

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH WILLIAM MARTINEZ,

Defendant-Appellant.

UNPUBLISHED

December 16, 2010

No. 293562

Wayne Circuit Court

LC No. 08-011094-FC

Before: JANSEN, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's convictions arose from a dispute between defendant and his brother, during which defendant shot his brother in the neck. His brother subsequently died in the hospital. At trial, defendant did not challenge the allegation that he shot his brother. Rather, defendant argued that the evidence failed to establish premeditation or intent. In addition, defendant argued that he was legally insane at the time of the shooting.

On appeal, defendant first argues that his defense counsel was ineffective for failing to object to allegedly inadmissible hearsay testimony from an emergency medical technician (EMT). The EMT testified that while he was attending to the victim's injuries, someone said, "his brother shot him." Defendant argues that this was inadmissible hearsay, highly prejudicial, and that defense counsel was ineffective for failing to object to it.

Having denied defendant's motion for a *Ginther*¹ hearing, we review this issue to determine whether the alleged ineffective assistance is apparent from the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). To prevail, defendant must demonstrate from

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the record that: (1) counsel's performance fell below an objectively reasonable standard, and (2) defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Further, the defendant must demonstrate that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

We need not determine whether the testimony was admissible, or whether defendant's counsel should have objected to the testimony, because we conclude that the testimony did not prejudice defendant. The fact that defendant shot his brother was not in genuine dispute at trial. Accordingly, even if the EMT's reference to the bystander's statement was inadmissible hearsay, the statement identifying defendant as the shooter could not have prejudiced defendant. The lack of prejudice defeats defendant's assertion of ineffective assistance of counsel. *Mack*, 265 Mich App at 129; *Rodgers*, 248 Mich App at 714.²

Defendant next argues that the trial court abused its discretion when it admitted a rifle into evidence. Defendant maintains that the rifle was irrelevant evidence and thus not admissible. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* A court abuses its discretion when it selects a course outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

Generally, irrelevant evidence is inadmissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence." MRE 401. Here, the evidence was relevant. The prosecutor produced evidence that a .22 caliber bullet was found in the victim's neck. Further, the prosecutor presented a witness who testified that she saw defendant riding a bicycle and holding what appeared to be a long gun wrapped in fabric. Another witness testified that she found a fabric-wrapped rifle in a shrub pile two weeks after the shooting. The introduction of the rifle into evidence tended to support the credibility of these witnesses. Therefore, the rifle was relevant evidence. See *People v Mills*, 450 Mich 61, 72-73; 537 NW2d 909, mod on other grounds, 450 Mich 1212; 539 NW2d 504 (1995).

Defendant next argues that the prosecutor failed to lay a proper foundation to admit the rifle into evidence. Defendant points out that there was a discrepancy in the testimony concerning the date defendant allegedly placed the rifle in the shrub pile and the date the witness found the rifle in the pile. This discrepancy does not negate the evidentiary foundation. The prosecutor presented sufficient circumstantial evidence connecting defendant to the rifle. *People v Murphy (On Remand)*, 282 Mich App 571, 580-582; 766 NW2d 303 (2009). In contrast, the

² We also reject defendant's tangential argument that the EMT's testimony violated his confrontation rights. US Const, Am VI; Const 1963, art 1, §20. Defendant has not demonstrated that the challenged evidence constituted a testimonial statement by an out-of-court witness. See *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

disparity in the dates was a matter of credibility. The credibility determination was a matter for the jury. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

Defendant next argues that the cumulative effect of these alleged errors denied him a fair trial. Because we find no error, we find no prejudicial cumulative effect. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007).

Defendant argues in his supplemental brief on appeal that the rule of *corpus delicti* precludes a conviction for first-degree murder in this case. We disagree. This unpreserved issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

“Under the *corpus delicti* rule, a defendant’s confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury.” *People v Schumacher*, 276 Mich App 165, 180; 740 NW2d 534 (2007) (internal quotation marks and citation omitted). “The *corpus delicti* rule is designed to prevent the use of a defendant’s confession to convict him of a crime that did not occur.” *Id.* (internal quotation marks omitted); see also *People v Harden*, 474 Mich 862, 862; 703 NW2d 189 (2005) (“We take this opportunity, however, to reaffirm that a challenge to the admission of a defendant’s statement under the *corpus delicti* rule constitutes a challenge to the admission of evidence, not to the sufficiency of evidence.”).

