

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 21, 2013

v

MARK ANTHONY ABRAITIS,  
  
Defendant-Appellant.

No. 309955  
Saginaw Circuit Court  
LC No. 11-036618-FC

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Before: K. F. KELLY, P.J., and MARKEY and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, carrying a dangerous weapon with unlawful intent, MCL 750.226, carrying a concealed pistol, MCL 750.227, receiving and/or concealing a stolen firearm, MCL 750.535b, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b.<sup>1</sup> Defendant appeals by right. We affirm.

This case involves the April 24, 2011 shooting death of defendant's girlfriend. On the night of the incident, defendant and his girlfriend had an argument through text messages while the victim was at a bar with coworkers. Defendant's coworkers saw him in an agitated state, with two guns in his car, claiming that he needed to shoot his guns to blow off steam. The victim's friends last saw her at the bar that night.

The next day, the victim's normally immaculate apartment was found in disarray. Police officers found defendant in his home with a note admitting that he had shot his girlfriend. The victim's body was found in a rural ditch, covered by cardboard. She had a gunshot wound to the

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<sup>1</sup> He was sentenced as a third habitual offender, MCL 769.11, to life in prison without parole for first-degree premeditated murder, 57 months to 10 years for felon in possession of a firearm, carrying a dangerous weapon with unlawful intent, and carrying a concealed weapon, 57 months to 20 years for receiving and concealing a stolen firearm, and 2 years for each count of felony firearm. Defendant does not challenge his sentences on appeal.

head. Police recovered the murder weapon and another handgun, which were eventually determined to be stolen.

Defendant first argues that there was insufficient evidence to support a finding that the murder was premeditated. We disagree. In determining whether the evidence was sufficient, we view the evidence in a light most favorable to the prosecution to determine “whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). “All conflicts in the evidence must be resolved in favor of the prosecution.” *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

First-degree premeditated murder requires proof that defendant killed the victim and that the killing was done in a willful, deliberate, and premeditated manner. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002); MCL 750.316(1)(a). Premeditation is a necessary element to establish first-degree premeditated murder, and it may be inferred from the circumstantial evidence found in the record. *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Premeditation requires thinking beforehand, and a thought process that is undisturbed by hot blood. *Id.* “While the minimum length of time needed to exercise this process is incapable of exact determination, a sufficient interval between the initial thought and the ultimate action should be long enough to afford a reasonable man an opportunity to take a ‘second look’ at his contemplated actions.” *Id.* Nonexclusive factors indicating premeditation are “(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 Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

A review of the entire record reveals that there was sufficient evidence for a jury to find premeditation. The prosecution presented evidence that defendant had acquired stolen guns the day prior to the incident. On the night of the incident, he expressed that he was so angry that he needed to fire his weapons. The same night, the victim received numerous nasty and belligerent texts from defendant. The day after the incident, the victim’s normally immaculate bedroom was found in disarray. Police found the victim in pajama-type clothing without shoes, a jacket, or her cellphone. A rational jury could determine that defendant forced the victim from the apartment or that she was forced to leave in a hurry. Furthermore, defendant took the victim to a very rural setting. Also, the victim had two contusions on her upper chest from which the jury could infer that defendant held her down by pressing his knees into her chest. The evidence indicated that the gun was loosely touching the victim’s face when fired, creating a contact wound, and that defendant shot straight down through the victim’s face and into the ground. Defendant then moved her body 100 feet into a ditch filled with water and covered her with cardboard. This was sufficient evidence for a rational jury to infer that defendant planned the crime. Therefore, there was sufficient evidence for a rational jury to find beyond a reasonable doubt that defendant’s killing of the victim was premeditated. *Ericksen*, 288 Mich App at 196.

Defendant next argues that the trial court abused its discretion when it admitted two autopsy photographs. We disagree. We review a trial court’s decision whether to admit photographic evidence for a clear abuse of discretion. *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). The court should determine whether the probative value of demonstrative evidence is substantially outweighed by its prejudicial effect. *People v Unger (On Remand)*, 278

Mich App 210, 247, 257; 749 NW2d 272 (2008). “Admission of gruesome photographs solely to arouse the sympathies or prejudices of the jury may be error requiring reversal.” *Ho*, 231 Mich App at 188. However, if there is a proper purpose, the gruesome details or shocking nature of the crime will not render the photograph inadmissible. *Id.* The trial court commits an abuse of discretion when the admission of a photograph “falls outside the range of reasonable and principled outcomes.” *Unger*, 278 Mich App at 217.

Here, the photographs showed the victim’s fractured skull and her brain removed and placed on a table. The trial court noted that the photograph of the victim’s skull showed the impact of the wound and how close the gun was to the victim’s head when it was fired. As for the photograph of the victim’s brain, the trial court found that its probative value of showing the path of the bullet through the brain—which was important to show defendant’s position when he fired the gun—was not substantially outweighed by its prejudicial effect. Despite any gruesomeness, the photographs were admitted for a proper purpose. *Unger*, 278 Mich App at 257. Furthermore, autopsy photographs demonstrating the nature and extent of injury, as the photograph of the skull did here by showing the magnitude of the skull fracture, may also be admitted despite their gruesome characteristics. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). The prosecution’s goal was to establish that defendant was on top of the plaintiff, holding her down with his knees, when he held the gun to her face and shot straight through her head. The photographs’ probative value of supporting the prosecution’s case and the scientist’s testimony was not substantially outweighed by their prejudicial effect. *Unger*, 278 Mich App at 257. Accordingly, the trial court did not abuse its discretion in admitting the autopsy photographs.

In addition, the forensic scientist’s entire testimony related to the effect that the bullet had on the victim’s skull and brain based on the gun’s position against or close to the victim’s face and the angle from which defendant shot the bullet. The forensic scientist referenced the photographs during his testimony. While the scientist may have been able to testify without the photographs, photographs that are helpful to support a witness’s testimony may be admitted despite their gruesome characteristics and the witness’s ability to testify to the information contained in the photographs. *People v Mills*, 450 Mich 61, 76; 547 NW2d 909 (1995).

Defendant next argues that defense counsel made four errors that separately, and cumulatively, resulted in ineffective assistance of counsel. We disagree. Effective assistance of trial counsel is presumed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). To establish ineffective assistance of counsel, a defendant must show “that counsel’s performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel’s error.” *Id.* We give deference to counsel’s trial strategy. *Unger*, 278 Mich App at 242-243.

First, defendant asserts that defense counsel failed to investigate or present an insanity defense. At trial, defense counsel indicated that he determined such a defense would not be viable. To establish an insanity defense, the defendant must show by a preponderance of the evidence that he lacked the “substantial capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law.” MCL 768.21a(1); *People v Lacalamita*, 286 Mich App 467, 470; 780 NW2d 311 (2009).

Defendant has provided no evidence that he suffers from mental illness or mental retardation, let alone that one of these disorders affected his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law. Thus, there is no basis for concluding that an insanity defense was viable. “Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.” *Ericksen*, 288 Mich App at 201. Furthermore, the decision not to seek an insanity defense was one of trial strategy with which we decline to interfere. *Unger*, 278 Mich App at 242-243.

Second, defendant claims that counsel failed to seek an independent psychological examination. Trial counsel investigated defendant’s request for such an examination and found no basis for the request. Defendant does not identify any facts or circumstances that would call into question the results of the competency evaluation that was performed and does not explain why an independent psychological evaluation would have been warranted. Defendant has the burden of establishing the factual predicate for a claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). An attorney is not required to advance meritless arguments offered by the client. *Ericksen*, 288 Mich App at 201. Defendant has not shown that the failure to move for an independent examination resulted in ineffective assistance of counsel.

Third, defendant claims that defense counsel failed to move for a change of venue. Defense counsel indicated that he researched the issue and concluded that there was no basis to move for a change of venue because pretrial publicity alone was not sufficient to warrant a change. This reasoning is supported by *People v Jendrzejewski*, 455 Mich 495, 502-503; 566 NW2d 530 (1997). Defendant offers no evidence to support his assertion that a change of venue was warranted. He only asserts that the crime occurred in 2011 and that the trial did not occur until 2012, such that potential jurors could have opinions on the matter. “The burden rests on the defendant to demonstrate the existence of actual prejudice or the presence of strong community feeling or a pattern of deep and bitter prejudice so as to render it probable that jurors could not set aside their preconceived notions of guilt, notwithstanding their statements to the contrary.” *People v Harvey*, 167 Mich App 734, 741-742; 423 NW2d 335 (1988). Defense counsel investigated and determined that defendant could not meet his burden; there has been no showing that defense counsel erred.

Fourth, defendant argues that defense counsel failed to timely notify the court of a breakdown in the attorney/client relationship. However, the record indicates that defense counsel immediately told the court after defendant claimed a breakdown in the attorney/client relationship, which came immediately after the trial court denied defendant’s motion for substitute counsel. Defendant has not pointed to any facts to indicate that defense counsel delayed in notifying the trial court of defendant’s claim. *Hoag*, 460 Mich at 6.

Fifth, defendant claims that the cumulative effect of defense counsel’s errors violated his constitutional right to the effective assistance of counsel. Because there were no individual instances of ineffective assistance of counsel, there was no cumulative effect.

Defendant next argues that the trial court abused its discretion when it denied defendant’s motion for substitute counsel and his motion for an independent psychological evaluation. We

disagree. With regard to the motion for substitute counsel, an indigent defendant is guaranteed the right to counsel, but not his choice of an attorney by seeking substitution of counsel. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011), citing *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Defendant must show good cause for the substitution and that the substitution would not unreasonably disrupt the proceedings. *Strickland*, 293 Mich App at 397. Good cause exists where trial counsel and the defendant have legitimate differences regarding a fundamental trial tactic. *Id.*

Here, defendant expressed ambiguous unhappiness with defense counsel's work and claimed that he did not believe that the attorney was doing enough work for him. This was insufficient to show good cause for substitute counsel. Defendant also claimed that defense counsel failed to visit him in jail. However, defense counsel refuted this claim by listing the specific times and duration of their visits. Furthermore, defendant's request came on the day of trial, and a substitution would have unreasonably delayed the trial. Therefore, the trial court did not abuse its discretion when it denied defendant's untimely request for substitute counsel. *Id.*

Regarding an independent psychological evaluation, MCL 768.20a(3) provides:

The defendant may, at his or her own expense, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. If the defendant is indigent, the court may, upon showing of good cause, order that the county pay for an independent psychiatric evaluation . . . .

Defendant does not suggest that he was planning to have an evaluation at his own expense. He offered no evidence for the trial judge to find cause for an independent examination. A competency exam had already been performed in the matter, which concluded that defendant was competent to stand trial. The competency examination did not find that defendant was legally insane at the time the crime was committed. Furthermore, the request came on the day of the trial, which the trial judge reasonably concluded was a dilatory tactic, not good cause. Regardless, MCL 768.20a(1) requires a notice of intent to assert an insanity defense at least 30 days before trial. If the notice is not properly filed and served, the court must exclude evidence offered to establish insanity. MCL 768.21(1). Given that no notice was filed in this case and the evidence would therefore have been precluded, an abuse of discretion did not occur by denying defendant the opportunity to secure such evidence. Accordingly, the trial court did not abuse its discretion in denying defendant's request for an adjournment for an independent examination.

Finally, defendant argues that he was denied his constitutional right to present an insanity defense. Defendant failed to preserve this issue, so we review for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

The United States and Michigan Constitutions provide a criminal defendant the right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984); US Const Ams VI, XIV; Const 1963, art 1 § 13. The right to present a defense is a fundamental due process element, but it is not an absolute right. *Hayes*, 421 Mich at 279. "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability

in the ascertainment of guilt and innocence.” *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973).

As noted above, defendant did not file a notice of intent to raise an insanity defense. Accordingly, being precluded from presenting evidence pertinent to such a defense was not plain error.

Moreover, defendant’s trial started on February 14, 2012. The original psychological evaluation determining his competency to stand trial was submitted to the court on September 22, 2011. In the near five months between the competency determination and his trial, defendant had more than sufficient time to seek independent expert assistance for an insanity defense. Defendant’s right to present a defense must be weighed against compliance with procedure and evidence. *Hayes*, 421 Mich at 279. Because there was sufficient time prior to trial to seek an independent evaluation, the trial judge’s decision to deny defendant’s request to adjourn the trial to seek an independent evaluation was not in violation of his constitutional right to present a defense. Therefore, defendant has not shown that the trial court committed plain error affecting his substantial rights. *Kimble*, 470 Mich at 312.

Affirmed.

/s/ Kirsten Frank Kelly  
/s/ Jane E. Markey  
/s/ Karen M. Fort Hood