

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHELLE MARIE GOGINS,

Defendant-Appellant.

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UNPUBLISHED

May17, 2007

No. 267371

Van Buren Circuit Court

LC No. 05-014640-FC

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree murder, MCL 750.316, and sentenced to life imprisonment without possibility of parole. Defendant appeals as of right. We affirm.

Defendant first argues that she was denied a fair trial when, on the third day of trial, she was surprised by the prosecutor's introduction of a taped conversation between defendant and her mother. She contends that the evidence was improperly admitted and that admission of the evidence deprived her of the right to effective assistance of counsel.

The decision whether to admit evidence is within a trial court's discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The due process clauses of the United States and Michigan Constitutions protect a defendant against unfair surprise by incriminating evidence. US Const, Am XIV, § 1; Const 1963, art 1, § 17. When the prosecution fails to disclose such evidence, the defendant is entitled to a trial continuance if needed to prevent unfair prejudice. *People v Suchy*, 143 Mich App 136, 141; 371 NW2d 502 (1985). However, absent a motion for a continuance at trial, this Court will not review the issue on appeal. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Here, the prosecutor informed the court that it had only become aware of the existence of the tape that morning. Defense counsel objected to admission of the tape, but did not ask for a continuance. Because defendant failed to move at trial for a continuance, we decline to review this issue. *Kvam, supra*. However, we note that the evidence on the tape was cumulative and, therefore, did not result in unfair prejudice.

Defendant also contends that the admission of the tape deprived her of the right to effective assistance of counsel because defense counsel's ability to defend was inhibited by the

late disclosure. In the alternative, defendant argues that defense counsel's performance was deficient because he did not move for a continuance. Because defendant did not move in the trial court for an evidentiary hearing or a new trial, defendant's claims of ineffective assistance of counsel are unpreserved and this Court's review is for plain error affecting defendant's rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

To establish ineffective assistance of trial counsel, defendant must show: 1) trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; 2) but for trial counsel's errors, there is a reasonable probability that the result of his trial would have been different; and 3) that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* at 302. Effective assistance is presumed, and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant claims that trial counsel was rendered ineffective by the late admission of the tape because he did not have the opportunity to adequately investigate and prepare a defense to the tape. We disagree. Defendant made numerous inculpatory statements to police. In the taped conversation defendant reiterated that she was at the victims' house and told her mother that she was in the wrong place at the wrong time. This evidence was cumulative to her other inculpatory statements and, contrary to defendant's assertion, the admittance of this tape did not "gut" trial counsel's defense. His theory of the case was that defendant was a liar and had made a false confession. After the tape was played, defendant actually testified that she had lied to her mother when making the statements. That is precisely the defense pursued at trial. Thus, defendant has failed to show that she was prejudiced by the admission.

Defendant also argues that defense counsel was ineffective for failing to move for a continuance. In cases where the prosecution makes untimely disclosures of evidence, even if the prosecutor is not at fault for failing to disclose surprise evidence, the defendant is entitled to a trial continuance if needed to prevent unfair prejudice. *Suchy, supra* at 141. Here, defendant has failed to show that she suffered prejudice as a result of admission of the tape. The trial court played the tape for trial counsel and defendant before admitting it to evidence. As was later revealed to the court, the tape contained cumulative evidence. Thus, a continuance was not necessary to stave off prejudice. Trial counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Requesting a continuance would have been futile, as the tape did not contain any evidence that had not already been presented. Defendant has failed to meet her burden of proving that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Toma, supra* at 302-303.

Defendant also asserts that her conviction is against the great weight of the evidence. In bench trial cases, such as this one, a new trial motion is not necessary to preserve the issue for appeal. MCR 7.211(C)(1)(c). We examine the trial court's findings for clear error, giving regard to the court's special opportunity to judge the credibility of witnesses. MCR 2.613(C). Absent exceptional circumstances, issues of credibility should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

Defendant claims that her numerous inconsistent statements and inability to recount basic facts about the murders shows that she was not involved in these crimes. We disagree. Defendant was charged with two counts each of first-degree murder and felony murder. The trial court dismissed the two counts of felony murder at sentencing and sentenced defendant to life imprisonment for the two first-degree murder convictions. A conviction of first-degree murder requires proof beyond a reasonable doubt that the defendant killed the victim and that the killing was “willful, deliberate, and premeditated[.]” MCL 750.316(1)(a); *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). A defendant can be held criminally liable for the principal crime under the theory of accomplice liability if: (1) the defendant intends or is aware that the principal is going to commit a specific criminal act; or (2) the criminal act committed by the principal is an “incidental consequence[ ] which might reasonably be expected to result from the intended wrong.” *People v Robinson*, 475 Mich 1, 9; 715 NW2d 44 (2006), quoting Perkins, *Criminal Law* (3d ed), pp 741-743, 745.

Here, defendant claimed that her associate killed the victims, and no evidence of her direct participation in the killings was presented. Therefore, defendant could be convicted of first-degree murder only if there was evidence that her associate engaged in premeditation and she was an accomplice. MCL 750.316(1)(a); *Robinson, supra*, 475 Mich at 9-11. Some time span between the initial homicidal intent and the ultimate action is necessary to establish premeditation and deliberation, and the interval should be long enough to afford a reasonable person time to take a “second look.” *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). 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. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

According to defendant, she and her associate drove to the victims' house, where the associate proceeded to break into the victims' home and murder them. Defendant and her associate planned to rob the victims during the middle of the night; therefore, it is reasonable to infer that they knew the victims would be at home and that they may encounter them. It is also reasonable to infer that her associate premeditated the murders because he took a knife and a pipe with him to the house. In addition, premeditation can be inferred from the killing methods employed. One victim died of compression to the neck, consistent with manual strangulation or some similar force. The other victim died of an incised neck. Her body was found in the upstairs bedroom, whereas the first victim was found on the main floor of the house. Therefore, one killing occurred before the other, giving the murderer plenty of time to reflect on his intention to kill the second victim.

Alternatively, premeditation can be inferred based on the actions of defendant and her accomplice before and after the murders. According to defendant, she retrieved a gasoline can from the car and her associate used the gasoline to ignite the house. It is reasonable to infer that they had a plan to use the gasoline to start the fire. It is reasonable to infer that they planned to kill the victims and cover up the crime with arson. *Abraham, supra* at 656. Given that defendant and her accomplice took a gasoline can to the victim's home and lit a fire to cover up the murders, that defendant's associate took two dangerous weapons into the victims' home, that he knew or should have known that the victims were home, and that defendant's accomplice sought

out a second victim to kill before lighting the fire, we conclude that the trial court had ample evidence to support a finding of premeditation.

The trial court also had to find that defendant must have known that her accomplice was going to murder the victims or that their deaths were the natural and probable consequence of the robbery they intended to commit. *Robinson, supra* at 9-10. On the facts as iterated above, the trial court could have reasonably inferred that defendant knew of her accomplice's intention to commit murder and, therefore, the trial court did not erroneously hold defendant liable under the accomplice liability theory.

Defendant has failed to meet her burden of showing that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. MCR 2.611(A)(1)(e); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). The trial court had ample evidence to convict the defendant of first-degree murder. Although the evidence consisted solely of defendant's own statements, which at times were contradictory or incomplete, the trial court found enough credible evidence to believe that defendant participated in these murders. Defendant's inculpatory statements were not patently incredible or so inherently implausible they could not be believed, and they were not so seriously impeached that the case is marked by uncertainties and discrepancies. *Lemmon, supra* at 642-644, 647. "Criminal cases are usually fought on the battlefield of witness credibility." *Id.* at 643 n 22. The trier of fact determines credibility. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). It is not unusual for a criminal defendant to offer different versions of the facts to the police, and any question of defendant's credibility was properly left to the trial court.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens