STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2005
v	No. 256842 Macomb Circuit Court
JEFFREY L. MCCUTCHEON, Defendant-Appellant.	LC No. 03-002203-FC

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of first-degree murder, MCL 750.316, and mutilation of a dead body, MCL 750.160. He was sentenced to life in prison for the first-degree murder conviction, and 57 to 120 months in prison for the mutilation of a dead body conviction. We affirm.

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

We review sufficiency of the evidence de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), "in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). "The elements of first-degree murder are that the defendant killed the victim and that the killing was either 'willful, deliberate, and premeditated.'" *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002), quoting MCL 750.316(1)(a). Defendant admitted that he killed the victim. He contends that the killing was unplanned and that there was no evidence of motive.

Motive is not essential to first-degree murder. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). Premeditation and deliberation do not necessarily require a "plan." "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). The gravamen is that defendant had sufficient time "to take a second look." *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). "The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing," including "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id*.

Defendant testified that he choked the victim until she stopped moving. He then drove away with her until she woke up and started to struggle, at which point defendant pulled over and again choked the victim until she stopped moving. Evidence of manual strangulation can be evidence that a defendant had an opportunity to take a second look. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). "Moreover, a defendant's attempt to conceal the killing can be used as evidence of premeditation." *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Defendant stored the victim's body in his trunk for days, hid the body in a wooded area on a friend's land, eventually retrieved and sawed the body into pieces, and ultimately attempted to dispose of the pieces in different places. Viewing the evidence presented in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the essential elements of first-degree premeditated murder were proven beyond a reasonable doubt. *Akins*, *supra* at 554.

Defendant next argues that the trial court erred when it denied his motion to suppress the evidence obtained as a result of the search of defendant's vehicle. Defendant contends that the search of his vehicle violated his right to be free of unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. We disagree. We review for clear error a trial court's findings of fact at a motion to suppress evidence, but we review the ultimate decision de novo. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

"Under certain circumstances, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even though there is no probable cause to support an arrest." *People v Jenkins*, 472 Mich 26, 32; 691 NW2d 759 (2005). Such a detention requires "a reasonably articulable suspicion that criminal activity is afoot," based on "an analysis of the totality of the facts and circumstances" and "commonsense judgments and inferences about human behavior." *Id*. Defendant impliedly concedes that the police reasonably approached his car on the side of the road with its hazard lights activated during a cold and stormy night in a high-crime area. The police were justified in administering sobriety tests when they smelled alcohol and when defendant admitted that he consumed half a pint of liquor. *People v Rizzo*, 243 Mich App 151, 158-159; 622 NW2d 319 (2000). Defendant passed the tests, and a LIEN search showed that defendant had no outstanding warrants and that the vehicle was registered to him. At that point, the police could no longer detain defendant because their suspicions had been dispelled. *Id*., 156.

However, defendant consented to their subsequent search of his vehicle. Consent, if freely and voluntarily given, is an independent exception to the warrant requirement. *Bolduc*, *supra* at 440. The officer who conducted the search confirmed defendant's permission twice, and defendant neither limited nor revoked that grant of permission. "An investigatory stop . . . is not so inherently coercive that it renders involuntary consent given during the stop." *People v Williams*, 472 Mich 308, 318; 696 NW2d 636 (2005). Defendant asserts no other evidence tending to show that he was coerced into giving consent. We find no clear error in the trial court's finding that the consent was valid.

Defendant finally argues that the prosecutor improperly shifted the burden of proof, and defense counsel failed to object, thus denying defendant both a fair and impartial trial and effective assistance of counsel. We disagree.

"We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). A prosecutor's closing argument may not shift the burden of proof by commenting "on a defendant's failure to testify or present evidence." *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor is entitled to fairly respond to issues raised by a defendant. *People v Jones*, 468 Mich 345, 352-353 n 6; 662 NW2d 376 (2003). The extent of the prosecutor's leeway to do so depends on the defense asserted, but the prosecutor is entitled to point out weaknesses and improbabilities in the defendant's case. *People v Fields*, 450 Mich 94, 115-117; 538 NW2d 356 (1995).

The prosecutor's comment, "is there any evidence in the case about the vehicle being repaired or about the vehicle being damaged? No, not at all[,]" did not shift the burden of proof to defendant. Rather, it was a fair comment suggesting that defendant's written statement may have improperly "soft-pedaled" defendant's actions by inaccurately stating what the victim did to defendant's car. This remark did not imply to the jury that defendant was required to disprove anything. In any event, the trial court correctly instructed the jury on the proper burden of proof, which alleviated any prejudice. *Akins*, *supra* at 562-563. We see no "overwhelming probability" that the jury was unable to follow the trial court's instruction. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). The prosecutor's remark did not prejudice defendant. For that reason, any objection by defendant's trial counsel would have been futile, and failing to object cannot constitute ineffective assistance. *Ackerman*, *supra* at 455.

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper