

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FRANK ALLEN LITTLE,

Defendant-Appellant.

UNPUBLISHED

October 9, 2001

No. 217298

Monroe Circuit Court

LC No. 97-028583-FC

Before: Bandstra, C.J., and White and Collins, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree premeditated murder, MCL 750.316, and sentenced to life imprisonment without parole. He appeals as of right. We affirm.

I

Defendant first argues that the evidence was insufficient to prove beyond a reasonable doubt that he committed the charged murder with premeditation. We disagree.

In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). With respect to the crime of first-degree premeditated murder, this requires a finding of proof sufficient to establish that the defendant intentionally killed the victim, and that the act of killing was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). After review of the record in this matter, we find that the evidence was sufficient to prove these required elements beyond a reasonable doubt.

Premeditation and deliberation characterize a thought process “undisturbed by hot blood.” *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. *Id.* While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to

afford a reasonable person time to subject the nature of the action response to a “second look.” *Id.* Proof of such premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident, including the parties’ prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself. *Id.*

This case presents a close question. Although there was no evidence of a long-term relationship between defendant and the victim, they were not complete strangers at the time of the stabbing. Evidence at trial showed that on the day before the murder, they entered into an agreement for defendant to rent a room in the victim’s trailer for a week. Further, defendant and the victim spent that evening and the beginning of the next day together at a bar, and there was testimony indicating that defendant made sexual advances toward the victim.

Moreover, while testimony at trial showed that a heated argument preceded the killing, the evidence does not necessarily indicate that the argument was the sort of “affray whose nature would not permit cool and orderly reflection.” *People v Morrin*, 31 Mich App 301, 331; 187 NW2d 434 (1971); see also *People v Tilley*, 405 Mich 38, 44-45; 273 NW2d 471 (1979). There was no evidence in the victim’s trailer that any physical altercation preceded the stabbing. Dennis Greenwood testified that he heard a loud argument coming from the victim’s trailer. When he looked out the window, he saw the victim and a man standing in her doorway. As he walked away from the window, he heard the victim say to the man, “get away from me, get out of here.” The man responded, “I’ll kill you, I’ll kill you, I’ll kill you.” There was evidence that approximately five to ten minutes passed between the time the argument started and the time that the gravely wounded victim arrived at Greenwood’s trailer, which was immediately next door to hers. A rational trier of fact could conclude from this evidence that defendant had sufficient time during the argument or between his threat and his attack, “to subject the nature of his response to a second look.” *Plummer, supra.*

Furthermore, although there was evidence of defendant’s intoxication earlier in the evening, it did not necessarily establish that he did not have the capacity for conscious reflection at the time of the stabbing. Cf. *id.* at 303. Testimony indicated that when the taxi driver picked up defendant and the victim from the bar at approximately 1:30 a.m., defendant was very intoxicated. However, the record shows that the stabbing occurred between 4:30 a.m. and 5:00 a.m., and, except for defendant’s statement to the police that he did not remember any of the events after he returned to the victim’s trailer because he was drunk, there was no evidence that defendant was still highly intoxicated at the time of the stabbing. Further, approximately an hour after the attack, defendant had the presence of mind to call a friend from a pay telephone to ask about the condition of the victim. The jury was instructed on the defense of voluntary intoxication and, apparently, rejected the proposition that defendant’s judgment was so impaired that he could not form the intent to commit first-degree premeditated murder.

On the other hand, there was no evidence that defendant was involved in conduct designed to cover up his actions afterwards, so as to support a finding of premeditation. See, e.g., *Haywood, supra* at 230 (defendant’s attempt to clean up blood after the killing suggests deliberation and premeditation). The prosecution argues that defendant’s choice to flee the scene rather than garner aid for the victim suggests that “the homicide was the product of planning and calculation rather than ‘hot blood.’” However, although such conduct may be indicative of

defendant's post-homicide state of mind, it suggests little or nothing about his thoughts before or during the murder. *People v Hoffmeister*, 394 Mich 155, 161, n 7; 229 NW2d 305 (1975). Moreover, leaving the scene of the crime is no more consistent with a premeditated attack than with a spontaneous attack prompted by "hot blood." Accordingly, we do not find that defendant's conduct demonstrates a lack of remorse that would support a finding of premeditation. Cf. *People v Paquette*, 214 Mich App 336, 342-343; 543 NW2d 342 (1995). Similarly, although the victim was stabbed numerous times, the brutality of the killing does not itself justify an inference of premeditation and deliberation. *Hoffmeister, supra* at 159.

Thus, the evidence of premeditation was certainly not overwhelming. Nonetheless, we must consider the evidence in a light most favorable to the prosecution. Doing so, we cannot conclude that there was no rational basis for the jury's conclusion that the killing was premeditated.

II

We similarly reject defendant's argument that the first-degree premeditated murder conviction was against the great weight of the evidence, and that the trial court therefore erred in failing to grant him a new trial on this basis. We review the denial of a motion for a new trial on great weight of the evidence grounds for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). The question is whether the verdict was manifestly against the clear weight of the evidence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993). "A verdict may be vacated only when it 'does not find reasonable support in the evidence but is more likely to be attributed to causes outside the record, such as passion, prejudice, sympathy or some extraneous influence.'" *Id.*, quoting *Nagi v Detroit United Railway*, 231 Mich 452, 457; 204 NW 126 (1925). As we concluded with respect to Issue I above, our review of the record does not convince us that the jury's finding of premeditation here was without reasonable support in the evidence. Further, there is nothing to suggest that this finding can be attributed to some inappropriate or extraneous influence.

III

Defendant next contends that his state and federal double jeopardy rights were violated when, two months after he was sentenced, the trial court entered an amended judgment of sentence ordering him to pay \$2,000 restitution. We disagree.

The double jeopardy guarantees of the federal and state constitutions protect a defendant from multiple punishments for the same offense. *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). The purpose of the double jeopardy protection against such punishment is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature. *People v Squires*, 240 Mich App 454, 456; 613 NW2d 361 (2000).

At sentencing in this matter, the trial court verified with the probation department that no formal request for restitution had yet been made. The court thus indicated that it was "not going to make any order along those lines at [that] time." However, upon its subsequent receipt of a

statement from the victim's father reflecting funeral costs of \$2,000,¹ the court entered an amended judgment of sentence providing for restitution in that amount.

The record indicates that the trial court did not foreclose an award of restitution at the time of defendant's sentencing.² Moreover, the court's subsequent restitution order did not result in punishment in excess of that intended by the Legislature. Indeed, restitution is required by MCL 780.766(2). Also, because the original sentence imposed was based on the inaccurate and erroneous belief that there was no claim for restitution, the court was authorized to modify this aspect of defendant's sentence. *People v Miles*, 454 Mich 90, 96-98; 559 NW2d 299 (1997). Accordingly, we conclude that defendant's double jeopardy rights were not violated.

IV

Defendant next argues that he was deprived of the effective assistance of counsel at trial. Again, we disagree.

To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must further affirmatively demonstrate that counsel's performance was both objectively unreasonable and so prejudicial as to deprive him of a fair trial, *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). In doing so, defendant must also overcome the presumption that the challenged action constituted sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In challenging his representation at trial, defendant first contends that counsel failed to adequately investigate defense witnesses. However, defendant has failed to show that failure to call these additional witnesses deprived him of a substantial defense. Therefore, this claim fails. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987).

Next, defendant contends that defense counsel failed to sufficiently argue his motion for a directed verdict. However, considering the basis for the trial court's decision in denying the motion, i.e., that notwithstanding evidence of defendant's intoxication the jury could still find premeditation and deliberation, we do not believe that there is a reasonable probability that a more detailed argument would have produced a contrary decision. Therefore, defendant has not shown the requisite prejudice to establish ineffective assistance of counsel.

¹ Defendant does not contest the accuracy of this amount.

² Contrary to defendant's assertion on appeal, the trial court sufficiently articulated where it had reserved the question of restitution by referring to the sentencing transcript when addressing this issue in its post-sentencing ruling.

Defendant also argues that counsel was ineffective because he failed to move to suppress defendant's statements to the police. In doing so, defendant asserts that these statements were involuntary because he was intoxicated. However, defendant cites no authority supporting a conclusion that suppression was warranted. Moreover, even if defendant was intoxicated, that fact alone is not dispositive of the issue of voluntariness. *People v Leighty*, 161 Mich App 565, 571; 411 NW2d 778 (1987). Under these circumstances, defendant has failed to show that defense counsel erred in this regard.

Defendant next argues that counsel erred in failing to object to the admission of several autopsy photographs at trial. In doing so, defendant asserts that these photographs were irrelevant to the charge against him and that, given their gruesome nature, their admission was highly prejudicial. We do not agree.

Although photographs that are calculated merely to arouse the sympathies or prejudices of the jury should not be admitted, *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod 450 Mich 1212 (1995), if a photograph is otherwise admissible for a proper purpose it is not rendered inadmissible merely because it brings vividly to the jurors the details of a gruesome or shocking accident or crime. *Id.*

Here, the disputed photographs were properly admissible to illustrate the testimony of the medical examiner regarding the nature, extent, and location of the victim's wounds. See *People v Coddington*, 188 Mich App 584, 598-599; 470 NW2d 478 (1991); *People v Fuzi*, 116 Mich App 277, 281-282; 323 NW2d 358 (1982). Moreover, as found by the trial court in denying defendant's motion for a new trial, the photographs were not so graphic as to prejudice the jury and to deter them from the proper exercise of their fact-finding role. Accordingly, because these photographs were properly admissible defendant has failed to establish prejudice requiring reversal. Counsel was not required to make frivolous or meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant further argues that defense counsel erred by failing to object to hearsay testimony offered by the victim's neighbor. However, contrary to defendant's assertion, the challenged statements qualified for admission as an excited utterance under MRE 803(2), and there was thus no basis for a proper objection. *Torres, supra.*

Finally, defendant argues that defense counsel was ineffective because he failed to impeach prosecution witness Garcia with his prior inconsistent statements concerning whether he had in fact overheard the victim arguing with someone on the night of her death. However, given Greenwood's testimony concerning the argument, any error in failing to raise this inconsistency was harmless, as there is little probability that, but for this error, the result of the proceedings would have been different.

V

Defendant next argues that the trial court's instructions regarding the inferences to be made from the use of a dangerous weapon were improper. Because defendant did not preserve this instructional issue by objecting below, appellate relief is precluded absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774;

597 NW2d 130 (1999); see also *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000).

Defendant contends that the trial court's instructions relieved the prosecutor of the burden of proving defendant's intent to kill, and shifted the burden of proof to defendant. We disagree. The court instructed the jury in accordance CJI2d 16.21. Unlike the instructions disapproved of in *People v Martin*, 392 Mich 553, 560-561; 221 NW2d 336 (1974), the instructions here did not leave the jury with no alternative other than to find that defendant intended to kill; the court merely informed the jury that it *may* make certain inferences. There was no shifting of the burden of proof. Indeed, the court instructed the jury numerous times that the prosecutor had the burden of proof. Accordingly, plain instructional error has not been shown.

VI

Finally, we reject defendant's contention that the trial court erred in denying his motion for a new trial. In seeking a new trial below, defendant advanced those same arguments as presented to this Court on appeal. As discussed above, we find these arguments to be without merit sufficient to warrant a disposition different from that reached by the trial court.

We affirm.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Jeffrey G. Collins