S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 19, 2009
v	No. 279040 Lapeer Circuit Court
RODNEY GLENN DAVENPORT, Defendant-Appellant.	LC No. 06-009067-FC

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

After a jury trial, defendant Rodney Glenn Davenport was convicted of three counts of first-degree murder, MCL 750.316(a), for the murders of James Hanson, Allyn Oesterle, and Marie Melzer and was sentenced to life imprisonment. He appeals as of right. We affirm.

Defendant, a drifter, stayed intermittently at an apartment in the Pines of Lapeer apartment complex that his friends rented. The victims also lived at the complex. Hanson and Oesterle lived together in an apartment in building 2 of the complex, while Melzer lived alone in building 3. Hanson, an acquaintance of defendant, owned an S-10 pickup truck that he would not let others drive. Melzer was 76 years old and was confined to a wheelchair. She typically kept the doors to her apartment unlocked.

Defendant had a drinking problem and, apparently, could be violent when intoxicated. Defendant and Michael Bobier, one of the individuals who defendant was staying with, fought on Friday, July 14, 2006, over some money that defendant owed. Defendant left the apartment and did not return until the evening of July 16.

Defendant had been drinking on July 16. When he returned to his friends' apartment, he only stayed a short time and then left to visit others in the complex.[1] Eventually, defendant went to the apartment of Ashley Hecht, another acquaintance who lived in the complex, and he continued to drink. He eventually left and headed toward the building in which Melzer lived.

[1] Some witnesses also saw defendant with Hanson at a gas station that evening.

Some time after about 1:00 a.m. on July 17, Hecht and her boyfriend saw defendant walking briskly away from Melzer's apartment building.

That day, Melzer's body was discovered in her apartment. She had died of multiple stab wounds to her chest. Defendant's fingerprint was found on an insurance card in Melzer's apartment, and a cigarette butt collected from her apartment contained defendant's DNA. The bodies of Hanson and Oesterle were discovered in their apartment the following day. Both men had been stabbed in the chest and someone had rummaged through Hanson's pockets. Hanson's truck was gone.

Hanson's abandoned truck was later discovered along the westbound ramp of M-15 entering onto I-69. The truck had run out of gas, and investigators would later identify defendant's DNA on the driver's-side door of the truck. On July 17, several witnesses testified that they saw defendant hitchhiking along the stretch of I-69 between the M-15 exit and the apartment complex, and passers-by eventually gave defendant a ride back to the apartment complex. Defendant was soon identified as a person of interest and was questioned by investigators shortly after returning to the complex. However, he was not arrested on July 17.

Early in the morning of July 18, defendant collected his things and his mother drove him to the small community of Otter Lake, where he had grown up. At Otter Lake, defendant encountered a childhood acquaintance, Turessa VanHorn, and reintroduced himself. Later, he told VanHorn that he was "in trouble for some traffic violations." Some time thereafter, he admitted "that he was in more trouble than traffic violations but he didn't tell [VanHorn] what...." VanHorn did not question defendant regarding this statement, believing that it would be best if she did not know too much about the situation. Defendant went to sleep in VanHorn's car and was arrested later that evening.

First, defendant argues that the trial court erroneously admitted statements that he made to the police because he was in custody at the time yet had not been read his *Miranda*[2] rights. We disagree.[3]

"A statement obtained from a defendant during a custodial interrogation is admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003), citing *Miranda*, *supra*. Here, there is no dispute that defendant did not receive *Miranda* warnings before he made his statement. However, "[i]t is well settled that *Miranda* warnings need be given only in situations

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

[3] Defendant raised this issue in a *Walker* hearing and, therefore, it is preserved for our review. *People v Walker* (*On Rehearing*), 374 Mich 331, 338; 132 NW2d 87 (1965). We review de novo the trial court's ultimate decision on a motion to suppress evidence. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). However, we "will not disturb a trial court's factual findings with respect to a *Walker* hearing unless those findings are clearly erroneous." *Id.* We must defer to the trial court's determinations regarding the credibility of the witnesses at a *Walker* hearing. *People v Tierney*, 266 Mich App 687, 708; 703 NW2d 204 (2005).

involving a custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken in custody or otherwise deprived of his freedom of action in any significant way. *Id*. Whether an accused was in custody at the time of the interrogation depends on the totality of the circumstances, and the key question is whether the accused reasonably could have believed that he was not free to leave. *Id*.

> "[T]he requirement of warnings [is not] to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" [*People v Mendez*, 225 Mich App 381, 384; 571 NW2d 528 (1997), quoting *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977).]

The trial court did not err when it permitted the prosecutor to admit evidence concerning defendant's statement to Officer Thomas Smith, because defendant was not in custody when he gave the statement. Defendant was not in a situation in which he could come to the reasonable conclusion that he was not free to leave or to refrain from answering questions posed by Smith. Defendant was informed that Smith wanted to talk to him about Melzer's murder and agreed to an interview. Defendant was transported to the police station by police cruiser for his convenience because he did not have another source of transportation, and he was not restrained or searched before entering the cruiser. The interview was fairly short and defendant was left alone and unrestrained in the interview room for at least ten minutes. And finally, although defendant was not given a formal *Miranda* warning, Smith told him that he was free to leave and was not obligated to answer any questions. Considering that Smith told defendant that he was free to end the questioning and leave and the officers acted in a manner consistent with such an assertion, defendant could not reasonably conclude that he was in custody when he spoke to Smith. Therefore, the officers were not required to give defendant a *Miranda* warning, and the trial court did not err when it admitted evidence concerning this interview.

Second, defendant argues that his trial counsel was ineffective for introducing evidence concerning his good character and genialness while intoxicated because, he claims, they opened the door to the introduction of the rebuttal testimony of Victor Wade Smyczak indicating that defendant had been in a violent fight when he was intoxicated. We disagree. Instead, we conclude that defense counsel introduced this character evidence as a matter of trial strategy and that any failure to challenge the admission of Smyczak's rebuttal testimony was harmless.

A party should raise a claim of ineffective assistance of counsel by a motion for a new trial or an evidentiary hearing. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant failed to move for a *Ginther* hearing, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In reviewing a claim of ineffective

assistance of counsel, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Criminal defendants are entitled to effective representation at every critical stage of proceedings against them. *People v Abernathy*, 153 Mich App 567, 568-569; 396 NW2d 436 (1985). However, counsel is not ineffective merely because the outcome is not optimal. *People v Davidovich*, 463 Mich 446, 453 n 7; 618 NW2d 579 (2000). Instead, counsel is ineffective if it has "sunk to a level at which it is a problem of constitutional dimension." *Id.*

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley* (*After Remand*), 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, a defendant must establish that his attorney's representation "fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004).

To establish that his counsel's deficient performance prejudiced the defense, a defendant must show that his attorney's representation "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In other words, the defendant must show that, because of counsel's deficient performance, the resulting proceedings "were fundamentally unfair or unreliable." *Rodgers*, *supra* at 714. This requires the defendant to demonstrate a reasonable probability that but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *Toma*, *supra* at 302-303.

In this case, defendant's attorney's decision to admit evidence concerning defendant's good character was a strategic decision and did not rise to the level of ineffective assistance of counsel. Although no eyewitness testimony placed defendant in either the Melzer or the Hanson-Oesterle apartments at the time of the murders, several witnesses testified that defendant was at the apartment complex about the time of the murders, was intoxicated, and tended to become violent when he was intoxicated. By presenting evidence that defendant was not violent when he was intoxicated, defendant's counsel could attempt to counteract the image of defendant as a violent, alcoholic, unstable drifter that had developed during the prosecution's case-in-chief. Although this testimony would open the door to character evidence and, specifically, additional evidence indicating that defendant was violent when he was intoxicated, the prosecution had already introduced evidence indicating that defendant had gotten into fights.[4] Defendant's counsel could reasonably conclude that introducing some evidence of defendant's good character outweighed the risk of opening the door to additional evidence of defendant's propensity for

[4] In particular, the prosecutor presented evidence in his case-in-chief indicating that defendant and Bobier were in a fight a couple of days before the murders and that defendant became aggravated when others provoked him when he was in an intoxicated state.

violence, because the jury would at least be presented with an image of defendant besides that of a violent, alcoholic drifter.

In addition, defendant's counsel's failure to challenge the admission of rebuttal testimony given by Smyczak did not deny defendant a fair trial. MRE 404(a) permits a criminal defendant to introduce evidence of his character to establish that he could not have committed the charged offense. *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986). The prosecutor may then offer testimony regarding defendant's reputation or opinions of defendant's character to rebut this character evidence, and he may cross-examine witnesses regarding reports of relevant specific instances of conduct. *Id.* at 130-131; see also MRE 405. The prosecution introduced Smyczak's testimony to rebut evidence presented by defendant under MRE 404(a) concerning his peaceful, non-violent nature. Smyczak's opinions regarding defendant's propensity for violence when drinking were properly admitted pursuant to MRE 405. Although MRE 405 does not permit the admission of specific-acts evidence on direct examination to establish defendant's character, any error resulting from defense counsel's failure to challenge the admission of Smyczak's testimony regarding specific acts of violence in which defendant participated did not affect the outcome of the case or otherwise deny defendant a fair trial. Smyczak's testimony was merely supplementary to the substantial evidence presented by the prosecutor indicating that defendant had been in a fight and had been intoxicated and acting in a boorish manner around the time of the murders. Further, defense counsel neutralized Smyczak's testimony by eliciting from him the admission that defendant had not started the fight that Smyczak had described. Although Smyczak's testimony would lead to the conclusion that defendant might become violent when provoked, the prosecution never theorized, and the evidence does not indicate, that defendant murdered Melzer, Hanson, or Oesterle after they provoked him.

Next, defendant argues that the prosecutor committed misconduct by misstating VanHorn's testimony during his closing argument. We disagree. In his closing argument, the prosecutor presented reasonable inferences that can be drawn from VanHorn's testimony and, therefore, the prosecutor's statements were not improper.[5]

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is "free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). To determine if a prosecutor's comments during his closing argument were improper, we evaluate the prosecutor's remarks in context, in light of defense

[5] Because defendant failed to raise this issue in a motion for a new trial, it is not preserved and we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

counsel's arguments and the relationship these comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

During his closing argument, the prosecutor summarized Turessa VanHorn's testimony as follows:

> Then we look at Rodney's behavior when he's on the run. He threatens Turessa VanHorn, "Take me somewhere or I'll do something to you and your family." He admits to her that he did something really bad but won't tell her what.

Defendant claims that in making this argument, the prosecutor improperly claimed that defendant "did something really bad" when the evidence did not support such a claim. However, the prosecutor's statements present a reasonable inference that can be drawn from VanHorn's testimony. VanHorn testified that defendant initially told her that he was "in trouble for some traffic violations" and later claimed "that he was in more trouble than traffic violations but he didn't tell me what . . . ." By initially mentioning that he had some traffic violations, defendant implied that he was in some sort of legal trouble. When defendant then altered his statement to claim that he was in "more trouble than traffic violations," a reasonable inference could be made that defendant's "trouble" with the authorities was more serious than a traffic infraction and, by process of elimination, rose to the level of some sort of criminal trouble, i.e., "something really bad." In making the contested statement, the prosecutor presented a reasonable inference arising from VanHorn's testimony. The prosecutor's statement was not improper and, therefore, defendant's claim of prosecutorial misconduct lacks merit.[6] Because the prosecutor's arguments did not constitute misconduct, defendant's claim that his counsel was ineffective for failing to challenge the prosecutor's arguments also lacks merit. *Riley*, *supra* at 142 ("Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.").

Defendant also argues that the prosecutor committed misconduct when he attempted to associate himself with the police investigation and vouch for the investigation in his opening and closing statements. In particular, defendant claims that the prosecutor's use of the terms "we," "us," and "we've" constitute an attempt to put himself in the middle of the police investigation. We disagree.

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[6] Regardless, the jury instructions cured any potential error. The trial court properly instructed the jury that defendant was presumed to be innocent and did not have to prove that he committed the charged offenses. Further, the trial court properly instructed the jury that the prosecution's closing statement is not evidence. See MCR 6.414(g). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, we assume that the jury did not consider the prosecutor's closing statement as evidence when deliberating and disregarded any assertions and arguments unsupported by the evidence.

First, the prosecutor's use of the term "we've" during his opening statement did not constitute an attempt to associate with the police investigation and vouch for its veracity. After considering the prosecutor's statement in context, we conclude that the prosecutor could have just as easily been referring to the case put together by the prosecutor's office against defendant when he used the term "we've" in relation to an investigation. The prosecutor did not refer to any action or proceeding undertaken by the police in the challenged portion of the opening statement, and he was not attempting to place himself in the middle of the police investigation and vouch for the investigation. Instead, the prosecutor's use of the term "we've" in the challenged portion of the statement, like his use of the term "we" earlier in his opening statement, indicates that the prosecutor was most likely using this pronoun to communicate that he was speaking on behalf of the entire prosecutor's office.

Second, the prosecutor did not attempt to associate himself with the police investigation through his use of the terms "we" and "us" in the first part of his closing argument. In the challenged portion of his closing argument, the prosecutor was not implying that he was directly involved in the investigation. Instead, the prosecutor's use of the terms "we" and "us" were rhetorical devices used to guide the jury through his analysis of the evidence and resulting conclusions. The prosecutor was not attempting to place himself in the middle of the police investigation or vouch for the credibility of this investigation, and his use of this rhetorical device did not constitute outcome-determinative misconduct. Consequently, the prosecutor's comments in both his opening statement and closing argument were proper; the prosecutor did not commit misconduct and defendant's claim of error lacks merit.

Defendant also argues that his due process rights were violated when the trial court declined to order the prosecutor to run LIEN inquiries and turn over information pertaining to witnesses' criminal histories. However, our Supreme Court's order in *People v Elkhoja*, 467 Mich 916; 658 NW2d 153 (2003), which adopts the dissent in *People v Elkhoja*, 251 Mich App 417; 651 NW2d 408 (2002), confirms that the prosecutor has no duty and is not statutorily permitted to run LIEN inquiries on its witnesses. Defendant's claim of error lacks merit.

Defendant argues that the trial court erred when it denied his motion for a directed verdict because the prosecutor presented insufficient evidence to support charges of first-degree murder brought against defendant.[7] We disagree.[8]

"Due process commands a directed verdict of acquittal when 'sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt' is lacking." *People v*

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[7] We need not address whether the prosecutor presented sufficient evidence to support defendant's convictions for felony murder because the trial court vacated these convictions at sentencing.

[8] We review de novo a trial court's decision to grant or deny a motion for a directed verdict. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). When evaluating a motion for a directed verdict, we "consider the evidence presented by the prosecution 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." *Id.* at 124.

Lemmon, 456 Mich 625, 633-634; 576 NW2d 129 (1998) (footnotes and citations omitted). If the evidence presented by the prosecution, viewed in the light most favorable to the prosecution, is insufficient to permit a reasonable trier of fact to find guilt beyond a reasonable doubt, the court must enter the requested directed verdict.

First-degree premeditated murder requires that the defendant killed the victim and that the killing was "willful, deliberate, and premeditated." MCL 750.316(1)(a). "Premeditation, which requires sufficient time to permit the defendant to take a second look, may be inferred from the circumstances surrounding the killing." *People v Coy*, 243 Mich App 283, 315; 620 NW2d 888 (2000). "Premeditation and deliberation may be established by evidence of '(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide.'" *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999), quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).

The prosecution presented substantial evidence linking defendant to Melzer's murder. Several witnesses indicated that defendant was at the complex near Melzer's apartment building about the time she was murdered, and forensic evidence indicated that defendant had recently been in Melzer's apartment, although he initially denied ever having been there. Melzer was an elderly, paralyzed woman who was stabbed multiple times; her fragile state belied an assumption that she might have been a threat to her killer, and her death by multiple stab wounds indicates that the killer had time to reflect on his actions as he stabbed her repeatedly in the chest. This evidence was sufficient to survive a motion for directed verdict, and the trial court did not err when it denied defendant's motion for a directed verdict dismissing this charge of first-degree murder.

The prosecution also presented sufficient evidence establishing that defendant murdered James Hanson and Allyn Oesterle to survive a motion for a directed verdict and to permit a reasonable jury to find defendant guilty of these counts of first-degree murder. Although investigators did not discover forensic evidence at Hanson and Oesterle's apartment that directly linked defendant to the scene, the prosecution presented evidence that Hanson occasionally gave defendant rides in his truck, that Hanson was last seen with defendant before he was murdered, and that although Hanson never let anybody drive his truck and kept his truck keys with him at all times, his keys were not in his apartment when his body was discovered and it appeared that someone had gone through the pockets of his clothes. Further, defendant was at the complex at the time in which Hanson and Oesterle were murdered. In addition, after the murders, Hanson's truck was found abandoned on a highway miles away from the complex and defendant was spotted walking on the stretch of interstate between the apartment complex and the spot where Hanson's truck was abandoned. Investigators also discovered defendant's DNA on the driver's side door of the truck. This evidence, taken in a light most favorable to the prosecution, indicates that defendant was in a position to kill Hanson and Oesterle. In addition, Hanson and Oesterle died from multiple stab wounds. Again, a reasonable juror could conclude that the killer had sufficient time to reflect on his actions as he repeatedly stabbed each victim. This evidence was sufficient to survive a motion for directed verdict, and the trial court did not err when it denied defendant's motion for a directed verdict to dismiss the charges of first-degree murder for the murders of Hanson and Oesterle.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Donald S. Owens