

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES SCOTT ALTMAN,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 267592

Midland Circuit Court

LC No. 05-002297-FC

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, and the trial court sentenced him to 18 to 30 years' imprisonment. He appeals as of right. We affirm.

I Basic Facts and Proceedings

Defendant's conviction arises from the death of his girlfriend, Christina "Tina" Fisher. On September 28, 2004, defendant brought Fisher to a hospital emergency room. Fisher presented a skull fracture on the back of her head, but showed no other injuries other than old abrasions. Fisher was unconscious and failed to regain consciousness before dying on October 8, 2004.

Defendant explained to hospital personnel and to the police that Fisher jumped from his car while they were driving on a gravel road in Midland County. Defendant initially told the police that he was driving 40 miles an hour at the time. Two treating physicians, two nurses, and the medical examiner all testified at trial that Fisher's injuries were inconsistent with defendant's version of events because she did not exhibit any torn clothing, and did not have any other bruises, abrasions, or broken bones. The prosecution's theory at trial was that Fisher died from a blow to the head by a flat, blunt object, and that her injuries were inconsistent with defendant's statement that she jumped out of a car moving 40 miles an hour.

II Directed Verdict

Defendant first argues that the trial court erred in denying his motion for a directed verdict on an original charge of first-degree premeditated murder. Defendant argues that there was insufficient evidence of premeditation and deliberation to submit that charge to the jury. 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 convict a defendant of first-degree murder, the prosecutor must prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. *People v Marsack*, 231 Mich App 364, 370; 586 NW2d 234 (1998). “To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or a problem.” *People v Furman*, 158 Mich App 302, 308; 404 NW2d 246 (1987). Both “characterize a thought process undisturbed by hot blood.” *Id.* The premeditation element does not impose a specific time requirement, but rather the evidence must show that sufficient time elapsed to allow the defendant to take a “second look.” *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Factors that may be considered in establishing premeditation include the defendant’s previous relationship with the victim, the defendant’s actions before and after the crime, and the circumstances of the killing, including the weapon used and the location of the wounds. *Id.* at 300. Premeditation and deliberation may be inferred from all the facts and circumstances, but the inferences must have support in the record and cannot be arrived at by mere speculation. *Id.* at 301.

The evidence showed that Fisher died from an severe isolated injury to the back of her head, inflicted while she was in an upright position. The prosecutor presented substantial evidence that persons who are thrown from moving vehicles onto roads sustain multiple abrasions, bruises, cuts, and broken bones, and that their clothes are torn and dirty. The evidence showed that defendant reported a scenario that was inconsistent with Fisher’s actual condition and injuries. The jury reasonably could infer that defendant fabricated the roadside scene to conceal the true cause of Fisher’s injuries. Considering all the evidence of the nature and circumstances surrounding Fisher’s injury, the jury could rationally infer that defendant acted on a decided course of action rather than an unplanned impulse. Accordingly, we conclude that there was sufficient evidence to submit the first-degree murder charge to the jury. Therefore, the trial court did not err in denying defendant’s motion for a directed verdict with respect to that charge.

Finally, defendant is not entitled to relief because he was acquitted of the first-degree murder charge. Here, overwhelming evidence supports the second-degree murder conviction, and jury compromise is unlikely. *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). Accordingly, defendant is not entitled to appellate relief.

III Hall’s Testimony

Defendant next argues that the trial court erred in allowing Police Lieutenant Gregory Hall to testify that he believed that defendant was not truthful regarding the cause of Fisher’s injuries when Hall interviewed him.

A trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). “An abuse of

discretion occurs when the decision results in an outcome falling outside the principled range of outcomes.” *Woodard v Custer*, 476 Mich 545, 719 NW2d 842 (2006).

Defense counsel subjected Hall to a lengthy cross-examination in which he insinuated that Hall irrationally and unjustifiably rejected defendant’s explanation of Fisher’s injuries. For example, he repeatedly questioned Hall about his reasons for redirecting the interview to focus on why defendant did not ask Fisher why she kept unfastening her seat belt. Counsel also challenged Hall’s use of the term “evasive” to describe defendant’s attempt to focus on minor details while failing to adequately explain his reaction to Fisher’s seat belt removal. On redirect examination, the prosecutor asked Hall for his opinion about defendant during the interview and Hall responded, “That I was not getting the truth about the incident.”

The prosecutor’s question and Hall’s response explained why Hall reacted to defendant’s answers the way he did, why he believed defendant was being selectively evasive in his answers, and why he tailored the interview to address apparent weaknesses in defendant’s assertions. The trial court correctly observed that defense counsel “opened the door” to the prosecutor’s question about Hall’s opinion. See, generally, *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988), and *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995) (holding that prosecutor may examine witnesses on matters introduced by the defendant).

Furthermore, Hall’s opinion was not inadmissible under MRE 701, which provides that a nonexpert witness may testify in the form of an opinion if the opinion is rationally based on the witness’s perception, and is helpful to a clear understanding of the witness’s testimony or the determination of a fact in evidence. Hall’s opinion regarding defendant’s evasiveness and credibility during the interview was not dependent on technical or specialized knowledge. Rather, it was based on defendant’s responses and the commonsense assumption that a driver would ask why his passenger was unfastening her seat belt and opening her car door, instead of simply refastening the belt and proceeding with the drive. “In general, police officers may provide lay opinions about matters that are not overly dependent on scientific, technical, or specialized knowledge.” *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988). Hall’s testimony fell within these parameters. Accordingly, the trial court did not abuse its discretion in allowing the testimony.

IV Nurses’ Testimony

Defendant next argues that the trial court erred in determining that two emergency room nurses, Peggy Kalafut and Renee Schlaack, were qualified to offer an opinion whether Fisher’s injuries were consistent with a fall from a moving vehicle traveling at approximately 40 miles an hour.

At trial, defendant only objected to Nurse Kalafut’s expert testimony. We review a trial court’s decision concerning whether a witness is qualified to testify as an expert for an abuse of discretion. *Woodard, supra* at 557. Defendant failed to object to Nurse Schlaack’s testimony. Accordingly, our review of Nurse Schlaack’s testimony is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

MRE 702 provides as follows:

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.

This rule permits a trial court to determine that a witness is qualified as an expert based on experience.

The trial court did not abuse its discretion in determining that Nurse Kalafut's extensive experience as an emergency room nurse, in which she had seen numerous trauma patients, including victims of motorcycle accidents and persons who were thrown from cars, qualified her to offer an opinion whether Fisher's injuries were similar to injuries commonly suffered by patients who experienced ejection from moving vehicles. Likewise, given Nurse Schlaack's experience as an emergency room nurse who had also observed numerous trauma patients, her testimony did not constitute plain error.

Defendant argues that the trial court failed to exercise its gatekeeping function in admitting Kalafut's testimony. In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004), our Supreme Court held that MRE 702 imposes an obligation on the trial court to ensure that any expert testimony admitted at trial is reliable. While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither "abandon" this obligation nor "perform the function inadequately." *Id.* Although the trial court did not extensively analyze the issue of Nurse Kalafut's qualifications and the reliability of her opinion, its analysis was sufficient for the circumstances. Her opinion and its underlying basis involved a simple, straightforward matter, which clearly related to her experiences as an emergency room nurse. Consequently, there was no need for the trial court to subject her qualification to greater scrutiny.

V Character and Bad Acts Evidence

Defendant next argues that the trial court erroneously allowed character evidence and prior bad acts evidence, contrary to MRE 404(a) and (b). He argues that the following evidence was inadmissible: (1) Fisher's letter accusing him of drunkenness, infidelity, pill use, and emotional cruelty; (2) Bonnie Jones's testimony that she believed defendant would harm Fisher; (3) Jones's testimony regarding defendant's presence at the hospital; (4) evidence of spin marks on Fisher's lawn; (5) evidence that Hall, Kalafut, and Schlaack believed defendant was a liar; (6) evidence that defendant was involved in a relationship with his ex-wife and other women during his relationship with Fisher; and (7) evidence that defendant refused to pay his portion of a phone bill. Defendant only objected to the admission of Fisher's letter at trial. Accordingly, the remaining claims of error are unpreserved and we review them for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

MRE 404(a)(1) provides that evidence of the character of the accused is not admissible to prove action in conformity therewith on a particular occasion, except that the prosecutor may offer evidence of a pertinent trait of the defendant's character to rebut the defendant's evidence of the same. MRE 404(b) prohibits evidence of prior bad acts to prove a person's character, but

permits the admission of such evidence for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. The evidence must be offered for something other than a character or propensity theory, it must be relevant under MRE 401, and the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).

Relevant evidence is 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; *Aldrich, supra* at 114. Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. MRE 402; *Aldrich, supra* at 114. 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.” MRE 403.

The trial court did not abuse its discretion in admitting portions of Fisher’s letter. The letter showed discord in Fisher and defendant’s relationship and was relevant to prove that defendant had a motive to assault or kill her. *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995). Further, the probative value of the letter was not substantially outweighed by the danger of unfair prejudice.

Defendant argues that the prosecutor improperly questioned Bonnie Jones about her belief that defendant would harm Fisher. Defendant has mischaracterized Jones’s testimony. Jones testified that she was initially unwilling to believe that defendant would harm Fisher. This testimony was relevant to explain why she did not immediately suspect or accuse defendant of assaulting Fisher when she first spoke to the police. To the extent that her testimony portrayed defendant in an unfavorable light, it was too vague and indirect to be deemed either unfairly prejudicial under MRE 403, or inadmissible character evidence under MRE 404(a)(1). Additionally, the testimony did not involve any prior bad acts and, therefore, was not precluded by MRE 404(b).

Defendant also mischaracterizes Jones’s testimony about his presence at the hospital. Jones never testified that defendant spent too little time at the hospital. On cross-examination, defense counsel asked her whether she believed this. In response, she admitted that she had communicated to defendant through his pastor that he should not visit, and that defendant complied with her request. Accordingly, this testimony was not improper evidence of defendant’s character.

Defendant’s remaining claims of evidentiary error are also without merit. Evidence of spin marks on Fisher’s property was not indicative of aggression; rather, it was relevant to the prosecutor’s theory that defendant used his car to transport the unconscious Fisher from her house to Hicks Road. As explained previously, there was no error in permitting Hall to testify that he disbelieved defendant’s version of events during questioning. Similarly, the nurses’ testimony was offered to show that Fisher’s injuries were inconsistent with defendant’s explanation, not to prove that defendant has a dishonest character. Evidence that defendant saw his ex-wife and other women during his relationship with Fisher was relevant to the issue of relationship discord. Finally, evidence that defendant moved out of the house he shared with friends after an argument over a phone bill was relevant to explain the course of events leading

up to Fisher's injury on the night of September 28, 2004. The evidence was not unfairly prejudicial, especially considering that Suzanne Stark only testified that she "assumed" defendant was responsible for the \$400 phone bill, not that he was actually responsible or that he refused to pay his share of the bill.

Defendant also argues that the trial court improperly admitted irrelevant evidence of Fisher's good character by allowing her coworkers to testify that Fisher was a good worker, did not appear to be suicidal, did not appear to use drugs, and wanted to help defendant get off drugs. Defendant argues that this evidence was unfairly prejudicial because it created a stark contrast between Fisher's allegedly good character and his own supposedly bad character. We disagree. Defendant made Fisher's mental state an issue by asserting that she was emotionally unstable, self-destructive, and suicidal. Fisher's coworkers' testimony was relevant to counter defendant's assertion. Additionally, evidence that Fisher seemed distraught near the end of her life and that she was worried about defendant's drug use was relevant to prove discord in her relationship with defendant.

For these reasons, we reject defendant's several claims of evidentiary error.

VI Effective Assistance of Counsel

Defendant also argues that he was denied the effective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or request for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent from the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To establish ineffective assistance of counsel, a defendant must show that his attorney's performance was objectively unreasonable in light of prevailing professional norms and that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002).

Defendant argues that counsel was ineffective for failing to object to inadmissible character evidence. As discussed previously, defendant's claims of improper character or bad acts evidence are without merit. Thus, any objections would have been futile. Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also argues that defense counsel failed to exploit a critical weakness in Hall's testimony, namely, that defendant admitted that he was driving about 40 miles an hour *before* Fisher jumped, but that he began to brake as Fisher left the car; therefore, he must have been driving less than 40 miles an hour at the moment of her leap. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Here, defendant presented this theory through other means. In any event, whether defendant was driving 40 miles and or some

lesser speed was not a critical issue in the case. Rather, it was the prosecutor's theory that Fisher's injuries were not consistent with a fall from a moving vehicle, regardless of the speed. Thus, defendant has not demonstrated that counsel's questioning of Hall was either deficient or prejudicial.

Defendant also argues that his first attorney informed trial counsel of a paint chip on the right rear wheel well of defendant's Cougar, but trial counsel failed to make use of this evidence, which could have corroborated his explanation of Fisher's injuries. There is no record basis for defendant's assumption that the alleged paint chip had exculpatory value. Nothing in the record supports a causal connection between Fisher's alleged jump and the chip. Accordingly, there is no basis for concluding that defense counsel was ineffective for failing to present this evidence.

VII Prosecutorial Misconduct

Finally, defendant argues that the prosecutor's conduct denied him a fair trial. Because defendant did not object to the prosecutor's conduct at trial, we review these unpreserved claims for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

The prosecutor did not shift the burden of proof by arguing that evidence was uncontradicted. Although a prosecutor may not comment on a defendant's failure to present evidence, or attempt to shift the burden of proof, *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999), he may argue that inculpatory evidence is undisputed or uncontradicted. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). Additionally, because defendant offered an explanation for Fisher's injuries, it was not improper for the prosecutor to comment on defendant's explanation by arguing that it did not explain certain evidence, e.g., Hoskins's bloodstain testimony. Once the defendant advances evidence or a theory, the prosecutor does not shift the burden of proof by arguing that the theory is not credible. *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998).

The prosecutor's remark, "We would like to know where it happened," was not made in the context of challenging defendant to explain where Fisher was injured. Rather, the prosecutor was acknowledging that the location of the assault was unknown, and arguing that this gap in the evidence did not establish reasonable doubt.

Nor did the prosecutor impermissibly comment on defendant's decision not to testify when he asked why defendant was "avoiding putting himself in a good light?" *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995). Viewed in context, the prosecutor was referring to defendant's evasiveness during his police interview, not defendant's decision not to testify at trial. The prosecutor's comment that defendant refused to voluntarily submit a blood sample was merely a passing reference during a recounting of defendant's contacts with the police. It was not calculated to suggest that defendant was asserting his rights in order to conceal his guilt.

Defendant also argues that the prosecutor assumed facts not supported by the evidence when he argued that all the medical evidence disproved defendant's version of events. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but he is free to argue the evidence and all reasonable inferences arising from it as they relates to his

theory of the case. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Although defendant argues that the prosecutor's argument was not supported by the testimony of Dr. Schell, the record discloses that Dr. Schell testified that a falling bicyclist is the only scenario in which a vehicle-to-road accident might result in an isolated skull fracture. Dr. Schell explained that this would not happen to a person ejected from a moving car or motorcycle. Defendant also argues that the prosecutor's arguments were contrary to Dr. Virani's preliminary examination testimony, but this testimony was not evidence at trial. Furthermore, Dr. Virani's preliminary examination testimony neither undermined the prosecutor's trial theory, nor bolstered defendant's theory. Accordingly, a plain error has not been shown.

The prosecutor's argument that defendant laid Fisher on Hicks Road was supported by the evidence and reasonable inferences arising from the evidence. *Ackerman, supra* at 450. Defendant tried to explain Fisher's injury by stating that she jumped out of a moving car on Hicks Road, but there was ample evidence to establish that her injuries could not have resulted from such an event. It was reasonable for the prosecutor to infer that the blood, drag marks, and tire marks on Hicks Road were deliberately manufactured by defendant to corroborate his version of events.

Defendant argues that the prosecutor's statement, "If he's a liar, he's a killer," was an improper argument suggesting that he should be convicted on the basis of his dishonest character. Viewed in context, the prosecutor was arguing that defendant lied about the cause of Fisher's injury and, therefore, he must have inflicted the injury. This argument comports with the law that a defendant's false exculpatory explanation may serve as evidence of guilt. See *People v Dandron*, 70 Mich App 439, 443-444; 245 NW2d 782 (1976).

Finally, defendant argues that the prosecutor repeatedly vouched for the reliability of the evidence. A prosecutor may not vouch for a witness's credibility or suggest that the government has some special knowledge that a witness's testimony is truthful. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, the prosecutor did not suggest that he had special knowledge concerning the cause of Fisher's injury, and did not urge the jurors to defer to his belief in defendant's guilt. Rather, the prosecutor argued that the jury should reject defendant's theory because it was not credible and was contrary to the evidence. Such argument is not improper. *Howard, supra* at 548.

In sum, defendant has failed to establish any improper conduct by the prosecutor, let alone plain error. Accordingly, appellate relief is not warranted.

Affirmed.

/s/ William C. Whitbeck

/s/ Michael J. Talbot

/s/ Brian K. Zahra