

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY LEE GOULD,

Defendant-Appellant.

UNPUBLISHED

October 25, 2011

No. 299104

Sanilac Circuit Court

LC No. 10-006681-FC

Before: FORT HOOD, P.J., and HOEKSTRA and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree premeditated murder, MCL 750.316(1)(a), and two counts of assault with intent to murder, MCL 750.83. Defendant was sentenced as an habitual offender, fourth offense, pursuant to MCL 769.12, to life imprisonment without the possibility of parole for each first-degree murder conviction and to 37 1/2 to 70 years' imprisonment for each assault with intent to murder conviction. For the reasons stated in this opinion, we affirm.

I. FACTS

On July 21, 2009, Cynthia and Harry (Ted) Reynolds visited Jacob and Doreen Wurmlinger at their house in Croswell, Michigan, where defendant also resided.¹ When the Reynolds arrived, the Wurmlingers were drinking beer. The Reynolds decided to stay and join the Wurmlingers. The group, including defendant, continued to drink for the rest of the evening. By about 1:30 a.m. everyone went to bed except for defendant. Cynthia woke up when she felt something touching her at about 5:00 a.m.; she turned on the bedroom light and saw defendant lying on the floor with a roll of duct tape. She awoke Ted and they tried to leave the home. However, according to Cynthia, defendant attacked Ted with a knife. According to Cynthia and Doreen, defendant then serially attacked the Reynolds and the Wurmlingers, alternating victims and weapons, which included a number of knives as well as a homemade garrote fashioned from

¹ Doreen Wurmlinger and Cynthia Reynolds are defendant's mother and aunt by marriage, respectively. Jacob Wurmlinger and Harry Reynolds were defendant's step-father and uncle, respectively.

a piece of twisted wire with two long metal carriage bolts attached to the ends and electrical tape around the bolts. Ted and Jacob did not survive the attacks; Cynthia and Doreen were severely wounded.

II. PHOTOGRAPHIC EVIDENCE

Defendant argues that the trial court abused its discretion when it admitted several graphic photographs of Jacob and Ted. Specifically, defendant argues that the photographs should have been excluded under MRE 403 because their gruesome nature made them highly prejudicial. Defendant argues that the photographs had very little probative value because the nature and manner of the victims' death was not disputed, and because the photographs were cumulative of the forensic examiner's testimony. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id.* (quotation and citation omitted).

"Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403." *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence is relevant if it sheds light on any material point. *People v Murphy (On Remand)*, 282 Mich App 571, 580; 766 NW2d 303 (2009).

Defendant was charged with two counts of assault with intent to murder and with two counts of first-degree premeditated murder. By entering a plea of not guilty, defendant put all the elements of the charged offenses at issue. *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Id.* 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." *Id.*

Defendant does not specifically contest the relevancy of the photographs. Nevertheless, the photographs of the victims were relevant in regard to whether defendant acted with premeditation and deliberation because the photographs depict the circumstances and nature of the killings. See *Gayheart*, 285 Mich App at 227 ("The photographs were helpful in proving defendant's intent to kill because they illustrated the nature and extent of the victim's injuries."). Moreover, the photographs of Ted show strangulation marks on his neck, and "evidence of manual strangulation can be used as evidence that a defendant had an opportunity to take a 'second look.'" *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). Thus, the

photographs shed light on the issues of premeditation and deliberation, elements of first-degree murder, and were therefore relevant pursuant to MRE 401.²

Under MRE 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Defendant argues that the gruesome nature of the photographs made them prejudicial and likely moved the jury to convict defendant based on sympathy for the victims. Gruesomeness alone, however, is not grounds for exclusion. *Mills*, 450 Mich at 76; *Gayheart*, 285 Mich App at 227. “The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice.” *Mills*, 450 Mich at 76.

We find that the probative value of the photographs was not substantially outweighed by unfair prejudice. “The photographs were helpful in proving defendant’s intent to kill because they illustrated the nature and extent of the victim[s’] injuries.” *Gayheart*, 285 Mich App at 227. The photographs were also helpful in explaining and corroborating the testimony of Cynthia and Doreen concerning the victims’ causes of death. The photographs explained and corroborated the forensic examiner’s testimony concerning the causes of death. The forensic examiner testified that the photographs were essential for demonstrating what happened to each of the victims. Although the photographs may be considered cumulative of the forensic examiner’s testimony, that alone does not make them excludable. *Id.* While the fact that the photographs are gruesome is prejudicial, almost all evidence introduced in a criminal trial is prejudicial to the defendant. *People v Fisher*, 449 Mich 441, 451-452; 537 NW2d 577 (1995). Unfair prejudice exists where “marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). In this case, the photographic evidence was significantly probative and not likely to be given undue or preemptive weight by the jury. Therefore, the trial court did not abuse its discretion when it admitted the photographs.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence to support his first-degree murder convictions. Defendant argues that the evidence suggests the attacks were a random event, and that the motiveless, out-of-control violence described by Doreen and Cynthia is inconsistent with the notions of premeditation and deliberation.

Sufficiency of evidence is a constitutional issue that is reviewed de novo by this Court. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We view the evidence “in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

² The photographs were also relevant to illustrate defendant’s intent with respect to the assault charges as to the victims who survived.

“First-degree premeditated murder requires proof that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). “This Court has consistently observed that ‘[b]ecause of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.’” *People v Ericksen*, 288 Mich App 192, 196-197; 793 NW2d 120 (2010), quoting *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). “Circumstantial evidence and the reasonable inferences it permits are sufficient to support a conviction, provided the prosecution meets its constitutionally based burden of proof beyond a reasonable doubt.” *Id.* at 196. 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.” *Abraham*, 234 Mich App at 656.

There was sufficient evidence from which the jury could conclude that the killings were premeditated and deliberate. Doreen and defendant each testified that defendant was the last person awake that night, indicating that defendant was waiting to catch his victims off guard. Further, the evidence also indicates that after everyone else retired to their bedrooms, defendant stayed up and constructed a wire garrote to use during the attacks. The garrote was constructed of wire, two long carriage bolts, and electrical tape, and it was found by police in the grass near the rear deck of the house. Although defendant testified that the device was a “fence puller” used to straighten fences, Doreen testified that she had not been made aware of any problems with the fence. There was wire and electrical tape on a tool bench inside the shed located near the house. Police found a beer can in a lime green “koozie,” or insulated beverage jacket, above the tool bench. Testimony and photograph exhibits show that defendant was drinking out of a green koozie that night. Cynthia testified that when she awoke she found defendant lying next to her bed with a roll of duct tape, which further supports an inference that defendant planned the attacks. Human blood was detected on the garrote, which shows that it was used during the attacks. Further, Cynthia testified that defendant tried to choke her with some type of device with wire and handles on it, and the forensic examination revealed that Ted died as result of stab wounds and manual strangulation. The evidence that Ted died as a result of manual strangulation supports the inference that “defendant had an opportunity to take a ‘second look.’” *Johnson*, 460 Mich at 733.

The circumstances of the killings themselves also support an inference that defendant acted with premeditation and deliberation. Defendant waited until everyone went to bed before attacking, and he attacked the victims in different rooms of the house using multiple weapons. Defendant tried to stop Cynthia and Doreen from calling 911. The 911 tape captures defendant’s voice as he repeatedly asks Cynthia if she called 911. The Wurmlingers’ neighbor heard someone yell “die, die, die” during the attacks. Finally, Doreen told police that defendant said he was going to kill her. Viewing the evidence in the light most favor to the prosecution, there was sufficient evidence to support the jury’s verdict convicting defendant of first-degree, premeditated murder.

IV. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor made improper statements during his closing argument that were designed to invoke sympathy in the jurors and improperly insinuate his own

personal disgust with defendant. Because defendant did not object during the closing argument, the issue is unpreserved. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *Id.* "Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Abraham*, 256 Mich App at 272-273. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 274-275.

Specifically, defendant alleges two statements made by the prosecutor constitute misconduct. The prosecutor stated:

But that tape, that tape, and I apologize now, I'm gonna play that tape for you again before I'm done, I'm preparing you for it now, but that tape is the telling, compelling what happened in that house. Frightening, absolutely frightening. Check his demeanor on that tape, I'm sure you remember it and I know you've only heard it once, and I've heard it more than I care to, but it's important to be aware of his demeanor on that tape.

* * *

And of course, you've heard from Cindy in terms of what happened to her. Look at these ladies, look at what these ladies had to endure. These ladies endured at that residence. These ladies has [sic] endured up to this trail [sic] and as they've had to testify, and also as they've had to testify relating to what you've heard out of the Defendant.

Prosecutors "are typically afforded great latitude regarding their arguments and conduct at trial," and "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger (On Remand)*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Further, a prosecutor is not required to present his arguments in the blandest possible terms. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). However, it is improper to appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Additionally, a prosecutor may not "vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness." *People v Seal*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

Defendant argues that by emphasizing the frightening nature of the 911 call, the prosecutor not only insinuated his own personal disgust with defendant, but also implied that he had some special knowledge of the tape's content. We disagree. The sentences preceding the allegedly improper comment show that the prosecutor was summarizing the contents of the 911 call and using its contents to discredit defendant's testimony. Defendant testified that Cynthia and Doreen killed their husbands, but the contents of the 911 tape cast doubt on the defendant's credibility. The prosecution is permitted to use the facts to argue that defendant should not be believed. *Id.* Also, the statement, "I know you've only heard it once, and I've heard it more than I care to," is not referring the prosecutor's belief that defendant was guilty. Rather, the prosecutor was merely stating that the tape was frightening to listen to, and it was not something

he enjoyed hearing multiple times. The prosecutor did not infer that he found defendant to be disgusting. Nor did the prosecutor infer that he had special knowledge. Instead, the prosecutor was simply stating that he heard the tape several times, and asked the jury to listen to it carefully.

We find the second comment made by the prosecutor more troubling. The comment “look at what these ladies had to endure” appears to be an improper attempt to invoke sympathy on behalf of the victims. However, even if the comment was improper, the error did not result “in the conviction of an actually innocent defendant” nor did it seriously affect “the fairness, integrity, or public reputation of the judicial proceedings.” *Abraham*, 256 Mich App at 274-275. Here, there was overwhelming evidence presented to support defendant’s conviction, and the jury was instructed that sympathies or prejudices must not influence the final decision. The proper instruction of the jury militates against finding outcome-determinative error because a jury is presumed to follow the trial court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, any resulting error did not constitute error requiring reversal.

V. CONCLUSION

We find that the photographic evidence was properly admitted because it was relevant, and its probative value was not substantially outweighed by undue prejudice. Further, there was sufficient evidence of premeditation and deliberation to support the jury’s verdict finding defendant guilty of first-degree murder. Finally, any misconduct committed by the prosecution did not constitute error requiring reversal.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Joel P. Hoekstra

/s/ Patrick M. Meter