STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 1, 2008
v	No. 276296 Berrien Circuit Court
GARY WAYNE STUDER, II, Defendant-Appellant.	LC No. 2006-402244-FC

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant Gary Wayne Studer appeals as of right his jury trial conviction for two counts of first-degree premeditated murder, MCL 750.316(1)(a); and one count of being in possession of a firearm during the commission of a felony, MCL 750.227(b). Defendant was sentenced to life imprisonment without the possibility of parole for each of his first-degree murder convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant first argues that the prosecutor failed to produce sufficient evidence from which a rational jury could find beyond a reasonable doubt that he committed first-degree premeditated murder, or first-degree felony murder. We disagree.

We review challenges to the sufficiency of the evidence de novo, considering the evidence presented in a light most favorable to the prosecution to determine whether the trier of fact court 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). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant was convicted of first-degree murder for the deaths of two victims, under alternate theories: first-degree premeditated murder, and first-degree felony-murder for deaths caused in the course of a first-degree home invasion. To establish first-degree premeditated murder, the prosecutor must show that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316; *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem." *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Premeditation and deliberation require sufficient time to

allow a reasonable person to take a "second look" at his actions, *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), and they can be inferred from the circumstances surrounding the victim's death. *Saunders*, *supra* at 496. Evidence of the victim's manner of death may also be used to establish premeditation. *People v Bowman*, 254 Mich App 142, 151-152; 656 NW2d 835 (2002). Stated another way, premeditation may be established through evidence of: (1) the parties' prior relationship; (2) the defendant's prior actions; (3) the circumstances of the killing; and (4) the defendant's actions after the killing. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). A pause of even a few seconds between the initial manifestation of homicidal intent and the ultimate act may be sufficient time for a defendant to deliberate. *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979).

The prosecutor presented sufficient evidence to allow a rational jury to find beyond a reasonable doubt that defendant acted with both premeditation and deliberation when he shot and killed his wife and her mother. The prosecutor presented evidence that defendant was involved in a contentious relationship with his wife, and that defendant suspected that their youngest son was the product of an extra-marital affair. Although not an essential element of a crime, proof of motive in a prosecution for murder is always relevant. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). On April 28, 2006, defendant's wife telephoned both the wife of defendant's father and emergency services, and informed them that defendant threatened her life that morning, and "held a gun to her head." Later, shortly before the killings occurred, defendant telephoned his father's wife and stated, "you're not going to believe what these bitches did to me," and "I'm on my way to Michigan. . . . I've got my gun, I'm loading it right now, I'm at the state line and I am going to kill them because they are never going to fucking do this to me again." Defendant's blood was found at the murder scene, and defendant was apprehended at the scene of the killings, where he admitted to the police officers that he shot the victims. Defendant specifically informed them that he shot his wife because he suspected that she was unfaithful and because he wanted to be a "good father," and he referred to his wife's mother (the other victim) as the "puppeteer" responsible for the problems between defendant and his wife. This evidence supported the jury's conclusion that defendant deliberated and premeditated killing the victims. He threatened his wife, later decided to kill her and her mother, loaded his weapon, announced his intention to kill them to another person, drove more than 20 minutes to the home of one of the victims, and subsequently shot both victims. Defendant had significant time between the initial manifestation of his homicidal intent and the killings. While defendant argues that the killings occurred in the "heat of passion," defendant did not provide any evidence consistent with this theory, and the prosecutor was not required to disprove every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).[1]

[1] Defendant also argues that he is entitled to a new trial because the trial court allowed the jury to consider a charge against him – first-degree premeditated murder – that was not supported by the evidence. However, because we conclude that there was sufficient evidence presented at trial to support the first-degree premeditated murder convictions, defendant's assertion in this regard necessarily lacks merit.

Because we conclude that the prosecutor presented sufficient evidence to support the defendant's convictions for first-degree premeditated murder, we need not address whether there was also sufficient evidence presented to support his convictions for first-degree felony murder.[2]

Defendant next argues that he was denied his due process right to a fair trial by the admission of unfairly prejudicial photographs, by the admission of statements by the deceased, and by the trial court's failure to inform defendant that he could provide evidence of his mental status at trial. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion occurs where a trial court's decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court's decision on a close evidentiary question ordinarily will not be considered an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Generally, all relevant evidence is admissible, except as otherwise provided by law; irrelevant evidence is not admissible. MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. MRE 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue prejudice, waste of time, or needless presentation of cumulative evidence." MRE 403; *Fletcher*, *supra*. To show that the danger of unfair prejudice substantially outweighed the probative value, a defendant is required to show that the challenged evidence will be given undue or preemptive weight by the jury, or that "it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Prejudice alone is not sufficient to require that evidence be excluded, because all relevant evidence that is contrary to a defendant's

[2] Were we to do so, however, we would conclude that the prosecutor also presented sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant committed both killings during the course of a first-degree home invasion. The elements of first-degree home invasion are: (1) the defendant broke and entered a dwelling or entered the dwelling without permission; (2) when the defendant did so, he intended to commit a felony, larceny, or assault, or he actually committed a felony, larceny, or assault while entering, being present in, or exiting the dwelling; and (3) another person was lawfully present in the dwelling or the defendant was armed with a dangerous weapon. MCL 750.110a; *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004). Here, in addition to the evidence mentioned above implicating defendant in the killing of the victims, the prosecutor presented evidence that defendant admitted to the police that he had fired 18 shots into the door of the apartment of one of the victims, and the police found that the glass in the rear door to the apartment was removed. Thus, a rational jury could have found that defendant broke and entered the apartment. Further, based on defendant's statements to his father's wife before the killings and his statements to the police afterward, as well as his conduct in coming to Michigan from Indiana with a loaded handgun, a rational jury could have found beyond a reasonable doubt that defendant broke into the apartment with the intent to assault the victims. Finally, one of the victims was found inside the apartment where she was shot at close range, indicating that another person was lawfully in the dwelling when defendant broke and entered the apartment.

cause is necessarily prejudicial to him. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995).

Photographs may be used to corroborate a witness' testimony; they are not excludable simply because a prosecutor's witness can testify about the information contained in the photographs. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). In this case, defendant argues that, even if the photographs were relevant, their graphic nature meant that the danger of unfair prejudice resulting from their admission substantially outweighed their probative value. However, gruesomeness alone does not require a trial court to exclude photographic evidence. *Id.* at 76-77. To establish first-degree murder under MCL 750.316, the prosecutor must show that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *Saunders, supra* at 496. Evidence of the victim's manner of death may be used to establish intent and, specifically, premeditation. *Bowman, supra* at 151-152. The photographs at issue were instructive in depicting the location, nature, and extent of the victim's injuries, which was relevant in turn to the issue of intent. *Id.*; *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). The trial court did not abuse its discretion by admitting the photographs.

Defendant also argues that the trial court abused its discretion, and violated his right to confront the witnesses against him, by admitting into evidence statements made by his wife to the police. However, while the trial court ruled outside the presence of the jury that the evidence was admissible, this evidence was not introduced by the prosecution, and thus, was never heard or considered by the jury. Therefore, any error necessarily was harmless, and does not require reversal. *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003).

Additionally, defendant argues that the trial court abused its discretion by precluding him from introducing evidence that he suffered from diminished mental capacity due to an automobile accident that allegedly occurred on October 10, 1998. Defendant did not obtain a ruling on the admissibility of evidence of his diminished mental health from the trial court. Therefore, this issue is unpreserved and appellate review is for plain error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). To avoid forfeiture under the plain error rule, three requirements must be met; (1) an error must have occurred; (2) the error must be plain; and (3) the error must have affected defendant's substantial rights, which generally requires defendant to show that the error affected the outcome of lower court proceedings. *Carines, supra* at 763-764. Defendant alternatively argues that his trial counsel was ineffective with respect to the handling of the evidence.

When available, a diminished capacity defense allows a defendant, even though legally sane, to offer evidence of mental abnormalities to negate specific intent. *People v Carpenter*, 464 Mich 223, 232; 627 NW2d 276 (2001). However, in *Carpenter*, the Michigan Supreme Court eliminated diminished mental capacity short of legal insanity as a viable defense to first-degree murder, and therefore, evidence of defendant's purported diminished capacity was irrelevant. *Id*. at 237, 239; *People v Abraham*, 256 Mich App 265, 271 n 2; 662 NW2d 836 (2003). While defendant argued that the evidence should have been admitted to provide the jury with context to evaluate defendant's testimony, defendant did not testify at trial; and thus, use of the evidence never became relevant. Defendant argues that *Carpenter* was wrongly decided, but *Carpenter* is binding precedent on this Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Furthermore, because the evidence was irrelevant and the defense that it

allegedly supports unavailable to him, defendant's trial counsel cannot be deemed ineffective for failing to take a futile position with respect to that evidence. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant next asserts that he was denied his due process right to a fair trial when, during his opening statement, the prosecutor mentioned irrelevant evidence about the history of defendant's marriage, the fact that defendant's wife had obtained a personal protection order against him, and that defendant's wife allegedly was "frantic" to "get away" from him. We disagree.

Generally, we review claims of prosecutorial misconduct de novo, on a case-by-case basis, examining the prosecutor's remarks in context to determine whether defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *Ackerman, supra* at 448. However, because the alleged errors were not preserved by a contemporaneous objection and a request for a curative instruction, appellate review here is for plain error. *Watson, supra* at 586. Further, no error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *Id.*; *Ackerman, supra* at 449.

Defendant argues that none of the evidence referred to in the prosecutor's opening statement was relevant, other than to show that defendant had a propensity to commit acts of violence. As noted above, "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence . . . . The logical relationship between the proffered evidence and the ultimate fact sought to be proven must be closely scrutinized." *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998) (citations omitted). "A variety of factors, including the elements of the charged crimes, the theories of admissibility, and the defenses asserted all help determine whether any particular piece of evidence is relevant." *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001). To prove first-degree premeditated murder, the prosecutor was required to prove premeditation. As previously noted, premeditation may be established through evidence of: (1) the parties' prior relationship; (2) the defendant's actions before the killing; (3) the circumstances of the killing; and (4) the defendant's actions after the killing. *Schollaert, supra* at 170. Further, the turbulent relationship was relevant as a motive for defendant to kill his wife. *Rice (On Remand), supra*. In addition, defendant's wife's telephone calls to emergency services were relevant to show that defendant threatened her with death earlier on the day of the shooting, which supported a finding of premeditation and deliberation. An attorney's opening statement is the appropriate time to state the facts that will be proven at trial. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). The prosecution was thus permitted to comment on this relevant evidence during his opening statement. There was no plain error.

Defendant also argues that the prosecutor impermissibly appealed to the jurors' sympathy and made an improper "civic duty argument" during opening statement by "stating that the family was in turmoil, the children were without a mother or relatives, and that the defendant was satisfying the grievances in his marriage" by killing the victims. An appeal to the jury to sympathize with a victim may constitute an improper argument. *Watson, supra* at 591.

However, the prosecutor did not urge the jurors to convict defendant as part of its civic duty. *Bahoda, supra* at 282. At worst, the prosecutor merely stated the obvious regarding the family's situation as a result of the killings and presented an argument as to defendant's motive that was consistent with the evidence presented. Prosecutors do not commit misconduct through good faith attempts to introduce evidence, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and the prosecutor was allowed to state his case during his opening. *Moss, supra.*

Finally, defendant generally claims that his trial counsel was ineffective for failing to object to the errors alleged on appeal, but defendant does not cite the specific portions of the trial at which his trial counsel should have objected, nor does he discuss whether trial counsel was pursuing a legitimate trial strategy by not objecting or explain how the alleged errors affected the outcome of trial. A party may not simply announce a position and leave it for this Court to discover and rationalize the basis for his claim. *Kevorkian, supra* at 389. Moreover, because the trial court's actions were not erroneous, objections to them would have been meritless. Counsel is not ineffective for failing to advocate a meritless position or to make a futile objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). And, we cannot conclude that, but for counsel's failure to make meritless objections, the result of trial would have been different. *Carines, supra* at 763-764.

We affirm.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Bill Schuette