

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EUGENE ROCAFORT, JR.,

Defendant-Appellant.

UNPUBLISHED

December 27, 2005

No. 257031

Kent Circuit Court

LC No. 03-010845-FC

Before: Whitbeck, C.J., and Bandstra and Markey, JJ.

PER CURIAM.

After a jury trial defendant was convicted of first-degree, premeditated murder, MCL 750.316, and was sentenced to life imprisonment. Defendant appeals by right. We affirm.

First, defendant argues that there was insufficient evidence to convict him of the crime charged. We disagree.

We review a claim of insufficient evidence by viewing the evidence in a light most favorable to the prosecution and determining whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A trier of fact may make reasonable inferences from direct or circumstantial evidence to find all of the elements of an offense beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

The essential elements of first-degree premeditated murder are that defendant killed the victim and that the killing was “willful, deliberate, and premeditated.” MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). Defendant argues that there was insufficient evidence to show that he killed the victim or that he acted with premeditation. But the prosecutor presented both video and testimonial evidence upon which a fact-finder could have reasonably concluded that the victim went into defendant’s apartment, after which she was never seen alive again. The victim was found in a wooded area behind the apartment complex where both defendant and the victim lived. Defendant’s DNA was found under the victim’s fingernail, and the victim had defensive wounds. The prosecutor also presented evidence that defendant had a motive for the crime. Viewing the evidence in a light most favorable to the prosecution, it was sufficient to permit a rational jury to find beyond a reasonable doubt that defendant killed the victim.

Premeditation requires sufficient time for the perpetrator to take a second look and may be inferred from all of the circumstances surrounding the killing. *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000). Here, the jury heard testimony that the victim suffered two non-fatal blows to the head with a blunt object before she died that rendered her unconscious. Further, the medical examiner testified that the cause of death was strangulation, which would have taken three to four minutes. Also, he testified that the victim's hands were bound while she was still alive. Viewing all of the evidence in a light most favorable to the prosecution, it was sufficient for a reasonable jury to conclude beyond a reasonable doubt that defendant premeditated and deliberated before killing the victim. Defendant essentially argues that the individual pieces of evidence do not support his conviction. However, defendant's arguments pertain to the weight of the evidence, which is a question for the jury. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Because sufficient evidence supported his conviction, we conclude that defendant's claim that the trial court erred in denying his motion for directed verdict is without merit.

Next, defendant claims that the trial court improperly admitted various items of evidence. We will separately address each alleged error.

First, defendant argues that the trial court abused its discretion when it admitted hearsay testimony from the witnesses regarding the victim's statements about defendant. Further, defendant argues that even if the evidence satisfied a hearsay exception, it was irrelevant and more prejudicial than probative. We disagree.

Several witnesses testified that the victim had previously told them that defendant had made unwanted sexual advances toward her and that she said she did not like defendant: she thought he was "creepy," and that she would never become sexually involved with him. Defendant claims that this evidence is inadmissible hearsay and even if it is within a recognized exception, it should have been excluded under MRE 403 because of its prejudicial effect.

MRE 803(3) states the following is not excluded by the hearsay rule.

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

We conclude all of victim's hearsay statements fall within this exception. The victim's statements were not of things she remembered or believed; rather, they reflected how she felt at that time about defendant. The evidence was relevant to the prosecutor's theory that defendant's motive for committing the crime was the victim's repeatedly rebuffing his sexual advances. It was not necessary for the victim's state of mind to be at issue for the trial court to admit such evidence. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996).

Additionally, the evidence was not unfairly prejudicial in light of its probative value. MRE 403 states that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." All evidence is prejudicial to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212

(1995). Unfair prejudice results only if marginally probative evidence is likely to be given undue weight by the jury or the probative value is substantially outweighed by the danger of unfair prejudice. *Id.* Here, the testimony was probative of defendant's motive. Motive was particularly relevant because the victim and defendant had frequent contact in the days before her death. Although witnesses testified that the victim did not like defendant, the security video and other testimony showed that the victim voluntarily spent time with defendant in the days preceding her death. Therefore, the jury was not likely to give undue weight to the testimony that would result in unfair prejudice.

Second, defendant argues that without a proper foundation, the trial court improperly admitted expert testimony that defendant could not be excluded as a donor for the DNA found on the white string that bound the victim's feet. We agree.

Because defendant failed to object to the testimony, we review his claim for plain error affecting his substantial rights. *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001). Here, the expert testified that the DNA from the white string came from more than one donor, but it was primarily the victim's. Further, the expert testified that defendant could not be excluded as the secondary donor. Defendant claims that the evidence did not have a proper foundation; therefore, it should not have been admitted.

We addressed a similar claim in *Coy*, *supra*. A forensic serologist testified that blood samples on a knife and a doorknob were from more than one person. Although the serologist could not positively identify to whom the blood belonged, she testified that neither the defendant nor the victim could be excluded as a possible contributor. *Id.* at 292-293. This Court stated that the record was "devoid of any supplemental probability or statistical analysis giving meaning to the fact of the potential DNA match, i.e. to what extent was it likely that defendant represented an individual who contributed to the mixed sample." *Id.* at 297. We determined that the evidence was not properly admitted because without some interpretive evidence regarding the likelihood or significance of the match, the testimony was not admissible expert testimony under MRE 702. *Id.* at 301-302. Further, we held that the evidence should have been excluded under MRE 403 because without evidence of the significance of the potential match the evidence was unfairly prejudicial. *Id.* at 302-303. Thus, we determined that the admission of the testimony resulted in clear, outcome-determinative error, in part because the prosecutor improperly argued that the evidence showed that the defendant's blood was on the knife. The DNA evidence was the only evidence that placed the defendant at the victim's apartment at the time of the murder in an otherwise weak case; therefore, he was awarded a new trial. *Id.* at 313-314.

Applying *Coy* to the present case, we find clear error in the admission of expert testimony that defendant could not be excluded as a donor of the DNA found on the white string without testimony of the statistical significance of that finding. Like the evidence in *Coy*, the evidence in the present case was admitted to show that defendant was with the victim when she was killed. Without evidence from which the jury could assess the significance of the testimony, such as how likely it is that defendant was the donor, testimony that defendant could not be excluded as a donor to the DNA on the white string does not help the jury understand the evidence or determine a fact in issue. Therefore, it was not admissible under MRE 702 and MRE 403.

Nevertheless, reversal is warranted only when plain error results in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of

judicial proceedings, independent of defendant's guilt or innocence. *Carines, supra* at 763-764. Further, unlike in *Coy*, defendant in the present case has not met his burden of establishing that clear error resulted in prejudice. *Carines, supra* at 763. The prosecutor presented video and testimonial evidence strongly suggesting that the victim went to defendant's apartment and never came out. Additionally, besides the mixed DNA found on the white string, defendant's DNA was found under the victim's fingernails. So, there was sufficient evidence to convict defendant of the crime without considering the improper DNA testimony, and defendant cannot establish that he was prejudiced as a result of its admission. A new trial is not warranted.

Defendant also asserts that we should apply the *Coy* analysis to find error occurred in the admission of testimony that defendant's DNA under the victim's fingernail was a result of more than casual contact. But the expert testified that it was highly unlikely to find a DNA match at all thirteen points from mere casual contact. Although she did not employ statistics, the expert's standard that is "highly unlikely" helped the jury understand the significance of the evidence, which satisfied the requirements of *Coy*. Further, the testimony met the requirements of MRE 703 because the facts that formed the basis of her opinion, i.e. the match at all thirteen points, were in evidence. Because the testimony was highly relevant to establish defendant caused the victim's death, the trial court did not abuse its discretion by admitting the evidence.

Third, defendant argues that the trial court abused its discretion by admitting the security video as evidence. We disagree.

Defendant asserts that the security video did not have the proper foundational requirement because there was no testimony regarding the acceptability of the recording methods. MRE 901 sets forth the requirements for authentication or identification of evidence such as a security video. It proves that the requirement of authentication is satisfied "by evidence sufficient to support a finding that the matter in question is what its proponent claims." Technicians testified that the video security system was installed and working properly. Also, other witnesses testified that the video accurately depicted their activities on the day in question. Consequently, because the video met the authenticity requirements, the trial court did not abuse its discretion when it admitted the evidence.

Defendant next contends that the prosecutor made improper statements such that defendant was denied a fair trial. We disagree.

We review defendant's claim of prosecutorial misconduct to determine whether he was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). A prosecutor may argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case. *Id.* at 452-453.

Defendant alleges several incidents of prosecutorial misconduct, but after a full review of the record we have found none. Many of defendant's claims are based on the prosecutor's attempts to admit evidence. But, most of the evidence was properly admitted. To the extent that improper evidence was admitted, defendant has not established bad faith or prejudice as a result of its admission. "The prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Id.* at 448, citing *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999).

Defendant argues that the prosecutor misstated the law and improperly asserted her personal beliefs as to defendant's guilt. We must view the prosecutor's comments in context. In doing so, we find they are not statements of personal belief but rather are reasonable inferences based on the evidence. We also find that the prosecutor's comments accurately reflect the law.

Only actual errors may be aggregated to determine if their cumulative effect merits reversal when separately they do not. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Therefore, defendant's argument that he was denied a fair trial based on the cumulative effect of the errors is without merit because we have found no errors. *Id.*

Defendant also argues that he was denied effective assistance of counsel. We disagree.

Defendant must overcome the strong presumption counsel provided constitutionally adequate assistance by showing "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Id.* at 444; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Defendant argues that counsel was ineffective for failing to object to matters that we have already found were not errors. As discussed previously, with the exception of the evidence that defendant could not be excluded as a DNA donor, any objection by counsel would have been futile. Counsel is not ineffective for failing to make futile objections. *Id.* at 715.

Defendant also argues that he was denied effective assistance because counsel failed to object to the testimony that defendant could not be excluded as a donor for the DNA on the white string. But even if counsel's failure to object fell below an objective standard of reasonableness under prevailing professional norms, defendant cannot establish that he was prejudiced because the erroneous admission of this evidence was not outcome determinative.

We affirm.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Jane E. Markey