STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 30, 2002
v	No. 231607 Macomb Circuit Court
RANDY JOHN BELLMAN, Defendant-Appellee.	LC No. 00-000440-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 233954 Macomb Circuit Court
RANDY JOHN BELLMAN, Defendant-Appellant.	LC No. 00-000440-FC

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was charged with open murder, MCL 750.316, and found guilty of first-degree murder, MCL 750.316, by a jury. After trial, the trial court granted defendant's motion for a directed verdict as to first-degree murder and entered a conviction of second-degree murder, MCL 750.317. In addition, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 180 to 270 months for the second-degree murder conviction, 95 to 240 months for the first-degree home invasion conviction, and two years' imprisonment for the felony-firearm convictions. In these consolidated appeals, the prosecution and defendant appeal by right. We affirm in part, reverse in part, and remand.

In Docket No. 231607, the prosecution argues that the trial court erred when it granted defendant's motion for directed verdict after the jury was discharged and entered a conviction of second-degree murder. We agree. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence

presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To convict a defendant of first-degree murder, the prosecutor must establish that the killing was intentional and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); see, also, *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id*. Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Factors evidencing premeditation are (1) the prior relationship between the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing, including the weapon used and the location of the wounds, and (4) the defendant's conduct after the victim's death. *Id*. at 300.

Here, viewing the evidence in the light most favorable to the prosecution, the evidence was sufficient to establish that defendant killed the victim with premeditation and deliberation. First, Christine Bellman, defendant's estranged wife, testified that defendant was unwilling to accept her decision to divorce him and their relationship was "not good." Second, before the killing, defendant had been following Bellman. Additionally, testimony indicated that the east entrance door of the victim's apartment building was forced open because there were wood shavings on the ground, and evidence existed that the victim's apartment door had been forced open with a screwdriver based on pry marks in the frame of the door. Moreover, a piece of the screwdriver remained in the door jamb, and a screwdriver was recovered from defendant's person when he was arrested.

Bellman's testimony at trial established that when defendant entered the apartment, he had a shotgun. The evidence demonstrated that defendant had more than a few seconds to take a "second look": defendant had turned away from the victim, but the victim was close enough to put his hand on defendant's shoulder. However, the victim's injuries suggested that although he was shot from long-range distance, he was shot as he was turning away from defendant. We conclude that the few seconds that elapsed between the time that defendant and the victim left the bedroom and the time that the shotgun was fired in the living room constituted sufficient time for defendant to take a "second look," particularly where Bellman testified that defendant appeared to be calm at the time that defendant and the victim left the bedroom. Lastly, defendant's statement after he shot the victim that "[y]ou ruined my f****** life," supports a conclusion that defendant acted out of revenge and with a purpose. Accordingly, a rational trier of fact could conclude beyond a reasonable doubt that defendant acted with premeditation and deliberation when he killed the victim. When viewed in the light most favorable to the prosecution, the evidence was sufficient to support the jury's verdict of first-degree murder. *Anderson, supra.*

In Docket No. 233954, defendant argues that the prosecution committed misconduct when it improperly suggested to the jury in its closing argument that defendant failed to produce evidence and improperly shifted the burden to defendant to prove his own innocence. We disagree. Generally, a defendant must timely and specifically object to preserve a claim of prosecutorial misconduct for appeal. *People v Stanaway,* 446 Mich 643, 687; 521 NW2d 557

(1994). Here, defendant failed to object to the prosecutor's argument. Therefore, this issue is unpreserved. To avoid forfeiture under the plain error rule, defendant must show a plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999). 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); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

A prosecutor has wide latitude and may argue the evidence and all reasonable inferences from it. *Bahoda, supra* at 282; *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). It is impermissible for the prosecutor to shift the burden of proof. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). A prosecutor may not comment on a defendant's failure to testify or present evidence, but may argue that certain evidence is uncontradicted and may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte*, *supra*.

Here, when the prosecution's closing argument is reviewed in its entirety, we conclude that no error occurred because the prosecution was responding to arguments raised in defense counsel's closing argument. Otherwise, improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16 (Ryan, J.); 260 NW2d 58 (1977). Further, this Court stated:

> [W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, [a] comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*Reid, supra* at 478, quoting *Fields, supra* at 115.]

Accordingly, in light of defense counsel's mischaracterization of fact that defendant asked Bellman to come home with him, and emphasis on defendant's intent to bring Bellman home to save his marriage, the prosecution properly rebutted defendant's theory by asking the jury to question if defendant and Bellman had a good relationship. If the jury had accepted defendant's theory, defendant would have been exonerated, and thus, the prosecution was free to argue that Bellman's fear of defendant was real and defendant's actual intent was to kill the victim. *Reid, supra*. We note defense counsel's mischaracterization of the evidence had the significant potential of misleading the jury to believe that defendant turned around because his wife "refused" to go with him; however, the difficulty with this case is that limited evidence was submitted regarding the details of the conversation between defendant and the victim in the bedroom. Nor was any evidence presented regarding what transpired in those few seconds when defendant and the victim were in the living room before the gun was fired. We conclude that

defendant's mischaracterization of the evidence was offered as a convenient explanation of the events on March 7, 1999, which if accepted, would have possibly exonerated defendant. Thus, the prosecution's rebuttal closing argument was not improper. *Reid, supra.*

Even if the prosecution's closing argument were improper and constituted error, to avoid forfeiture of the claimed error, defendant must show that the error was plain and that his substantial rights were affected, i.e., the outcome of the trial was affected. *Carines, supra* at 763-764, 774. Here, defendant cannot establish prejudice. Absent an objection, a judge's instruction that arguments of attorneys are not evidence can dispel any prejudice. *Bahoda*, *supra* at 281. Here, the trial court gave detailed instructions to the jury regarding the consideration of evidence in its deliberations. First, the jury was given instructions immediately after closing arguments where the court stated, " The defendant is not required to prove his innocence or to do anything . . . [e]very defendant has the absolute right not to testify. When you decide the case, you must not consider the fact that he did not testify. It must not affect your verdict in any way." Further, the trial court reminded the jurors that "[t]he lawyers' statements and arguments are not evidence." In light of defense counsel's explicit theory of the case, and defendant's mischaracterization of the evidence, the prosecution's closing argument was an appropriate rebuttal argument that did not improperly shift the burden of proof. Moreover, given that defendant failed to object to the prosecution's argument, and the trial court provided the jury with instructions before its deliberations, defendant was not prejudiced. Accordingly, the claim of error is forfeited. *Carines, supra* at 763.

Defendant also argues that the evidence was insufficient to sustain his conviction for second-degree murder. Again, we disagree. As previously discussed, the trial court erred in granting defendant's motion for a directed verdict as the prosecution presented sufficient evidence for a rational trier of fact to conclude that defendant committed first-degree murder. Thus, defendant is not entitled to relief on this basis.

Defendant next argues that trial counsel was ineffective because (1) trial counsel failed to object to the prosecution's closing argument, and (2) trial counsel failed to present an insanity defense. We disagree. To preserve the issue of ineffective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing before the trial court. *Marji, supra* at 533. Failure to timely move for a new trial or *Ginther*[1] hearing forecloses appellate review.[2] Therefore, this issue is unpreserved, and this Court will review an unpreserved claim of ineffective assistance of counsel by reviewing errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish a denial of effective assistance of counsel, a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Pickens*, 446 Mich

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

[2] Defendant filed an untimely motion with this Court requesting a remand for a *Ginther* hearing on February 25, 2002, eleven months after the claim of appeal was filed and one year and three months after defendant was sentenced.

298, 302-303; 521 NW2d 797 (1994). The deficiency must be prejudicial to defendant to the extent that, but for counsel's error, the result of the proceedings would have been different. *Carbin, supra* at 600. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). This Court will not second guess counsel's trial tactics. *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

Defendant first argues that trial counsel was ineffective for failing to object to the prosecution's closing argument. In light of our previous conclusion that the prosecution's closing argument was not improper, defendant has failed to establish an error apparent on the record. Trial counsel was not required to advocate a meritless position. *Snider, supra* at 425.

Defendant next argues that trial counsel was ineffective by failing to investigate and present an insanity defense. The decision to present or omit evidence is presumed to be a matter of trial strategy. *People v Emerson, (After Remand),* 203 Mich App 345, 349; 512 NW2d 3 (1994). "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*. This Court will not reverse where failure to raise an insanity defense is a question of trial strategy. *People v Newton (After Remand),* 179 Mich App 484, 493; 446 NW2d 487 (1989). Insanity is an affirmative defense that requires proof that, as a result of mental illness or mental retardation, the defendant lacked substantial capacity either to appreciate the nature and quality or the wrongfulness of his conduct or to conform his conduct to the requirements of the law. MCL 768.21a(1); see, also, *People v Carpenter*, 464 Mich 223, 230-231; 627 NW2d 276 (2001). The defendant bears the burden of proving the defense of insanity by a preponderance of the evidence. MCL 768.21a(3); *Carpenter, supra* at 231.

Here, defendant has failed to show that the defense of insanity was substantial and may have made a difference in the outcome of the trial. A review of the record establishes that, had an insanity defense been pursued, there was not a reasonable likely chance of acquittal. Additionally, in light of the findings of the Center for Forensic Psychiatry ("CFP"), and defendant's conduct during the period surrounding the instant offense, we are satisfied that defendant would not have prevailed with an insanity defense. Further, in light of the CFP report and defense counsel's awareness of the findings contained therein, we conclude that defense counsel made a strategic decision to emphasize the prosecution's burden to prove that defendant had the actual intent to kill, versus revealing to the jury (1) defendant's determination to communicate with his estranged wife, (2) defendant's manipulative threats of suicide, (3) defendant's substance abuse, and (4) defendant's awareness of the wrongfulness of his actions on the night of the instant offense in light of defendant's initial desire to leave the apartment before the police arrived. Accordingly, defendant's claim that trial counsel failed to adequately investigate, research, and present this claim is without merit. Trial counsel was not required to advocate a meritless position. *Snider, supra*.

We affirm in part, reverse in part, and remand for reinstatement of the jury's verdict of first-degree murder and resentencing consistent with first-degree murder. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Jane E. Markey