

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY MARTIN,

Defendant-Appellant.

UNPUBLISHED

August 10, 2004

No. 248158

Wayne Circuit Court

LC No. 02-015097-01

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, 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. Defendant appeals as of right. We affirm.

I. Sufficiency of the Evidence

Defendant first argues that there was insufficient evidence of premeditation and deliberation to support his first-degree murder conviction. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

In order to convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2002). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem...[P]remeditation and deliberation characterize a thought process undisturbed by hot blood.” *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-331; 187 NW2d 434 (1971). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). And, premeditation and deliberation may be established by evidence of the prior relationship of the parties, the

defendant's actions before the killing, the circumstances of the killing itself, and the defendant's conduct after the homicide. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

In this case, the evidence showed that defendant and his father had a prior relationship characterized by his father's frequent rantings and ravings. This evidence supports an inference of premeditation and deliberation insofar that it shows that defendant had a motive to kill his father. Regarding the circumstances of the killing, defendant admitted that he hid the gun under the couch where he was lying immediately before the shooting. The evidence also permitted an inference that a sufficient amount of time elapsed before defendant reached under the couch to get the gun and, thus, had sufficient time to contemplate his actions and take a second look. Defendant's post-homicide conduct also supports a finding of premeditation and deliberation. The evidence permitted the jury to conclude that defendant attempted to conceal the crime by deliberately breaking the gun and then fabricating a story about an accidental shooting. An attempt to conceal a killing may support a finding of premeditation and deliberation. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). The evidence also indicated that defendant delayed calling 911, and then stalled when help finally arrived.

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 premeditated and deliberated the fatal shooting of his father.

II. Prosecutorial Misconduct

Defendant next argues that misconduct by the prosecutor deprived him of a fair trial. We disagree. Because defendant did not object to the challenged conduct at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A. Burden-shifting Argument

A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because this argument tends to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983).

Defendant contends that the prosecutor violated this rule when she pointed out that defendant failed to offer records supporting his claim that he was hospitalized after giving his third custodial statement. But where a defendant advances an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). That is, "[a]lthough 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." *Id.*

Defendant testified at trial that he gave his last custodial statement only because he was sick from seizures and the police promised he could obtain medical attention if he told them what they wanted to hear. He claimed that after giving this last statement, the police transported him

to a hospital, where he stayed approximately four days. The prosecutor, merely, properly commented on the validity of this claim. The remarks did not constitute plain error.

Moreover, the prosecutor was permitted to comment on defendant's failure to produce a corroborating witness where he took the stand and testified on his own behalf. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993).

B. Attacking Defense Counsel

Defendant contends that the prosecutor improperly suggested that defense counsel was trying to mislead the jury. A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). Here, the prosecutor suggested that defense counsel was distracting the jury by attempting to get it to focus on what the prosecutor characterized as non-issues. Given the responsive nature of the prosecutor's remarks, they did not amount to plain error requiring reversal. *Id.*

C. Expressing Personal Belief in Defendant's Guilt

It is improper for the prosecutor to express a personal belief in the defendant's guilt. *People v Humphreys*, 24 Mich App 411, 418-419; 180 NW2d 328 (1970). In this case, however, the prosecutor argued that the evidence showed that defendant was guilty of first-degree murder. Accordingly, there was no violation of this principle.

D. Arguing Facts Not of Record

Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences arising from the evidence. *Watson, supra* at 588. In this case, the prosecutor's statements suggesting that there was no gunpowder residue on the victim were supported by the medical examiner's testimony and reasonable inferences arising therefrom. Therefore, no plain error exists in this regard.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad