test for determining the sufficiency of the evidence in a criminal case is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). "The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id.* at 400.

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and

deliberate. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000); *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." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). 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. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

Here, viewed in a light most favorable to the prosecution, the evidence indicates that defendant and the victim were former lovers and that defendant believed that the victim infected him with HIV. The prior relationship between the victim and defendant, the fact that the victim had recently begun dating someone new, and defendant's belief that he contracted HIV from the victim is evidence of motive, which supports a finding of premeditation and deliberation. *Abraham, supra* at 656; *Schollaert, supra* at 170-171. Moreover, on the night the victim was killed, defendant left work early after thinking about his HIV status, the money he was spending to treat his condition, and the fact that his job was in jeopardy. Defendant then walked 6.9 miles to the victim's apartment in the middle of the night. Defendant admitted that he was angry as he walked to the victim's apartment. This long walk, in the middle of the night while defendant was angry, also supports a finding of premeditation and deliberation. After arriving at the victim's apartment, defendant, although he had not been threatened by the victim in any way, struck the victim in the head with a ceramic vase. Thereafter, defendant went into the kitchen and retrieved a knife or knives. At this point, defendant had the opportunity to reconsider his actions before returning to the bedroom with a weapon. However, he did return to the bedroom where he stabbed the victim in the area of the heart twenty-eight times and eighteen times in the back. The fact that defendant struck the victim with a vase, apparently incapacitating him, and then stabbed him with three different knives supports a finding of premeditation and deliberation. *Kelly, supra* at 642. The location of the wounds, primarily in the area of the heart, also suggests that the killing was premeditated and deliberate. Moreover, the evidence and reasonable inferences arising from it indicated that it took some time to inflict the forty-six stab wounds, giving defendant time to consider what was occurring. *Kelly, supra* at 642. Furthermore, defendant used three different knives in the attack on the victim. In fact, one of the knives broke off in the victim's back during the attack. Defendant either returned to the kitchen for another knife or picked up one of the knives he had previously brought into the bedroom and continued stabbing the victim. In either case, defendant, again, had an opportunity to take a second look. Defendant's conduct after the killing likewise supports an inference of premeditation and deliberation. For instance, defendant put his bloody work shirt into the washing machine in an effort to remove the victim's blood stains from it. This was a methodical and deliberate attempt to dispose of evidence that could implicate defendant in these crimes.

Accordingly, the trial court did not err in denying defendant's motion for a directed verdict on the first-degree murder charge.

Next, defendant claims that errors by defense counsel at trial deprived him of his right to the effective assistance of counsel. Because defendant did not move for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to errors apparent

on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy, and (2) that his deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant first contends that defense counsel improperly failed to pursue a motion to suppress notes found during a search of defendant's bedroom. Although the trial court offered to schedule a suppression hearing, defense counsel and defendant agreed not to seek a suppression hearing. Therefore, because defendant did not choose to challenge the propriety of the search (and, therefore, the admissibility of the notes found during the search), he should not be allowed to claim on appeal that the notes were inadmissible as the product of a "bad search." Defendant may not assign error on appeal to something he and his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). To do so would allow a defendant to harbor error as an appellate parachute. *Id.*

In any event, the evidence of record reflects that defendant's sister provided valid consent to the search of defendant's bedroom. This case is distinguishable from *People v Mullaney*, 104 Mich App 787; 206 NW2d 347 (1981), on which defendant relies. In *Mullaney*, the sister consenting to the search was living in the defendant's house and her consent was obtained after the police falsely told her that a search warrant was already on the way. Here, the apartment belonged to defendant's sister, Shirley. Shirley's name was on the lease, she had lived in the apartment for over twelve years, and she had unfettered access to defendant's bedroom. Moreover, the police did not lie to Shirley to obtain her consent. Although the police told Shirley that they would obtain a search warrant if she did not consent to the search, this Court has previously held that consent is not involuntary merely because it is given after the police state that they will obtain a search warrant when, in fact, they have the ability to do so. *People v Shaw*, 188 Mich App 520, 522, 525; 470 NW2d 90 (1991). Defendant does not dispute that the police had the ability to obtain a search warrant.

In sum, defense counsel did not err in failing to pursue the suppression motion. Moreover, because there is no indication in the record that the motion would have been successful had defense counsel pursued it more vigorously, defendant has not established that he was prejudiced by any alleged deficiency by counsel. *People v Darden*, 230 Mich App 597, 604-605; 585 NW2d 27 (1998).

Defendant also argues that defense counsel improperly failed to object to the prosecutor's cross-examination of defendant's expert witness, forensic psychologist Cathie Zmachinski, on the ground that the questions posed, and the answers elicited, were not pertinent to the issue of insanity or mental illness. Defendant claims that defense counsel's failure to object constituted ineffective assistance of counsel because, under *People v Toma*, 462 Mich 281; 613 NW2d 694 (2000), the admission of statements made to a forensic examiner are restricted to those pertinent to a defendant's sanity. We note that some of Dr. Zmachinski's testimony on cross-examination, specifically her indications that defendant reported "feeling confused, depressed, hopeless, like life was over," and that defendant was "hearing voices throughout the evening," did relate to

defendant's claim of mental illness. In any event, even if Dr. Zmachinski improperly related the details provided to her by defendant regarding the incident in question, defendant cannot show that he was prejudiced by her testimony. Most of the details provided by Dr. Zmachinski had already been provided by the prosecutor's witnesses or by defendant's own testimony. In fact, much of Dr. Zmachinski's testimony was cumulative to that provided by defendant at trial. Under these circumstances, defendant was not prejudiced by Dr. Zmachinski's testimony.

Defendant also claims that, during closing argument, defense counsel improperly admitted that defendant was guilty of UDAA and unlawful possession of a financial transaction device. A defendant is deprived of the effective assistance of counsel when his lawyer admits the client's guilt without first obtaining the client's consent to this strategy. *People v Krysztopaniec*, 170 Mich App 588, 595-596; 429 NW2d 828 (1988). However, it is "only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel." *Id.* at 596. Contrary to defendant's assertion, defense counsel did not indicate that defendant was guilty of UDAA and unlawful possession of a transaction device. He merely indicated that he was "not going to argue about those . . . counts," but noted "there was somewhat of an issue because [defendant] used the [victim's] car all the time." We do not construe defense counsel's remarks as a concession of guilt. Moreover, defendant was not prejudiced by the remarks in light of the fact that he admitted at trial that he took the victim's Jeep without permission and that he took the victim's credit card after killing the victim.

Lastly, defendant claims that the prosecutor improperly appealed to the jury's sympathies during closing argument. Because defendant failed to object to the challenged comments at trial, we review this issue for plain error that affected defendant's substantial rights. *People v Carnies*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). They are free to argue the evidence and all reasonable inferences arising from the evidence as it relates to their theory of the case. *Id.* There is no requirement that a prosecutor phrase his argument in the blandest of all possible terms. *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). Nevertheless, it is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988).

After reviewing the prosecutor's remarks in context, it does not appear that the comments were an impermissible attempt to elicit the jury's sympathy. The evidence at trial supported the challenged remarks, and it appears that the prosecutor was merely commenting on the evidence presented. Moreover, even if the prosecutor's comments were improper, they did not rise to the level of error requiring reversal. The prosecutor's remarks did not affect the outcome of the proceedings considering the overwhelming evidence that defendant killed the victim. Further, the trial court instructed the jury that they "must not let sympathy or prejudice influence [their] decision," thereby dispelling any prejudice. *Bahoda, supra* at 281. Under these circumstances, defendant has failed to demonstrate outcome-determinative plain error.

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen