STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL SCOTT OESCHGER,

Defendant-Appellant.

UNPUBLISHED
August 21, 1998

No. 194926
Oakland Circuit Court
LC No. 95-141867 FC

Before: Corrigan, C.J., and MacKenzie and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals by right his convictions by jury of two counts of first-degree premeditated murder, MCL 750.316(a); MSA 28.548(a), and two counts of first-degree felony murder, MCL 750.316(b); MSA 28.548(b). The trial court sentenced defendant to two terms of life imprisonment without the possibility of parole. We affirm.

This case arises from the slayings of twelve-year-old Cassandra Fiolek and twelve-year-old Jennifer Wicks in Central Park in Milford. On the night of their deaths, the girls apparently climbed out of Cassandra's bedroom window to meet defendant and codefendant Aaron Stinchcombe[1] in the park. Cassandra's mother learned that they were missing the following morning. A teenager discovered the girls' severely decomposed bodies in a culvert three days later. Both girls died from stab wounds.

Police officers interviewed defendant on the day after the girls' bodies were discovered. Despite his initial denials, defendant eventually confessed to his involvement in the murders during questioning by Sergeant Thomas Callahan of the Milford Police Department. Defendant then drafted a written statement comporting with his oral confession. He also made similar statements during a subsequent interview with Detective William Kucyk of the Oakland County Sheriff's Department. After confessing to the murders, defendant led police officers to the locations where he had hidden a knife, where he and codefendant burned the victims' clothing, and where they had disposed of Cassandra's backpack and other possessions.

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* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Defendant, however, changed his story at trial. He testified that he passed out after he and codefendant consumed alcohol with the victims on the night of their murders. According to defendant, codefendant awakened him after murdering the victims and ordered him to assist in moving their bodies. Defendant maintained that he passed out again after hiding the bodies and did not recall burning the victims' clothes or disposing of their possessions. Defendant further explained that his statements to the police were not based on personal recollection but instead on information learned from codefendant.

I

Defendant argues that the trial court erred in denying his motion to suppress his statements to the police. We disagree. In reviewing the trial court's ruling on a motion to suppress, this Court reviews the record de novo and makes an independent determination on the issue of voluntariness. *People v Sexton,* __ Mich __, __; __ NW2d __ (1998), slip op p 29. In doing so, however, we defer to the trial court's factual findings unless they are clearly erroneous. *People v Kowalski,* __ Mich App __, __; __ NW2d __ (1998), slip op p 3.

We reject defendant's first contention, raised in his Standard 11 brief,[2] that the trial court clearly erred in determining that he was not under arrest when he made the incriminating statements. At the *Walker*[3] hearing, the trial court found that defendant was not under arrest or "in custody" for purposes of *Miranda*[4] at the time he made the incriminating statements. In determining whether a defendant was "in custody" at the time of the interrogation, this Court examines the totality of the circumstances to determine whether the defendant reasonably believed that he was not free to leave. *People v Mendez,* 225 Mich App 381, 382-383; 571 NW2d 528 (1997).

We agree with the trial court that defendant was neither under arrest nor "in custody" at the time he made the incriminating statements. Defendant acquiesced in the police request for an interview and voluntarily accompanied the officers to the police station. At the outset of the interview, Sergeant Callahan advised defendant that he was not in custody. Defendant never expressed a belief that he was not free to leave and at no point during the interview exhibited a desire to leave. The record simply contains no support for defendant's assertion that he was under arrest or otherwise detained when he confessed to the murders.

We likewise reject defendant's arguments that his *Miranda* waivers were involuntary and the police questioning infringed on his right to counsel under *Miranda*. The trial court correctly found that *Miranda* did not apply because defendant was not in custody at the time he made his confession. *People v Anderson,* 209 Mich App 527, 532; 531 NW2d 780 (1995). Defendant's arguments are therefore without merit.

Further, even if it was necessary to determine whether defendant voluntarily waived his *Miranda* rights, the record does not support defendant's arguments. The record does not suggest that the police took advantage of defendant's lack of intelligence or that defendant's mental deficiency contributed to his decision to make the statements. The police did not engage in any improper conduct and did not coerce defendant into making inculpatory statements. Thus, contrary to defendant's

assertion, the record clearly demonstrates that defendant knowingly and voluntarily chose to answer the police officers' questions and provide a written confession.

II

Defendant next argues that the prosecution failed to present sufficient evidence to support his convictions. We disagree. In reviewing the sufficiency of the evidence, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To support a conviction of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *Anderson, supra* at 537. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* To support a conviction of first-degree felony murder, the prosecutor must prove that (1) the defendant killed the victim; (2) the defendant possessed the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result; and (3) the killing occurred while the defendant committed, attempted to commit, or assisted in the commission of an enumerated felony, of which first-degree criminal sexual conduct is one. MCL 750.316(b); MSA 28.548(b); *People v Lee*, 212 Mich App 228, 258; 537 NW2d 233 (1995).

Further, one who procures, counsels, aids, or abets in the commission of an offense may be convicted and punished as if he committed the offense directly. MCL 767.39; MSA 28.979; *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). Aiding and abetting includes all forms of assistance rendered to the perpetrator. *Turner, supra* at 568 An aider and abettor must, however, possess the same intent as that required of the principal. *People v Barrerra*, 451 Mich 261, 294; 547 NW2d 280 (1996). For purposes of felony murder, a person who participates in a crime with knowledge of the principal's intent to kill or cause great bodily harm has the requisite malice to support a conviction. *Id.*

In this case, the prosecution presented sufficient evidence to support convictions under both theories of first-degree murder for the death of Jennifer Wicks. In his statements to the police, defendant admitted that, on urging by codefendant, he strangled Jennifer and slit her throat so that she would not witness codefendant's sexual assault of Cassandra. Thus, by defendant's own admission, he killed Jennifer while assisting codefendant in committing first-degree criminal sexual conduct. C.f. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992) (the murder need not be contemporaneous with the enumerated felony, but the defendant must have intended to commit the felony at the time the homicide occurred). Defendant further stated that he "hesitated for a couple of minutes" before stabbing Jennifer. This pause between the initial homicidal intent and the ultimate act was sufficient to establish premeditation and deliberation for purposes of first-degree premeditated murder. See *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979). Therefore, we conclude that a rational jury could find beyond a reasonable doubt on the basis of this evidence that defendant

intended to kill Jennifer, that the killing was premeditated and deliberate, and that the killing occurred while defendant assisted codefendant in sexually assaulting Cassandra.

The prosecution likewise presented sufficient evidence to support convictions under both theories of first-degree murder for the death of Cassandra Fiolek. Defendant admitted that codefendant had advised him twelve hours before the murders that he intended to sexually assault and kill Cassandra. Defendant stated that he killed Jennifer so that she would not witness codefendant's assault of Cassandra. He further admitted that he gagged Cassandra so that she would not cry out while codefendant sexually assaulted and stabbed her. Defendant then joined codefendant in hiding the victims' bodies and disposing of evidence implicating them in the crime. A rational jury could find beyond a reasonable doubt on the basis of this evidence that defendant assisted codefendant with knowledge that codefendant intended to kill Cassandra, that the killing was premeditated and deliberate, and that the killing occurred while defendant assisted codefendant in sexually assaulting Cassandra. It was for the jury to weigh this evidence against defendant's trial testimony that he did not remember the murders and based his confession on information obtained from codefendant. *Wolfe, supra* at 514-515.

III

We reject defendant's final contention that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him so as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994). In doing so, however, defendant must overcome the presumption that the challenged action was sound trial strategy. *People v Daniel,* 207 Mich App 47, 58; 523 NW2d 830 (1994). Further, in this case, review is foreclosed unless the alleged deficiency is apparent on the record because defendant did not raise this issue below. *People v Barclay,* 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant first argues that trial counsel erred in failing to object to the prosecutor's opening statement and closing argument. We disagree. The prosecutor permissibly commented on the evidence and accurately described the heinous nature of the crimes. *Lee, supra* at 255; *People v Hoffman,* 205 Mich App 1, 21; 518 NW2d 817 (1994). The prosecutor was not required to phrase her arguments in the blandest of all possible terms. *People v Ullah,* 216 Mich App 669, 678; 550 NW2d 568 (1996). Although isolated remarks, such as characterizing defendant himself as evil and a butcher, may have been improper, defendant has not overcome the presumption that counsel engaged in sound strategy by not objecting and thereby focusing the jury's attention on the remarks. *Daniel, supra* at 58. Further, the trial court's instruction that the attorneys' arguments were not evidence and admonishment that the jurors not let sympathy or prejudice influence their decision dispelled any prejudice. See *People v DeLisle,* 202 Mich App 658, 671; 509 NW2d 885 (1993).

We similarly reject defendant's contention that trial counsel's failure to present a medical expert to testify regarding a head injury suffered by defendant one month before the crimes denied him the effective assistance of counsel. Counsel's decisions whether to present witnesses are matters of trial strategy. *Daniel, supra* at 58. Here, trial counsel proffered the testimony of a clinical psychologist who

testified regarding defendant's mental capacity and head injury. The doctor opined on the basis of an interview with defendant and review of defendant's medical records that defendant was capable of premeditation and deliberation and could form the requisite intent. We will not second guess counsel's decision not to call an additional expert.

Finally, defendant argues in his Standard 11 brief that trial counsel should have more thoroughly investigated the circumstances surrounding his statements to the police to establish that he was under arrest when he confessed to the murders. We disagree. As previously discussed, defendant was not under arrest or in custody at the time of his confession. Counsel was not required to further pursue this meritless motion. *Daniel, supra* at 59.

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Robert P. Griffin

[1] This Court affirmed codefendant's convictions by a separate jury of two counts of first-degree felony murder. *People v Stinchcombe,* unpublished opinion per curiam of the Court of Appeals, issued July 18, 1997 (Docket No. 194229).

[2] Although defendant raised this issue in the context of his claim of ineffective assistance of counsel, we address it here because he argues that further investigation would have demonstrated that he was under arrest at the time he made the incriminating statements.

[3] *People v Walker (On Rehearing),* 374 Mich 331, 338; 132 NW2d 87 (1965).

[4] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).