

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFONSO FRANCISCO MARTINEZ,

Defendant-Appellant.

UNPUBLISHED

April 19, 2005

No. 249416

Saginaw Circuit Court

LC No. 01-020907-FC

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals of right his jury trial conviction of first-degree premeditated murder, MCL 750.316(1)(a). The trial court sentenced him to life in prison without parole. We affirm.

Defendant and the victim were having marital problems, and defendant believed that the victim was having an affair. The victim died early on October 9, 2001, as the result of blunt force trauma to the head and neck, consistent with beating and choking. The victim's body was later found in the trunk of her car, which was parked within walking distance of their house in Saginaw. Defendant could not be located, but returned to Saginaw four days after the victim was killed. Relatives identified boots, bloody jeans, and a t-shirt that were found in a neighbor's trash can as those worn by defendant on the evening of October 8, 2001. Relatives also testified that they had received telephone calls from defendant, who threatened to kill the victim and the men with whom he believed she was having an affair.

I. Request for a Continuance

Defendant argues that the trial court erred in denying his request for a second continuance before the start of trial. He maintains that a continuance was necessary to enable him to investigate recent allegations that some of his children may have witnessed him assaulting the victim on the night she was killed, and allegations that he committed other violent acts toward the victim before her death.

The preliminary examination was conducted on November 30, 2001. Approximately eighteen months later, trial was scheduled to begin on April 1, 2003. Throughout this time, the victim's three youngest children maintained that they were asleep when the victim was beaten and killed. Three days before trial was due to begin, however, the prosecutor received information that defendant's son had told others that he woke up and saw defendant strangle the

victim. In addition, one of defendant's daughters told a cousin that she was awake during the assault. At the same time, the prosecutor learned of information about defendant's past abusive behavior toward the victim from Teresa Valasquez, with whom the victim and the children had lived for a period shortly before she was killed.

The prosecutor learned of this new evidence on the Friday before trial. The prosecutor interviewed Valasquez, notified defense counsel, and provided him a transcript of the interview. On April 1, 2003, after being informed of this new evidence, defense counsel requested a continuance so that he could interview and observe the children. Counsel also acknowledged that the prosecutor had provided the new information from Valasquez and wanted to review the transcript of her interview. Counsel stated that he anticipated he could begin selecting a jury the next morning. The trial court agreed to continue the matter until the next day.

On April 2, 2003, defense counsel stated that he had met with the children. He then requested a second continuance in order to meet with the children's therapist and to further investigate Valasquez's proposed testimony. Defense counsel also complained that he had not received notice of the intent to offer the prior acts testimony and moved that it be excluded. The prosecutor responded that he had provided notice of the substance of prior acts testimony from Susan Rocha, the victim's mother, and provided counsel with a copy of Valasquez's recent statement concerning defendant's abusive conduct toward the victim on the day before she was killed. The trial court denied his request for another continuance.

Defendant contends that the trial court abused its discretion in denying his second request for a continuance. We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002). In determining whether a trial court abused its discretion in denying a criminal defendant's request for a continuance, we consider the following factors: (1) whether the defendant was asserting a constitutional right; (2) whether the defendant had a legitimate reason for asserting that right; (3) whether the defendant was negligent in asserting it; (4) whether there were prior adjournments of trial at the defendant's request; and (5) whether the defendant has demonstrated prejudice from the trial court's abuse of discretion. *People v Pena*, 224 Mich App 650, 660-661; 569 NW2d 871 (1997), modified in part on other grounds 457 Mich 885 (1998).

In the instant case, the trial court granted defendant's initial request for a continuance. Defendant has failed to demonstrate that a second continuance was necessary or that he was prejudiced by the trial court's decision. Defense counsel requested a second continuance so that he could interview the therapist of defendant's son before he testified. However, the child was not scheduled to testify until April 4, thereby giving counsel adequate time to interview the therapist before the child testified. Further, the prosecutor indicated that counsel could renew his request for a continuance after interviewing the therapist if he still believed that a continuance was necessary. Defense counsel never moved for a further continuance. Under these circumstances, defendant has not shown that the trial court abused its discretion in denying his request for a continuance.

We also reject defendant's claim that he was prejudiced by the trial court's decision. Although defendant maintains that he was unable to investigate the prior acts evidence and the children's testimony, he does not explain how he would have proceeded differently had a

continuance been granted. Defendant also disregards the fact that he had the opportunity to investigate the evidence during the two-week trial.

Defendant further asserts that he was prejudiced by the late disclosure of the prior acts evidence, but he has not demonstrated that he is entitled to relief. Defendant acknowledged that the prosecutor did not purposefully withhold the newly discovered evidence, and the trial court correctly found that the evidence was admissible under MRE 404(b) to show both malice and motive. *People v Morris*, 139 Mich App 550, 557; 362 NW2d 830 (1984); *People v McClure*, 29 Mich App 361, 370; 185 NW2d 426 (1971). Indeed, even when the notice requirement of MRE 404(b) is not satisfied, reversal is not required where, as here, the evidence was relevant and admissible under MRE 404(b), and the defendant had actual notice of the evidence sufficient to prepare a defense. *People v Hawkins*, 245 Mich App 439, 453-456; 628 NW2d 105 (2001). Moreover, the evidence concerned defendant's past abusive conduct toward the victim, so defendant cannot claim that the evidence surprised him. We therefore reject this claim of error.

II. Sufficiency of the Evidence

Defendant next argues that the prosecution failed to present sufficient evidence to prove that he killed the victim or that the killing was committed with premeditation and deliberation. We review de novo challenges to the sufficiency of the evidence in criminal trials to determine whether, in a light most favorable to the prosecutor, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Randolph*, 466 Mich 532, 572; 648 NW2d 164 (2002). Circumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime, including the elements of premeditation and deliberation. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant's son testified that he witnessed defendant choke the victim and place her in the trunk of her car, and the prosecutor presented evidence of a strained marital relationship between defendant and the victim shortly before the victim was killed. Several relatives testified that defendant questioned them about the victim's alleged infidelity and threatened to kill her. Additionally, a jailhouse informant testified that defendant admitted killing the victim. Defendant was also linked to clothes and other items that were stained with the victim's blood. Furthermore, evidence was presented that, immediately after the victim was killed, attempts were made to clean up the victim's blood in the house and to dispose of the victim's body and defendant's clothes, and of defendant's subsequent interstate flight. Flight, although not direct evidence of guilt, is "admissible to support an inference of 'consciousness of guilt.'" *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). According to the forensic examiner, the victim received multiple blows to the head and was strangled, circumstances that support an inference of premeditation. *People v Johnson*, 460 Mich 720, 733; 597 NW2d 73 (1999). Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant killed the victim with premeditation and deliberation. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

III. Request to Recall a Witness

Defendant next argues that the trial court deprived him of his constitutional right to present a defense when it denied his request to recall his son. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). We also review a trial court's decision to limit cross-examination for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 221; 646 NW2d 875 (2002).

We conclude that the trial court did not abuse its discretion. The record discloses that, although defendant wished to recall his son, defense counsel did not believe it was necessary. Further, the trial court reviewed defendant's list of questions that he wanted to ask his son and found that they did not raise anything new, and many dealt with wholly collateral matters. None of the questions concerned matters that could not have been explored more fully during defense counsel's initial cross-examination of the child. Furthermore, his son was a seven-year-old child whose guardian ad litem informed the trial court that he had been traumatized by the experience of testifying and would be further traumatized if he were recalled. The trial court's concern for the vulnerability of the witness was a proper consideration. *Maryland v Craig*, 497 US 836, 855-856; 110 S Ct 3157; 111 L Ed 2d 666 (1990); *People v Pesquera*, 244 Mich App 305, 310; 625 NW2d 407 (2001).

IV. Admission of Autopsy Photographs

Defendant contends that the trial court abused its discretion in admitting photographs of the victim's autopsy. The decision to admit or exclude photographs is within the sole discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). The proper inquiry is whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.*; MRE 403.

The autopsy photographs were referenced during the forensic examiner's testimony and were instructive in depicting the nature and extent of the victim's injuries. See *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). They were explained in a clinical manner, without undue sensationalism. Moreover, defendant was charged with first-degree premeditated murder and, therefore, his intent was directly at issue in the case. Evidence of injury is admissible to show intent to kill. *Mills, supra* at 71. The autopsy photographs were probative of defendant's intent because they illustrated the nature and extent of the victim's injuries. *Id.* The photographs were also probative of whether the victim was struck repeatedly and strangled and, therefore, relevant to show that the killing was premeditated, and whether defendant had time to take a "second look" at his actions. See *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). We presume that "today's jurors, inured as they are to the carnage of war, television and motion pictures, are capable of rationally viewing, when necessary, a photograph showing . . . the body of a victim in the condition . . . in which found." *Mills, supra* at 77 n 11, quoting *People v Turner*, 17 Mich App 123, 132; 169 NW2d 330 (1969). For these reasons, the trial court did not abuse its discretion in admitting the photographs at trial.

V. Prosecutorial Misconduct

Defendant next argues that misconduct by the prosecutor deprived him of a fair trial. We generally review claims of prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Because defense counsel failed to object to the prosecutor's conduct at trial, we

review these claims for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Ackerman, supra* at 448. To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003), citing *Carines, supra* at 763.

For the most part, defendant's allegations of misconduct involve claims previously discussed in this opinion, which defendant now recasts under the label of prosecutorial misconduct. Defendant maintains that the prosecutor acted improperly by introducing the victim's autopsy photographs, by presenting the prior acts testimony of Rocha and Valasquez, by opposing defense counsel's request for a continuance, and by opposing defendant's request to recall his son as a witness. We find no merit to these claims. A prosecutor's good-faith efforts to introduce evidence cannot be the basis of prosecutorial misconduct. *Ackerman, supra* at 448. Defendant has presented nothing to suggest that the prosecutor acted in bad faith by seeking to introduce relevant evidence. Nor has defendant shown that the prosecutor withheld the newly revealed other acts evidence. Further, having failed to show that the trial court abused its discretion by denying the request for a continuance, defendant cannot show that the prosecutor's opposition to that request was improper.

Defendant further argues that the prosecutor acted improperly by presenting the testimony of a jailhouse informant, but he merely claims that the testimony was not consistent with testimony from other sources. Defendant has failed to show or explain how the prosecutor's presentation of the informant's testimony was improper. Defendant also claims that the prosecutor "cleverly parlayed" the testimony of the children's therapist, who was called by the defense, into support for the testimony of defendant's son. Defendant has failed to show or explain how this questioning constituted improper vouching for his son's credibility, or that it was otherwise improper. An appellant may not simply announce a position or assert an error and leave it to this Court to "discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Defendant contends that the prosecutor referred to facts not in evidence during his closing argument when he asserted that the murder was not a robbery because the victim's jewelry was not disturbed. A prosecutor may not argue the effect of testimony that was not entered into evidence at trial. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Because the prosecutor questioned the forensic examiner about the autopsy photographs and specifically mentioned the jewelry on the victim, this argument is meritless.

Defendant also claims that the prosecutor impermissibly vouched for the credibility of witnesses and denigrated defense counsel. In the instant case, however, the prosecutor never claimed to have personal information or "special knowledge" of which the jury was unaware. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). A prosecutor may argue from the evidence that a witness is worthy or not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A prosecutor is not permitted to personally attack defense counsel or the credibility of defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW 2d 354 (1996).

In this case, the prosecutor did not suggest that defense counsel was intentionally attempting to mislead the jury, but merely was responding to defense counsel's arguments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). The court instructed the jury that the lawyers' statements and arguments are not evidence, and jurors are presumed to follow the trial court's instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

VI. Cumulative Error

Lastly, defendant claims that the cumulative effect of these errors denied him a fair trial. We review a cumulative-error argument to determine if the combination of alleged errors denied the defendant a fair trial. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003). Only the unfair prejudice of several actual errors can be aggregated to satisfy the standards set forth in *Carines*, *supra* at 774. *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002). Because we have determined, *supra*, that defendant was not prejudiced by any errors, "this issue is without merit." *People v Werner*, 254 Mich App 528, 544; 659 NW2d 688 (2002).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Hilda R. Gage