STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED March 1, 2002
V	No. 226745 Wayne Circuit Court
EDWARD L. YOUNG, Defendant-Appellee.	Criminal Division LC No. 99-004769

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant was charged with second-degree murder, MCL 750.317. He was convicted by a jury of voluntary manslaughter, MCL 750.321, and was sentenced to 71 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court abused its discretion by allowing the prosecutor to read on redirect examination a paragraph from a statement made to the police by the witness, Jacqueline Sheille. During her cross-examination, defense counsel asked Sheille about the statement, questioning her at length about the fact that she did not tell the police that defendant told Martin Robinson or anyone else that he had just killed someone, as she claimed at trial. At times during her cross-examination, defense counsel read sentences from Sheille's police statement. On redirect examination, the prosecutor introduced over defendant's hearsay objection, a paragraph from Sheille's statement to the police. The trial court determined that the statement was admissible under MRE 613. The prosecutor read to the jury the paragraph, which was for the most part consistent with Sheille's trial testimony.[1]

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). Sheille's statement to the police was admissible under the rule of completeness. "The premise of the rule is that a thought or act cannot be accurately understood without considering the entire context and content in which the

[1] The statement did not indicate that defendant admitted to the killing shortly after it occurred, as Sheille testified at trial.

thought was expressed." *People v McReavy*, 436 Mich 197, 214-215; 462 NW2d 1 (1990). Because defense counsel introduced part of Sheille's statement, the trial court did not abuse its discretion in allowing the prosecutor to read the complete paragraph from which defense counsel's questions were taken.[2]

II

Defendant next argues that the trial court erred in admitting the preliminary examination testimony of Martin Robinson because the prosecutor did not show due diligence in attempting to locate Robinson for trial. At trial, defendant objected to the reading of Robinson's prior testimony only on the ground that the testimony was not reliable. Because defendant did not object to the admission of Robinson's prior testimony on the ground that the prosecution failed to show due diligence in trying to locate Robinson or that a diligent, good faith effort was made to locate Robinson, this issue has not been preserved for appeal. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We therefore review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant's Sixth Amendment right to confrontation is not violated by the use of a transcript of prior testimony from a witness if it is shown that the witness is unavailable and that the prior testimony bears satisfactory indicia of reliability. *People v Dye*, 431 Mich 58, 65; 427 NW2d 501 (1988). "The test for whether a witness is 'unavailable' as envisioned by MRE 804(a)(5)[3] is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial." *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). "The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Id.*

At the due diligence hearing in this case, Investigator Abdella, the officer-in-charge, testified regarding the efforts of his office to locate Robinson. The officers went to the home of Robinson's mother, whose address Robinson provided in his witness statement. She told the

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[2] Furthermore, because the statement was admissible, the trial court did not abuse its discretion in denying defendant's motion to strike Sheille's direct examination testimony that related to the statement. In any event, defendant has not properly presented this issue for appeal because he has failed to argue the issue or cite any authority to support his position. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Therefore, this issue is deemed abandoned. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

[3] MRE 804(a)(5) provides: "'Unavailability as a witness' includes situations in which the declarant is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown."

officers that Robinson was homeless and, because of issues with his family, did not come to her house very often. Abdella gave her information about the court date and time, as well as a business card with his office telephone number, and asked Robinson's mother to pass these along to Robinson if she saw him and to ask Robinson to call Abdella. Abdella also was able to obtain an address for Robinson's sister and went to her home. The family members there indicated that, although Robinson had lived there at one time, he had not lived in that home nor had they seen him since November 1999. Abdella left a copy of the subpoena and asked the family members to give Robinson the information if he showed up.

Abdella's office received a telephone call from someone identifying himself as Martiness Robinson, who indicated that he received the subpoena and was aware of the court date. The caller indicated that he worked at a construction site in Harper Woods and requested that the police not go to his job. The caller also stated that he lived with his sister on Three Mile, which Abdella knew was not accurate. Detroit officers subsequently contacted the Harper Woods Police Department and drove around Harper Woods, but found no construction sites. Abdella also checked the LEIN system, which provided multiple aliases and several past addresses for Robinson. Detroit officers went to all of the addresses and went to neighbors' houses at each address to inquire about Robinson's whereabouts.

Despite these efforts, Robinson did not show up in court to testify. Abdella spoke to both Sheille and her sister, Brenda Manning, that morning about Robinson. Sheille indicated that she saw Robinson several times since receiving a copy of his subpoena, as recently as the day before. She and Robinson had spoken about the trial date and the subpoena, and he sometimes indicated that he would come to testify and other times indicated that he would not. Sheille opined that he would not come and that she would be surprised if he did. Both Sheille and Manning told Abdella that Robinson was homeless and moved around from day to day. Sheille told Abdella that she did not know where Robinson lived or where he was.

Under these circumstances, we conclude that the prosecution demonstrated that the police made a diligent good faith effort to locate Robinson and secure his testimony at trial. Therefore, the use of Robinson's testimony from the preliminary examination was not plain error that affected defendant's substantial rights. *Carines, supra*.

III

Next, defendant argues that the trial court committed reversible error by permitting the prosecutor to admit into evidence and publish to the jury a photograph of the victim. The challenged item is a black-and-white photograph that depicts the deceased victim lying on his back, wearing only a pair of pants and surrounded by a pool of blood, with a knife handle protruding from his chest. Defendant argues that the photograph was admitted for no proper purpose, because the defense never took the position that defendant did not kill the victim with a knife or that the knife blade did not completely penetrate the victim's chest, and the photograph was highly inflammatory. Furthermore, defendant asserts that the medical examiner, police witnesses, and Sheille all testified that only the knife handle protruded from the deceased's body.

We review the admission of photographic evidence for an abuse of the trial court's discretion. *People v Flowers,* 222 Mich App 732, 736; 565 NW2d 12 (1997). "Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error

requiring reversal." *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). "However, a photograph that is otherwise admissible for some proper purpose is not rendered inadmissible because of its gruesome details or the shocking nature of the crime." *Id.* The issue is whether the photographs are "evidence of 'any fact that is of consequence to the determination' of the defendant's guilt and whether the photographs made the existence of certain facts more or less probable." *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). All elements of a criminal offense are "in issue" when a defendant pleads not guilty, and the prosecution must carry the burden of proving every element beyond a reasonable doubt, regardless of whether the defendant disputes any of the elements. *Id.* at 69-70.

The offense of second-degree murder, of which defendant was originally charged, consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999). The prosecutor argues that the photograph was relevant to the element of malice, which is defined as "the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Id.*, quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Malice for second-degree murder does not require an actual intent to kill but can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm or intentionally did an act that was in obvious disregard of life-endangering consequences. *Id.*

After viewing the photograph and reading the trial transcripts, we agree that the photograph was admissible to show the element of malice. The photograph, considered in conjunction with the testimony of the medical examiner that a ten-inch blade was within the victim's body and had passed through two ribs and the left lung, showed that defendant used great force in stabbing the victim and, thus, acted in a manner likely to cause death or great bodily harm. We conclude that the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice to defendant. MRE 403. Although the photograph depicted the bloodied body of a homicide victim, the testimony from the eyewitness, police witnesses, and medical examiner was equally graphic and horrific. Further, the prosecutor had reproduced the photograph in black and white "to try to tone them down." Under these circumstances, the trial court did not abuse its discretion in admitting the photograph into evidence.

IV

Defendant next argues that the trial court erred in denying his motion for a directed verdict of the charged offense of second-degree murder. When reviewing a trial court's decision on a motion for directed verdict, this Court reviews the record de novo and considers the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proved beyond a reasonable doubt. *Mayhew, supra* at 124.

As previously noted, the offense of second-degree murder consists of the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *Mayhew, supra* at 125. That the victim died from a knife wound administered by defendant was not disputed at trial.

There was sufficient evidence from which the jury could determine that defendant acted with malice and without justification. Sheille testified that when she came home that evening the victim was sleeping on the couch and defendant was sitting at the kitchen table drinking vodka. She did not hear any sounds of an argument, but heard the victim hollering after he was stabbed. Manning testified that defendant, her live-in boyfriend, was upset with the victim, her former boyfriend, who was staying at her apartment, because the victim was supposed to leave the apartment that night but had not. She also contended that defendant did not like the victim using drugs in the apartment, and they had argued about that.

The medical examiner, Dr. Hlavaty, testified that the victim had two external injuries, a small laceration on the outer left eyebrow, which was consistent with a terminal fall, and a stab wound in the left side of the chest. The knife's ten-inch blade was still in the victim's body and had gone through two ribs and the left lung. Dr. Hlavaty believed that such a wound would take a considerable amount of force. Although the victim had some cocaine in his system, which was a stimulant and had been ingested three to four hours before his death, the amount was not remarkable and would not have caused a serious reaction even in a first-time drug user. Moreover, the victim also had morphine, a depressant, in his system.

The testimony of Sheille and Manning suggests that defendant was upset with the victim, but was not fighting with him immediately before the stabbing. The testimony of Dr. Hlavaty suggests that defendant used a great amount of force in stabbing the victim. There was no evidence that the victim engaged in a physical altercation before being stabbed because the only physical injury other than the stab wound was a small laceration adjacent to the eyebrow, which the medical examiner opined was caused when the victim, who had run to the stairwell after being stabbed, fell dead. Therefore, there was sufficient evidence from which the jury could find that, by stabbing the victim with great force, defendant, at a minimum, intentionally set in motion a force likely to cause death or great bodily harm or intentionally did an act that was in obvious disregard of life-endangering consequences. *Mayhew, supra* at 125. Because a rational trier of fact could find that the prosecution had established the elements of the charged offense, the trial court did not err in denying defendant's motion for a directed verdict. *Id*. at 124.

V

Finally, defendant argues that the trial court committed reversible error by reading a jury instruction that voluntary intoxication was not a defense to second-degree murder or voluntary manslaughter. He contends that the instruction was misleading and led the jury to believe that defendant was raising voluntary intoxication as a defense, which he was not. Defendant maintains that his only defense at trial was self-defense and, therefore, the record did not support the intoxication instruction.

This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). Instructions to the jury should be considered as a whole rather than extracted piecemeal to establish error. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). The trial court is required to charge the jury concerning the law applicable to the case. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). The instructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997). Even if

the instructions are somewhat imperfect, reversal is not required if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Aldrich, supra* at 124.

Sheille testified that defendant had been drinking before the offense occurred. Defendant acknowledged in his statement to the police that he had been drinking vodka that day. During the cross-examination of Investigator Abdella, defense counsel asked several questions about defendant's mental state during the first interrogation, including whether Abdella believed that defendant was sober and not intoxicated. When defense counsel asked why Abdella had come back to talk to defendant the next day, the officer indicated that, toward the conclusion of the first interview, defendant seemed tired and Abdella thought that defendant was perhaps hung over. Therefore, there was some evidence that defendant had been drinking heavily and may have still been displaying the affects of that drinking the next day. Additionally, defense counsel argued during closing argument that the jury may be concerned about defendant's state of mind and referred to testimony that defendant had been drinking and was still hung over the next day.

Given this evidence and the defense argument, the trial court did not abuse its discretion in giving the instruction on voluntary intoxication. Although the prosecutor did not request this instruction before closing arguments and in writing as required by MCR 6.414(F), the need for the instruction became apparent because of the arguments presented by defense counsel during closing argument.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter