STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY ROBERT BRAKE,

Defendant-Appellant.

UNPUBLISHED
November 23, 2010

No. 293141
Ottawa Circuit Court
LC No. 08-033162-FC

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of four counts of first-degree premeditated murder, MCL 750.316(1)(a), and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life without parole for each of the four counts of first-degree premeditated murder and two years' imprisonment for each of the three counts of felony-firearm, with credit for 236 days. The three counts of felony-firearm are to be served concurrent to each other and concurrent to one count of first-degree premeditated murder, but consecutive to the other three counts of first-degree premeditated murder. For the reasons set forth in this opinion, we affirm the convictions and sentences of defendant.

I. FACTS

On September 29, 2008, Sharmaine Zimmer, her sons Tyler and Jeremy Zimmer, and Jeremy's girlfriend, Katherine Brown, were found dead in the Zimmers' home in Ottawa County. The family dog was also found dead at the home. The Zimmers died of gunshot wounds, and Brown died of a head injury as the result of three to ten blows to her head with a hard, blunt object.

At approximately 12:45 a.m. on September 29, 2008, Heather Trout, the Zimmers' neighbor, saw smoke coming from the Zimmers' home and called 911. After the fire was extinguished, the bodies were found in the home. Sharmaine's body was found in the living room. She had been shot once in the chest and once in the abdomen. Tyler's body was found in the basement. He had been shot twice in the chest. Jeremy's body was found in a bedroom in the upper level of the home. He had been shot once in the head. Brown's body was found at the top of the staircase leading to the second floor. There was no trace of clothing on the bottom part of Brown's body when the body was found. However, no sexual assault examination was conducted because Brown's body was too severely burned. Sharmaine, Tyler, and Brown were

dead before the fire ensued. Their time of death was estimated to be between 11:00 p.m. and midnight on September 28, 2008. While there was no testimony regarding an approximate time of death for Jeremy, testimony revealed that he was still breathing when the fire began.

According to testimony presented by various expert witnesses, there were at least three areas of origin of the fire in the house, which was indicative of an incendiary fire or arson. The areas of origin included the bedroom where Jeremy's body was located, the living room where Sharmaine's body was located, and on top of the lower part of Brown's body on the stairs.[1]

Police officers assigned to the case initially determined that a Glock handgun had been used in the murders. Detective Lieutenant Jeffrey Crump of the Michigan State Police, who was an expert in firearms, indicated that he had never previously identified a bullet from a Glock firearm because Glock firearms typically do not leave individual characteristics on bullets, which makes it difficult to match used bullets to Glock firearms. Nevertheless, Lieutenant Crump testified that the markings on the bullets possessed characteristics consistent with being fired from a Glock 27 handgun.

Officers assigned to the case reviewed police reports and discovered that on October 16, 2008, Mary Parker was standing on a street corner in Grand Rapids and defendant picked her up in order to engage in a sexual act with her. Parker testified at defendant's trial. According to Parker, at some point during their encounter, defendant got violent and proceeded to hit, kick, and choke Parker as well as drag her around while holding a gun. Parker was hit hard with what she thought was a beer bottle, which resulted in her receiving eight staples in her head. At one point, defendant pointed a gun at Parker's head and said, "Are you stupid? I have got a gun to your head, and I will kill you." Defendant subsequently grabbed Parker's head and repeatedly hit it on a picnic table. Defendant later pulled off Parker's pants and underwear and put his fingers into her vagina. Parker then noticed a police vehicle and ran towards it for help. Defendant was arrested and was found to be in possession of a .40-caliber Glock 23 handgun. Because a Glock handgun was used to murder the Zimmers and defendant was found in possession of a Glock handgun when he was arrested for assaulting Parker, the police wondered whether defendant was involved in the murders of the Zimmers and Brown. Consequently, the police performed a computer search to determine defendant's previous addresses in an effort to try to determine whether defendant was connected to the Zimmers or Brown. The computer search resulted in the police determining that defendant previously lived next to the Zimmers.

A search warrant was executed on defendant's home. One of the items recovered during the search of defendant's home was a .40-caliber Glock 27 handgun. Two spent shell casings were also located inside defendant's pole barn. Lieutenant Crump determined that the three casings found at the crime scene and the two casings taken from defendant's pole barn were fired

[1] There was some disagreement among the experts as to whether Ms. Brown's body was a point of origin. Two experts, Detective Steve McCarthy and Special Sergeant Greg Stormzand with the Michigan State Police, testified that based on the extensive fire damage to the stairway, they believed that Brown's body was a point of origin. However, Stormzand testified that he could not definitively make that conclusion because there was no evidence that could be subject to laboratory testing; the evidence was consumed by the fire.

from the same gun. In addition, Lieutenant Crump determined that the gun that ejected all five of those casings was defendant's Glock 27 handgun. Moreover, Lieutenant Crump indicated that the Glock 27 handgun was altered after the three casings at the crime scene were ejected and after the two casings found in defendant's pole barn were ejected.

David E. Balash, who was "an independent firearms examiner, forensic science consultant, [and] crime scene reconstructionist," concurred with Lieutenant Crump's findings in the case. Further, Balash observed markings Lieutenant Crump did not document on one of the casings found at the crime scene and one of the casings found in defendant's pole barn. Balash testified that these markings resulted in him determining "positively without question" that both of those casings were ejected from defendant's Glock 27 handgun.

Detective Thomas Knapp of the Ottawa county sheriff's department interviewed defendant at the police department; during the interview, defendant indicated that he had not seen the Zimmers since he was 12 or 13 years old. However, there was testimony at trial to the contrary by Robert Zimmer II, who was also Sharmaine's son, and who testified that defendant's parents separated when defendant was approximately 17 or 18 years old, so defendant moved in with the Zimmers for approximately one year in the 1990s. In addition, Dylan Rasch, who was Jeremy's friend, was at the Zimmers' home in the spring of 2008 when defendant killed a couple of skunks which were in the Zimmers' yard, with a shovel. Further, George Torres, who was the owner of Bodell Pest Control and handled pest control for the Wright Tavern where Sharmaine worked, also testified that on the morning of September 16, 2008, which was 12 days before the murders, Torres observed Sharmaine talking with defendant at the Wright Tavern.

Testimony was also provided that suggested that defendant was going to be giving or selling a military statue to Sharmaine. Melissa Sue Kruithoff testified that she previously lived in the same apartment complex as defendant and his girlfriend, Tarah VanDyke, but Kruithoff believed that defendant and VanDyke moved out of the complex in August of 2008 because Kruithoff remembered noticing them gone around that time. Kruithoff moved out of the apartment complex on September 18, 2008, but started throwing things in the dumpsters a few weeks before. Kruithoff testified that she threw into the dumpster several knickknacks from her relationship with her ex-husband and one of the things she threw into the dumpster was a statue of a marine wearing a blue uniform and holding a flag. The statue was approximately 10 or 12 inches tall and was in a box wrapped in bubble wrap.[2]

Tarah VanDyke testified that she was defendant's girlfriend and that she lived with defendant on September 28, 2008. Defendant indicated to VanDyke that he planned to go to the house of a friend, Danny Butts, on the evening of September 28, 2008. At 10:07 p.m., defendant made a telephone call to William Simon to see if Simon was coming to look at some tires defendant was selling. Immediately after ending his call with Simon, defendant left the home he

[2] Dawn Prescott, a member of Sharmaine's bowling team in the fall of 2008, testified that on September 22, 2008, six days before the murders, Sharmaine told her that she was getting a new statue or figurine from an old male friend, which was an army boy character wearing blue and carrying or holding a flag. The figurine was described as being 12 inches tall.

shared with VanDyke to purportedly go to Butts's house.[3] Defendant returned home that evening at approximately 11:30 p.m. When defendant returned, VanDyke noticed that defendant smelled like smoke. However, VanDyke testified that defendant always smelled like smoke. Further, defendant told VanDyke that there was a bonfire at Butts's house. Consequently, VanDyke dismissed the idea that there was something unusual about defendant smelling like smoke. When defendant returned, he also possessed a statue of a uniformed, military officer in a blue suit holding a flag. The statue was approximately 9 to 12 inches tall and was wrapped in bubble wrap. Defendant indicated that he obtained the statue from Butts and put the statue on the mantel. However, Butts testified that he had no contact with defendant after April 19, 2008, when defendant attended Butts's birthday party. Further, Butts testified that he did not give defendant a statue with a military-type figure.

Fradel Pugh, an inmate in the Kent county jail during October and November 2008, during the same time that defendant was there, testified that defendant told him that he liked .40-caliber Glock handguns. While in jail, Pugh and defendant watched the news reports about the fire and murders at the Zimmers' home. Defendant indicated, at that time, that "that little blonde was sure hot." Pugh reported that defendant told him that "he had to have her," meaning have sexual intercourse with her, "by any means necessary, even if it would come to getting rid of the rest of the people in the house." Defendant indicated that "I take what I want." Defendant further indicated that he "beat the shit out of her," because "shooting her would have been too good" for her. In addition, defendant indicated to Pugh that he hated women because they mistreated him and that women were essentially only good for sexual intercourse. Pugh also testified that defendant indicated that he liked to have sexual intercourse with prostitutes and not pay them for their services, then "pistol whip them" when they would not get out of his vehicle.

Defendant was convicted of four counts of first-degree premeditated murder, MCL 750.316(1)(a), and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. This appeal ensued.

II. ANALYSIS

Defendant first argues that the trial court abused its discretion in admitting, pursuant to MRE 404(b), evidence that defendant assaulted and raped Mary Parker. According to defendant, the facts surrounding the assault and rape of Mary Parker were dissimilar to the facts of this case, and the trial court therefore erred when it granted the prosecutor's motion to admit evidence of the assault and rape of Parker to prove motive and intent. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

> However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. Accordingly, when such preliminary questions of law are at issue, it must be

[3] The travel time from defendant's home to the Zimmers' home was approximately 20 minutes.

> borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. [*Id.*]

The Michigan Supreme Court explained the abuse of discretion standard in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003):

> At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment. An abuse of discretion occurs, however, when the trial court chooses an outcome falling outside this principled range of outcomes. [Citations omitted.]

An error in the admission of bad-acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). The defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *Id*.

On April 3, 2009, the prosecutor moved in limine to admit evidence of similar acts, pursuant to MRE 404(b)(1), in order to prove "motive, intent, scheme, plan, or system in committing the murders." In the motion, the prosecutor indicated that defendant was previously "convicted of Assault With Intent to Commit Murder and Criminal Sexual Conduct 1st Degree in the blunt force attack on Mary Parker." The prosecutor further indicated that "[o]n October 16, 2008, Ms. Parker was severely beaten about the head and body by Brake and then raped during the attack."

During the hearing on plaintiff's motion in limine to admit evidence of similar acts, the prosecutor indicated that "[t]he attack on Parker consisted of multiple blunt trauma to the head." Further, defendant was carrying a .40-caliber Glock handgun at the time of the attack and at one point during the attack, defendant pointed the gun at Parker and threatened to shoot her.

In the prosecutor's motion in limine to admit evidence of similar acts, the prosecutor also indicated that "[defendant] himself, in a statement to a fellow inmate, equated his brutal attack on Katherine Brown to the similar attacks he committed on Mary Parker and other women. [Defendant] indicated to Pugh that both were severely beaten about the head, but not killed by gunshot because [defendant] 'hated women, who were only good for sex' and shooting them would have been 'too good' for them."

On April 24, 2009, the trial court issued an opinion and order relating to the prosecutor's motion in limine to admit evidence of similar acts. In the opinion and order, the trial court summarized what the prosecutor sought to prove with the evidence:

> The prosecution's theory of the case is that defendant wanted to have a consensual relationship with Brown, but could not. Instead, he raped her and killed her. He killed the other victims to facilitate his rape of Brown and to eliminate witnesses to his crime. The prosecution explains that testimony by a fellow Kent County jail inmate will establish the links between the prior crime

> and the charged acts. That witness will purportedly testify that defendant told him that he wanted to rape Brown. The witness will also testify that defendant holds women in contempt and believes their only value is as sex objects. Because of that belief, he beats them about the head to subdue them for sex, which is what he did to Parker and other prostitutes. The witness will also testify that defendant told him that shooting is "too good" for a woman, which is why he did not use his gun on Parker, or, presumably, Brown. Thus, motive is an issue in this case because it explains the way the victims died – only Brown was beaten to death; the other three were shot. Intent is also an issue in the case because the prosecution must show that defendant acted with malice.

In *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998), our Supreme Court clarified the procedural safeguards to be employed by the trial court prior to admission of other acts evidence.

> To protect against such impermissible inferences [of character to conduct], this Court has established a procedural safeguard in the form of a four-pronged standard that a trial court must insure is satisfied before admission of other acts evidence. 413 Mich 309. This Court recently redefined the four-part standard for admissibility of other acts evidence under Rule 404(b) in *People v VanderVliet* and rejected a mechanical application of a bright-line test for admissibility under MRE 404(b). The *VanderVliet* standard requires that the trial court determine:
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> > First, that the evidence be offered for a proper purpose under Rule 404(b); second, that it be relevant under Rule 402 as enforced through Rule 104(b); third, that the probative value of the evidence is not substantially outweighed by unfair prejudice; fourth, that the trial court may, upon request, provide a limiting instruction to the jury.

Defendant argues that the facts surrounding the assault and rape of Parker were dissimilar to the facts of this case. Thus, defendant asserts that the trial court erred when it granted the prosecutor's motion to admit evidence of the assault and rape of Parker to prove motive and intent.

MCL 768.27 provides:

> In any criminal case where the defendant's motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing an act, is material, any like acts or other acts of the defendant which may tend to show his motive, intent, the absence of, mistake or accident on his part, or the defendant's scheme, plan or system in doing the act, in question, may be proved, whether they are contemporaneous with or prior or subsequent thereto; notwithstanding that such proof may show or tend to show the commission of another or prior or subsequent crime by the defendant.

MRE 404(b) is the counterpart to MCL 768.27. *People v Smith*, 282 Mich App 191, 205; 772 NW2d 428 (2009). MRE 404(b)(1) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith." However, such evidence may be admissible to show motive, intent, scheme, plan, or system in doing an act. MRE 404(b)(1). As stated above, evidence of other crimes, wrongs, or acts is admissible under the following circumstances: (1) the evidence is offered for a proper purpose under MRE 404(b)(1); (2) the evidence is relevant; (3) the evidence is not substantially outweighed by unfair prejudice; and (4) "that the trial court may, upon request, provide a limiting instruction to the jury." *Starr*, 457 Mich at 496; *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003). MRE 404(b) is a rule of inclusion, not exclusion. *People v Engelman*, 434 Mich 204, 213; 453 NW2d 656 (1990). Thus, other-acts evidence should be admitted "as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002).

We begin our analysis under *Starr*, by concluding that the prosecutor articulated proper purposes under MRE 404(b)(1) of showing motive and intent as well as common plan or scheme. We additionally find that these were "legitimate, material, and contested grounds on which to offer the evidence because . . . defendant entered a general denial." *Starr*, 457 Mich at 501. Only one of the offered theories needs to be a proper noncharacter purpose to allow admission of the evidence. *Id.*

As to the second prong articulated in *Starr*, we find that the evidence was relevant. MRE 401 provides the definition of relevant evidence as follows:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Evidence which is not relevant is inadmissible. MRE 402. In *People v Mills*, 450 Mich 61, 66-68; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995), the Court indicated that:

> There are two separate questions this Court must answer to determine whether the evidence was admissible under MRE 401. First, we must determine the "materiality" of the evidence. In other words, we must determine whether the evidence was of consequence to the determination of the action. Second, we must determine the "probative force" of the evidence, or rather, whether the evidence makes a fact of consequence more or less probable than it would be without the evidence. [Citations and footnotes omitted.]

"The prosecution bears the burden of establishing the relevance of the other-acts evidence, and the trial court must closely scrutinize the logical relationship between the other-acts evidence and the facts at issue." *People v Orr*, 275 Mich App 587, 589; 739 NW2d 385 (2007). Logical evidence is the "relationship between the evidence [being offered] and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998) (citation omitted).

The evidence was logically relevant because it tended to show that defendant was executing a common plan or scheme and intended to kill Brown in the same manner in which defendant had a motive and the intent to kill the Zimmers. MRE 404(b)(1). Importantly, in order to be convicted of first-degree premeditated murder, the prosecutor must prove that defendant intended to kill the victim.[4]

With respect to common plan or scheme, the record reflects that the attacks on Parker and Brown both occurred in the early morning hours. In addition, in both attacks, defendant had a gun readily available to use, but he did not use the gun to shoot the women; instead he used the gun to beat the women viciously on their heads. Further, in both attacks, a .40-caliber Glock handgun was possessed. Moreover, defendant sexually assaulted Parker and the evidence, in this case, suggests that Brown was sexually assaulted and the lower portion of her body purposely burned in order to destroy evidence of the sexual assault. This conclusion was supported by the potential testimony of Pugh who indicated that defendant told him that defendant wanted to rape Brown. In addition, because of the similarities between the crimes, it is clear that just as defendant intended to kill Parker, evidenced by the fact that defendant was convicted of assault with intent to murder Parker, defendant intended to kill Brown. Consequently, the similarities of the crimes tend to show that defendant had a common plan or scheme to, in the early morning hours, while in the possession of a .40-caliber Glock handgun, attack and rape women with the intent to kill by viciously beating the woman on the head throughout the attack. MRE 404(b)(1). This common plan or scheme was material to a determination of defendant as the perpetrator of the murders. *Engelman*, 434 Mich at 222.

With respect to intent, the facts supported that defendant intended to kill Parker. Because of the similarities with respect to the attack on Brown, the attack on Parker made it more probable that defendant was executing a common plan or scheme, from which a reasonable inference could be made that defendant intended to kill Brown. MRE 401; *Mills*, 450 Mich at 66-68. The trial court correctly concluded that the similar-acts evidence was relevant to show that defendant was executing a common plan or scheme and intended to kill Brown. MRE 404(b)(1); *Starr*, 457 Mich at 496; *Ackerman*, 257 Mich App at 439-440.

In addition, the similar-acts evidence was relevant to show that defendant had the motive and intent to kill the Zimmers. Defendant's motive to kill the Zimmers was material to this case because it helped to explain why defendant would kill the Zimmers. *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). The attack on Parker made it more probable than not that defendant planned, per his common scheme, to assault and beat Brown. From this, a reasonable inference may be drawn that defendant had the motive and intent to kill the Zimmers so that he was not prevented from assaulting and killing Brown and so that there

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[4] See *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000), where this Court indicated that intent is a necessary element in proving first-degree premeditated murder. Thus, defendant's intent was material to a jury's determination of whether defendant was guilty of first-degree premeditated murder. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). In addition, "[p]roof of motive in a prosecution for murder, although not essential, is always relevant." *People v Rice*, 235 Mich App 429, 440; 597 NW2d 843 (1999).

were no witnesses to his crimes. *Mills*, 450 Mich at 66-68; MRE 401. Hence, the attack on Parker was also relevant because it tended to show that defendant had the motive and the intent to kill the Zimmers. *Mills*, 450 Mich at 66-68; MRE 401.

Next, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

"All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible." *Mills*, 450 Mich at 75. The testimony of Parker was highly probative of why defendant would enter a home and shoot three people to death and beat the other victim to death. "All evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible." *Id.* Thus, even though the evidence may be prejudicial if the jury uses the evidence in considering whether defendant was acting in conformity with his character, this fear does render the evidence inadmissible. *Id*.

Finally, the trial court indicated in its opinion and order that it would be providing the jury with a limiting, cautionary instruction with regard to this evidence. The trial court gave such an instruction, and "[j]urors are presumed to follow their instructions." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Further, defendant does not argue that the instruction given to the jury at trial was improper or did not accurately reflect the trial court's ruling.

For the above-stated reasons, we hold that the trial court did not abuse its discretion when it granted the prosecutor's motion to admit evidence of the assault and rape of Parker to prove motive to kill the Zimmers and intent to kill the Zimmers and Brown.

Defendant next argues on appeal that it was necessary to prove that his Glock 27 handgun was the same weapon used to commit the murders in order to connect him to the crime scene. Specifically, defendant asserts that the testimony of Lieutenant Crump, who was an expert in firearms, was inconclusive because he could not determine whether the recovered bullets were fired from defendant's Glock 27 handgun. Moreover, defendant argues that Balash, the "independent firearms examiner, forensic science consultant, [and] crime scene reconstructionist," testified about markings that Lieutenant Crump did not mention. Therefore, defendant argues that the firearm testimony was inconclusive and faulty and was insufficient to prove defendant's guilt beyond a reasonable doubt. We review de novo the question whether there was sufficient evidence to support the verdict by viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

The first-degree premeditated murder statute, MCL 750.316(1)(a), provides:
(1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:

(a) Murder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing.

The trial court instructed the jury in this case that:

The defendant is charged with the crime of first-degree, premeditated murder, and to prove this [charge,] . . . the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant caused the death of Katherine Brown. That is, that Katherine Brown died as a result of blunt trauma to the head.

Second, that the defendant intended to kill Katherine Brown. And, third, that this intent to kill was premeditated, that is, thought out beforehand.

And, fourth, that the killing was deliberate, which means that the defendant considered the pros and cons of the killing and thought about and chose his actions . . . before he did it.

There must have been a real and substantial reflection for long enough to give a reasonable person a chance to think twice about the intent to kill. The law does not say how much time is needed. It is for you to decide if enough time passed under the circumstances of this case. The killing cannot be the result of a sudden impulse without thought or reflection.[5]

The instruction correctly provides the elements of first-degree premeditated murder. *Mette*, 243 Mich App at 330.

The felony-firearm statute, MCL 750.227b(1), provides, in part:

A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony, and shall be imprisoned for 2 years.

The trial court instructed the jury in this case that:

[5] The trial court provided the jury with instructions relating to three other counts of first-degree premeditated murder with regard to Tyler, Jeremy, and Sharmaine, providing virtually identical language except that those instructions provided that those victims "died as the result of a gunshot wound." Moreover, those instructions provided that defendant intended to kill that particular victim. Those instructions are not repeated here in order to eliminate redundancy.

> [T]he defendant is also charged with the separate crime of possession of a firearm during the time . . . that he committed the crime of murder . . . of Tyler John Zimmer. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt.
>
> First, that the defendant committed the crime of murder, which has been defined for you. It is not necessary, however, that the defendant be convicted of that crime. Second, that at the time that the defendant committed the crime he knowingly carried or possessed a firearm. A pistol is a firearm.[6]

The instruction correctly provides the elements of felony-firearm. *People v Duncan*, 462 Mich 47, 50 n 3; 610 NW2d 551 (2000).

Further, "it is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Thus, the identity of a defendant as the perpetrator of an offense must be proved beyond a reasonable doubt for a jury to convict. *Id.*; *Hardiman*, 466 Mich at 417, 420-421.

Viewing the evidence de novo in a light most favorable to the prosecution, there was sufficient evidence to enable a reasonable fact-finder to find defendant guilty beyond a reasonable doubt of four counts of first-degree premeditated murder and three counts of felony-firearm. Defendant's argument that the firearms evidence was faulty and evidence connecting the murder weapon to his gun was necessary for a conviction is without merit.

In this case, Lieutenant Crump clearly testified that defendant's Glock 27 handgun was the weapon used to kill the Zimmers,[7] and Balash explicitly agreed with that finding, indicating that he was "absolutely positive in his results." Thus, there was clear, specific testimony linking defendant to the crimes. In addition, the testimony on the record in this case provided that defendant admitted that he committed the murders to an inmate in the Kent county jail while defendant was in the jail. Further, the inmate and Parker's testimony both demonstrated that defendant had motive and intent to kill the Zimmers to enable his assault of Brown, and Parker's similar-acts testimony supported that defendant had the intent to kill Brown and executed a common plan or scheme against her. See *Sabin*, 463 Mich at 68, where the Court indicated that motive is relevant in proving the identity of the perpetrator of the crime; see also *Engelman*, 434 Mich at 222, where the Court indicated that "proof of a common scheme, plan, or system" is material to the determination of whether defendant committed a charged offense.

Further, although defendant claimed he was at the house of Danny Butts on the night of the murders, Butts testified that he had not seen defendant in months. Thus, defendant's

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[6] The trial court provided the jury with instructions relating to two other counts of felony-firearm with regard to Jeremy and Sharmaine, which included virtually identical language. Those instructions are not repeated here in order to eliminate redundancy.

[7] Although Lieutenant Crump did not identify the gun based on the recovered bullets, he positively identified the gun based on ejected casings.

whereabouts on the night of the murders were unknown. The record also reflects that when defendant was interviewed by the police about the murders, he lied, stating that he had not seen the Zimmers since he was 12 or 13 years old. In fact, there was testimony that defendant lived with the Zimmers for approximately one year when he was 17 or 18 years old. There was also evidence that in 2008 defendant was at the Zimmers' house and that he killed some skunks for the Zimmers at that time. "[P]roved-to-be false exculpatory statements . . . may be used as probative evidence of guilt." *People v Dandron*, 70 Mich App 439, 443; 245 NW2d 782 (1976). Also, defendant returned home in possession of a statue that Sharmaine Zimmer had indicated to a friend she was interested in obtaining. Review of record testimony also indicates that defendant had sufficient time to drive from his house to the Zimmers' home, commit the murders, then return home all while purportedly being at Butts's house. Importantly, the opportunity to commit a crime can be used to determine that defendant was the perpetrator of the crime. Defendant's statements regarding his last contact with the Zimmer family were also called into question by witnesses who had seen defendant at the residence and speaking with Sharmaine Zimmer immediately preceding the murders. Hence, a reasonable fact-finder could conclude, using reasonable inferences, that because defendant had the opportunity to commit the crimes, he was the perpetrator of the crimes. *Plummer*, 229 Mich App 299. Based on the foregoing, viewed in a light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to determine that the essential elements of the crimes were proved beyond a reasonable doubt. *Herndon*, 246 Mich App at 415.

In reaching our conclusion, we note that nothing in the record supports defendant's argument that the firearms testimony was faulty. Any argument to the contrary is abandoned by defendant's cursory treatment of the issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Further, the argument is irrelevant where the firearms testimony was one piece of evidence connecting defendant to the crime; and the testimony, viewed in a light most favorable to the prosecution, clearly supported defendant's conviction.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello