STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2002
v	No. 231516 Macomb Circuit Court
LOUIS WAYNE SCOTT, Defendant-Appellant.	LC No. 00-001128-FC

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced to 60 to 101 years' imprisonment. We affirm.

Defendant's first claim on appeal is that the prosecution committed misconduct requiring reversal by referring to defendant as a "heartless bastard," injecting religion into the proceeding, and appealing to the jurors' sympathy by reading a poem in its closing argument. We disagree.

Defendant failed to preserve the claim of prosecutorial misconduct for our review because he failed to object to the claimed errors at trial. Therefore, defendant must show that the error was plain, i.e., clear or obvious, and affected defendant's substantial rights by prejudicing the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 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). "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001). However, a prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *Bahoda, supra* at 282-283. However, a prosecutor "is not required to state inferences and conclusions in the blandest possible terms." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

During the prosecution's closing argument, the prosecution made the following statements to the jury:

> Why does he have to deny Officer Patrick's statement and say that he's lying too? You tell me. The police officer who comes to the door and asks to see the baby with the bruises, do you think maybe if you show him another child that has no bruises, he might go away?
>
> Oh, yeah, and Detective Anderson, the same officer who treated him fairly and allowed him to correct his notes, go over things and make sure everything was coordinated to his statement, when he says, 'I didn't cry when I first saw him on the 10th," he's lying too.
>
> And why is that? Because he doesn't want you to think that he was a *heartless bastard*. And pardon the use of the words, but that's exactly what he was. He showed no emotion whatsoever to Detective Anderson when he talked [sic] him on the 10th or the 13th. When Detective Anderson tells you that he was emotionless, he says, 'No, I was crying. He's lying.'

The prosecution went beyond proper conduct by referring to defendant as a "heartless bastard." This error, however, did not affect defendant's substantial rights. This comment was isolated when reviewed in context. Furthermore, there was overwhelming evidence of defendant's guilt. Defendant admitted to becoming angry with the victim when she would not stop fussing, and squeezed her in a "bear hug" until she stopped crying and heard her gasp for air. Defendant also admitted to forcibly throwing the victim face down on a bed from a distance of one to two feet. Defendant further admitted to putting his hand in the middle of the victim's back, between her shoulder blades, and holding her face down on the mattress until she stopped crying and then stopped moving altogether. Defendant admitted that he then left the room to watch the *Roseanne* show. Thus, the prosecutor's comment did not affect defendant's substantial rights.

Additionally, during the prosecution's rebuttal closing argument, the prosecution read the following poem to the jury:

> Once upon a time there was a child ready to be born, so one day she asked God, "They tell me You are sending me to Earth tomorrow. How am I going to live there, being so small and helpless?"
>
> "Among the many angels, I chose one for you. She'll be waiting for you and take care of you."
>
> "They tell me here in Heaven I don't do anything but sing and smile. That's enough to make me happy."
>
> "Your angel will sing and smile for you every day. You will feel your angel's love and be happy."
>
> "How am I going to be able to understand when people talk to me? I don't understand the language when they talk."
>
> "Your angel will tell you the most beautiful and sweet words you will ever hear. With much patience, your angel will teach you how to speak."

"What will I do when I want to talk to You?"

"Your angel will place your hands together and teach you how to pray."

"But, God, I heard on Earth there are bad men. Who will protect me?"

"Your angel will try to defend you."

At that moment there was much peace in Heaven. The voices from Earth could already be heard. The child, in a hurry, asked softly, "Oh, God, I'm about to leave now. Please tell me my angel's name."

"Your angel's name is of no importance. You can simply call her 'mommy.'"

Defendant argues that the prosecution read the poem to the jury in an improper attempt to both elicit an emotional response and inject religion into the proceeding. We agree, but nevertheless find that the defendant was not prejudiced by this error. "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). Moreover, generally where a prosecutor violates the statutory prohibition against questioning a defendant or a witness about their religious beliefs, automatic reversal is required. *People v Leshaj*, 249 Mich App 417, 420-421; 641 NW2d 872, citing *People v Hall*, 391 Mich 175, 182-183; 215 NW2d 166 (1974). However, where the offensive conduct occurred in closing arguments we will not find error requiring reversal if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Here, the improper arguments made by the prosecution during closing argument did not affect defendant's substantial rights because, as discussed above, the evidence overwhelmingly supports the jury's guilty verdict. Furthermore, the trial court instructed the jury that sympathy or prejudice should not influence their decision. Accordingly, reversal is not warranted on the basis of these errors. *Carines*, *supra*.

Defendant next claims that he was denied effective assistance of counsel by the failure of defense counsel to object to the comment that defendant was a "heartless bastard" and to the religious poem read to the jury by the prosecution to elicit an emotional response. We disagree.

Defendant failed to preserve this issue for our review because he did not move for a new trial or an evidentiary hearing before the trial court. Therefore, our review is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the fact finder would not have convicted the defendant." *Snider*, *supra* at 423-424, citing *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). The deficiency must be prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Furthermore, the defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.*

Even if it was error for defense counsel not to object to the prosecution's comments, defense counsel's error did not transform the lower court proceedings into an unfair trial for defendant. Overwhelming evidence existed to convict defendant. Therefore, defendant has failed to overcome the presumption that he received effective assistance of counsel at trial. See *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989).

Defendant's third claim on appeal is that the trial court erred in failing to grant defendant's motion for a directed verdict on the charge of first-degree murder because the prosecution failed to produce evidence of premeditation and deliberation. We disagree.

This Court reviews motions for a directed verdict de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). When reviewing a motion for a directed verdict, this Court must review the evidence presented by the prosecution 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 charged were proved beyond a reasonable doubt. *Id*.

The offense of premeditated first-degree murder is a specific intent crime, which requires proof that the defendant possessed an intent to kill. *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). "To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); MCL 750.316. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of premeditation and deliberation. *Herndon, supra* at 415.

Circumstantial evidence existed that would allow a rational trier of fact to reasonably conclude that premeditation and deliberation occurred. Defendant admitted to becoming angry with the victim when she would not stop fussing and squeezing her in a "bear hug" until she stopped crying. Defendant heard her gasp for air. Defendant also admitted that when the victim began to cry again, he forcibly threw the victim face down on a bed from a distance of one to two feet and yelled "fine," put his hand in the middle of the victim's back, between her shoulder blades, and held her face down on the mattress until she first stopped crying and then stopped moving altogether. Defendant then admitted that he heard a sigh or last breath and then left the room to watch the *Roseanne* show.

The testimony of Dr. Werner Spitz, the medical examiner, also supported the conclusion that premeditation and deliberation occurred. Dr. Spitz testified that he believed that defendant had smothered the victim for longer than one minute, and maybe as long as two minutes. Furthermore, Dr. Gabara testified that he found healing fractures both on the victim's first left rib and right arm, both of different ages, that could only have been caused by direct trauma and could not have been inflicted by a fifteen-month-old child, the victim's sibling, as suggested by defendant. Dr. Spitz also corroborated Dr. Gabara's testimony that the victim had a healing fracture on her first left rib and further testified that the victim had additional bruises of various ages on her body. Thus, when viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to find beyond a reasonable doubt that premeditation and deliberation may have occurred. Thus, the trial court did not err by denying defendant's motion for a directed verdict.

Defendant also asserts that the trial court abused its discretion in departing from the statutory sentencing guidelines and sentencing defendant to 60 to 101 years' imprisonment. We disagree. The trial court must impose a sentence within the sentencing guidelines unless there is a substantial and compelling reason for the departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 437 n 10, 439; 636 NW2d 127 (2001); *People v Babcock*, 250 Mich App 463, 465, 468; 648 NW2d 221 (2002) (*Babcock II*). A trial court's finding that there were objective and verifiable factors constituting substantial and compelling reasons for departing from the appropriate sentencing guidelines range is reviewed for an abuse of discretion. *Babcock II, supra* at 467, quoting *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000) (*Babcock I*). The existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine and, therefore, is reviewed for clear error. *Babcock II, supra* at 467, quoting *Babcock I, supra* at 75-76. A trial court's determination that a particular factor is objective and verifiable is reviewed as a matter of law. *Babcock II, supra* at 467, quoting *Babcock I, supra* at 76. "[T]he principle of proportionality can be considered concerning the extent of a departure." *Babcock II, supra*, at 468-469, citing *Hegwood, supra*, 465 Mich 437 n 10.

The trial court noted the helplessness, innocence, and inability of the child to protect herself as substantial and compelling reasons to depart from the legislative guidelines. All three of these factors are objective and verifiable, and the trial court did not abuse its discretion in determining that these factors were substantial and compelling reasons to depart from the guidelines. The victim in this case was not merely a "vulnerable victim"[1] as defendant contends, but rather, a completely helpless and innocent infant who had no way to protect herself against defendant. Thus, the trial court's finding that there were substantial and compelling reasons to warrant an upward departure from the legislative guidelines was not error. Moreover, the extent of the departure was appropriate and defendant's sentence was proportionate to the crime. *Hegwood, supra*.

Defendant's final claim on appeal is that the trial court inappropriately sentenced defendant based upon the belief that he was guilty of first-degree murder. We disagree. A trial court may not ignore a jury verdict and substitute its own belief of guilt as a reason for justifying a sentence imposed upon a defendant. *People v Fortson*, 202 Mich App 13, 21; 507 NW2d 763 (1993), citing *People v Glover*, 154 Mich App 22, 45; 397 NW2d 199 (1986). While the trial court stated its disagreement with the jury verdict, it also stated its acceptance of that verdict. Because the record supports the trial court's decision to depart upward from the statutory guidelines, we reject defendant's contention that the trial court's sentence reflected an improper attempt by the trial court to substitute its own beliefs about defendant's guilt for the findings of

[1] Vulnerability of a victim as far as age and strength may be accounted for in the scoring of offense variable 10, MCL 777.40, however, there is no scoring specifically referencing an infant or "newborn."

the jury. The trial court did not err in sentencing defendant.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder