STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME JAMES SMITH,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

Grand Traverse County
No. 181137
LC No. 93-006437-FC

Before: Hood, P.J., and Neff and M. A. Chrzanowski,* JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree premeditated murder, MCL 750.316; MSA 28.548, and sentenced to the mandatory term of life without parole. He appeals as of right and we affirm.

I

Despondent because the decedent, the mother of defendant's infant son, was seeing other men and planned to end her relationship with him, defendant shot her twice at close range, killing her. Defendant had been with the decedent in decedent's truck when he shot her. Numerous witnesses saw defendant leave the scene on foot. Defendant was soon stopped by police officers, who arrested him and found a handgun later identified as the gun used to kill the decedent. Defendant presented a defense of diminished capacity based on severe depression.

II

Defendant first asserts that evidence of the decedent's state of mind was inadmissible hearsay, irrelevant, highly prejudicial and of no probative value, and was thus improperly admitted. Specifically, he challenges evidence that defendant "play[ed]" with the decedent's mind; that the decedent felt that the relationship with defendant was not going well; and that she was worried because she wanted to end the relationship.

* Circuit judge, sitting on the Court of Appeals by assignment.

The decedent's statements, though hearsay, were admissible pursuant to MRE 803(3) because they were relevant to the prosecutor's theory of the case that defendant murdered the decedent because he was extremely distraught at her intent to end their relationship. *People v Fisher*, 449 Mich 441, 450-451; 537 NW2d 577 (1995). There was evidence, including a note from defendant to the decedent expressing distress at the deterioration of the relationship, indicating that the decedent's state of mind was generally known to defendant, and that provided a motive for murdering her. Motive is always relevant in a homicide case. *People v Mihalko*, 306 Mich 356, 361; 10 NW2d 914 (1943).

Moreover, the danger of unfair prejudice did not outweigh the probative value of the evidence. There was no testimony that the decedent feared defendant or that she related anything that might have led the jury to believe that he was a "bad person." *Fisher, supra* at 454. Rather, the evidence was properly admitted to substantiate the prosecutor's theory regarding defendant's motive.

Because there was no error in admitting the evidence of the decedent's state of mind, defendant's related argument that counsel provided ineffective assistance by failing to object is without merit. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

III

Defendant next argues that evidence of his state of mind was improperly admitted because it "was not in close proximity to the charged offense," and that his counsel rendered ineffective assistance in failing to object. A witness testified that, three weeks prior to the murder, defendant had said "I've got to get out of here before I kill [the decedent]." Also admitted into evidence was a letter handwritten by defendant in which he stated, in the present tense, that he still loved the decedent, missed her and was very hurt at not seeing her. The date of the letter was not established.

Defendant relies on *People v DeRushia*, 109 Mich App 419, 423; 311 NW2d 374 (1981), where this Court reversed the defendant's conviction for voluntary manslaughter because of the erroneous admission of the defendant's statement to her sister-in-law, made nine months before she killed her husband, that defendant had once been so angry at him for mistreating her children that she pointed a gun at him as he slept and that she said she "would have killed him." This Court held that the statement was not a statement of "then-existing" mental or emotional condition and was not, therefore, an exception to the rule against hearsay. MRE 803(3). Also, the statement was logically and legally irrelevant because the circumstance that made the defendant angry was the decedent's mistreatment of her children, whereas the reason she killed him was because, moments before the killing, he had been beating her and threatening to kill her.

Here, because both the statement and the letter were in the present tense, they were indicative of defendant's state-of-mind at the time they were made and therefore came within the hearsay exception for present sense impressions. MRE 803(3). The evidence is logically relevant because it refers to defendant's unhappiness at the deterioration of the relationship and the prosecutor's theory of the case was that defendant murdered the decedent because of that unhappiness. With regard to the legal relevance of the evidence, i.e., remoteness, defendant's statement was made only three weeks prior to the shooting. While the date of defendant's letter was not established, it undoubtedly was

written during the latter part of the relationship between defendant and the decedent. See *People v Melvin*, 70 Mich App 138, 144-46; 245 NW2d 178 (1976) (threatening letter, written as long as two and one-half years before the defendant killed his wife, properly admitted).

Finally, the probative value of the evidence was not outweighed by unfair prejudice. Defendant does not assert that the jury's bias, sympathy, anger, or shock were provoked by the challenged evidence, nor is there any objective evidence of this having occurred. *Fisher, supra* at 452.

Because the evidence was admissible, there was no error in defense counsel's failure to object to its admission. Defendant's argument that he was denied the effective assistance of counsel must fail. *Pickens, supra* at 312.

IV

Defendant next asserts that the trial court abused its discretion in denying his motion for change of venue and in conducting a perfunctory voir dire, because this case received extensive pre-trial publicity. We disagree. In response to defendant's initial motion for change of venue, which was made well in advance of trial, the prosecutor requested that the trial court reserve judgment until a later time. There is no indication that the motion was renewed.

All potential jurors were questioned about prior knowledge of the case. Jurors who indicated they had knowledge of details of the case were questioned in chambers. Those who indicated they could not be fair to defendant were excused. Our review of the voir dire record does not substantiate defendant's assertions that there were strong community feelings against him and the pretrial publicity was so extensive that the jurors could not remain impartial, and that the impaneled jury was actually prejudiced and there was an atmosphere surrounding the trial that created a probability of prejudice. *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995).

V

Defendant next asserts the evidence was insufficient to establish premeditation and deliberation. We disagree.

> [T]o convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. Premeditation may be established through evidence of the following factors: (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) (citations omitted).]

Here, the evidence showed that defendant was upset that the decedent was seeing other men and that he feared losing her. He purchased a handgun on the day of the shooting. He asked the decedent to drive him somewhere, thus arranging it so that they would be alone together. He shot the decedent not once, but twice, at close range. He then fled the scene of the shooting.

Defendant had plenty of time to think about his actions, and had ample opportunity to take a "second look." *Id*. When viewed in a light most favorable to the prosecution, the evidence presented at trial was sufficient to permit the jury to conclude that when defendant killed the decedent, he did so with premeditation and deliberation. *Id*.

VI

Defendant also asserts in an in propria persona supplemental brief that the prosecutor offered perjured testimony, that his conviction is invalid because the defense expert was more qualified than the prosecution's expert, and that defendant's appellate counsel rendered ineffective assistance in failing to revise an issue in the manner defendant requested and in failing to recognize that the prosecutor offered perjured testimony. We find no merit in these arguments.

A

Defendant asserts that the prosecution's forensic expert perjured herself when she used the word "invalid" in describing the results of a Minnesota Multiphasic Personality Inventory (MMPI) test taken by defendant after having first described the test as "reliable." Perjury is a willful assertion made under oath and known to be false by the person making it. Black's Law Dictionary (6th ed), 1139. Although a prosecutor may not knowingly present false testimony, *People v Wiese*, 425 Mich 448, 453-454; 389 NW2d 866 (1986), this testimony was not false. When the prosecution's forensic expert described as "invalid" the MMPI administered to defendant, she meant that the test's validity scales indicated that defendant was being untruthful in his responses. She did not mean that the MMPI was an invalid diagnostic tool. Because there was no perjury, there was neither prosecutorial misconduct in the offer of this testimony, nor ineffective assistance of appellate counsel in failing to present this issue on appeal.

B

We reject defendant's argument that his conviction is invalid because defendant's expert witness was "more qualified" than the prosecution's. Both witnesses were qualified as experts by the trial court. The determination whether a witness is qualified to testify as an expert is within the discretion of the trial court. *People v Whitfield*, 425 Mich 116, 123; 388 NW2d 206 (1986). The limitations of an expert's expertise go to the weight the jury will give to the expert's testimony, not to its admissibility. *Id*. at 124. The experience and knowledge of both experts were brought to the attention of the jury. We find no error here.

C

Defendant wanted appellate counsel to argue that "defense counsel was ineffective where he did not present the only witness who would have testified that [defendant] discussed committing suicide on the day of the shooting." We note that no *Ginther*[1] hearing was held; therefore, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Although defendant has appended correspondence between himself and appellate counsel to his second in propria persona supplemental brief on appeal in an effort to substantiate this claim, these documents cannot be reviewed since they are not part of the record. *Isagholian v Transamerica Ins Corp*, 208 Mich App 9, 19; 527 NW2d 13 (1994). We note, however, that these documents indicate that defendant's appellate counsel carefully reviewed the merits of the issue and decided for strategic reasons not to revise it. Counsel noted that there was no mention of this witness during the trial, that the witness' statements conflicted with what was presented at the trial, that this conflict would "take away from the strength of the issue regarding her non-production at trial," and that the witness' credibility would be weak because she had a drinking problem on the date in question. Moreover, other evidence was presented at trial to show that defendant had been suicidal prior to the incident -- his father testified about prior serious suicide attempts, as did the defense expert witness. We conclude that appellate counsel's decision not to include this argument was reasonable and constituted sound strategy.

VII

In a supplemental brief submitted by substitute counsel, defendant raises three additional arguments.

A

First, defendant argues that the trial court erred in failing to instruct the jury pursuant to MCL 768.29a; MSA 28.1052(1), which provides that where a defendant asserts a defense of insanity the judge shall, before testimony is presented on that issue, instruct the jury on the definitions of mental illness, mental retardation, and legal insanity. Although defendant correctly notes that the instruction should be given even absent a request from counsel, in this case defense counsel affirmatively advised the trial court that he did not believe that these instructions were required to be given. Defendant may not allege error on appeal based on something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). A contrary ruling would allow defendant to create an appellate parachute. *Id.*

Notwithstanding this, however, we have reviewed carefully the record in this case and find that the trial court's failure to instruct the jury pursuant to MCL 768.29a; MSA 28.1052(1) does not warrant a reversal of defendant's conviction. Evidence was presented regarding defendant's mental state on the day of the shooting, and the jury was properly instructed on the defense of diminished capacity. Because we are not convinced that the instructional error in this case led to significant confusion regarding a diminished capacity defense, the error was not outcome determinative and does not warrant reversal. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

B

Defendant next argues that he was denied the effective assistance of trial counsel. We disagree. Although we review trial counsel's performance de novo, *Pickens*, *supra* at 302-303, we presume that counsel provided effective assistance and defendant bears a heavy burden to prove otherwise, *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989).

Defendant first argues that trial counsel requested a jury instruction on the defense of accident that eliminated key factual and *mens rea* elements contained in CJI2d 7.1. We disagree, as the record does not support defendant's assertion that the instruction given was submitted by defense counsel. Moreover, although we find the instruction somewhat imperfect, it fairly presented the issue to the jury and sufficiently protected defendant's rights. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992).

Defendant next argues that defense counsel erroneously informed the trial court that the jury instructions required by MCL 768.29a; MSA 28.052(1) were unnecessary. Defendant insists that this mistake of law constitutes per se ineffective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defendant as to deprive him of a fair trial. *Pickens*, *supra* at 302-303. Here, in light of counsel's reasonable strategy decision to withdraw the insanity defense, and the proper instructions given the jury regarding the defense of diminished capacity, we cannot say that defendant was denied a fair trial.

Defendant also argues that counsel was ineffective for failing to object to the prosecutor's closing remarks. This argument must fail because, as discussed below, these remarks were not objectionable. *People v Rone*, 109 Mich App 702; 311 NW2d 835 (1981).

Defendant's remaining challenges to defense counsel's performance are likewise without merit, as our review of the record convinces us that these alleged mistakes and omissions were valid decisions pursuant to a reasonable trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). We will not second-guess these matters.

C

Defendant's final argument is that the prosecutor improperly shifted the burden of proof to defendant in his closing argument. We decline to review this issue because any potential prejudice could have been avoided by a timely curative instruction. *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988). Further, read in context, the prosecutor's remarks did not shift the burden of proof to defendant, *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 570 (1994), and the jury properly was instructed regarding the prosecutor's burden to prove defendant's guilt beyond a reasonable doubt. *Lee, supra* at 254. We find no error here.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).