

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARRON LEON MASON,

Defendant-Appellant.

UNPUBLISHED

December 21, 2004

No. 248615

Kent Circuit Court

LC No. 02-004077-FC

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree premeditated murder, MCL 750.316(1)(a). The trial court sentenced him to life in prison without eligibility for parole. We affirm.

The instant case stems from allegations that defendant sexually assaulted and murdered the decedent when she was walking home from work late at night on November 30, 1997. On appeal, defendant first contends that the prosecution presented insufficient evidence to sustain his conviction.

We review de novo a defendant's claim that the evidence presented at trial was insufficient to support a conviction as a matter of law. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing a challenge to the sufficiency of the evidence, we examine the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The scope of review remains the same whether the evidence presented is direct or circumstantial. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences arising from it may constitute sufficient evidence of the elements of a crime. *People v Bulmer*, 256 Mich App 33, 37; 662 NW2d 117 (2003).

In order to prove that a defendant committed first-degree murder, the prosecution must present evidence establishing that "the defendant intentionally killed the victim and that the killing was premeditated and deliberate." *People v Marsack*, 231 Mich App 364, 370-371; 586 NW2d 234 (1998). In *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), citations omitted, our Supreme Court explained as follows:

To show first-degree premeditated murder, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation. The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a “second look.”

In the instant case, the man who discovered the body testified that it was concealed under a sheet of wood molding beneath a highway overpass. The medical examiner testified that the decedent appeared to have been sexually penetrated in both the vagina and anus before her death and that she died from asphyxia caused by strangulation. Additionally, a laboratory technician with the Grand Rapids Police Department testified that he obtained semen from stains on the decedent's clothing and from rectal swabs collected during her autopsy. He further stated that the DNA profiles from this semen matched the DNA profile made from a sample of defendant's blood and that the chance of another African-American matching these profiles was infinitesimal.

The evidence presented was sufficient to prove all of the elements of first-degree murder. When examined in the light most favorable to the prosecution, the DNA evidence shows that defendant sexually penetrated the decedent just before her death. Based on this evidence, a jury could reasonably infer that defendant killed the decedent. Furthermore, evidence that a victim died from manual strangulation can be used to establish that a defendant had an opportunity to take a “second look” and “a defendant's attempt to conceal the killing can be used as evidence of premeditation.” *Gonzalez, supra*. Because the decedent's killer strangled her and attempted to hide her body, the jury could conclude that defendant acted intentionally and with premeditation and deliberation. Thus, a rational jury could have determined that the prosecution proved first-degree murder beyond a reasonable doubt.

Defendant also asserts that the prosecution failed to establish that the DNA testing done in the instant case was conducted using generally accepted laboratory procedures before the results were presented to the jury and that the trial court erred in failing to rule on the admissibility of this evidence. Because defendant failed to preserve his objection to the admission of the DNA evidence, we review the issue for plain error affecting his substantial rights. *Herndon, supra*, 404, citing *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

The DNA profiles used to compare the semen stains found on the decedent to samples of defendant's blood were created using the Polymerase Chain Reaction (PCR) method of DNA testing. Trial courts may take judicial notice of the reliability of DNA testing using this method. *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995). But before a court may admit the results, the prosecution bears the burden of establishing that “generally accepted laboratory procedures were followed in conducting the test.” *Id.*, 283.

In the instant case, before testifying as to the results of any particular test, the DNA analyst, Joel Schultze, gave extensive testimony concerning his qualifications and the reliability of the Grand Rapids laboratory of the Michigan State Police. He further stated that when conducting the tests on defendant's DNA he followed the required protocols, ran tests on a control sample to ensure accuracy, and had his work reviewed by another scientist. Schultze's testimony concerning the procedures employed provided sufficient foundation for the admission

of his findings. Thus, the trial court did not commit plain error in allowing testimony concerning the results of the DNA tests.

Nevertheless, defendant asserts that the trial court had an affirmative duty to rule on the admissibility of the evidence and that a separate pretrial hearing should have been held to determine whether accepted procedures were followed. In *Herndon*, *supra*, 404, the defendant similarly argued that the trial court erred in failing to hold a pretrial hearing regarding the admissibility of DNA evidence, but this Court found that such hearings were not required. It stated, “When presented with a different case, this Court or the Michigan Supreme Court might require this sort of hearing as some other jurisdictions have done.” *Id.* But the defendant failed to request a pretrial hearing, the laboratory representatives indicated that they used proper procedures, the defendant did not challenge their testimony, and he failed to present any evidence that they actually deviated from the approved procedures or that the DNA analysis was otherwise invalid. *Id.*, 404-405. Consequently, this Court found no plain error and refused to use the case as “a vehicle to change trial procedure.” *Id.*, 405.

In the instant case, defendant similarly failed to move for a pretrial hearing and the laboratory analyst testified that proper procedures were followed. Furthermore, defendant did not challenge the presentation of the test results during Schultze’s testimony. Although he later presented some evidence of improprieties, his expert witness could only testify that, after reviewing Schultze’s reports, there were several areas of concern and the samples tested could possibly have become contaminated. As in *Herndon*, defendant failed to show that the lab actually deviated from the proper procedures or that the test results were invalid.

Additionally, in *Lee*, *supra*, 281, this Court held that where serious errors exist in a particular laboratory’s work, a court might find its test results inadmissible. But whether the proper procedures and safeguards are followed in a particular case generally constitutes a “matter for the jury to consider in determining how much weight it should give the results.” *Id.* Because defendant only showed that improper procedures might have been employed, this constituted a question of weight rather than admissibility. Therefore, the trial court’s failure to hold a pretrial hearing concerning the admissibility of the test results does not constitute plain error and we refuse to further review the issue.

Next, defendant asserts that the trial court erred in admitting the DNA evidence because the prosecution failed to provide sufficient context for the jury to assess the statistics concerning the likelihood that defendant was the source of the DNA found on the decedent. Schultze testified that the probability of the genetic profile of an African-American other than defendant matching the DNA of the semen found on the decedent was 36.8 quintillion to 1.

In *Herndon*, *supra*, 405, the defendant similarly claimed that the prosecution’s DNA experts failed to give sufficient testimony concerning the “statistical probability” that the blood found on the defendant belonged to the victim. This Court stated that, although “there can be serious problems with making these predictions because of a variety of factors, including insufficient data used for the purpose of comparison, this sort of statistical evidence is generally admissible.” *Id.*, 406. It then held that, because the defendant had not “shown that there was any particular flaw in the statistics generated,” he failed to establish the “plain error and prejudice necessary to merit a new trial.” *Id.*

Like the defendant in *Herndon*, defendant fails to point to any specific problems with the computation of the statistics in the instant case. Rather, he merely asserts that there are general concerns about the reliability of such figures. Furthermore, challenges to the statistical analysis of DNA evidence are relevant to its weight, not its admissibility. *People v Coy*, 258 Mich App 1, 11; 669 NW2d 831 (2003). Therefore, defendant cannot show plain error affecting his substantial rights.

Finally, defendant contends that, based on the instructions for taking samples on the state requisition form used in the instant case, no alcohol may be used to sterilize the skin or syringe when drawing a blood sample. He asserts that the prosecution failed to present sufficient foundation concerning whether this was done when his blood was drawn and thus, the results of the DNA tests were inadmissible. But defendant makes no argument that the use of alcohol to sterilize a person's skin before drawing a blood sample can somehow affect the results of a DNA test and cites no authority to support his contention that the prosecution must establish that no alcohol was used before such test results may be admitted. The only authority mentioned, 1949 PA 300, concerns the “registration, titling, sale, transfer, and regulation” of motor vehicles. None of the sections of this act discuss blood tests or the drawing of blood samples. An appellant may not simply announce a position and leave “it to this Court to discover and rationalize the basis for the claims.” *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). And the failure to properly address the merits of a claim of error constitutes an abandonment of the issue. *Id.* Thus, we decline to review the issue.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello