

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 17, 2013

v

OUSSAMA T. OTHMAN,

Defendant-Appellant.

No. 310811
Wayne Circuit Court
LC No. 11-011863-FC

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of second-degree murder, MCL 750.317. He was sentenced as a second habitual offender,¹ MCL 769.10, to a term of 562 months to 100 years in prison. We affirm.

I

On March 26, 2004, an employee of the city of Detroit discovered the partially burned body of the victim, a suspected prostitute, in a vacant lot on the city's southwest side. According to the Wayne County medical examiner, the victim had been severely beaten in the head, struck more than 20 times with a heavy, narrow object such as a tire iron, crowbar, or lead pipe. The victim's body was subsequently set on fire. The medical examiner determined that the victim had died as a result of blunt force trauma to the head before her body was burned.

Evidence was collected from the scene and an autopsy was conducted. Among other things, a rape kit and oral swab were collected from the victim. The oral swab tested positive for the presence of sperm cells. However, at least initially, the DNA profile developed from the

¹ Defendant initially received notice that he would be subject to enhanced sentencing as a fourth habitual offender, MCL 769.12. However, at the time of sentencing, defense counsel and the prosecutor apparently agreed that defendant was subject to enhanced sentencing as a second habitual offender, MCL 769.10. Indeed, defendant's minimum sentence of 562 months indicates that he was sentenced as a second habitual offender rather than as a fourth habitual offender. See MCL 777.61; see also MCL 777.21(3)(a).

sperm cells was not placed into the national database and there was no third-party DNA sample with which to compare it. The victim's rape kit and oral swab were preserved for future evidentiary use. With no strong suspect and little other physical evidence, the case eventually went cold. The victim's murder was later featured on a television program entitled *The First 48*.

Rahib Othman (Rahib), defendant's brother, met with representatives of the Detroit Police and the United States Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) on March 9 and 10, 2010. Rahib told the authorities that he had been watching *The First 48* with defendant and that defendant had admitted to receiving oral sex from the victim, beating the victim, and setting the victim's body on fire. Rahib's interview with the officers was video recorded and was ultimately played for the jury at defendant's trial. Rahib then met with the officers again in July 2011, at which time he told them that defendant had beaten the victim in his truck and had subsequently moved the victim's body to a vacant lot where he set it on fire. Rahib told the officers that defendant and a friend named Erfan had then cleaned the blood out of the truck.

Lynne Helton, a biological examiner for the Michigan State Police, subsequently received an oral swab that the Detroit Police collected from defendant. Helton ran tests on the oral swab and developed a known DNA profile for defendant. Helton then compared defendant's DNA profile with the DNA profile developed from the sperm cells found in the victim's mouth. Defendant's DNA profile matched the DNA profile of the sperm cells.

At defendant's preliminary examination, Rahib testified that defendant had confessed to receiving oral sex from the victim, hitting the victim in the head, and subsequently setting the victim's body on fire. Following the preliminary examination, defendant was bound over on a charge of open murder, MCL 750.318.

At trial, ATF Special Agent Richard Jury testified that he and Detroit Police Officer Rudy Zuniga met with Rahib on March 9, 2010, regarding certain information that Rahib claimed to have pertaining to a homicide. On the basis of Rahib's statements during the meeting, Agent Jury set up a more detailed interview with Rahib for the following day, March 10, 2010, at which time Jury and Zuniga were joined by Detroit Police Officers Moises Jimenez and Hampton.² Agent Jury had known Rahib, an ATF informant, since about 2007. Jury testified that Rahib appeared to be lucid and sober during the interview of March 10, 2010, and stated that Rahib had no difficulty answering the officers' questions. Jimenez similarly testified that Rahib appeared to be sober and not under the influence of drugs at the time of the interview. Jimenez confirmed that Rahib was not in custody during the interview and was not promised anything in exchange for his statements. During the interview, Rahib told the officers that he had been watching *The First 48* with defendant, that defendant had admitted to receiving oral sex from the victim, and that defendant had confessed to beating the victim and setting her body on fire. As noted previously, a video recording of Rahib's interview was played for the jury.

² Officer Hampton is identified by his last name only throughout the lower court record.

The jury heard the testimony of several laboratory analysts concerning the presence of sperm cells and male DNA on the oral swab collected from the victim. In particular, Helton testified that defendant's DNA profile matched the DNA profile of the sperm cells found in the victim's mouth. Defendant stipulated that his DNA was present on the oral swab collected from the victim.

Samuel Harmon, a superintendent for Adamo Demolition Company, testified that defendant had worked for him between 1999 and 2006. According to Harmon, defendant frequently discussed prostitutes while at work. Harmon testified that, during the late winter or early spring of 2004, defendant told him that "he had a prostitute and that he had a disagreement with her and that he had to rough her up because he didn't get what he wanted."³

At trial, Rahib fully acknowledged that he had implicated defendant in the victim's murder, both during his interview with the authorities on March 10, 2010, and at the preliminary examination. However, Rahib recanted his earlier statements and testified that although defendant had received oral sex from the victim, defendant had never confessed to beating her, killing her, or setting her body on fire. Rahib testified that he had lied at the police interview and at the preliminary examination. When confronted with his previous statements and testimony, Rahib insisted that he had been under the influence of drugs at the time of his police interview on March 10, 2010, and that he had been motivated to falsely implicate his brother by the possibility of reward money and his desire to get out of jail, where he was lodged pursuant to a material witness detainer. Rahib maintained that he had a history of lying and fabricating stories.

Following the prosecution's case-in-chief, defendant moved for a directed verdict of acquittal. The circuit court denied the motion, ruling that the prosecution had presented sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that defendant was guilty of murder.

The defense presented the testimony of Erfan Chami, who testified that he had never helped defendant clean blood out of his truck. The defense also called Mahmoud Othman, another of defendant's brothers, who testified that Rahib had a history of lying, using drugs, and stealing to support his drug addiction.

Pursuant to the open murder statute, MCL 750.318, the circuit court instructed the jury on the elements of both first-degree murder and second-degree murder. The court also instructed the jurors that they could consider only "the evidence that has been properly admitted in this case" and that the statements and arguments of the attorneys were not evidence. As explained previously, the jury convicted defendant of second-degree murder, MCL 750.317.

³ Defendant objected to Harmon's testimony in this regard on the ground that it constituted improper other-acts evidence under MRE 404(b) and was unfairly prejudicial under MRE 403. The circuit court overruled defendant's objection and allowed the testimony. The court determined that Harmon's testimony did not constitute other-acts evidence under MRE 404(b) and was admissible as an admission of a party opponent under MRE 801(d)(2)(A). The court also determined that Harmon's testimony was not unfairly prejudicial.

II

Defendant first argues that the circuit court improperly admitted the testimony of his former supervisor, Samuel Harmon, who testified that defendant had told him that “he had a prostitute and that he had a disagreement with her and that he had to rough her up because he didn’t get what he wanted.” Defendant contends that Harmon’s testimony in this regard constituted inadmissible other-acts evidence under MRE 404(b) and was also unduly prejudicial. We disagree.

As a preliminary matter, we note that Harmon’s testimony concerning defendant’s prior statement certainly qualified as an admission of a party opponent under MRE 801(d)(2)(A). Contrary to defendant’s contention on appeal, “any out-of-court statement made by a defendant which is offered against that defendant is an admission.” *People v Brown*, 120 Mich App 765, 782; 328 NW2d 380 (1982). Because the admission was offered against defendant and was defendant’s own statement, it was not hearsay and was admissible as substantive evidence. MRE 801(d)(2)(A); see also *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

Defendant’s admission to Harmon did not constitute improper other-acts evidence. Defendant claims that because there was “no specific timeframe provided,” his alleged statement to Harmon must have pertained to some other, previous altercation with a prostitute. Accordingly, defendant argues, the statement constituted evidence of other acts or wrongs and was inadmissible under MRE 404(b)(1). We find no merit in defendant’s argument. Contrary to defendant’s claim, Harmon specifically testified that defendant made the challenged statement to him in late winter or early spring of 2004. The victim’s body was discovered on March 26, 2004. Given the proximity in time between the statement and the discovery of the victim’s body, there is simply no reason to believe that defendant was describing a different or previous altercation with a prostitute. The only logical inference arising from the nature and timing of the statement to Harmon is that defendant was describing his assault of the specific victim involved in this case. The challenged statement to Harmon did not constitute evidence of “other crimes, wrongs, or acts” within the meaning of MRE 404(b).⁴

Nor was defendant’s statement to Harmon unfairly prejudicial under MRE 403. Evidence offered against a party is “by its very nature . . . prejudicial, otherwise there would be no point in presenting it.” *People v Fisher*, 449 Mich 441, 451; 537 NW2d 577 (1995). “The pivotal consideration is whether the probative value of the testimony is substantially outweighed by unfair prejudice.” *Id.* Defendant’s statement to Harmon did not inject extraneous considerations such as bias, anger, shock, or sympathy into the merits of the case. See *id.* at 452-453; *People v Goree*, 132 Mich App 693, 702-703; 349 NW2d 220 (1984). And unlike the evidence at issue in *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998), defendant’s

⁴ Moreover, even if the statement to Harmon had constituted evidence of other acts or wrongs, it still would have been admissible under MRE 404(b)(1). A previous assault on a prostitute of the type described would have been sufficiently similar to the beating of the victim in this case “to support an inference that they [we]re manifestations of a common plan, scheme, or system.” *People v Sabin (After Remand)*, 463 Mich 43, 63-64; 614 NW2d 888 (2000).

statement to Harmon was not only “marginally probative.” The challenged statement to Harmon was relevant and highly probative because it implicated defendant in the crime and tended to explain his motives for attacking the victim. We find no error in the admission of the evidence.

III

We reject defendant’s assertion that the photographs of the victim’s body and crime scene were unfairly prejudicial and should have been excluded under MRE 403. “Photographic evidence is generally admissible as long as it is relevant, MRE 401, and not unduly prejudicial, MRE 403.” *People v Gayheart*, 285 Mich App 202, 227; 776 NW2d 330 (2009). Photographs may be used to corroborate the witnesses’ testimony and gruesomeness alone need not cause exclusion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod 450 Mich 1212 (1995).

The photographs were relevant because they fairly depicted the injuries sustained by the victim and the condition in which the victim’s body was discovered. In its attempt to prove that defendant acted with the intent to kill, the prosecution was certainly entitled to show and describe the nature of the victim’s wounds. Evidence of violence and multiple wounds is relevant to prove an intent to kill. *People v Hoffmeister*, 394 Mich 155, 160; 229 NW2d 305 (1975). The photographs were helpful in proving defendant’s intent to kill because they illustrated the nature and extent of the victim’s injuries. *Gayheart*, 285 Mich App at 227. Moreover, we note that under the open murder statute, the prosecution was entitled to introduce evidence of both first-degree premeditated murder and second-degree murder. See MCL 750.318. “[E]vidence that a victim sustained multiple violent blows may support an inference of premeditation and deliberation.” *People v Unger*, 278 Mich App 210, 231; 749 NW2d 272 (2008). Similarly, evidence that the defendant burned the victim’s body after the killing may be probative of premeditation and deliberation. *People v Gonzalez*, 468 Mich 636, 642; 664 NW2d 159 (2003). The photographs helped to establish that the victim had sustained multiple blows to the head and that her body was subsequently burned.

The photographs fairly depicted the nature, extent, and location of the victim’s wounds, as well as the condition in which the victim’s body was discovered, and tended to make it more probable that defendant acted with a premeditated and deliberate intent to kill the victim. See MRE 401. Further, the photographs did not present an enhanced or altered representation of the injuries. *Mills*, 450 Mich at 77. Although the photographs were graphic and unpleasant, we cannot say that their probative value was substantially outweighed by the danger of undue prejudice. *Id.*; see also *Gayheart*, 285 Mich App at 228. The circuit court did not abuse its discretion by admitting the photographs into evidence.⁵

⁵ For this same reason, defense counsel did not render ineffective assistance by failing to object to the admission of the challenged photographs. Because the photographs were admissible, any objection to their admission would have been futile. Defense counsel was not ineffective for failing to make a futile objection to the admission of the photographs. *Unger*, 278 Mich App at 257.

IV

Defendant next argues that there were several instances of prosecutorial misconduct that deprived him of a fair trial. We perceive no misconduct requiring reversal.

We review claims of prosecutorial misconduct on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). “[T]he prosecutor’s comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003).

A

Defendant asserts that the prosecutor committed misconduct by stating during his closing argument that defendant took the victim’s wallet and identification. Defendant asserts that this statement was improper because it was not based on any facts in evidence. It is true that no wallet or identification was found with the victim’s body. At the same time, however, there was absolutely no evidence to establish that the victim ever possessed a wallet or identification before or during her interaction with defendant. A prosecutor may not argue facts that are not in evidence or mischaracterize the evidence at trial. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The prosecutor’s suggestion that defendant stole the victim’s wallet and identification, although possible, was not a reasonable inference arising from the properly admitted evidence. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). There was simply no evidence to establish that *anyone* took these items.

Nevertheless, it cannot be seriously disputed that the prosecutor’s argument in this regard did not affect the outcome of defendant’s trial. The absence of a wallet and identification from the area surrounding the victim’s body was an entirely collateral matter. Further, there was other substantial evidence of defendant’s guilt that was wholly unrelated to the presence or absence of the victim’s wallet and identification. The prosecutor’s isolated, fleeting reference to the victim’s wallet and identification, while improper, did not so deflect the jury’s attention from the evidence presented as to deprive defendant of a fair trial. See *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997).

B

Defendant asserts that the prosecutor again committed misconduct during his closing argument when he questioned Rahib’s claims concerning the volume of his drug use. During his testimony, Rahib claimed that he used hundreds of Vicodin and Soma pills every month. The prosecutor argued that, given the price of Vicodin and Soma pills, this was effectively impossible because it would have cost Rahib tens of thousands of dollars each year to support such a large drug habit. Contrary to defendant’s argument on appeal, Rahib gave testimony regarding the number of pills he used per day and the price he paid for Vicodin, Soma, and Xanax. The prosecutor’s comments in this regard were fairly based on the evidence and the reasonable inferences arising therefrom. *Bahoda*, 448 Mich at 282.

C

Defendant further asserts that the prosecutor committed misconduct by referencing crime statistics during his direct examination of the Wayne County medical examiner. In particular, the prosecutor asked the medical examiner about the number of autopsies performed each year in Wayne County. The witness confirmed that there were thousands of deaths reported in 2004, but that not all of them had required autopsies by the medical examiner's office. Defendant contends that the prosecutor's question improperly alluded to the high number of murders in Wayne County, was designed to shock and inflame the jurors, and appealed to the jurors' sense of civic duty.

It is beyond the scope of proper argument for the prosecutor to appeal to the jurors' sympathies or sense of civic duty. *People v Thomas*, 260 Mich App 450, 455-456; 678 NW2d 631 (2004); *Watson*, 245 Mich App at 591. However, defendant's argument is wholly without merit. The prosecutor never explicitly mentioned the number of murders in Wayne County. Nor did the prosecutor attempt to appeal to the jurors' sympathies or sense of civic duty. Viewed in context, it is clear that the prosecutor was simply asking the witness about the procedure for assigning case numbers to autopsies at the Wayne County medical examiner's office. More specifically, the victim's autopsy was assigned case number 04-03007, and the prosecutor was merely asking what this case number signified. We find no prosecutorial misconduct on these facts.

V

Defendant next argues that the prosecution presented insufficient evidence to prove beyond a reasonable doubt that he committed second-degree murder. We disagree.

We view the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have concluded that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). "All conflicts in the evidence must be resolved in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222.

Second-degree murder "is a common-law offense, defined as the unlawful killing of one human being by another with malice aforethought." *People v Goecke*, 457 Mich 442, 463; 579 NW2d 868 (1998). The elements of second-degree murder are (1) the death of a human being, (2) caused by the defendant, (3) with malice, and (4) without justification or excuse. *Id.* at 463-464; see also MCL 750.317. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *Goecke*, 457 Mich at 464.

The prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant intentionally killed the victim with malice. Defendant essentially confessed his involvement in the murder to his brother, Rahib. Defendant also admitted to his supervisor, Samuel Harmon, that he had assaulted a prostitute in late winter or early spring of 2004. As

explained previously, this statement to Harmon was admissible against defendant as substantive evidence. MRE 801(d)(2)(A); see also *Lundy*, 467 Mich at 257. Lastly, the presence of defendant's sperm cells in the victim's mouth provided strong evidence that defendant was present at the time of the victim's murder and the last person to be with the victim before she died.

We fully acknowledge that, at trial, Rahib recanted his earlier statements, instead insisting that defendant had never admitted to the victim's murder. However, the jury also heard Rahib's earlier statements and preliminary examination testimony in which Rahib had implicated defendant and described defendant's confession. "The jury is 'free to believe or disbelieve, in whole or in part, any of the evidence presented at trial.'" *Unger*, 278 Mich App at 228, quoting *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). The jury was perfectly free to believe Rahib's earlier preliminary examination testimony and statements to the police, but to discredit his recantation testimony at trial. We afford deference to the jury's special opportunity to weigh the evidence and assess the credibility of the witnesses. *Unger*, 278 Mich App at 228-229.

Moreover, the presence of defendant's sperm cells in the victim's mouth established that defendant was with the victim shortly before her death. This forensic evidence established that defendant had the opportunity to kill the victim, and evidence of opportunity is always logically relevant in a prosecution for murder. *Id.* at 224.

Finally, as noted earlier, evidence of violence and multiple wounds is relevant to prove an intent to kill. *Hoffmeister*, 394 Mich at 160. Similarly, "malice may be inferred from the type of weapon used and the manner in which the crime was committed." *People v Stanek*, 61 Mich App 573, 579; 233 NW2d 89 (1975). The evidence established that the victim had been severely beaten, struck in the head more than 20 times with a heavy, narrow object such as a tire iron, crowbar, or lead pipe. Such a brutal beating is certainly sufficient to establish malice, as its natural tendency is to cause great bodily harm or death. *People v Thomas*, 85 Mich App 618, 624; 272 NW2d 157 (1978).

In sum, it was for the jury to weigh the evidence and decide which testimony to believe. *Unger*, 278 Mich App at 222. We conclude that the prosecution presented sufficient evidence to prove beyond a reasonable doubt that defendant killed the victim with malice.⁶

⁶ In his statement of the questions presented, defendant also suggests that the jury's verdict was against the great weight of the evidence. But defendant makes no great-weight argument in the text of his brief on appeal, and we could therefore decline to address the matter. See *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) (noting that "[t]he failure to brief the merits of an allegation of error constitutes an abandonment of the issue"). At any rate, we cannot conclude that the jury's verdict was against the great weight of the evidence. Defendant's arguments focus almost entirely on Rahib's recantation testimony at trial and whether it should have been believed or disbelieved by the jury. "Conflicting testimony, even when impeached to

VI

Lastly, defendant argues that the circuit court erred in the scoring of offense variables (OVs) 5 and 7. We do not agree.

The circuit court assessed 15 points for OV 5, MCL 777.35, which pertains to psychological injury to a member of the victim's family. Pursuant to MCL 777.35(1)(a), the court may assess 15 points if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." The presentence investigation report (PSIR) contained the victim impact statement of the victim's husband. See MCL 780.764. In his statement, the victim's husband explained that his oldest son had died of a heroin overdose following the victim's death and that his other two children had received counseling at school since the victim's death. These uncontested statements were sufficient to establish by a preponderance of the evidence that the victim's two younger children had sustained "serious psychological injury requiring professional treatment."⁷ MCL 777.35(1)(a); see also *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). The circuit court properly assessed 15 points for OV 5.

The circuit court also assessed 50 points for OV 7, MCL 777.37, which pertains to aggravated physical abuse. Pursuant to MCL 777.37(1)(a), the court may assess 50 points if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." There was overwhelming evidence to establish that the victim was treated with excessive brutality in this case. The Wayne County medical examiner testified that the victim had been struck in the head more than 20 times with a heavy, narrow object such as a tire iron, crowbar, or lead pipe. The medical examiner went on to explain that approximately 20 percent of the victim's brain had been beaten out of her skull and that the victim's skull had been "completely shattered similar to an egg shell." The circuit court did not err in its determination that "the number of blows, the location, and circumstances would support [a finding of] excessive brutality." The court properly assessed 50 points for OV 7.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly

some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

⁷ The circuit court may rely on the contents of a defendant's PSIR in determining the existence of sentencing factors and calculating the guidelines. *People v Nix*, 301 Mich App 195, 205 n 3; 836 NW2d 224 (2013). Sentencing factors need only be proven by a preponderance of the evidence. *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010).