STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT MONTGOMERY WYNNE,

Defendant-Appellant.

UNPUBLISHED
December 3, 1999

No. 192512
Allegan Circuit Court
LC No. 95-009788 FC

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm.

Defendant first argues that the trial court erred in failing to grant a new trial based on newly discovered evidence of res gestae witnesses. We disagree. Defendant's characterization of the evidence as newly discovered is erroneous. Because the information was available prior to trial, it cannot be classified as newly discovered.[1] *People v Lewis*, 31 Mich App 433, 437; 188 NW2d 107 (1971). In any event, the testimony would not have aided in developing a full disclosure of the facts surrounding the commission of the murder. Accordingly, the Steins were not res gestae witnesses. *People v Baskin*, 145 Mich App 526, 530-531; 378 NW2d 535 (1985).

Defendant next argues that he was denied the right to impeach prosecution witness, Mark Peckham, and demonstrate that Peckham had committed the murder. We disagree. Defendant offered evidence in the form of testimony of other "witnesses" concerning various things Peckham had said or done in the past. Testimony regarding Peckham's past violence and criminal acts, offered to prove that he acted in conformity therewith, constituted improper impeachment under MRE 404(b). Testimony regarding his sexual proclivities was inadmissible because it was unrelated to truthfulness. *People v Chaplin*, 412 Mich 219, 225-226; 313 NW2d 899 (1981). Testimony offered to contradict Peckham's testimony was inadmissible because a proper foundation for impeachment did not occur,

People v Barnett, 165 Mich App 311, 315; 418 NW2d 445 (1987) and it constituted impeachment by extrinsic evidence on a collateral matter. *People v Sutherland*, 149 Mich App 161, 165-166; 385 NW2d 637 (1985). Testimony regarding Peckham's history of mental illness was inadmissible because defendant failed to establish that the information was temporally relevant, that is, that any mental illness was suffered by Peckham and affected his memory, ability to perceive reality, or tell the truth. *United States v Jackson*, 863 F Supp 1462, 1465 (D Kan, 1994).

Defendant next argues that the trial court erred in failing to dismiss the charges due to the intimidation of defense counsel and defense witnesses. We disagree. During trial, new evidence was located by defense investigators under suspicious circumstances and turned over to defendant's counsel. A police officer suspected that the evidence had been planted and threatened to charge one defense investigator and defendant's family members. The threat of a police officer is attributable to the prosecution. *People v Hooper*, 157 Mich App 669, 675; 403 NW2d 605 (1987). However, because the threat did not dissuade the witnesses from testifying and there is no evidence that it caused them to withhold testimony that they otherwise would have offered, we find that any error was harmless. *United States v Foster*, 128 F3d 949, 953 (CA 6, 1995); *United States v Pierce*, 62 F3d 818, 832-833 (CA 6, 1995). Defendant also challenges intimidation of his trial counsel by threats from the prosecution. Because defense counsel did not withdraw from the case and there is no evidence that the threat of prosecution actually affected his ability to represent defendant effectively, defendant was not prejudiced or deprived of his right to counsel. *United States v Amlani*, 111 F3d 705, 710-711 (CA 9, 1997). The trial court was not required to disqualify defense counsel because there was no evidence that he was involved in any criminal activities and no evidence thereof either was or would have been disclosed to the jury. *United States v Garrett*, 727 F2d 1003, 1007-1008 (CA 11, 1984). The trial court did not err in denying defendant's motion to dismiss.

Defendant next argues that the prosecution violated *People v Nash*, 418 Mich 196, 228; 341 NW2d 439 (1983), which prohibits disclosure to the jury that the police received evidence from defendant's attorney. We disagree. Review of the record reveals that the prosecutor did not *elicit* such evidence from the witnesses. One witness volunteered that the evidence had been in defense counsel's possession in response to another question. The prosecutor, however, is not responsible for voluntary, nonresponsive answers to questions, and admission of the answer by the witness does not constitute error. *People v Williams*, 114 Mich App 186, 198-199; 318 NW2d 671 (1982).

Defendant next argues that the trial court improperly excluded evidence regarding neighbor Randy Bellingar's involvement with drugs. We disagree. Defendant sought to show that Bellingar used, possessed, or grew marijuana in order to show that he might have killed the victim. The few established facts disclosed by the record fail to support that conclusion, which could only be reached by piling inference upon inference based on evidence that was speculative at best. *People v Wilson*, 107 Mich App 470, 474; 309 NW2d 584 (1981). Bellingar's involvement with drugs did not make it more probable that he killed the victim, *People v Brooks*, 453 Mich 511, 519; 557 NW2d 106 (1996), especially where as here, there was no evidence to link Bellingar to the murder weapon, which was owned by defendant and found in his home.

Defendant also sought to introduce evidence of Bellingar's involvement with drugs to impeach the testimony of his wife and stepson. The evidence was not admissible as impeachment evidence because it related to a collateral matter, *Sutherland, supra*, and it did not support the inferences necessary to draw a conclusion that the witnesses' testimony was untruthful. We find no abuse of discretion in the exclusion of the evidence surrounding Bellingar. *People v Howard*, 226 Mich App 528, 542; 575 NW2d 16 (1997).[2]

Defendant next argues that the trial court erred in admitting other acts evidence at trial. We disagree. Evidence of other crimes is not admissible to prove the character of a person to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material. MRE 404(b)(1). If the other acts evidence is offered "to prove some fact other than character, admissibility depends upon whether its probative value outweighs its prejudicial effect, taking into account the efficacy of a limiting instruction in cushioning the prejudicial effect of the evidence." *People v Crawford*, 458 Mich 376, 385; 582 NW2d 785 (1998). The other acts evidence, that defendant had vandalized the victim's farm equipment, was offered as part of a logical progression of events demonstrating that defendant had a motive to harm the victim. Although motive is not an element of the crime, it was relevant to show that defendant was the one person known to harbor animosity toward the victim, thus making it more likely that he was, in fact, the person who committed the crime and was not "framed" by someone else as he claimed. The evidence, although prejudicial, was not unfairly so because the prior acts were dissimilar to the crime charged, *Crawford, supra*, and the court properly instructed the jury on the limited use of the evidence. We find no abuse of discretion. *Id.*

Defendant next argues that the trial court erred in refusing to allow defense expert, David Balash, to testify regarding ballistic evidence. We disagree. The trial court did not abuse its discretion in refusing to qualify Balash as an expert in the area of determining entry and exit wounds in bodies when he had not examined the victim. The trial court did not require that Balash satisfy an overly narrow test of qualifications, rather, defendant failed to lay a foundation to show that he was qualified to make such an assessment from the coroner's report. *People v Haywood*, 209 Mich App 217, 225; 530 NW2d 497 (1995). Furthermore, the trial court did not abuse its discretion in admitting the bullets recovered from the victim's body into evidence or in denying defendant's motion for a new trial due to a break in the chain of custody. The testimony of the prosecution witnesses established to a reasonable degree of certainty that the bullets did come from the victim's body. Any deficiency in the chain of custody went to the weight of the evidence, not its admissibility. *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994). Defendant's claim that the admission of the evidence denied him an opportunity to call another medical examiner regarding proper chain of custody procedures has not been preserved for appeal, defendant having failed to make an offer of proof at trial. MRE 103(a)(1). To the extent defendant sought to have the witness criticize the techniques of the medical examiner who performed the autopsy, the testimony would not have been admissible. *People v Brownridge*, 459 Mich 456, 460 n 4; 591 NW2d 26 (1999). We find no abuse of discretion.

Defendant next argues that the trial court abused its discretion in admitting photographs into evidence. We disagree. The photographs were admissible to prove intent and to corroborate the medical examiner's testimony. *People v Mills*, 450 Mich 61, 71; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). There was no abuse of discretion in the admission of the photographs. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997).

Defendant next argues that the prosecutor wrongfully withheld, or the trial court erred in denying his motion for discovery of, a police officer's personnel file, which ostensibly contained evidence that the officer was under investigation for wrongdoing. We disagree. Because the officer's misconduct was unrelated to this case, did not involve falsifying evidence, and had not yet resulted in the filing of criminal charges, it was not material to a determination of guilt or punishment and thus the prosecutor was not required to produce it. *United States v Agurs*, 427 US 97, 112; 96 S Ct 2392; 49 L Ed 2d 342 (1976); *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Brownridge (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket No. 183507, issued 8/17/99), slip op at 2. Because the officer did not have charges pending against him and the incident of misconduct was unrelated to veracity, evidence of the misconduct was not admissible for impeachment purposes, MRE 608(b), MRE 609, and thus the court did not abuse its discretion in denying the motion. *People v Valeck*, 223 Mich App 48, 51; 566 NW2d 26 (1997).

Defendant next argues that the trial court erred in denying his motion to dismiss for failure to preserve evidence regarding fingerprints and residue testing. We disagree. The failure to preserve evidence that may have exonerated the defendant does not constitute a denial of due process unless the defendant shows that the police acted in bad faith. *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993). Because defendant has made no such showing, defendant was not denied a fair trial. *Id.* Furthermore, we note that residue testing would not have exonerated defendant because it was his theory that the gun was used by someone else to kill the victim, then returned to defendant's home in order to "frame" him for the murder. Residue tests would have demonstrated that the gun had recently been fired, but not who fired it.

Defendant next asserts that the trial court erred in denying his motion to suppress evidence on the basis that the search warrant affidavit contained false statements. To prevail on a motion to suppress evidence pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), the defendant must show by a preponderance of the evidence that the affiant knowingly and intentionally or with reckless disregard for the truth inserted false material into the affidavit or made a material omission and that the false material or material omission was necessary to a finding of probable cause. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995); *People v Kort*, 162 Mich App 680, 686; 413 NW2d 83 (1987).

The affidavit did not contain any material omissions. It did contain one false statement regarding information that the affiant received from other officers, but there was no evidence to show that the affiant knew or had reason to believe at the time that the information was false or that the officers who provided it knew or had reason to believe it was false. Therefore, the trial court's finding that the statement was an innocent mistake is not clearly erroneous. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

Defendant also contends that the court should have suppressed the search warrant because the allegations failed to establish probable cause. When reviewing a magistrate's conclusion that probable cause to search existed, this Court does not review the matter de novo or apply an abuse of discretion standard. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). Paying deference to the magistrate's determination that probable cause did exist, this Court considers only whether the actual facts and circumstances presented to the magistrate would permit a reasonably cautious person to conclude that there was a substantial basis for the finding of probable cause. *Id.*

The affidavit indicated that defendant lived near the place where the victim was killed, that defendant was upset with the victim over a land transaction, that he had previously been investigated in connection with the vandalism to the victim's farming equipment, and that defendant owned the same type of weapon that had been used to shoot the victim. These facts and circumstances provide a substantial basis for the magistrate's determination of probable cause. Therefore, the trial court properly denied defendant's motion to suppress.

Defendant next argues that he is entitled to a new trial based on ineffective assistance of counsel. This issue is not properly before this Court because defendant simply alleges, without briefing, certain claims, *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992), and fails to cite any authority in support of the claims that are briefed. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, the claims concerning trial counsel's performance are related to the principal errors raised on appeal which, as noted above, do not warrant relief. Defendant has failed to show that, but for counsel's alleged errors, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant next argues that the trial court erred in denying his motion to permit the jury to view the scene. We disagree. The trial court did not abuse its discretion in denying the motion given that photographs and diagrams of the scene were admitted into evidence, there was no dispute as to their accuracy, and the court found that viewing the scene would not have aided the jury in deciding any facts at issue. *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981).

Lastly, defendant argues that the trial court erred in failing to provide a proper instruction regarding reasonable doubt. We disagree. The trial court's instruction on reasonable doubt was proper. *People v Hubbard (After Remand)*, 217 Mich App 459, 487-488; 552 NW2d 493 (1996). Defendant's failure to request a modified instruction on reasonable doubt precludes relief. MCL 768.29; MSA 28.1052. Defendant did not request, nor was he entitled to, an instruction similar to CJI 4:2:02. *People v Marsack*, 231 Mich App 364, 380; 586 NW2d 234 (1998). Defendant's claim that the trial court did not give a cautionary instruction on other acts evidence is belied by the record. We find no error requiring reversal.[3]

Affirmed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ E. Thomas Fitzgerald

[1] In fact, one of the alleged res gestae witnesses testified at trial, and testimony of other family members was cumulative to this testimony. Furthermore, another alleged witness was subpoenaed to testify at trial, but was not called.

[2] Defendant also contends that newly discovered evidence reveals that Bellingar had marijuana at his home at the time of the murder. In the voluminous exhibits submitted by defendant, the statement of William Christman, IV, was submitted. Therein, Christman stated that he observed marijuana in a freezer behind the Bellingar house, however, he failed to identify when this viewing incident occurred. Christman also stated that Bellingar's stepdaughter had a party one and a half weeks to two weeks before the murder. At that time, Bellingar's stepdaughter gave Christman marijuana, however, he did not see the location from which the drugs were taken. He merely assumed that it was from the same location because it looked the same. Additional statements about roach clips and growing of marijuana were hearsay, *People v Bartlett*, 231 Mich App 139, 159; 585 NW2d 341 (1998), and based on Christman's assumptions that the marijuana was grown because it was "not worth buying." Defendant's contention, that this statement established that marijuana was present at the Bellingar residence at the time of the murder, is without merit. Furthermore, defendant's contention, that the victim was "seen" with drug officials following the raid on his farm, failed to establish that the victim was "involved" with officials such that any vandalism to his property could be construed as retaliation.

[3] Defendant failed to brief his claim that he is entitled to a new trial based on prosecutorial misconduct and has therefore abandoned the issue. *Kent, supra*.