

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK ALAN VERCRUYSSSE,

Defendant-Appellant.

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UNPUBLISHED  
February 25, 2014

No. 311884  
Eaton Circuit Court  
LC No. 11-020386-FC

Before: SHAPIRO, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for first-degree premeditated murder, MCL 750.316(1)(a), and receiving and concealing a stolen firearm, MCL 750.535b. Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to life in prison without the possibility of parole for first-degree murder and 20 to 30 years in prison for receiving and concealing a stolen firearm. The court ordered defendant's sentences to be served concurrently to each other but consecutive to another sentence for which defendant was on parole at the time of the crimes. We affirm.

On June 24, 2011, the 83-year-old victim told his son that he was going to visit defendant so defendant could pay him \$1,000 of the \$2,000 that he was owed. The victim never returned home and the police quickly identified defendant as a person of interest. Defendant admitted that he was with the victim for a short period of time, but told the police that he was unaware of the victim's present whereabouts. Approximately two weeks later, defendant's sister and brother-in-law observed that defendant apparently placed personal property bearing the victim's name in the brother-in-law's trailer. Defendant's brother-in-law immediately contacted the police, who promptly obtained a warrant and searched the trailer on July 16, 2011. The victim was found rolled up in a carpet inside the trailer. His feet were tied together with a coaxial cable and his head was covered with a plastic bag. A couch with blood stains was also discovered.

Detectives interviewed defendant at about 10:00 p.m. on July 16, 2011. During the interview, defendant explained that the victim drove to his house to discuss money. While in the garage, he and the victim started arguing. The victim unexpectedly pushed defendant, and defendant responded by pushing the victim to the ground which apparently knocked him unconscious. Defendant then exited the garage. Defendant stated that when he reentered the garage, the victim surprised him and hit him with a piece of metal that defendant thought might

have been a clock. Defendant said he instinctually hit the victim with his hand and the victim “went down” and appeared to be dead. Defendant then went inside his house for at least 30 minutes. When he reentered the garage, he choked the victim with a cord, “making sure he was dead.” Defendant said he placed a bag over the victim’s head so he would not have to see it.

The next day, the police searched the garage and seized numerous items. The searching officers suspended the search during the afternoon while defendant performed a reenactment of the crime for other officers. During the reenactment, defendant did not identify the metal object with which he was allegedly struck. When the reenactment was complete, the officers seized any remaining items that appeared to have evidentiary value. One of the items seized was a brass light fixture, which officers believed to be the object best resembling a clock. At trial, defendant highlighted the prosecution’s failure to test the light fixture for his DNA or the victim’s fingerprints. Defendant argued that these tests would have corroborated his claim that he killed the victim only after he was assaulted with the light fixture. The prosecution observed that defendant never identified the light fixture during the reenactment, which suggested that he was not truthful about being hit with a metal object. In response, defendant contended that the fixture was removed from the garage by the police when they initially gathered evidence, before the reenactment.

The trial court instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, and self-defense. The jury ultimately found defendant guilty of first-degree murder and receiving and concealing a stolen firearm. Defendant subsequently moved for a directed verdict of acquittal, or alternatively a new trial. Defendant argued that the prosecution presented incorrect facts to the jury when it contended that the light fixture was present during the reenactment. Additionally, defendant argued that his due-process rights were violated when the light fixture was not tested for DNA and fingerprints before trial. The trial court denied the motion because defendant failed to show suppression of evidence, intentional misconduct, or bad faith. Further, the trial court noted that the evidence against defendant was overwhelming.

Defendant first argues that the prosecution committed misconduct by relying on false testimony from the officers that the light fixture was not seized until after the reenactment. We review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130.

In *People v Gratsch*, 299 Mich App 604; 831 NW2d 462, lv den in part and vacated in part on other grounds 838 NW2d 686 (2013), this Court stated as follows:

A defendant’s right to due process guaranteed by the Fourteenth Amendment is violated when there is any reasonable likelihood that a conviction was obtained by the knowing use of perjured testimony. Accordingly, a prosecutor has an obligation to correct perjured testimony that relates to the facts of the case or a witness’s credibility. When a conviction is obtained through the knowing use of perjured testimony, a new trial is required only if the tainted evidence is material to the defendant’s guilt or punishment. So whether a new trial is warranted depends on the effect the misconduct had on the trial. The entire focus of [the] analysis must be on the fairness of the trial, not on the prosecutor’s

or the court's culpability. [*Id.* at 619-620 (citations and internal quotation marks omitted).]

Facts known by the chief investigative officer are imputed to the prosecution. See *People v Lester*, 232 Mich App 262, 279-280; 591 NW2d 267 (1998).

Defendant overstates the legal relevance of the light fixture. Defendant argues that if the prosecution did not falsely imply that he was lying about being struck by an unidentified metal object, then he would have had a significantly stronger argument for voluntary manslaughter or self-defense. Even assuming that defendant was able to submit undisputed evidence to the jury that he was unexpectedly hit by the victim with the light fixture, this fact would have no bearing on the outcome of the case. When the defendant is the initial aggressor in a fatal confrontation, the victim's response cannot be "legally sufficient provocation" for the purposes of voluntary manslaughter. See *People v Townes*, 391 Mich 578, 592-593; 218 NW2d 136 (1974). Here, the facts show that defendant first used deadly force when he pushed the victim to the ground and apparently knocked him unconscious. It was therefore a legally reasonable response for the victim to strike defendant in the head when he reentered the garage, as he was acting in lawful self-defense. *Id.* at 592. Accordingly, defendant is unable to claim on appeal that the victim's alleged action with the light fixture constituted legally adequate provocation. For the same reason, defendant is also unable to claim that he acted in self-defense. See *People v Reese*, 491 Mich 127, 158; 815 NW2d 85 (2012) (the aggressor in a confrontation cannot use self-defense as a complete justification to homicide).

Further, to warrant a conviction for voluntary manslaughter, "there cannot be a lapse of time during which a reasonable person could control his passions." *People v McMullan*, 284 Mich App 149, 156; 771 NW2d 810 (2009). Defendant admitted to police that at least a 30-minute period elapsed before he reentered the garage to choke and suffocate the victim. The reflection period of at least 30 minutes in the house was more than sufficient for a reasonable person to control his or her passions. See *People v Pouncey*, 437 Mich 382, 385, 392; 471 NW2d 346 (1991).

Defendant also argues that his due-process rights were violated when the police failed to test the light fixture for his DNA and the victim's fingerprints. Defendant raises the following alternative due-process arguments: (1) the government intentionally or in bad faith suppressed evidence favorable to his case; (2) the government was required to conduct DNA and fingerprint tests on the light fixture; (3) the failure to conduct DNA and fingerprint tests violated his right to present a complete defense; and (4) the government failed to preserve potentially exculpatory evidence in violation of *Arizona v Youngblood*, 488 US 51; 109 S Ct 333; 102 L Ed 2d 281 (1988). We review this unpreserved issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763.

Defendant's first argument is meritless. "Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). "Nor does due process require that the prosecution seek and find exculpatory evidence." *Id.* Here, defendant has not identified any instance of suppressed evidence, as the light fixture itself was admitted at trial. In addition, defendant has not identified any intentional

misconduct or bad faith because there is no dispute that the light fixture was available for testing, had defendant actually sought testing before trial. See *People v Johnson*, 113 Mich App 650, 656; 318 NW2d 525 (1982).

With respect to defendant's second argument, the government has no affirmative obligation to test evidence on behalf of a defendant. *People v Anstey*, 476 Mich 436, 461; 719 NW2d 579 (2006). Moreover, defendant had an avenue for testing the light fixture before trial. MCR 6.201(A)(6) provides that a trial court "may order that a party be given the opportunity to test without destruction any tangible physical evidence." And MCL 775.15 provides that a trial court may appoint an expert for an indigent defendant when necessary. *People v Tanner* 469 Mich 437, 442-443; 671 NW2d 728 (2003); *People v Leonard*, 224 Mich App 569, 580-582; 569 NW2d 663 (1997). Defendant therefore had an opportunity to test the light fixture before trial on his own behalf.

Defendant's third argument is meritless as well. Because the police have no constitutional duty to develop potentially exculpatory evidence, failure to perform a test does not violate a defendant's right to present a defense. *Anstey*, 476 Mich at 461.

Defendant's fourth argument fails because the allegedly exculpatory evidence that he sought was not the light fixture itself, which was unquestionably admitted at trial. Rather, the evidence that he sought was a DNA test and a fingerprint test of the light fixture. There is no dispute that these tests were never conducted. "For due[-]process purposes, there is a crucial distinction between failing to disclose evidence that has been developed and failing to develop evidence in the first instance." *Id.* When a defendant claims that his due-process rights were violated because a scientific analysis was not conducted, *Youngblood* is inapplicable. *Id.*

Defendant next argues that the evidence was insufficient to prove first-degree murder beyond a reasonable doubt. A claim of insufficient evidence is reviewed de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

"The elements of first-degree murder are (1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Premeditation means "to think about beforehand," and deliberation means "to measure and evaluate the major facets of a choice or problem." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation and deliberation "may be inferred from the circumstances surrounding the killing." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Moreover, the identity of the defendant as the perpetrator of the crime is a fact that must be proven beyond a reasonable doubt. See *People v Davis*, 241 Mich App 697, 699-700; 617 NW2d 381 (2000).

Defendant does not argue that the evidence was insufficient to prove intent to kill, premeditation, deliberation, or his identity as the perpetrator of the homicide. Defendant only

argues that the evidence was insufficient to prove that the victim died as a result of strangulation or suffocation, or both. Proof that the victim died as a result of strangulation or suffocation is not an element of first-degree murder. However, the jury instructions indicated that death by strangulation or suffocation was a fact that the prosecution had to prove beyond a reasonable doubt.

An expert witness opined that the victim died by strangulation or suffocation, or both. She explained that the cartilage fractures in the victim's neck were consistent with strangulation, which was plainly consistent with the fact that the victim's body was discovered with cords around his neck. The victim's mouth was gagged and two plastic bags covered his head when the body was discovered. While the prosecution was not required to affirmatively disprove the theory that the victim died immediately from the head injury, see *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000), the expert explained that the relatively small cut found on the victim's head strongly suggested that the head injury was not sufficient to cause immediate death. The expert also explained that the blood stains on the couch indicated that the victim was alive when defendant placed the cords around his neck and plastic bags over his head. Moreover, defendant told police that he strangled and suffocated the victim to "finish the job." Accordingly, the evidence was sufficient to prove beyond a reasonable doubt that the victim died by strangulation or suffocation.

Defendant also argues that the trial court should have ordered DNA and fingerprint testing of the light fixture and considered the results of those tests before denying his motion for a new trial. Defendant argues that if the tests revealed the presence of his DNA and the victim's fingerprints, then a new trial would be warranted. See *People v Webb*, 493 Mich 904, 904; 823 NW2d 283 (2012). We review for an abuse of discretion a trial court's decision to deny a motion for a new trial. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

"A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal, or because it believes that the verdict has resulted in a miscarriage of justice." *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999), citing MCR 6.431(B). For the reasons explained above, favorable test results would not support reversal on appeal because the evidence against defendant was overwhelming and whether he was hit with the light fixture has no legal relevance. Thus, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Finally, we note that a defendant has no due-process right to post-conviction DNA testing, absent a possible showing of actual innocence. See *District Attorney's Office for the Third Judicial Circuit v Osborne*, 557 US 52, 69-72; 129 S Ct 2308; 174 L Ed 2d 38 (2009). In this case, there is no contention that defendant is actually innocent of the homicide.

Affirmed.

/s/ Douglas B. Shapiro  
/s/ Jane E. Markey  
/s/ Cynthia Diane Stephens