Thus, the rule of *corpus delicti* only pertains to the admission of a defendant’s confession. While it has been stated that one “underlying purpose” of the rule is “to guard against, indeed to preclude, conviction for a criminal homicide when none was committed,” the rule is nevertheless “merely a preliminary procedural requirement” for the admission of extrajudicial confessions. *People v McMahan*, 451 Mich 543, 548-549. 549 n 10; 548 NW2d 199 (1996). Here, there was no confession offered or admitted at trial, so the rule of *corpus delicti* is not applicable.

Defendant next argues in his supplemental brief on appeal that there was insufficient evidence to convict him beyond a reasonable doubt of first-degree murder. We disagree.

This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational juror could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Vaughn*, 186 Mich App 376, 379; 465 NW2d 365 (1990). Further, this Court must defer to the factfinder’s role in determining the weight of the evidence and the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998). Circumstantial evidence and reasonable inferences arising therefrom may constitute proof of the elements of the crime. *Carines*, 460 Mich at 759.

The elements of first-degree murder are (1) the intentional killing of a human, (2) with premeditation and deliberation. *People v Taylor*, 275 Mich App 177, 179; 737 NW2d 790 (2007); MCL 750.316(1)(a). Defendant first argues that there was insufficient proof of premeditation. “Premeditation and deliberation may be inferred from the circumstances, and

minimal circumstantial evidence is sufficient to prove an actor's state of mind." *People v Lewis (On Remand)*, 287 Mich App 356, 365; 768 NW2d 461 (2010), lv pending.

As defendant acknowledges, multiple witnesses testified about an altercation between defendant and his brother on the day of the shooting. There was testimony that defendant swung a stick of some kind at his brother. Further, defendant threatened to kill the victim's family and to burn their house down. Just before the shooting, defendant was directly threatening to kill the victim. Defendant argues that a prior altercation is not *per se* evidence of premeditation. The evidence of the altercation did, however, establish that less than an hour before the shooting, defendant angrily assaulted his brother. This evidence was sufficient to allow a reasonable juror to find that the shooting was premeditated.

Defendant also argues that the victim's wife's testimony regarding defendant's actions before the shooting "may have been exaggerated" because she would be bitterly resentful over her husband's death. This argument is unavailing, because it disregards the jury's role in credibility determinations. It is the jury's province to make credibility determinations and to weigh the evidence. *Lemmon*, 456 Mich at 645-646.

Defendant's other arguments similarly challenge witness credibility. Defendant challenges the reliability of an eyewitness to the shooting, as well as the testimony that he was seen with a "long gun," and that a long gun was found in a shrub pile. We decline defendant's invitation to reweigh the evidence or to assess the witnesses' credibility.

Defendant next argues in his supplemental brief on appeal that the prosecutor offered perjured testimony. We review this allegation for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 759. Having reviewed the record and defendant's arguments, we find no indication that the prosecutor knowingly presented perjured testimony. See *People v Lester*, 232 Mich App 262, 277; 591 NW2d 267 (1998) (prosecutor may not *knowingly* offer perjured testimony).

Next, defendant argues that defense counsel was ineffective for raising the insanity defense instead of the arguments he has raised on appeal. Defendant states, with no supporting argument, that an insanity defense is "almost impossible for an attorney to prove," and "a reasonable attorney would have known that the likely outcome of such a defense was that of . . . guilty but mentally ill." Contrary to defendant's blanket assertion that insanity defenses are "almost impossible" to prove, this Court has held that it may be ineffective assistance for an attorney *not* to assert an insanity defense under some circumstances. See *People v Shahideh*, 277 Mich App 111, 118-119; 743 NW2d 233 (2007), rev'd on other grounds 482 Mich 1156 (2008). Accordingly, raising the defense does not, without more, constitute ineffective assistance. Absent any actual argument regarding why pursuing an insanity defense in *this* case was objectively unreasonable, we cannot find defendant's counsel ineffective for presenting the defense.

Last, defendant argues that he should be permitted access to trial transcripts and other relevant case documents. Defendant filed a motion to this effect with this Court, and the motion was granted on June 2, 2010. This Court ordered that the trial court clerk forward the transcript and relevant case documents to defendant. *People v Martinez*, unpublished order of the Court of Appeals, entered June 2, 2010 (Docket No. 293562). The trial court's journal entries indicate

that the court mailed the transcripts and documents to defendant on June 10, 2010. The transcript issue is thus moot. *People v Mansour*, 206 Mich App 81, 82; 520 NW2d 646 (1994).

Affirmed.

/s/ Kathleen Jansen

/s/ David H. Sawyer

/s/ Peter D. O'Connell