

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDMUND THURMAN HERNDON,

Defendant-Appellant.

UNPUBLISHED

December 20, 2005

No. 256120

Wexford Circuit Court

LC No. 03-006996-FC

Before: Fitzgerald, P.J., and O’Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317. Defendant was sentenced to sixteen to thirty years’ imprisonment on the charge. We affirm.

Defendant’s conviction resulted from the shooting death of his wife. On the afternoon of the incident, Wexford County 911 received a call from defendant, who reported that he had just shot and killed his wife. Defendant disconnected, and the 911 dispatch called him back and kept him on the phone until officers arrived. Defendant was taken into custody, and the officers on the scene found the victim on the floor with a gunshot wound to the right side of her head. The officers also found a shotgun lying on a table near the victim. Defendant informed the officers that he and the victim were fighting about replacement bathroom fixtures when he decided to get the shotgun and commit suicide. He said the shotgun barrel was too long for him to shoot himself, so he took the gun to the victim. Defendant told the officers that he again attempted to commit suicide and the victim called him stupid and warned him not to threaten her. Defendant also admitted that he thought she might call the police. Defendant stated that he aimed the shotgun at the victim’s head, but he insisted that he did not remember pulling the trigger. However, he admitted to an officer that “he knows he did it.”

Defendant first raises a number of claims of ineffective assistance of counsel, specifically arguing that counsel was ineffective for failing to hold a preliminary examination, failing to request a bill of particulars, not informing defendant of the possibility of taking a polygraph, not bringing a motion to suppress defendant’s statements to police, not objecting to a portion of defendant’s confession under MRE 106, waiving his opening statement, not obtaining a ballistics or psychological expert, failing to effectively cross-examine witnesses, and failing to effectively mount a defense to the charges against defendant. None of defendant’s allegations of ineffective assistance of counsel have merit.

To show ineffective assistance of counsel, a defendant must establish that “(1) counsel’s performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceedings would have been different but for trial counsel’s errors.” *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). A defendant bears the heavy burden of showing that counsel was not effective, because effectiveness of counsel is presumed. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The defendant must also overcome a strong presumption that counsel’s decisions did not constitute sound trial strategy. *Ackerman, supra*.

Defendant argues that trial counsel should have challenged the first-degree murder charge and the lack of evidence of premeditation and deliberation at a preliminary examination rather than waiving it. However, defendant was charged with open murder, and “the elements of premeditation and deliberation are not required elements for which evidence must be presented at a preliminary examination in order to bind a defendant over for trial on open murder charges.” *People v Coddington*, 188 Mich App 584, 593-594; 470 NW2d 478 (1991). Therefore, defendant cannot show that waiver of the preliminary examination would have affected the outcome of the trial. *Ackerman, supra* at 455-456. Likewise, defendant has not advanced how the failure to demand a bill of particulars affected the outcome of the trial. Trial counsel testified at the *Ginther*¹ hearing that he did not file for a bill of particulars in the case because he knew the particulars in the case and it was a relatively simple case. Therefore, defendant cannot show how this strategic decision affected the outcome of the case. Similarly, defendant has not shown how the failure to offer him a polygraph examination affected the trial’s outcome. Defendant did not testify at trial, and evidence of polygraph results would not have been admissible anyway. *People v Barbara*, 400 Mich 352, 359; 255 NW2d 171 (1977).

Defendant next alleges that counsel was ineffective for failing to suppress defendant’s statements to police. However, defendant does not offer any legal reasoning warranting the suppression of his obviously voluntary statements and has abandoned the issue on appeal. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Defendant also argues that trial counsel should have moved to have the context of one of his inculpatory statements admitted into evidence under MRE 106. However, defendant does not address the merits of this issue, either, so it is also abandoned. *Harris, supra*. Defendant also argues that counsel was ineffective for waiving his opening statement. However, defendant did not present any proofs, so he had nothing on which to base an appropriate opening argument, and his counsel made an extensive closing argument, accurately presenting defendant’s theory of the case to the jury. See *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev’d in part on other grounds sub nom *People v Holcomb*, 444 Mich 853 (1993). Therefore, his trial counsel did not err in this regard.

Defendant next argues that counsel was ineffective for failing to call witnesses, specifically a ballistics expert, a psychological expert, and defendant’s daughter. However, defendant has not proffered any admissible, exculpatory evidence from the proposed experts, so he has failed to demonstrate how these experts would have assisted his defense. *People v Dixon*,

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

263 Mich App 393, 398; 688 NW2d 308 (2004). Additionally, trial counsel testified that he did not call defendant's daughter to testify because it would have opened the door to potentially harmful rebuttal testimony from defendant's other adoptive children. This trial strategy was reasonable and not ineffective. *Id.* Defendant finally argues that counsel was ineffective for failing to cross-examine witnesses and present any type of defense to the charges. Trial counsel established a defense based on provocation and a lack of premeditation and was successful in defending against the first-degree murder charge. In this case, this result alone strongly indicates the effectiveness of counsel. Although, in hindsight, counsel may have been able to do more, defendant has not shown any deficiencies that could have substantially changed the course of trial. *Ackerman, supra* at 455.

Defendant next argues that he is entitled to post-trial discovery to test the shotgun. Defendant never suggested that the gun discharged accidentally until his motion for new trial, so defendant is not entitled to post-trial discovery. See *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). Moreover, defendant's statements repeatedly allude to the fact that he lost his temper, pointed the gun directly at his wife, and knew he pulled the trigger. Therefore, we are not persuaded that further discovery would serve any legitimate purpose, especially considering defendant's conviction for second-degree murder.

Defendant argues that there was insufficient evidence to support his conviction of second-degree murder. However, even if the jury believed that defendant lacked the necessary intent to kill his wife, second-degree murder is a general intent crime. *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Here, there was sufficient evidence that, while enraged, defendant stood a few feet away from his wife, pointed a shotgun directly at her head, and fired. It follows that defendant "acted with wanton and wilful disregard of the likelihood that the natural tendency of the defendant's conduct was to cause death or great bodily harm" *Id.* at 470. Nevertheless, defendant also argues that the jury should have found sufficient provocation to reduce the charge to manslaughter. Not only is an argument over bathroom fixtures insufficient provocation for the use of deadly force, the prosecutor provided sufficient evidence on all of the elements of second-degree murder and was not required to disprove defendant's theory of innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant finally argues that his sentence violated his Sixth Amendment right to a jury trial, based on the United States Supreme Court's decision in *Blakely v Washington*, 542 US 296, 303-305; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, a majority of our Supreme Court has held that *Blakely* does not affect Michigan's sentencing system, because any fact-finding by the trial judge only affected defendant's minimum sentence, not his maximum sentence. *People v Claypool*, 470 Mich 715, 730 n 14 (Taylor, J., joined by Markman, J.), at 741 (Cavanagh, J.), and at 744 n 1 (Weaver, J.); 684 NW2d 278 (2004).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly