

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM L. BLACKBURN,

Defendant-Appellant.

UNPUBLISHED

July 5, 2002

No. 223446

Wayne Circuit Court

LC No. 97-006372

Before: Kelly, P. J., and Murphy and Murray, JJ.

PER CURIAM

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Basic Facts and Procedural History

Defendant and the victim, who lived in the same apartment building, were involved in a bar fight. Later that same day, as the victim and a neighbor approached her apartment, defendant confronted her. Armed with a shotgun, defendant shot the victim in the chest and then fled. The victim's husband and the neighbor claimed to have witnessed the shooting.

At trial, defendant presented a diminished capacity defense. According to defendant's expert, defendant suffered from deficits in the frontal lobe area of his brain, which may cause reactivity and confusion.¹ Defense counsel argued that defendant's conduct, at most, amounted to involuntary manslaughter. Conversely, the prosecutor theorized that defendant committed first-degree murder by lying in wait for the victim. The jury convicted defendant of first-degree murder.

¹ In *People v Carpenter*, 464 Mich 223; 627 NW2d 276 (2001), which was decided after defendant's trial, our Supreme Court held that diminished capacity is not a viable defense.

II. Lying In Wait

Defendant first argues that the trial court erroneously gave an instruction on lying in wait because there was no evidence demonstrating how long defendant was in the hallway before he confronted the victim. At trial however, the objection lodged by defendant was predicated upon whether defendant concealed himself, rather than on the length of time that defendant stood in the hallway. “[G]enerally, an objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground.” *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Thus, this issue was not preserved for our review. Typically, when an issue is not preserved, a defendant must show plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is only warranted if the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

In essence, defendant is not challenging the substance of the jury instruction delivered by the trial court but rather, claims that there was insufficient evidentiary support for a lying in wait theory of first-degree murder. We will therefore consider this claim in accord with the standards applicable to a sufficiency of the evidence challenge. To determine the sufficiency of evidence, the reviewing court must view the evidence presented in a light most favorable to the prosecution and determine whether the evidence would justify a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

First-degree murder is “[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.” MCL 750.316(1)(a). Lying in wait is a factor to consider in determining if a premeditated and deliberate murder was proven, and that the requisite time interval for premeditation would be one involving sufficient time for a reasonable person to subject the nature of his or her response to a second look. See *People v Johnson*, 113 Mich App 650, 661; 318 NW2d 525 (1982).

We find that the evidence in this case was sufficient to support a lying in wait theory for purposes of a first-degree murder conviction. It was not necessary that the prosecution present direct evidence that defendant waited for a specific duration of time. Circumstantial evidence and reasonable inferences arising from the evidence can be satisfactory proof of the elements of a crime. *Nowack, supra* at 400. See also *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998) (premeditation and deliberation may be inferred from all the facts and circumstances.)

In the case at bar, evidence was presented that the victim went to a store and, upon her return, found defendant, with whom she had fought earlier in the day, standing with a shotgun outside of her apartment. This is sufficient to enable a rational trier of fact to infer that defendant waited for the victim for some period of time for the purpose of killing her. Examined in light of all the facts and circumstances, a reasonable juror could infer that defendant waited for the victim long enough to subject the nature of his response to a second look. We thus find no error requiring reversal.

III. Prosecutorial Misconduct

Next, defendant claims that misconduct by the prosecutor denied him a fair trial. Because defendant did not timely object to the prosecutor's alleged improper remarks, we review defendant's claim for plain error which affected defendant's substantial rights. *People v Carines*, *supra* at 763-764; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Issues of prosecutorial misconduct are decided on a case by case basis. *Schutte*, *supra* at 721. "[T]he reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.* The test is whether the prosecutor's conduct denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

Having examined defendant's numerous claims of misconduct in context, we find that defendant has not established any basis for reversal. The challenged remarks were either proper or such that defendant's substantial rights were not affected. *Bahoda*, *supra*; *Schutte*, *supra*. We are not persuaded that defendant has established any plain error that, viewed singularly or cumulatively, deprived him of a fair trial. *Bahoda*, *supra* at 292 n 64.

IV. Ineffective Assistance of Counsel

Defendant contends that trial counsel was ineffective. To the extent that defendant moved for a new trial in the trial court based on ineffective assistance of counsel, this issue was preserved for appellate review. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). Because the trial court did not conduct an evidentiary hearing, however, our review is limited to the facts contained in the existing record. *Id.* at 352. We note that this Court previously denied defendant's motion to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). However, consistent with our authority to grant any relief as a case may require, MCR 7.216(A)(7), we will consider defendant's claims not only upon the facts contained in the record as it exists, but also within the context of the documentary proofs submitted by defendant on appeal with an eye towards determining whether a remand for an evidentiary hearing would be appropriate. Considered in this light, we conclude that defendant cannot establish a basis for reversal predicated upon the ineffective assistance of trial counsel.

A claim of ineffective assistance of counsel involves a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). As our Supreme Court stated:

For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" *Id.* at 167. [*People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).]

Defendant first claims that defense counsel's failure to question the accuracy of the preliminary examination testimony of John Stacey deprived him of the effective assistance of counsel. We do not agree. Upon review of the record, defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness. Furthermore, we are satisfied from the existing record that defendant cannot establish the requisite prejudice. Contrary to defendant's claim on appeal, the preliminary examination testimony, as recorded and read to the jury, did not disclose testimony by Stacey that the shotgun dropped. Rather, the testimony was that defendant "laid it down and it went off and she fell." Examining this statement in light of the other proofs, including the absence of any physical evidence that it was possible for a shotgun that had been "laid down" to cause the victim's chest wound, we fail to see how defense counsel's conduct prejudiced defendant.

Defendant next claims that defense counsel was ineffective by not moving to suppress evidence of the shotgun seized from his apartment. We find it unnecessary to determine whether defense counsel was deficient because it is plain from the record that there is no reasonable probability that, but for this alleged deficiency, the result of the trial would have been different. *Toma, supra*. The fact that the prosecutor was able to establish that the safety was engaged upon the firearm's seizure, does not automatically warrant a different result, particularly given defense counsel's own use of this evidence in closing argument to contend that the shotgun was in poor condition and was therefore not a very powerful weapon.

Additionally, defendant claims that defense counsel provided ineffective assistance by not honoring his right to testify. Defendant asserts that he wanted to testify in support of his claim that he "blacked out." We note, however, that defendant's failure to testify is deemed a waiver of the right to testify. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Further, we find no basis in defendant's affidavit or other proofs submitted to the trial court to conclude that defendant's failure to testify deprived him of a substantial defense, that is, one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). A difference of opinion on trial tactics does not constitute ineffective assistance of counsel. *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987). We are satisfied from the existing record that defendant can show neither deficient performance by defense counsel nor prejudice arising from defendant's failure to testify. *Toma, supra*.

Because defendant has failed to show that he was deprived of a substantial defense, we find it unnecessary to address defendant's claim that his right to testify was adversely impacted by an alleged pre-trial misstatement of the law by defense counsel with regard to impeachment by prior convictions under MRE 609. Indeed, defendant's affidavit filed in support of his motion for a new trial did not aver that his desire to testify was conditioned on his prior criminal record being excluded. Further, we reject defendant's argument on appeal suggesting that MRE 609 is the only evidentiary basis for prior conviction evidence. MRE 609 only applies to general impeachment evidence. However, evidence of prior convictions may still be admissible for other purposes, such as to rebut specific statements of a defendant who testifies at a trial or an insanity defense. See *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1995), and *People v Lipps*, 167 Mich App 99, 109; 421 NW2d 586 (1988). We further note that the trial record in this case reflects that defendant had an opportunity to hear the type of prior criminal record evidence that the trial court would allow when defense counsel moved, without success, to have the

prosecution's expert cautioned not to mention defendant's prior criminal record. Although the prosecution's expert did not testify regarding defendant's criminal record, we find that the trial record militates against defendant's assertion that he did not insist on testifying at trial because of defense counsel's alleged pretrial misstatement of the law.

Defendant's remaining claims of ineffective assistance of counsel warrant little discussion. We are satisfied based on the existing record that defendant cannot establish that defense counsel's questioning of Stacey about his prior statement to the police amounted to the requisite deficient performance or otherwise caused prejudice. *Toma, supra*. We decline to address defendant's other claims regarding other-acts evidence and an alleged impermissible propensity for crime argument made by the prosecutor, given defendant's failure to brief these issues. *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992); *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Next, even assuming that the prior statement of Joyce O'Dell would have been admissible under MRE 613, we find that defendant was not prejudiced by defense counsel's alleged deficiency in failing to introduce this statement. *Toma, supra*. Further, because the trial record does not support defendant's claim that defense counsel elicited damaging evidence regarding two shotguns, we reject defendant's claim of ineffective assistance of counsel on this basis. Finally, we are not persuaded by defendant's cursory claim that defense counsel's failure to seek a mistrial or timely object to matters addressed elsewhere in this opinion establish a basis for either reversal of his conviction or a remand for an evidentiary hearing his ineffective assistance of counsel claim.

V. Trial Court Errors

Next, defendant presents three claims concerning alleged errors committed by the trial court. Because defendant did not object to any of the matters below, these issues are not preserved for appellate review. Accordingly, defendant must establish plain error that affected his substantial rights. *Carines, supra*. On the record here before us, we find no basis for relief.²

Although it may have been preferable for defense counsel's objection to the photographs to have been made outside of the jury's presence, MRE 103(c), we do not find that the trial court's explanation for its evidentiary ruling deprived defendant of a fair trial. *People v Paquette*, 214 Mich App 336; 340-341; 543 NW2d 342 (1995). Unlike the situation presented in *People v Jones*, 130 Mich App 676, 678; 344 NW2d 46 (1983), the trial court here did not become an unsworn witness on a crucial issue. The message conveyed to the jury was that the

² Defendant also raised these claims in his motion for new trial. Under MCR 6.431(B), the trial court was permitted to grant a new trial on any ground that would support appellate reversal or because it believes that the verdict resulted in a miscarriage of justice. Generally, we review the trial court's ruling on a motion for new trial for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). Because defendant has not briefed the trial court's decision on that motion, we deem that issue abandoned. *Kent, supra* at 209-210. Regardless, the trial court relied on the record as the basis for its decision denying defendant's new trial motion. We therefore find that the general standards for reviewing unpreserved issues is applicable. *Carines, supra*.

photographs were not relevant to the juror's role as the finders of fact. The court's characterization of the photographs as "kind of gross" added nothing to what the jury could already infer from the evidence technician's testimony; specifically, that he observed a large gaping hole in the victim's chest.

We also find that defendant has not shown plain instructional error. The reasonable doubt instruction was not improper. *People v Snider*, 239 Mich App 393, 420-421; 608 NW2d 502 (2000); *People v Sammons*, 191 Mich App 351, 372; 478 NW2d 901 (1991). Also, the trial court's remark that it had no option but to charge the jury on second-degree murder was an accurate statement of the law. *People v Jenkins*, 395 Mich 440, 442; 236 NW2d 503 (1975). Reviewed within the context of the instructions as a whole, there was no error because the instructions fairly presented the issues for trial and sufficiently protected defendant's rights. *People v Canales*, 243 Mich App 571; 574; 624 NW2d 439 (2000).

VI. Cumulative Error

Finally, we reject defendant's claim that cumulative error deprived him of a fair trial. Only actual errors are aggregated to determine their cumulative effect. *Bahoda, supra* at 292 n 64. "[T]he effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). In the case at bar, defendant has not established actual errors which, singularly or cumulatively, deprived him of a fair trial.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray