STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2005
v	No. 255730 Saginaw Circuit Court
KEITH DAVID WOOD, Defendant-Appellant.	LC No. 03-023199-FC

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions of first-degree premeditated murder, MCL 750.316(1)(a); first-degree felony murder, MCL 750.316(1)(b); first-degree criminal sexual conduct (CSC), MCL 750.520b; kidnapping, MCL 750.349; and third-degree fleeing and eluding, MCL 750.479a(3). Defendant was sentenced to life in prison for first-degree murder, with the court finding that the CSC and kidnapping convictions merged into the conviction for felony-murder. Defendant was also sentenced to seventy-six months to ten years' imprisonment on the third-degree fleeing and eluding conviction. We affirm.

Defendant first argues that there was insufficient evidence to support his first-degree murder convictions. We disagree. We review a claim of insufficiency of the evidence to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding" that all the elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The prosecutor does not have to disprove the defendant's theory of innocence. *Id*. at 400. Rather, the prosecutor need only prove the elements of the case beyond a reasonable doubt. *Id*. Additionally, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

First, there was sufficient evidence of premeditation to support defendant's premeditated murder conviction. "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Morrin*, 31 Mich App 301, 329; 187 NW2d 434 (1971) (internal footnotes omitted). A finding of premeditation and deliberation requires there to be a lapse of time for a defendant to take a second look before acting. *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). In this case, the victim died from manual strangulation. Although manual strangulation alone is not sufficient evidence of

premeditation, "evidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.'" *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999), quoting *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). There was also evidence that the victim had defensive wounds, which also can be used as evidence of premeditation. *Id*. at 733. Defendant fled the scene of the crime with the victim's body in his car. There was also evidence presented that defendant had been involved in an argument with the victim a few days before the murder. This circumstantial evidence was sufficient for the jury to find defendant guilty of first-degree premeditated murder.

Defendant also argues that there was insufficient evidence of first-degree felony murder. The elements of first-degree felony murder are (1) a killing, (2) with intent to kill, do great bodily harm, or to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm was a probable result (malice), (3) during the commission of a felony listed in the statute. *Nowack*, *supra* at 401. There was sufficient evidence that defendant committed first-degree CSC because the victim was fifteen years old and related to defendant as a cousin and sperm containing defendant's DNA was found in the victim's mouth. MCL 750.520b(1)(b)(ii). There was also evidence from which the jury could infer that defendant committed the murder to attempt to prevent detection of the first-degree CSC, mainly that defendant fled the crime scene with the victim's naked body in his car. See *People v Thew*, 201 Mich App 78, 86; 506 NW2d 547, (1993). Therefore, there was sufficient evidence to find defendant guilty of felony murder.[1]

Next, defendant argues that the jury's verdict was against the great weight of the evidence regarding the murder charges. We disagree. In determining whether a verdict is against the great weight of the evidence, "[t]he test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). It is obvious that the evidence did not heavily preponderate against the verdict and that the trial court did not abuse its discretion in denying defendant's motion for a new trial. There was strong evidence of defendant's guilt of both first-degree premeditated murder and first-degree felony murder. There was evidence of manual strangulation, defensive wounds, and defendant's motive to harm the victim because of his racism and her relationship with an African-American. Further, the victim's body was found in the car defendant had been driving and sperm from defendant was found in her mouth. This strongly supported the jury's finding that defendant premeditated and carried out the murder of the victim. Similarly, the evidence is strongly indicative of defendant having sexually penetrated the victim during the incident provided substantial support for a finding that defendant committed first-degree felony murder with first-degree CSC as the predicate felony. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial based on the great weight of the evidence.

[1] As there was sufficient evidence to support the felony murder conviction based on first-degree CSC, we decline to address whether the felony murder conviction was also supported based on kidnapping.

Defendant next argues that a number of trial court errors denied him a fair trial. For the most part, these errors were not preserved at the trial court and we review for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant argues that the trial court made prejudicial comments during jury selection. The remarks concerned that fact that defendant fled from police with the victim's naked body in his car. We conclude that defendant has not shown that he was denied a fair trial from these remarks. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). At trial, defendant did not dispute the fact that he was found fleeing from police with the victim's body in the car. Additionally, once the jury was selected, the court instructed the jury that its comments were not meant to reflect any opinion on the case. After the close of evidence, the court again instructed the jury that its comments were not evidence and that it was not trying to express any opinion on the case. If there was any prejudice from the court's comments, it was cured by the remainder of the court's instructions to the jury.

Defendant argues he was denied a fair trial when the court failed to instruct the jury on involuntary manslaughter as a lesser offense of first-degree murder. First, we note that defendant did not request this jury instruction and, in fact, for the most part, expressed satisfaction with the jury instructions as a whole. This constitutes waiver of appellate review of the alleged error in the jury instructions. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004). Additionally, any error in not giving an instruction on involuntary manslaughter was harmless because the jury was instructed on both first-degree and second-degree murder and rejected the lesser offense of second-degree murder. The jury's rejection of second-degree murder indicates an unwillingness to convict on involuntary manslaughter, and any error in failing to instruct on involuntary manslaughter was harmless. *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).

Defendant argues that he was denied a fair trial by the admission of certain evidence. First, defendant argues that the pathologist testified at trial outside his areas of expertise. However, we conclude that this testimony was not inadmissible as the pathologist was explaining how the victim died and was basing his opinion on objective medical evidence and his interpretation of his medical findings while performing the autopsy. *People v Swartz*, 171 Mich App 364, 376-377; 429 NW2d 905 (1988). Defendant also argues that the trial court erred in admitting gruesome photographs. However, the photographs of the victim's injuries were relevant to show premeditation. The photographs were also instructive in depicting the nature of the victim's injuries and the pathologist referred to them during his testimony. As such, the photographs were admissible. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

Defendant also argues that the trial court erred in denying admission to portions of "chat" records found on the victim's and defendant's computers. The police detective who recovered the portions of the chat records testified that he did not know whether the phrases he found on the computers were complete or whether they were missing words. Because the detective testified that the chat records were fragmented and incomplete, the trial court did not abuse its discretion, see *People v Stiller*, 242 Mich App 38, 53-54; 617 NW2d 697 (2000), in denying their admission as they had little probative value. MRE 403.

Defendant also argues that he was denied a fair trial because of the admission of irrelevant information but does not offer any citation to the record in this regard, except to point out where one witness stated she had "bad experiences" with defendant. Defendant also does not cite any case law and simply states the issue is addressed in the context of his argument on prosecutorial misconduct. As such, we conclude that any issue regarding irrelevant information in this context has been abandoned. *People v Connor*, 209 Mich App 419, 430-431; 531 NW2d 734 (1995) ("We decline to consider this issue in light of such cursory treatment with little or no supporting authority.").

Defendant next argues that several instances of prosecutorial misconduct denied him a fair trial. Again, defendant did not object to any of the alleged instances of prosecutorial misconduct and we review for plain error that affected defendant's substantial rights. *Rodriquez, supra* at 32. Additionally, in reviewing these claims of prosecutorial misconduct, the prosecutor's remarks are examined in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). We have reviewed the instances defendant complains of and conclude that none require reversal.

Defendant argues that the prosecutor committed misconduct by eliciting irrelevant information. For the most part, the information defendant complains of was relevant background information and not at all prejudicial to defendant. The fact that the victim played basketball and that one of the witnesses had "bad experiences" with defendant was not directly relevant to the crime. However, defendant has not shown that the admission of the testimony was unduly prejudicial. Additionally, because there was no objection to the admission of this information, defendant has to show plain error affecting his substantial rights. *Callon*, *supra* at 329. As we previously indicated, there was sufficient evidence to support defendant's convictions in this case and defendant has not shown how the admission of this evidence denied him a fair trial.

Defendant argues that the prosecutor expressed his personal belief in defendant's guilt, appealed to the jury's sympathy for the victim, made an improper civic duty argument, and misstated the law. None of these instances were objected to by defendant. When reviewing the complained of comments in context, it is clear that the prosecutor's comments were not improper. Additionally, the trial court instructed the jury that the attorney's statements were not evidence, which cured any potential prejudice from the prosecutor's comments. *Callon, supra* at 329-330.

Defendant also argues that the prosecutor improperly elicited from a witness that defendant was on parole at the time of the crime. There was one isolated comment from a witness that she was responding to a "call that there was a parole violation from a person named Keith Wood." There was no further mention of defendant's parole status in the trial. Additionally, the trial court offered to issue a curative instruction to the jury, which defendant's attorney declined for strategic reasons. Because the prosecutor did not question the witness in a way to elicit this information and because the remark was isolated, defendant cannot show that he was denied a fair trial because of the remark. Additionally, any potential prejudice could have been cured with an cautionary instruction to the jury, *Callon, supra*, which defendant declined.

Defendant argues that the cumulative errors of prosecutorial misconduct denied him a fair trial. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not. Reversal is warranted only if the effect of the errors was so

seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003) (citations omitted). Given our conclusion that few of the alleged instances of prosecutorial misconduct were actually error and of those few, none of the errors seriously prejudiced defendant, he was not denied a fair trial by prosecutorial misconduct.

Defendant next argues that he was denied effective assistance of counsel when counsel failed to object to the errors previously discussed and when counsel did not seek a second psychological evaluation. We disagree. Because there was no *Ginther*[2] hearing held in the trial court, this Court's review is limited to mistakes that are apparent from the lower court record. *People v Riley* (*After Remand*), 468 Mich 135, 139; 659 NW2d 611 (2003). In order to show that counsel was ineffective, defendant must show that counsel's "representation fell below an objective standard of reasonableness," *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. Proof of both of the above is needed to show that a conviction '"resulted from a breakdown in the adversary process that renders the result unreliable."' *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), quoting *Strickland*, *supra* at 687.

As we have concluded that most of the errors defendant complains of were not, in fact, errors, counsel was not ineffective for failing to object to them. Counsel is not required to make a meritless motion. *Riley*, *supra* at 142. Where we did conclude that error occurred, we determine that it was not seriously prejudicial to defendant. Therefore, defendant cannot show that, but for counsel's failure to object, the result of the proceeding would have been different. *Strickland*, *supra* at 694.

Trial counsel was also not ineffective for failing to obtain an independent psychological evaluation. When a defendant presents no history of mental illness, the failure to raise an insanity defense is not ineffective assistance of counsel. *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984). Here, defendant underwent a psychological evaluation at the state Center for Forensic Psychiatry. This evaluation determined that defendant was competent to stand trial and was not insane for purposes of criminal responsibility. Counsel chose to rely on this evaluation and did not seek a second forensic evaluation. Defendant does not assert any irregularity with this evaluation that would warrant counsel seeking a second opinion. A licensed psychologist performed the evaluation, and defendant was interviewed for two and a half hours. Although on appeal defendant states that trial counsel had nothing to lose by seeking a second opinion, he did not assert how, even if a second opinion was sought, the result of the proceeding would have been any different. There is no evidence that defendant was insane at the time of the crime or that he was incompetent to stand trial. Defendant does not even allege that he suffers from any kind of mental illness. Therefore, it is unclear what reason trial counsel would have had to even request a second psychological evaluation. Defendant also does not assert how he was prejudiced from his trial counsel not seeking an additional psychological evaluation. As such, even if counsel erred, he cannot show that this error was outcome determinative or that it would have made any difference in the trial. *Strickland*, *supra*, at 694;

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

see also *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (defendant has burden of establishing factual predicate for ineffective assistance of counsel claim).

Defendant finally argues that the trial court erred in denying his motion for a new trial and striking his exhibits to his motion for new trial. Defendant argues that a new trial should have been granted because of the previously addressed errors. Because we have concluded that none of the errors required reversal, defendant was not entitled to a new trial. Since defendant was not entitled to a new trial, we decline to address the trial court's decision to strike defendant's attachments to his motion.

Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly