

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT LEE FOSTER,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 264173

Calhoun Circuit Court

LC No. 04-001949-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree murder, MCL 750.316(1)(a). On March 25, 2004, defendant's wife, Deborah Foster, died as the result of sustaining multiple stab wounds and a blunt force trauma to the back of her head. Defendant was charged with open murder in connection with his wife's death. At trial, defendant moved for a directed verdict, arguing that the prosecutor failed to present sufficient evidence of premeditation or deliberation to justify submitting a charge of first-degree murder to the jury. Following the trial court's denial of the motion, the jury found defendant guilty of first-degree murder and defendant was sentenced to life in prison. We affirm.

Defendant first contends there was insufficient evidence to sustain his conviction and that the trial court erred in denying his motion for a directed verdict. A trial court's decision on a motion for a directed verdict is reviewed, essentially, under the same standard as the sufficiency of the evidence, except that this Court only considers the evidence presented by the prosecution up to the time the directed verdict motion is made. Reviewing the evidence in a light most favorable to the prosecution, the court must determine whether it is insufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt. If indeed the evidence presented by the prosecutor is insufficient, then a directed verdict or judgment of acquittal must be entered. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998).

The prosecutor presented overwhelming evidence that defendant killed his wife. After defendant was arrested, police transported him to a hospital where defendant acknowledged to the emergency room nurse that he stabbed his wife. After defendant was transported to the jail, defendant told the booking officers that he had killed his wife and would appreciate it if they would hurry up with their questioning so he could lie down. Defendant was seen leaving the apartment complex "quite fast," while Deborah emerged from the building covered in blood. When defendant was apprehended, his hands were covered in blood. Defendant informed police

that the knife was at his wife's house, and defendant's blood was discovered on the walls inside Deborah's apartment. Further, the evidence established that the relationship between defendant and his wife was volatile. Defendant and his wife had been married for less than a year when Deborah moved out of the marital home, filed for divorce, and obtained a personal protection order (PPO) against defendant. Five days before the killing, defendant violated the PPO. On the day Deborah was killed, neighbors observed Deborah and defendant fighting outside of her apartment and, later that day, defendant was observed inside the apartment with a knife.

The evidence also demonstrated that the killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation may be inferred from all of the facts and circumstances surrounding the killing. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Factors that may be considered to establish premeditation include the following: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Plummer*, 229 Mich App 293, 300-301; 581 NW2d 753 (1998).

While, the brutal nature of a killing alone is not sufficient to show premeditation, *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999), the circumstances of the killing in this case indicate that defendant had sufficient time to take a second look, *Anderson, supra* at 537. Deborah sustained 19 stab wounds, including cuts to her neck and carotid artery, and a severe blunt force trauma to the back of her head. Between stabbing Deborah and striking her with the frying pan, defendant had the opportunity to reflect upon his actions. See *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998); *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Defendant's conduct after the killing, including his lack of remorse and attempt to hide his involvement, is also relevant to the determination that the killing was premeditated. *People v Paquette*, 214 Mich App 336, 342-343; 543 NW2d 342 (1995); *Haywood, supra* at 230. Throughout his interrogation, defendant denied killing Deborah and attempted to mislead the detective about how he sustained his hand injury. As such, the evidence presented regarding the relationship between defendant and his wife, defendant's actions before and after the crime, and the circumstances of the killing could persuade a rational trier of fact that the killing was premeditated and deliberate. *Plummer, supra* at 300-301; *Anderson, supra* at 537. Moreover, "defensive wounds suffered by a victim can be evidence of premeditation." *Johnson, supra* at 733. An autopsy revealed that Deborah had bruises and scrapes on her chest, arm, legs, thigh, and foot, suggesting a struggle had occurred.

The evidence also established a motive for the killing. Although proof of motive is not essential in a murder prosecution, it is always relevant and further serves to demonstrate premeditation. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). Defendant asserted that his wife had previously been unfaithful to him. Defendant told police that when he saw Deborah get out of a van containing other men he "couldn't take it anymore." A witness testified, while defendant and his wife were fighting, defendant had a knife and told Deborah, "If I can't have you, Bitch, there ain't [sic] nobody gonna [sic] have you."

In addition to the evidence presented by the prosecutor, defendant's testimony supported his conviction for first-degree murder. Defendant admitted that he killed Deborah. Despite asserting a belief that Deborah was planning to stab him, defendant remained in the apartment

and procured two knives. Defendant acknowledged thinking that he was “gonna kill her.” Defendant hit Deborah in the head with a frying pan and then stabbed her multiple times, admitting he had warned Deborah that if he ever began to assault her he would be unable to stop.

Defendant contends that he was suffering from a mental illness and was taking medication at the time of the murder. Defendant’s attempt to raise the issue of his capacity to form the specific intent required for the crime of first-degree murder is without merit. The trial court determined that defendant was competent, and defendant has not challenged the trial court’s finding in that regard. Further, “[t]he intent to kill may be proven by inference from any facts in evidence.” *People v Abraham*, 234 Mich App 640, 658; 599 NW2d 736 (1999). Based on the evidence presented, as detailed *supra*, a reasonable jury could have concluded defendant had the requisite intent to commit first-degree murder.

Finally, defendant contends that trial counsel was ineffective for permitting him to testify in a narrative fashion. Defendant failed to move for a new trial or for an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, this issue is unpreserved. See *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *Id.*

Before defendant testified, his counsel informed the trial court, outside the presence of the jury, that defendant would be testifying in a narrative fashion. Based on the context of the discussion with the court, it is apparent that defense counsel determined he could not question defendant without violating the Michigan Rules of Professional Conduct, which prohibit the subornation of perjury. See MRPC 3.3. Defendant has failed to present any evidence that defense counsel’s determination was unfounded. Thus, defendant has failed to establish that his trial counsel’s decision to refrain from asking questions during his testimony was not objectively reasonable. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). The failure to present perjured testimony by one’s client does not constitute ineffective assistance of counsel. *Nix v Whiteside*, 475 US 157, 166; 106 S Ct 988; 89 L Ed 2d 123 (1986); *People v Hubbard*, 156 Mich App 712, 715-716; 402 NW2d 79 (1986). Because no errors are apparent on the record to support defendant’s claim of ineffective assistance of counsel, defendant is not entitled to relief.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot