

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK ALBERT YOUNG SMITH,

Defendant-Appellant.

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UNPUBLISHED

March 4, 2010

No. 288519

Wayne Circuit Court

LC No. 08-001135-FC

Before: Hoekstra, P.J., and Stephens and M. J. Kelly, JJ.

PER CURIAM.

Following a jury trial for the homicides of four persons, defendant was convicted of four counts of first-degree premeditated murder, MCL 750.316(1)(a), four counts of first-degree felony murder, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment without parole for each murder conviction, two to five years' imprisonment for the felon-in-possession conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. Because we conclude that defendant was not denied the effective assistance of counsel and that the trial court's instruction on second-degree murder was not plainly erroneous, we affirm defendant's convictions. However, we remand for correction of the judgment of sentence.

I. Ineffective Assistance of Counsel

Defendant claims that defense counsel rendered ineffective assistance of counsel by failing to object to an aiding and abetting jury instruction, by failing to object to a "confession" instruction, and by failing to object to the prosecutor's improper argument. We disagree. Because no evidentiary hearing was held and no findings were made, our review is limited to the facts on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Defendant's ineffective assistance of counsel claims hinge on the premise that defendant's statements to the police during a video recorded interview were admitted for impeachment purposes only. Thus, defendant claims that the prosecutor's reliance on the

statements as substantive evidence was objectionable. Defendant also suggests that his statements to the police were obtained in violation of his *Miranda*<sup>1</sup> rights.

To the extent that defendant suggests his statements were taken in violation of *Miranda*, the record below shows that the trial court never excluded defendant's statements to the police for this reason. Also, there is no indication that defendant raised any questions as to the voluntariness of the statements and no *Walker*<sup>2</sup> hearing was ever held. Moreover, on appeal, defendant has not addressed the merits of the alleged *Miranda* violation. Under these circumstances, we find the claim abandoned. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004). (“The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.”)

At trial, the prosecutor introduced the video recording of defendant's statements to the police in rebuttal after defendant testified. Although the prosecutor, in his cross-examination of defendant, stated that he would introduce defendant's statements as impeachment evidence, there is no indication in the record that the trial court limited the admissibility of defendant's statements for impeachment purposes. In addition, defendant has not provided us with any argument supported by the record that his statements were not admissible as substantive evidence. Defendant's statements, as statements of a party-opponent, were admissible as both impeachment and substantive evidence under MRE 801(d)(2). *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). Furthermore, the video recording was proper rebuttal evidence. See *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003). Because the facts on the record do not establish that defendant's statements were admissible only for the limited purpose of impeachment, any objections by defense counsel to the jury instructions or the prosecutor's closing argument based on a claim that defendant's statements could not be used as substantive evidence would have lacked merit. Counsel was not ineffective for failing to make futile objections. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). Defendant was not denied the effective assistance of counsel.

## II. Jury Instructions

Defendant argues that the trial court failed to provide a complete instruction on the intent element of second-degree murder when it failed to define the term “great bodily harm.” We disagree. We review this unpreserved claim of instructional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court instructed the jury on all the elements of second-degree murder. *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). It did not, however, define the term “great bodily harm.” The term is not defined by statute, and there is no error when a trial court fails to define a term that “is generally familiar to lay persons and is susceptible to ordinary comprehension.” *People v Knapp*, 244 Mich App 361, 377; 624 NW2d 227 (2001) (quotation omitted). Case law has defined “great bodily harm” as a “serious injury of an aggravated

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>2</sup> *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

nature.” See *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Defendant makes no persuasive argument that a lay person’s “ordinary comprehension” of the term “great bodily harm” does not comport with the case law definition. Accordingly, defendant has not shown that the trial court plainly erred when it failed to define the term “great bodily harm.”

Moreover, even if the trial court did err in failing to define the term, the error did not affect defendant’s substantial rights. The jury found defendant guilty of first-degree premeditated murder. Thus, the jury obviously concluded that defendant acted with an actual intent to kill. See *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009) (“The elements of premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation.”).

### III. Double Jeopardy

Defendant contends that his convictions for first-degree premeditated murder and first-degree felony murder for each victim violated double jeopardy. We agree. Where, as here, a defendant is convicted of first-degree premeditated murder and first-degree felony murder for a single homicide, in order to avoid double jeopardy implications, the defendant should receive one conviction for first-degree murder supported by two theories. *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006); *People v Bigelow*, 229 Mich App 218, 220-221; 581 NW2d 744 (1998). We remand for modification of defendant’s judgment of sentence; the judgment shall specify that defendant was convicted of and sentenced on four counts of first-degree murder supported by the two theories of premeditated murder and felony murder. *Bigelow*, 229 Mich App at 220.

### IV. Cumulative Error

Finally, defendant argues that the cumulative effect of defense counsel’s ineffective assistance of counsel and the trial court’s failure to provide an adequate jury instruction on the intent element of second-degree murder denied him a fair trial. Based on our foregoing conclusions regarding the alleged errors, there is no basis to reverse on a “cumulative effect” argument. See *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

Affirmed, but remanded for correction of defendant’s judgment of sentence. We do not retain jurisdiction.

/s/ Joel P. Hoekstra  
/s/ Cynthia Diane Stephens  
/s/ Michael J. Kelly