STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 27, 2001
V	No. 224371 Oakland Circuit Court
MICHAEL LEE BARNHART, Defendant-Appellant.	LC No. 98-163746-FC

Before: Zahra, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions on four counts of first-degree felony murder, MCL 750.316(b), three counts of first-degree premeditated murder, MCL 750.316(a), one count of second-degree murder, MCL 750.317, and one count of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to life imprisonment without parole on each of the four first-degree felony murder convictions, life imprisonment without parole on each of the three first-degree premeditated murder convictions, life imprisonment on the second-degree murder conviction, and to a term of twenty-five to forty years for the first-degree home invasion conviction.[1] We affirm.

I

This case arises out of a quadruple bludgeoning committed during a breaking and entering into a home in Holly Township, during the early morning hours of November 1, 1998. All of the four victims were killed by a hammer. Three were killed while they slept. The four

[1] The three counts of first-degree premeditated murder and one count of second-degree murder were vacated with defendant being sentenced to life imprisonment without parole on three counts of first-degree murder under alternate theories of premeditated murder and felony murder, plus life imprisonment without parole on an additional count of first-degree felony murder. Sentence enhancement was dismissed on the first-degree home invasion conviction, and defendant was resentenced on that count to a term of 160 to 240 months.

victims sustained a total of at least forty-nine violent fierce blunt-force blows to the face and head.

Defendant first claims that the trial court abused its discretion by admitting four graphic color photographs of the murder victims. We disagree. These photographs were relevant to the case pursuant to MRE 401, and their probative value was not substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

The first inquiry into the admissibility of these photographs is whether they were relevant. *Mills, supra* at 66. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.* at 66-67. In the instant case, the four color photographs were proof of several facts that were of consequence to the case and had significant probative value in proving defendant's guilt.

The credibility of witnesses offering testimony is a fact "of consequence" to a determination in a case. *Id.* at 72. The photographs were necessary to corroborate defendant's tape-recorded confession, the testimony of the medical examiner, and the testimony of the investigating detective.

Of specific importance to this case is that a general denial of guilt puts at issue all elements of a charged offense, regardless of whether a defendant specifically disputes or offers to stipulate to any of the elements, and the prosecution carries the burden of proving every element beyond a reasonable doubt. *Id*. at 69-70. Here, the three elements of intent to kill, premeditation, and deliberation were directly at issue in the case because they were part of the elements of felony murder and premeditated murder. Felony murder consists of the following elements: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the felony-murder statute. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). First-degree premeditated murder consists of the following elements: (1) the defendant intentionally killed the victim, and (2) the act of killing was premeditated and deliberate. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). 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 a crime. *Id*.

Here, the photographs served to graphically show the amount of time necessary for defendant to have inflicted the numerous heinous blows to the head and face of one victim before moving on to inflict the same type of brutal blunt blows to the next. Defendant's detailed tape-recorded confession indicated that after killing the first two victims, he rummaged through at least two rooms before finding his last two victims asleep in their bedroom. The pictures of the last two victims showed that their fatal injuries were as heinous and as forceful as those of the first two victims. The large quantity of blood on all the victims' bodies, the walls, and the beddings, attested to defendant's awareness of the type of injuries he was inflicting. Therefore, the pictures were necessary to prove the elements of premeditation and deliberation.

Since the purpose of admitting the photographs into evidence was to prove (1) elements of the crime, and (2) the credibility of witnesses, it was more than sufficient to show that the photographs were important to understanding facts that were of consequence to the determination of defendant's guilt. *Mills, supra* at 69. Thus, these photographs were relevant to the case.

The next inquiry is whether their probative value is substantially outweighed by the danger of unfair prejudice. *Id.* at 66. The Michigan Supreme Court, in *Mills*, quoted with approval its decision in *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972) (quoting 29 Am Jur 2d, Evidence, § 787, pp 860-861), which outlined the proper standard for weighing the probative value of graphic photographs against their unfair prejudice:

> "Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than an oral description, and to the extent calculated to excite passion and prejudice, does not render it inadmissible in evidence." [*Mills, supra* at 77.]

Defendant argues that none of the four photographs clearly depict either the number or manner of the injuries sustained by the victims, nor do they shed light on defendant's intent to kill them. Defendant claims that their admission was merely calculated to excite the passion and prejudice of the jury. Undoubtedly, the photographs in the instant case are gruesome. They vividly show the spatter and splatter of blood on the bodies of the victims and their immediate surroundings, caused by the total of forty-nine fierce blows that defendant rendered, with a single hammer, to the head and face of each. Nonetheless, the relevancy of these photographs was not substantially outweighed by the danger of unfair prejudice.

First, three of the four photographs accurately represented the positions in which each of the victims was found. In the fourth photograph, the body of the victim had been turned over. That photograph was admitted to show the effect of the injuries the victim sustained while she was sleeping on her stomach.

Second, while the exact number of blows that each victim sustained was not represented in the photographs, the brutality and fierceness of the blows inflicted were accurately demonstrated, making it more probable than not that defendant intended to kill his victims with deliberation and premeditation.

Third, the trial court was careful to examine a total of six photographs which the prosecution offered, and rejected two of them because they showed the bodies of the victims after they were moved, and because the injuries in the rejected pictures were amply represented in the other four pictures.

Fourth, the trial court, in its discretion, found that the photographs had material value, and found it necessary that they be in color, rather than in black and white. The prosecutor had explained to the trial court that the use of color photographs was necessary because the blood spattering on the bedding would have otherwise appeared to be part of the floral bedding. Additionally, even defense counsel conceded to the prudence that the prosecutor showed in selecting, from hundreds of pictures taken from the crime scene, the least objectionable ones. Therefore, we find that the trial court properly admitted these four photographs because their probative value was not substantially outweighed by their unfair prejudice. They were necessary and proper to show defendant's intent to kill with premeditation and deliberation, to corroborate the defendant's tape-recorded confession, and to corroborate the testimony of the medical examiner and the investigating detective.

II

Defendant next argues that evidence obtained from a police search of his automobile was neither a valid "automobile search and seizure" exception or a valid "search incident to arrest" exception to the warrant requirement, when the police waited in hiding until defendant entered his vehicle before arresting him on an outstanding warrant. We conclude that the police search of defendant's automobile was a valid exercise of the search incident to arrest exception to a warrantless search because the arrest was based upon a lawful outstanding warrant for defendant's arrest. Furthermore, we reject defendant's claim that the officers' purpose for waiting to arrest defendant until he entered his car and drove away, was a pretext to search his car.

This Court reviews de novo a trial court's ultimate decision on a motion to suppress. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). However, the trial court's underlying findings of fact are reviewed for clear error. *Id*. This Court reviews constitutional issues de novo. *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000).

The right to be secure against unreasonable searches and seizures absent a warrant based upon probable cause is subject to several specifically established and well-delineated exceptions. *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). In order to show that a search was in compliance with the Fourth Amendment, the police must show either (1) that they had a warrant or (2) that their conduct fell within one of the narrow, specific exceptions to the warrant requirement. *Id.* at 418. In the instant case, it is not disputed that the police did not have a warrant to search defendant's vehicle. Therefore, the search, in order to be valid, must have met at least one of the exceptions to the warrant requirement. Examples of exceptions to the warrant requirement are: (1) searches incident to arrest, (2) automobile searches and

seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances. *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993). Defendant does not dispute the fact that there was an outstanding felony warrant for his arrest at the time he was arrested on November 3, 1998. Nor does defendant claim that the police lacked the requisite probable cause to search his vehicle under the automobile search and seizure exception. Instead, he argues that while affecting the arrest, the police violated his due process rights when they searched his vehicle without a warrant because the police employed a ruse in arresting him. Defendant claims that the police waited to arrest him until he entered and drove his car so as to search his vehicle and obtain the evidence found therein.

Defendant argues that because the police employed a ruse in arresting him, the trial court erred in its application to his case of the United States Supreme Court decisions in *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), and *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981). In *Chimel*, *supra* at 763, the Supreme Court held that when conducting a search incident to a lawful arrest, the police may search the arrestee and the area within his immediate control. The *Chimel* decision was further developed in *Belton*, where the Supreme Court held that, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Belton*, *supra* at 460. Defendant proffers that the decision of the persuasive case of *State v Robb*, 605 NW2d 96 (Minn, 2000), applies to his case. In that case, the Minnesota Supreme Court held *Belton* inapplicable because the defendant was not an "occupant" in the vehicle -- when the defendant was first approached by the deputies, he was too far away from the vehicle, both in distance and in time, to have had an opportunity to conceal a weapon, contraband or evidence in the vehicle. *Id*. at 101. Furthermore, the court ruled that *Chimel* was inapplicable because the defendant's proximity to the vehicle was fully controlled by the arresting officers and not necessary to the safe and orderly processing of the arrest. *Id*. at 102.

Defendant's argument is without merit. The facts of the instant case are distinguishable from *Robb*. In *Robb*, the police initiated contact with the defendant when they called him to come to shore, and this was long before the defendant was near his car. The Minnesota Supreme Court found that the police did not have the required probable cause to support a protective search of the vehicle because there was no reasonable inference that the defendant was dangerous and could gain control of a weapon. *Id*. at 103. In the instant case, the police initiated contact with defendant when the marked patrol car signaled him to stop his vehicle. Unlike the defendant in *Robb*, defendant here was already in the vehicle when the police initiated contact with him, and he had an opportunity to conceal a weapon or evidence in the vehicle. Defendant, at the time a suspect of a heinous, brutal crime, was dangerous. Weapons reported missing from the crime scene could have been in his vehicle. Furthermore, *Robb* does not discuss the issue of a police ruse, and is inapplicable to defendant's argument.

Defendant's brief on appeal does not point out any reference on the record which would substantiate defendant's claim that the police intended to arrest defendant while he drove his car as a pretext to search his car. Detective Sergeant Muir knew that the outstanding felony warrant against defendant would entitle him to arrest defendant at his residence. But the record shows that four guns were reported missing from the crime scene the night of the four brutal murders. Muir testified that he did not know where the guns were, and suspected that they could have been

in the house, or in the car. While the record clearly shows that it was Muir's intent to arrest defendant's person, nowhere does the record show that the arrest was being used as pretext for searching defendant's car. Defendant makes no argument that police were previously aware of incriminating evidence located in defendant's car.

The warrantless search was lawful under the "search incident to arrest" exception. Fundamental to the search incident to arrest exception is the requirement that there must be a lawful arrest in order to establish the authority to search. *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996). This includes the search of the passenger compartment of an automobile occupied by the arrestee as a contemporaneous incident of that arrest. *Belton, supra* at 460. The officer may also examine the contents of any containers found within the passenger compartment. *Id*. Here, defendant does not dispute the fact that he was arrested pursuant to an outstanding felony warrant against him at the time of his arrest on November 3, 1998. Furthermore, the search of an automobile is generally reasonable even if the defendant has already been removed from the automobile to be searched and is under the control of the officer. *People v Fernengel*, 216 Mich App 420, 423-424; 549 NW2d 361 (1996). Therefore, the police search of defendant's automobile was a valid exercise of the search incident to arrest exception to a warrantless search because the arrest was based upon a lawful outstanding warrant for defendant's arrest and there is no showing that the police employed a ruse.

III

Defendant next argues, in his supplemental brief in propria persona, that the trial court reversibly erred in denying defendant's "pretrial motion to quash." Defendant has not properly presented this issue for appellate review. Other than this statement, defendant's brief on appeal does not even cursorily refer to the issue, and the record does not show that defendant raised any pretrial motion to quash. 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 Kelley*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, we need not address this issue.

IV

Defendant next argues that the trial court reversibly erred in denying his motion for directed verdict. We disagree. When ruling on a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made 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 Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998).

Defendant was charged under alternating theories of first-degree premeditated murder and first-degree felony murder.[2]

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[2] As stated above, first-degree premeditated murder consists of proof that the defendant intentionally killed the victim, and the act of killing was premeditated and deliberate. *Mette, supra* at 330. Premeditation and deliberation require sufficient time to allow the defendant to

(continued…)

Defendant argues that the evidence merely shows that he acted impulsively in the heat of passion when the first victim confronted him. We disagree. First, although defendant did not know his victims, he knew from a previous conversation with the informant, that the house was occupied by an elderly couple. He was careful to ask whether the house was equipped with an alarm system. He equipped himself with a screwdriver and a hammer; the former was used to enter the house through a basement window while the latter was used as the murder weapon.

Second, defendant's own confession indicates that while he was concerned about being discovered before he entered the house, he was inexplicably fearless once he was inside the house. This is perhaps most evident in the fact that even though he heard a television or radio sound coming from behind a closed bedroom door, he nevertheless opened the door, and entered the room. He saw a little light emitting from a television or a night lamp. When he heard a rustling from the bed within, he did not flee out the door from which he came. Instead, he went further inside the bedroom and confronted the occupant. In his own confession, defendant stated that he approached the bed and "asked about who was getting up." In the ensuing struggle, the victim received a total of eighteen blunt blows to the back of his head, face, stomach area, and on the wrists. Defensive wounds suffered by a victim can be evidence of premeditation. *People v Coy*, 243 Mich App 283, 316; 620 NW2d 888 (2000).

Third, defendant stated that at some point as he confronted the first victim, he "then blacked out," instinct took over and he stopped thinking. However, the photographs of the victims that were admitted into evidence circumstantially show that defendant had a moment in time, or a pause in his act, so as to move from the floor at one side of the bed where his first victim fell to the other side of the bed where he started to inflict another series of blunt blows on the second victim's face and head. Although defendant stated that he heard the second victim, a woman, mumble or say something from where she was laying in bed, the autopsy revealed that she had died in her sleep. Furthermore, the autopsy revealed that she was wearing ear plugs and an eye mask used for blocking light.

Fourth, defendant stated in his own confession that after there was no one moving anymore but him, he searched the bedroom. When he found nothing there, he went to another room, later identified as the study room, turned on the light, found a flashlight, turned off the light, and then used the flashlight to search through a filing cabinet and cupboards. He only found a rifle, which he examined. It was only after he left the study room and entered the second bedroom when he found another couple in bed. Instead of fleeing, he approached the sleeping elderly man and bludgeoned him with fourteen blunt blows to the head and face. He then approached the woman, who was sleeping on her stomach, and rendered her seven blunt blows

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take a second look. *Abraham*, *supra* at 656. 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*. Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing. *Kelley*, *supra* at 642.

that punched out the inside of her skull. After rendering a total of twenty-one blows to these two victims, defendant then resumed his search as methodologically as he did prior to, and after, killing his first two victims. He had the presence of mind to search the closet, the dressers, and a jewelry box. He grabbed a wallet from a pair of pants next to the bed. He searched a display of guns in the living room. He went up to the attic, and then down to the basement, where he forced open several brief cases and a chest, and then up back to the front porch, where he had earlier thrown a purse.

Fifth, and further attesting to defendant's methodological, cool thought process, defendant was fully capable, three days after the murders, to accurately draw from memory a diagram of the interior of the house. He was also capable in articulating, in his confession, a highly detailed account of the crime he committed.

In light of the above, the evidence circumstantially shows that it took some time to inflict as many blunt force blows to the face and head that each of the four victims separately suffered, giving defendant time to consider what was occurring. Defendant's own testimony suggested several opportunities for him to reconsider his actions, with perhaps the most significant opportunity being after he killed his second victim in her sleep, when he had ample time to rummage through at least two rooms before happening upon the last two victims and bludgeoning them while they slept. Though circumstantial, as evidence of deliberation and premeditation frequently is, this evidence was sufficient, when considered in a light most favorable to the prosecution, to prove guilt beyond a reasonable doubt.

Defendant is correct in stating that the brutality of a killing does not, in itself, justify an inference of premeditation and deliberation. The violence and multiple wounds, while more than ample to show an intent to kill, cannot standing alone support an inference of a calmly calculated plan to kill requisite for premeditation and deliberation, as contrasted with an impulsive and senseless, albeit sustained, frenzy. *People v Hoffmeister*, 394 Mich 155, 160; 229 NW2d 305 (1975). However, as the Michigan Supreme Court pointed out in *Hoffmeister*, "[i]t is not claimed that the evidence would permit a finding that the wounds were inflicted over such a period of time that there was an intervening period for premeditative reflection by the assailant." *Id*. at 159 n 4. In the instant case, as discussed, the evidence permitted a jury finding that the wounds sustained by each of the four victims, both individually and collectively, were inflicted over a period of time sufficient for premeditative reflection by defendant.

Defendant also argues that there was no evidence to show he brought the hammer as part of a premeditated and deliberated plan to kill the victims. In light of our findings above, it is unnecessary to discuss the possible reasons defendant brought the hammer to the crime scene.

Defendant next argues that the prosecutor failed to show any motive for the killings. This argument is without merit. The prosecutor did not have an obligation to prove motive beyond a reasonable doubt because it is not an element of the offense. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976).

Viewing these circumstances in the light most favorable to the prosecution, a conclusion may be made that evidence of premeditation and deliberation existed, and the jury could reasonably infer that defendant had an opportunity to take a "second look" before killing each of

the four victims. Therefore, the trial court did not err in denying defendant's motion for a directed verdict.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ William B. Murphy