

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAY ANTHONY WALLER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2011

No. 297639

Ingham Circuit Court

LC No. 09-001029-FC

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

PER CURIAM.

Defendant was convicted by jury trial of one count each of second-degree murder, MCL 750.317, one count of possession of a firearm in the commission of a felony (felony-firearm), MCL 750.227b, and one count of carrying a concealed weapon (CCW), MCL 750.227. The court sentenced defendant to 28 to 60 years' imprisonment for the second-degree murder conviction, with a concurrent sentence of two to five years for CCW. These sentences are to be served consecutive to the two-year sentence for felony-firearm. We affirm.

Defendant's convictions stem from the shooting death of Dominique Carter. After the killing, defendant fled to North Carolina and changed his name. In North Carolina, defendant began living with Catrina Kay. During a domestic altercation, defendant threatened Kay and recounted the circumstances of the murder in Michigan. Defendant argues that testimony concerning the domestic dispute was impermissible other acts evidence that should not have been allowed into evidence. We disagree.

MRE 404(b)(1) governs admission of other acts evidence. It provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

MRE 404(b) is a rule of legal relevance, and limits the use of evidence that is logically relevant. *People v VanderVliet*, 444 Mich 52, 61-62; 508 NW2d 114 (1993), amended 445 Mich

1205 (1994). Our Supreme Court articulated the following test for admissibility of evidence of prior bad acts in *VanderVliet*: (1) the prosecutor must offer the evidence to prove something other than a bad character or “propensity for criminality” theory; (2) the evidence must be relevant under MRE 402; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id.* at 74-75. Upon request, the evidence should be accompanied by a proper limiting instruction. *Id.* at 75.

The prosecutor indicated below that the evidence of the circumstances in which defendant made his confession to Kay was being offered “under the context of the statement made as probative of the veracity of the statement made.” This is a proper purpose under MRE 404(b). Further, evidence of the context in which the confession was made was relevant because it gave the jury a complete understanding of the circumstances in which the confession was offered, as well as providing evidence that could assist the jury in assessing Kay’s credibility.

Additionally, the jury was given a limiting instruction on how to use the evidence:

You may only think about whether this evidence tends to show the context in which the Defendant’s alleged statements to . . . Kay were made. You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the Defendant is a bad person or that he is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct.

“It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that Kay’s testimony was more prejudicial than probative, and should have been excluded under MRE 403. In this context, prejudice means “an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one.” *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Defendant states that the testimony was unfairly prejudicial because it was perjured and it confused the issues because of a lack of a timeline. But defendant provides no evidence that the testimony was perjured beyond his own bare assertion, and he does not explain why the lack of timeline would have confused the jury. The crucial part of Kay’s testimony was straightforward: defendant told her that he had intended to kill Carter before the altercation and that he had done so. This testimony was highly probative of the key issue of defendant’s mental state.

Although defendant argues that he received ineffective assistance of counsel, he did not preserve this argument below, so our review is for plain error apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To be deficient, counsel’s representation must be so severely lacking as to deprive the defendant of a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, “the

defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.” *Id.* at 689 (quotation marks and citation omitted).¹

Defendant argues that his trial counsel allowed exculpatory evidence to go unheard. The only exculpatory evidence defendant identifies is that Kay knew of defendant’s “wanted” status prior to March 11, 2009. There is no evidence in the record that Kay knew defendant was wanted for murder prior to March 11, 2009, and defendant does not explain why he thinks she knew this or how it would have more than a marginal impact on Kay’s credibility.

Defendant finally complains that his counsel “allowed the jury to speculate on unresolved charges in North Carolina.” The record does not reveal that defendant was ever charged with a crime in North Carolina. To the extent that defendant is referring to Kay’s testimony regarding her altercation with defendant, that testimony was admissible, and the jury was properly instructed on how to consider it. Based on the record, defendant cannot overcome “the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 US at 689.

Next, we address defendant’s argument that the court erred in denying his motion for a directed verdict on the first-degree murder charge because the evidence did not support a finding that he possessed the requisite mental state. In conducting a de novo review of the court’s ruling, we consider the evidence produced by the prosecution in the light most favorable to it to determine whether a rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

To secure a conviction for first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act was premeditated and deliberate. *People v Saunders*, 189 Mich App 494, 496; 473 NW2d 755 (1991). Premeditation may be inferred from surrounding circumstances “including the parties’ prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself.” *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995).

The evidence showed that defendant was angry with Carter and believed that Carter had stolen from him, and that he took a gun to the scene. The medical evidence established that Carter was shot in the back. This evidence was consistent with Kay’s testimony, in which she

¹ Defendant also claims that his counsel was ineffective because he failed to object to Kay’s testimony regarding the domestic dispute. However, his counsel did object, as defendant himself notes when stating that the evidentiary issue was preserved for review. Defendant’s argument that counsel’s failure to “[s]tack MRE’s to achieve the objective of introduction left an incomplete analysis of the reason(s) behind the court’s ruling” is not immediately clear. In any event, defendant fails to make further argument or provide any supporting authority. Therefore, the argument is abandoned. *Matuszak*, 263 Mich App at 59.

recounted how defendant had confessed to the killing, and that he had told a friend prior to the shooting that he was going to kill Carter. Given that the credibility of witnesses is best left to the trier of fact, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), the evidence was sufficient to warrant the denial of the motion for a directed verdict.

We likewise reject defendant's argument that there was insufficient evidence of his intent to support his conviction for second-degree murder. In reviewing the sufficiency of the evidence to support a conviction, this Court must decide whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Patterson*, 428 Mich 502, 524-525; 410 NW2d 733 (1987).

"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). Defendant argues that there was insufficient evidence to prove that he acted with malice in that it failed to show he intended to kill, intended to do great bodily harm, or intended to 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 Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Malice may be inferred from the use of a weapon, and it may be inferred from circumstantial evidence. *People v Roper*, 286 Mich App 77, 85-86; 777 NW2d 483 (2009).

There was sufficient evidence of intent. Defendant shot Carter twice after accusing him of theft. This is sufficient for the jury to find that defendant intended to cause great bodily harm, or at the very least, intended to act "in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, 457 Mich at 464. Defendant later told Kay that he had shot Carter and that he had intended to kill him. The confession also contradicts defendant's argument that no evidence of defendant's state of mind was presented at trial.

With respect to defendant's argument that the trial court erred by restricting the amount of testimony re-read upon a request by the jury, defendant has the responsibility to furnish this Court "with a record to verify the factual basis of any argument upon which reversal [is] predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant has not done so. Moreover, "[w]hen a jury requests that testimony be read back to it, both the reading and the extent of the reading rest within the sound discretion of the trial judge." *People v Sullivan*, 167 Mich App 39, 48; 421 NW2d 551 (1988). On the record before us, there is no indication that the court abused its discretion.

Defendant next contends that misconduct by the prosecutor violated his Sixth and Fourteenth Amendment rights to a fair trial. Defendant did not raise this argument below. "Absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless a defendant demonstrates plain error that affected his substantial rights, i.e., error that was outcome determinative." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

The primary allegation of misconduct is that the prosecutor allowed a number of witnesses to lie on the stand. However, there is no evidence that the witnesses lied, let alone that the prosecutor was aware of it if they had lied. Similarly, defendant cites to no evidence supporting his contention that the prosecution withheld material evidence.

Defendant also argues that the prosecutor improperly vouched for the credibility of a prosecution witness during closing argument by referencing the witness's plea-bargain. Although a prosecutor may not vouch for the credibility of a witness by suggesting that he has special knowledge about the witness's truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), a reference to a plea agreement that requires the witness to testify truthfully does not violate this stricture unless the prosecution uses it to suggest "special knowledge, not known to the jury, that the witness was testifying truthfully." *Id.* The prosecutor did refer to the witness's plea agreement, but only in response to defense insinuations that the witness would have testified differently if the prosecution had not struck a deal with him.²

As to defendant's contention that the prosecutor committed misconduct by telling the jury that defense counsel's role was to confuse the jury, we have no doubt that the prosecution may not question the defense attorney's truthfulness. *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). However, defendant does not point to any specific comment by the prosecutor that crosses this line. In fact, the prosecution's references to defense counsel appear to us to have been consistently respectful.

Finally, defendant argues that the prosecutor impermissibly compared this case with a case of child molestation, citing *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). It is true that the record shows that the prosecutor was contrasting the theft of a camcorder with child molestation, but only to show that defendant did not have sufficient cause to shoot Carter. The prosecutor did not compare defendant to a child molester. Therefore, this does not constitute an attempt to prejudice the jury against defendant.

Defendant's last argument is that the trial court improperly assessed him 10 points under offense variable (OV) 19 for interference with the administration of justice for fleeing and changing his name. When scoring an offense variable, the trial court should not consider anything outside of the sentencing offense unless the language of the offense variable statute specifically provides otherwise. *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009). MCL 777.49 states in pertinent part as follows:

Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice or the rendering of emergency services. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

² Defendant also complained that this witness was shackled while he testified. However, he fails to show how the shackling of a prosecution witness would be damaging to his case.

* * *

(c) The offender otherwise interfered with or attempted to interfere with the administration of justice . . . 10 points

Our Supreme Court has held that OV 19 specifically provides for consideration of conduct after completion of the sentencing offense. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). Defendant's flight and name change interfered with his capture and arrest as justice is not fully administered until the accused is brought to trial. See *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004) (holding that "administration of justice" incorporates more than just actual judicial process). The fact that the investigation could proceed without defendant's presence in Michigan does not mean that the administration of justice was not hampered.

Affirmed.

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