STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 8, 2007
v DAMAINE GRIFFIN, Defendant-Appellant.	No. 267567 Wayne Circuit Court LC No. 05-008537-01

Before: Smolenski, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, carjacking, MCL 750.529a, possession of a firearm during the commission of a felony, MCL 750.227b, felon in possession of a firearm, MCL 750.224f, and felonious assault, MCL 750.82. Defendant was sentenced to life imprisonment for the felony murder and second-degree murder convictions, 39 to 80 years' imprisonment for the carjacking conviction, two years' imprisonment for the felony-firearm conviction, two to five years' imprisonment for the felon in possession of a firearm conviction, and one to four years' imprisonment for the felonious assault conviction. We affirm in part and vacate in part.

Defendant first argues that the trial court abused its discretion when it allowed the prosecution to admit four photographs showing Ronald Weaver's gunshot wounds. We disagree. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

Evidence is relevant if it has "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. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995); MRE 403. "The elements of the offense are always at issue. Thus, the prosecution may offer all relevant evidence, subject to MRE 403, on every element." *Mills*, *supra*, p 70.

Defendant was charged with first-degree premeditated and felony murder, and both require that the prosecution prove defendant's intent. While first-degree murder is a specific

intent crime and requires proof that the defendant had an intent to kill, felony murder is a general intent crime and requires that the prosecution prove defendant's intent to kill, intent to inflict great bodily harm, or intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *People v Herndon*, 246 Mich App 371, 389; 633 NW2d 376 (2001).

The prosecution presented four photographs of Ronald's contact wound. The photographs were admitted for the purpose of showing defendant's intent to murder. Because defendant's intent to murder Ronald was at issue and evidence of a victim's injury is admissible to show intent to kill, the photographs were relevant under MRE 401, and admitted for a proper purpose. *Mills*, *supra*, p 71.

Defendant argues that the probative value of the photographs substantially outweighed the danger of unfair prejudice, but, defendant is mistaken. *Mills*, *supra*, p 76. A prosecutor may not seek to admit gruesome photographs solely to arouse the sympathies or prejudices of the jury. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). "However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors." *Mills*, *supra*, p 76.

Here, the relevancy of the photographs was not substantially outweighed by the danger of unfair prejudice. The photographs are an accurate factual representation of the injury suffered by Ronald and the photographs did not present an enhanced or altered representation of the injury. *Mills*, *supra*, p 77. "The trial court is not expected to protect the jury from all evidence that is somewhat difficult to view. The Rules of Evidence provide that the court must only limit that evidence whose probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. In this case, the pictures were [mildly] gruesome; however, they were necessary to the proper determination of the defendant's guilt and were not unfairly prejudicial." *Mills*, *supra*, p 79.

Although defendant further argues that the photographs were unnecessary because Dr. Cheryl Lowe presented testimony discussing Ronald's contact wound, "photographs are not excludable simply because a witness can orally testify about the information contained in the photographs." *Mills*, *supra*, pp 76-77. Defendant also argues that the volume of photographs admitted was improper. However, because defendant has failed to show that the admission of four photographs was excessive and improper, he has failed to support his claim.

Defendant next argues that he was denied a fair trial because improper opinion testimony was presented to the jury and that his counsel was ineffective for failing to object to the opinion testimony. We disagree. Because defendant did not object below, this Court reviews defendant's unpreserved improper opinion testimony issue for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Because the trial court did not hold an evidentiary hearing, defendant's ineffective assistance of counsel claim review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). However, if a claim of ineffective assistance of counsel involves a question of law, this Court's review is de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Lowe, a forensic pathologist, was certified during trial to give forensic, anatomic and clinical expert testimony regarding Ronald's death. Lowe performed Ronald's autopsy and she determined that Ronald died from a single gunshot wound to the head. Lowe maintained that the gun that killed Ronald was held to his cheek when it was fired because Ronald's cheek had a "muzzle imprint" and "soot in the wound." Lowe then testified that, based on her findings, she concluded that Ronald was "executed, or shot point blank."

Although defendant argues that Lowe's testimony was improper opinion and expert testimony, Lowe's conclusion that Ronald was "executed, or shot point blank" was based on her experience and training as a forensic pathologist. Because Lowe's conclusion was based on her training and expertise as a forensic pathologist, she did not render improper opinion testimony nor did she render improper "state of mind" testimony. At no time in Lowe's testimony did she state that Ronald's shooter acted with premeditation and deliberation, as defendant alleges. Lowe's testimony was not improper, and therefore, defendant's claim is meritless.

Defendant's ineffective assistance of counsel claim is also meritless. Because defendant has failed to show error and counsel is not obligated to make futile objections, defendant has failed to show that he was denied the effective assistance of counsel. *People v Thomas,* 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant also argues that the trial court erred when it denied his motion for a directed verdict of acquittal regarding the first-degree premeditated and felony murder charges against him. We disagree. "When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich,* 246 Mich App 101, 122; 631 NW2d 67 (2001).

To prove first-degree premeditated murder the prosecution must show that "the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); MCL 750.316(1)(a). At the time defendant moved for a directed verdict of acquittal, evidence had been presented which showed that Ronald was shot and killed in the garage of his home. Ronald's wife, Margie Weaver, watched defendant point a gun at Ronald while in the garage of their home. Ronald told Margie to close the garage door and when she did she immediately heard shots fired. Ronald was fatally shot and defendant drove off in Ronald's car.

The evidence was sufficient for a jury to conclude that the elements for a first-degree premeditated murder conviction were proven, i.e., that defendant intentionally killed Ronald and that the act of killing was premeditated and deliberate. *Mette, supra*, p 330. "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Marsack,* 231 Mich App 364, 370-371; 586 NW2d 234 (1998). While "the length of time needed to measure and evaluate a choice before it is made is incapable of precise determination, there must be some interval in which a 'second look' can be contemplated." *People v Coddington,* 188 Mich App 584, 599-600; 470 NW2d 478 (1991). Sufficient evidence was presented which would lead a reasonable jury to conclude that defendant acted with premeditation and deliberation. A reasonable jury could infer that defendant's actions were premediated and deblierate because defendant approached Ronald as Ronald prepared to enter his home. Thus, the evidence was suffiicent for a jury to conclude that defendant was waiting for Ronald. Defendant held a gun to Ronald's head during this time and when Margie opened the garage door defendant pointed the gun at her, but returned the gun to Ronald's head when Margie closed the door. The trial court did not err in denying defendant's motion for a directed verdict on this charge.

The evidence presented was also sufficient for a reasonable jury to conclude that defendant committed first-degree felony murder. The elements of felony murder are: (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, i.e., malice, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in the statute, including carjacking. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).

The evidence was sufficient for a reasonable jury to conclude that defendant acted with malice when he shot Ronald. Malice can be inferred from the circumstances surrounding the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). Ronald was shot in the face and it was determiend that, based on the muzzle imprint and the soot in the wound, the gun was held up to Ronald's cheek when it was fired. Because of the nature and extent of Ronald's injury, we find that a reasonable jury could infer that defendant acted with malice when he shot Ronald, i.e., that defendant intended to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. *Nowack, supra*, p 401. We also conclude that a reasonable jury could infer from the evidence that defendant committed carjacking, i.e., that defendant took Ronald's motor vehicle in his presence and by threat of force or violence. *People v Davenport,* 230 Mich App 577, 579; 583 NW2d 919 (1998).

Defendant further argues that his right against double jeopardy was violated when he was convicted of first-degree felony murder and the underlying felony of carjacking. We agree. Because this constitutional issue was not preserved for appeal, our review is for plain error affecting defendant's substantial rights. *People v Akins,* 259 Mich App 545, 567, 675 NW2d 863 (2003).

The United States and Michigan Constitutions prohibits placing a defendant twice in jeopardy for a single offense. *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). "Convictions of both felony murder and the underlying felony offend double jeopardy protections." *Akins*, *supra*, p 567. Carjacking may serve as a predicate offense for first-degree

felony murder. MCL 750.316(1)(b). Defendant was charged and convicted of first-degree felony murder and the underlying felony of carjacking. When a defendant is erroneously convicted of both felony murder and the underlying felony, it is proper to vacate the conviction and sentence for the underlying felony. *Akins*, *supra*, p 567. Because defendant was convicted and sentenced for both felony murder and the underlying felony of carjacking, his carjacking conviction and sentence is vacated. *Akins*, *supra*, p 567.

Defendant also argues that his double jeopardy rights were violated when he was convicted of both first-degree felony and second-degree murder for the murder of one person. We agree. A double jeopardy challenge presents a question of law that this Court reviews de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). "Multiple murder convictions arising from the death of a single victim violate double jeopardy." *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). Because defendant cannot be convicted of both first-degree felony murder and second-degree murder for the death of a single victim, defendant's second-degree murder conviction is vacated. *Clark*, *supra*, p 429.

Affirmed in part and vacated in part.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra