

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

BARRY SHAWN COLEMAN,

Defendant-Appellant.

UNPUBLISHED

June 16, 2011

No. 296756

Saginaw Circuit Court

LC No. 08-031820-FC

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, for which he was sentenced to 41 to 65 years in prison.¹ We affirm.

Underlying this case is a debt for which death was exacted as payment. The deceased victim was Tiffany Cody. Cody was known among friends and acquaintances for her drug use. Defendant was known as a drug dealer. Sometime in early September 2008, Cody attempted to sell defendant a car she had previously stolen for several hundred dollars. However, after receiving the money from defendant Cody was unable to obtain the proper title for the vehicle or find a different buyer, so defendant demanded a refund. Notably, two days before Cody's death, on September 5, 2008, defendant threatened that if he was not repaid, "he would kill [Cody]," and later exclaimed: "[Cody] better not be playing with my money or I'll kill this bitch."

The next day, Cody called two acquaintances. The first, Karen Withers, who was also the stolen vehicle's former owner, testified that Cody sounded fearful on the phone and begged for money or the car's title because she was in trouble and in fear for her life. A man identifying himself only as "Brandon" also spoke to Withers and angrily threatened that "some way or somehow someone was going to pay for it today." Withers, an Indiana resident, told Cody that she would wire \$800 to a Kroger in Bridgeport, Michigan, and subsequently called 911 to alert the local authorities. Local police, however, did not find Cody at Kroger. The second witness,

¹ This conviction was the lesser offense of the charge of first-degree premeditated murder, MCL 750.316(1)(a) or, alternatively, felony-murder, MCL 750.316(1)(b). Defendant was acquitted of extortion, MCL 750.213, the felony underlying the alternative charge.

Cody's former mother-in-law, testified that Cody requested \$300 because she was in a lot of trouble since "they were going to kill her." An unidentified man also spoke on the phone and indicated that this situation had persisted for a couple of days.

On the morning of September 7, 2008, Cody's body was found near the parking lot of the Price Nature Center in Bridgeport Township. The autopsy revealed that Cody had sustained three blows to the head and had died from blunt force trauma inflicted by a "considerable" amount of force. Experts opined that the blows resulted from a fist or alternatively from Cody's head striking concrete pavement – either due to a fall or by force.

Apparently following up on their investigation, police located defendant on October 10, 2008. Following a brief chase, officers subdued defendant with a taser and arrested him. During his subsequent police interview, defendant claimed he had purchased a vehicle from Cody, but upon learning the vehicle was stolen, had required Cody to call friends and relatives to get his money. When Cody came up empty-handed, defendant claimed that he drove her to the nature center where a fight ensued. Defendant admitted punching Cody's head three times and kicking her, but claimed she injured her head when falling. According to defendant, he did not intend to kill Cody.

On appeal, defendant initially challenges his sentence on the ground that the court improperly relied upon the prosecution's sentencing memorandum in sentencing him as a fourth habitual offender, MCL 769.12.² However, defense counsel not only failed to raise this issue below, but in fact indicated that the prosecution's memorandum was accurate. Specifically, counsel stated:

I have received and reviewed a copy of [the prosecutor's] written sentencing memorandum. It's my understanding that he commented on the specific prior record and offense variables. I believe that the Department scored their report largely consistent with his memorandum, with the exception of including habitual offender fourth status, *which unfortunately is accurate*. [Emphasis supplied.]

This waiver extinguished any alleged error premised on the memorandum and we need not address this issue further. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).³

Next, defendant asserts that the evidence was insufficient to show that he had the requisite state of mind to support his second-degree murder conviction. The due process clause

² That memorandum indicated that the sentencing information report failed to reflect defendant's prior conviction of felon in possession of ammunition in 2004.

³ Defendant also alludes to the court's reliance on the prosecution's sentencing memorandum in scoring prior record variable 2. To the extent defendant implies error, he has not only abandoned such an argument by failing to raise it in his statement of questions presented, *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003), but as previously concluded he has waived any error based on the court's reliance on the sentencing memorandum.

of the state and federal constitutions require the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). This Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), citing *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979).

“The elements of second-degree murder are: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death.” *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009), aff’d 488 Mich 922 (2010); MCL 750.317. “Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm.” *People v Werner*, 254 Mich App 528, 531; 659 NW2d 688 (2002) (quotation marks and citation omitted). “[M]inimal circumstantial evidence will suffice to establish the defendant’s state of mind, which can be inferred from all the evidence presented.” *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

In this case, ample evidence exists from which to infer that defendant acted with malice. It was widely known that defendant was upset over Cody’s failed attempt to sell a stolen vehicle. In the days before her death, defendant was heard to say on at least two occasions that he would kill Cody if she failed to pay him back. Consistent with these threats, two other witnesses testified that Cody had called the day before her death “begging for her life” and fearfully pleading for money lest she be killed. Cody expressed that she “didn’t have much time left” and was in a lot of trouble. During at least one call, a man with Cody expressed his anger over Cody’s debt and threatened that if he did not get his money, “someone was going to pay for it today.” Notably, defendant later admitted that it was he who forced Cody to call friends and relatives to retrieve his money. After Cody’s death, defendant apprehensively told an acquaintance that he had beaten up a girl so badly that “she could be dead” and admitted to police that he had punched Cody in the head thrice and had kicked her.

When this evidence is considered in conjunction with the brutal nature of Cody’s injuries (the autopsy revealed Cody had sustained three blows to her head, one of which was sufficient to cause death from the “considerable, considerable amount of force” applied), it is reasonable to infer *at a minimum* that defendant acted with the intent to cause great bodily harm or with willful and wanton disregard that the natural consequence of his actions was death. *People v Thomas*, 85 Mich App 618, 624; 272 NW2d 157 (1978) (“defendant’s savage and brutal beating of the decedent is amply sufficient to establish malice [for second-degree murder]. He clearly intended to beat the victim and the natural tendency of the defendant’s behavior was to cause great bodily harm.”) In short, evidence of defendant’s guilty mens rea was legion; his sufficiency argument is entirely devoid of merit.

This brings us to defendant’s standard 4 brief, which raises two issues of prosecutorial misconduct accompanied by ineffective assistance of counsel. Prosecutorial misconduct occurs

if a defendant is denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We review unpreserved claims prosecutorial misconduct for plain error affecting substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Review of unpreserved claims of ineffective assistance of counsel, however, is limited to mistakes apparent on the existing record, and can only be established if defendant shows that counsel's performance fell below an objective standard of reasonableness and that but for counsel's error the result of the proceedings would have been different. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Regarding prosecutorial misconduct, defendant first asserts that the prosecutor improperly suggested that defendant's forensic pathologist expert "was paid to testify in a certain way." However, the prosecutor's argument specifically attacked the thoroughness of the expert's investigation relative to his \$3,000 fee. Such an argument was based on the evidence and hardly constituted an unfair personal attack on the expert. It is well-established that a prosecutor is "free to argue from the evidence presented that an expert witness had a financial motive to testify at trial." *People v Unger*, 278 Mich App 210, 239; 749 NW2d 272 (2008). We find no error here. Likewise, the prosecutor's argument that defendant sold drugs in order to finance his escape to Chicago because "he knew all along what he had done" was not improper. Indeed, evidence of flight may indicate consciousness of guilt, and a prosecutor is free to comment on all reasonable inferences relating to his theory of the case. *Id.* at 226; *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995).

Finally, because the foregoing allegations of prosecutorial misconduct are meritless, defense counsel was not defective for failing to lodge an objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (defense counsel is not required to make meritless motions or fruitless objections). Defendant cannot maintain his claims of ineffective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens