

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW Q. RICHARDSON,

Defendant-Appellant.

UNPUBLISHED

August 7, 2003

No. 237800

Wayne Circuit Court

LC No. 00-014039

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

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree murder (premeditated), MCL 750.316, and two counts of possession of a firearm during the commission of a felony, MCL 750.227(b). He was sentenced to life imprisonment for each first-degree murder conviction, to be served consecutively to two years' imprisonment for each felony-firearm conviction. He appeals as of right, and we affirm.

Defendant argues that his statement to police was obtained in violation of his right to counsel because he had requested counsel before the confession was elicited, and that his trial counsel was ineffective for failing to seek suppression on this basis. As a general rule, "[a]n accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." *People v Paintman*, 412 Mich 518, 525; 315 NW2d 418 (1982), quoting *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981).

The admission of defendant's statement does not require reversal. Defendant failed to preserve this issue by objecting on this basis below and therefore our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). We find no such error because evidence was presented that specifically rebutted defendant's claim that he had requested counsel before his confession was elicited. At defendant's *Walker*¹ hearing, defendant claimed that he requested an attorney from officers

¹ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

Kinney and Bates before giving his statement. Defense counsel cross-examined both Kinney and Bates regarding whether defendant asked for an attorney. Both denied that defendant made a request for an attorney or to remain silent. Defense counsel then raised the issue again at trial, and again questioned Bates regarding whether defendant made a request for an attorney. Though defendant contends that he requested counsel during conversations with Kinney and Bates prior to his written confession, Kinney and Bates specifically denied that defendant made this request. Given the conflicting evidence, we cannot say that the confession was inadmissible and that defendant has shown a plain error that affected his substantial rights.

Defendant alternatively argues that he was denied the effective assistance of counsel because defense counsel failed to move to suppress his confession on the basis that the statement was made after defendant asked for an attorney. Defendant must show, with regard to counsel's performance "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant has failed to establish the requisite prejudice from defense counsel's decision to abstain from moving to suppress defendant's confession based on defendant's assertion of his right to counsel. Defendant asserted that he told Kinney and Bates that he wanted a lawyer. Kinney and Bates, however, both denied that defendant made a request for an attorney or to remain silent. An additional hearing to suppress defendant's confession on the basis of right to counsel would have produced the same evidence that was presented at the *Walker* hearing. It is unlikely that the court would have suppressed the confession on the basis of that evidence in light of all the testimony offered regarding defendant's confession.² Therefore, defendant has not established ineffective assistance of counsel.

Defendant next argues that the trial court improperly denied his motion for directed verdict because there was insufficient evidence of premeditation. 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 up to the time the motion was made, viewed in the light most favorable to the prosecution, 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 killing was intentional and that the act of killing was accompanied by premeditation and deliberation on the part of the defendant. *People v Tanner*, 255 Mich App 369, 417; 660 NW2d 746 (2003).

² Defendant claimed that he had written out a statement and that the officer then said that the officer had to copy the statement. Defendant contended that the officer then presented him with a statement that defendant believed to be a copy of his statement, which defendant did not read, but signed, and which turned out not to be a copy of his statement.

Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *Id.*, citing *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998). Premeditation may be established through evidence of such factors as the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing, and the defendant's conduct after the victim's death. *Id.*, citing *Plummer, supra*, 229 Mich App 301.

Here, evidence was presented that defendant and Lewis were involved in trafficking drugs. Defendant arrived at the Barbara after he had lost the drugs that had been given to him to sell. An argument ensued between defendant, Lewis and Elena, and defendant grabbed a gun from Lewis. Defendant then shot Elena, first in the arm and then in the head while she was on the floor. Defendant chased Lewis into a bedroom, spoke with him, and then shot him in the head. After the shootings, defendant locked the house, went home, and hid the gun. Viewing the evidence presented by the prosecutor up to the time the motion for directed verdict was made in the light most favorable to the prosecution, a rational trier of fact could be persuaded beyond a reasonable doubt that the “killing[s] [were] intentional and that the act[s] of killing [were] accompanied by premeditation and deliberation on the part of [] defendant.” *Tanner, supra*, 255 Mich App 417.

Defendant next argues that reversal is required because the trial court improperly admitted two crime scene photographs of Elena and Lewis and a photograph of Elena at her prom. We disagree. Since defendant failed to object to the admission of the photographs, we review this unpreserved issue for a plain error affecting defendant’s substantial rights. *Carines, supra* at 761-762.

Probative evidence of guilt is “always prejudicial from a defendant's point of view. The relevant question is whether the evidence was unfairly prejudicial.” *People v Oswald (After Remand)*, 188 Mich App 1, 8; 469 NW2d 306 (1991). Photographs are admissible if substantially necessary or instructive to show material facts or conditions. If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. [*People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994) (some internal citations omitted).]

Crime scene photographs of a victim’s wounds are admissible to establish premeditation. See *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995) (photograph depicting large amount of blood on carpeting from victim’s wounds and some bullet casings near the blood was relevant to premeditation); see also *People v Howard*, 226 Mich App 528, 550; 575 NW2d 16 (1997) (autopsy photographs depicting alleged powder burns on victim’s neck is relevant to the issue of intent). Here, the photographs were admissible to show defendant’s premeditation. The photograph of Elena shows that she was killed when in the corner of the room, and on the floor. The photograph of Lewis depicts that he was shot in the head, which is relevant to establishing premeditation. Moreover, the photographs did not “vividly portray the details of a gruesome or shocking accident or crime,” *Hoffman, supra*, at 18, and are unlikely to have influenced the verdict. While we agree that the picture of Elena at her prom had only the most marginal relevance, we reject the argument that the picture prejudiced defendant by intensifying

the effects of the crime scene photograph. Therefore, defendant has not established a plain error affecting his substantial rights.

Defendant next argues that the prosecutor improperly elicited evidence that defendant was on probation. We disagree. Since defendant did not object to the alleged misconduct of the prosecution, we review this unpreserved issue on appeal for a plain error affecting defendant's substantial rights. *Carines, supra*, at 761-762.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). A finding of prosecutorial misconduct may not be based on a prosecutor's good faith effort to introduce evidence. *Id.*

Given the context in which the disputed testimony was stated, we conclude that the prosecution was attempting a good faith effort to introduce evidence when the disputed statement was made. *Noble, supra*, 238 Mich App 660. The prosecution asked if there was "[a]ny conversation going - - is Que [defendant] saying anything to you during that time?" The witness responded, "[y]eah, he was just saying that his probation officer is going to" Given the context of the question, defendant has failed to establish that the prosecution attempted to elicit anything other than whether the witness had a conversation with defendant. This is further evidenced by the prosecution's next question, "[w]as there - - at that time did you have any conversation with Que regarding Elena and Darnell?" Given that there is no indication that the prosecution attempted to elicit defendant's probationary status from the witness, we find no prosecutorial misconduct. Moreover, defendant was not prejudiced by the statement because the trial court excluded it. Although the jury may have heard the statement, the statement was not admitted into evidence for the jury to consider. Thus, we find no prosecutorial misconduct or trial court error.

Defendant next argues that defense counsel's failure to object to the admission of Elena's prom picture, two gruesome photographs depicting the victims at the crime scene, and the failure to introduce Kinney's testimony that she was not present when defendant confessed constitutes ineffective assistance of counsel. There was no evidentiary hearing or motion for new trial before the trial court and this Court will consider defense counsel's mistakes only to the extent they are apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *LeBlanc, supra*, 465 Mich 579. The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

Defendant must show, with regard to counsel's performance "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . .

resulted from a breakdown in the adversary process that renders the result unreliable.” *LeBlanc, supra*, 465 Mich 578.

Regarding Elena’s prom picture, defendant claims this photograph improperly depicts “the victim at the height of her young womanhood, a sympathetic portrayal of a victim.” We are satisfied that the admission of this photograph did not affect the outcome of the trial. Regarding the two allegedly gruesome photographs, we conclude that objections to the photographs being admitted would have been futile.

Defendant further argues that defense counsel’s failure to introduce Kinney as a witness to impeach Bates’ testimony constitutes ineffective assistance of counsel. Defendant claims that Kinney had previously testified that she was not present when defendant made his confession. Defendant also claims that Bates testified that Kinney was present when defendant made his confession. Defendant argues that Kinney should have been called as a witness to impeach Bates’ trial testimony that Kinney was present during defendant’s confession. However, Kinney was not asked if she was in the room when defendant made an incriminating statement. Thus, Bates’ testimony that Kinney was present during defendant’s confession is not inconsistent with Kinney’s testimony that she had Bates remove defendant from her office. And, since Kinney did not testify that she was not in the room when defendant made incriminating statements, defendant’s claim that she could have impeached Bates’ testimony is unsupported. Therefore, defendant has failed to establish ineffective assistance of counsel.

Defendant last argues that the cumulative effect of a number of errors denied him a fair trial. We disagree. Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of minor errors may add up to error requiring reversal. *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984). “‘Cumulative error,’ properly understood, actually refers to cumulative unfair *prejudice*, and is properly considered in connection with issues of harmless error.” “Only the unfair prejudice of several *actual* errors can be aggregated to satisfy the standards set forth in [*Carines, supra*, 460 Mich 774.]” *Leblanc, supra*, 465 Mich 592 n 12 (emphasis in original). We conclude that because there were no errors that demonstrated unfair prejudice to defendant, there is no cumulative effect of a number of minor errors. Therefore, defendant has failed to establish a plain error affecting his substantial rights.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White