

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK H. STEPHAN,

Defendant-Appellant.

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UNPUBLISHED

February 5, 2004

No. 241051

Wayne Circuit Court

LC No. 01-006558-01

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment without parole. He appeals as of right. We affirm.

Defendant first argues that there was insufficient evidence of premeditation to support his conviction of first-degree murder.<sup>1</sup> We disagree.

The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The test is whether a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *Id.* The resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). The trier of fact may also draw reasonable inferences from the evidence. *Id.* at 379-380.

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant acted with premeditation and deliberation. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). “To premeditate is to think about beforehand; to

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<sup>1</sup> In connection with this issue, defendant also argues that the prosecutor improperly impeached her own witness. Because defendant did not separately raise this issue in his statement of issues presented, it is not properly before this Court. See MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, there is no merit to this argument, because MRE 607 expressly provides that “[t]he credibility of a witness may be attacked by any party, including the party calling the witness.”

deliberate is to measure and evaluate the major facets of a choice or a problem.” *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Both “characterize a thought process undisturbed by hot blood.” *Id.* “While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable [person] an opportunity to take a second look at his contemplated actions.” *Id.* Premeditation may be inferred from all the facts and circumstances, including the relationship between the parties, the circumstances of the killing, and the defendant’s conduct before and after the murder. *Id.*

Defendant was convicted of killing his wife. Evidence was presented at trial that defendant and the victim had been having financial problems, that they had been arguing, and that, shortly before the victim died, she planned to confront defendant with her discovery that he had been lying about his employment. The victim’s body was found fully clothed in the bathtub of the couple’s home, and the cause of death was determined to be drowning.

Defendant claimed that he was not at home when the victim died, but gave inconsistent statements concerning how long he was gone. Additionally, when he allegedly returned home and found the victim’s body, he did not call the police or attempt to pull the victim from the bathtub in an attempt to revive her. Instead, evidence suggested that he covered her face, flooded the bathroom, made telephone calls, and went to summon neighbors in an effort to establish an alibi and cover up evidence of his crime.

According to expert testimony, a person who is drowning would be conscious and struggle violently for about 1-1/2 to 2 minutes, before losing consciousness. The person would then be in a dying mode, with death likely occurring within another thirty seconds.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant killed the victim. Additionally, the testimony describing the process and length of time required to kill a person by drowning was sufficient to support an inference that defendant acted with premeditation and deliberation. Thus, there was sufficient evidence to support defendant’s conviction of first-degree murder.

Defendant next argues that reversal is required because of the nearly twenty-year delay in prosecuting this case. We disagree. Constitutional claims of due process violations are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

“[I]n order to establish a due process violation in the context of prearrest delay a defendant must first demonstrate prejudice.” *People v McIntire*, 232 Mich App 71, 94; 591 NW2d 231 (1998), rev’d on other grounds 461 Mich 147 (1999); see also *People v Adams*, 232 Mich App 128, 132-135; 591 NW2d 44 (1998). This prejudice must be “actual and substantial.” *Adams, supra* at 134-135 “The prosecutor then bears the burden of persuading the court that the reason for the delay was sufficient to justify whatever prejudice result[ed].” *McIntire, supra*.

We agree with the trial court that defendant failed to show that he was prejudiced by the prearrest delay. At trial, defendant testified that he loved the victim, that they got along, and that she was not angry with him even after he admitted lying to her about his employment situation. Defendant argues that he was prejudiced by the delay because his father, who died in 1990,

visited defendant and the victim on the night before she died and could have corroborated his claim that the victim was not angry. However, any additional evidence that defendant and the victim seemed to be getting along on the night before the victim died would have been cumulative. Furthermore, such testimony would not have substantially aided defendant, given that the principal issues at trial concerned defendant's conduct the following morning. Defendant failed to establish actual and substantial prejudice due to prearrest delay.

Next, defendant argues that reversal is required because the prosecutor improperly urged the jury, as it were, not to give defendant a "break" because of the long delay in charging him. We disagree.

Claims of prosecutorial misconduct are reviewed on a case by case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, where a defendant fails to object to alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated any prejudice or failure to consider the issue would result in a miscarriage of justice. *Noble, supra*; see also *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000). As with other unpreserved issues, defendant must show a plain error affecting his substantial rights, i.e., error that is clear or obvious, and affects the outcome of the proceeding. *Schutte, supra* at 720; see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A prosecutor may not shift the burden of proof or undermine the presumption of innocence. See *People v Fields*, 450 Mich 94, 104-105, 108; 538 NW2d 356 (1995). However, a prosecutor may comment on the evidence and all reasonable inferences arising from the evidence. See *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

In this case, the prosecutor's comments did not shift the burden of proof to defendant or undermine the presumption of innocence. The prosecutor merely anticipated that defendant would argue that he had been prejudiced by the lengthy delay, and responded accordingly. This was permissible comment on the evidence. See also *People v Watson*, 245 Mich App 572, 593; 629 NW2d 411 (2001) (an otherwise improper remark may not rise to error requiring reversal when responding to issues raised by the defense). Additionally, apart from instructing the jury on the presumption of innocence and the prosecution's burden of proving every element of the crime beyond a reasonable doubt, the court instructed the jury that counsel's arguments are not evidence, and that they must not let sympathy or prejudice influence their decision. Defendant has failed to show that the prosecutor's comments amounted to plain error requiring reversal.

Defendant next argues that the trial court erred in refusing to instruct the jury on voluntary and involuntary manslaughter. We disagree. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

If requested, a trial court must instruct the jury on necessarily included lesser offenses if "a rational view of the evidence would support such an instruction." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). Voluntary and involuntary manslaughter are necessarily included lesser offenses of first-degree murder. *Id.* at 540-542. With voluntary manslaughter,

malice is negated by heat of passion caused by adequate provocation; with involuntary manslaughter, the killing results from the defendant's negligence, not from malice. See *id.*

In the present case, however, defendant denied killing the victim. Further, defendant never claimed that the victim died during a heated argument, or that he killed her accidentally. Indeed, defendant specifically denied arguing with the victim or telling anyone that he had pushed her. Additionally, two medical examiners testified that the victim's injuries did not occur accidentally and, instead, were consistent with having been held underwater while she drowned. The trial court properly concluded that the requested manslaughter instructions were not supported by a rational view of the evidence.

Next, defendant argues that the trial court erred in allowing the prosecutor to cross-examine his character witnesses concerning his reputation for truth or veracity where his direct examination of the witnesses was limited to his reputation for peacefulness. We disagree.

The scope and duration of a witness' cross-examination is within the trial court's discretion. MRE 611(b); *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002). A defendant's credibility is always at issue in a criminal case, particularly when, as here, he chooses to testify. *Fields, supra* at 110. MRE 608(a) provides that "[t]he credibility of a witness may be attacked . . . by evidence in the form of opinion or reputation . . . [of their] character for truthfulness or untruthfulness . . . ." Additionally, MRE 611(b) provides:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge *may* limit cross-examination with respect to matters not testified to on direct examination. [Emphasis added.]

In the present case, defendant's credibility was clearly at issue. Defendant called five witnesses to testify to his reputation for peacefulness. Questions concerning defendant's reputation for veracity were appropriate to impeach defendant's credibility under MRE 608(a), and, under MRE 611(b), the trial court had the discretion to allow the prosecutor to go beyond the scope of defendant's direct examination. There was no error.

Lastly, defendant argues that a new trial is required because the prosecutor's expert witness allegedly demanded to be paid before consenting to speak with defendant. Because defendant does not cite any record support for this claim, nor have we found any, and because defendant has failed to cite any applicable authority in support of his position, we deem this issue abandoned. See *Mudge v Macomb County*, 458 Mich 87, 104-105; 580 NW2d 845 (1998).

We affirm.

/s/ Bill Schuette  
/s/ William B. Murphy  
/s/ Richard A. Bandstra