

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENSON W. GREEN,

Defendant-Appellant.

UNPUBLISHED

June 16, 2000

No. 212126

Wayne Circuit Court

Criminal Division

LC No. 96-008248

Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree 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).¹ The trial court sentenced defendant to life imprisonment without parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals by right. We affirm.

I

Defendant first argues that insufficient evidence existed to sustain his conviction of first-degree murder. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction, we 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 Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). To prove first-degree, premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). “Premeditation and deliberation require sufficient time to allow the defendant to take a second look.” *Id.*

¹ Defendant was convicted after his third trial. In each of the two previous trials, the jury was unable to reach a unanimous verdict.

Defendant focuses his insufficiency of the evidence argument on the credibility of the prosecution's two primary witnesses, whose testimony from prior proceedings was read to the jury. Resolving the credibility of these witnesses was a function for the jury, not of this Court. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). We observe, however, that defendant's confession corroborates much of the challenged testimony.

Viewing the evidence in a light most favorable to the prosecution, as we must, defendant's second statement to the police and the testimony of Gordon Vance are sufficient to establish that, at a minimum, defendant performed acts that aided and assisted in the planned avenging of a gang-related shooting that resulted in the death of the young victim. Defendant acknowledged driving the two shooters to the vicinity of the Hawthorne Recreation Center, near where the victim lived. There was at least one assault rifle in the car, and possibly two, although the evidence is inconsistent on which perpetrator possessed the weapons. Defendant either planned to "holler at" (i.e., shoot) some men involved in the wounding of an acquaintance or knew that the other two perpetrators had planned this. According to his own statement, defendant waited in the car and heard numerous rounds of gunfire. When the two shooters returned to the car, defendant transported them back to Vance's house. This evidence is sufficient to convict defendant of aiding and assisting in a premeditated murder, thus making him equally responsible for the primary offense even though he was not one of the actual shooters. MCL 767.39; MSA 28.979; *People v Smielewski*, 235 Mich App 196, 209 n 4; 596 NW2d 636 (1999). Further, under the doctrine of transferred intent, it does not matter that the deceased, an eleven-year-old boy who was standing in front of a neighbor's house with his father, was not the shooters' intended victim. *People v Plummer*, 229 Mich App 293, 304 n 2; 581 NW2d 753 (1998).

Regarding defendant's argument that strong evidence suggested that the shot that killed the victim actually came from the area around the recreation center and, therefore, not from his companions' guns, the coroner testified that the bullet that killed the young victim was a high velocity projectile from a high-powered weapon. Also, spent casings from an assault rifle were found near the parked cars in the street and on the berm. Because no casings from a high powered weapon were found in the area of the recreation center, the evidence sufficiently enabled the jury to find that the fatal shot had been fired from an assault rifle in the hands of one of defendant's two companions.

II

Next, defendant argues that the prosecution failed to establish that it exercised due diligence in attempting to secure the in-court testimony of Gordon Vance and Terrell Brown, whose testimony from prior proceedings was read to the jury. We disagree. The trial court's determination that the prosecution made a diligent good-faith effort to locate these missing witnesses for trial will not be disturbed on appeal absent a clear abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).

The prosecutor established that both witnesses had been personally served with subpoenas, that officers had spoken with both witnesses, and that arrangements had been made to give both witnesses rides to the court, but that both were gone when the officers arrived to pick them up for trial. Defendant argues that, pursuant to this Court's decision in *People v James (After Remand)*, 192 Mich App 568; 481 NW2d 715 (1992), the efforts shown by the prosecutor to produce the two witnesses were

insufficient to be considered due diligence. We find that the facts of this case are not as extreme as in *James*, and the trial court did not abuse its discretion in allowing the prosecutor to use the former testimony of these two witnesses.

Defendant also claims that the trial court's failure to read the entire prior testimony of the unavailable witnesses was error requiring reversal. However, the record shows that defendant did not request further testimony to be read and, accordingly, this issue is not preserved for our review.

III

Defendant argues that he was denied his constitutional right to the effective assistance of counsel because statements made by defense counsel during opening and closing arguments shifted the burden of proof to defendant, defense counsel failed to object to the lack of due diligence in producing the unavailable witnesses, and defense counsel failed to object to reading the witnesses' prior testimony to the jury. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance fell below an objective standard of reasonableness under prevailing norms. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). Defendant also must show that counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). This means that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 314.

Defense counsel closed his opening argument with the following statement, "And I hope that by the end of the case, at the conclusion, you'll be able to decide beyond a reasonable doubt that Mr. Green is not guilty." In his closing argument, defense counsel stated, "The second key principle is Mr. Denson Green does not have to prove that he is not guilty. The prosecutor must prove beyond a reasonable doubt that he is guilty. And what I will show you based on what the evidence presented today that you're going to find beyond a reasonable doubt that Mr. Green is not guilty of this charge." While defense counsel may have misspoke regarding the burden of proof, the trial court instructed the jury on the correct burden of proof and specifically admonished the jury that if one of the lawyers gave contrary interpretations of the law, the jury was to follow what the court said and not what the lawyer said. Therefore, defendant cannot establish that his counsel's misstatements deprived him of a fair trial.

The trial record also belies defendant's contention that his trial counsel waived the in-court appearance and testimony of Gordon Vance and Terrell Brown. Defense counsel demanded the production at trial of these two witnesses. After hearing testimony regarding the efforts made to secure their presence, counsel strongly objected to the reading of their prior testimony, arguing that the prosecutor had not shown due diligence in securing the witnesses for trial. When the trial court found that the prosecutor's efforts were sufficient but offered to issue bench warrants for the witnesses' arrests in one last attempt to secure their presence, defendant personally waived this final attempt and asked to proceed with the transcripts. Therefore, defendant's argument that counsel's performance was constitutionally ineffective is without merit.

IV

Next, defendant argues that the prosecutor's continuous reference to gang activity denied him a fair trial. We disagree. Defendant cites *People v Hubbard*, 209 Mich App 234; 530 NW2d 130 (1995), as precedent for finding that interjecting information about gangs and gang activity is more prejudicial than probative and grounds for reversal. In *Hubbard, supra* at 237-238, the trial court allowed a police detective to testify over defense objection about the common characteristics of drug dealers, and the prosecutor referred to this profile evidence as circumstantial evidence of the defendant's guilt in presenting his theory of the case to the jury.

The instant case presents far different facts. Although defendant maintains that there was no evidence of gang activity, defendant himself introduced in his statements to the police the idea that those involved in the shooting were gang members and that the shooting was committed in retaliation for an earlier gang-related shooting. Therefore, the trial court did not abuse its discretion in denying defendant's motion to exclude gang references. The evidence was necessary to understand the motive for what otherwise appeared to be a senseless shooting.

V

Defendant also maintains that the coroner's violation of the trial court's sequestration order was grounds for a mistrial. We disagree. The trial court has the discretion to order sequestration of witnesses and, in instances of violation of a sequestration order, discretion to exclude or allow the testimony of the offending witness. *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987).

During defendant's first two trials, Dr. Sawait Kanlue testified that he did not personally perform the autopsy and could not tell what caliber weapon killed the victim. At defendant's third trial, Dr. Laning Davidson testified that he performed the autopsy and could classify the type of bullet that killed the victim as "a high velocity type of bullet coming from a high powered weapon" because it exited from the body, which a bullet from a low velocity weapon would not, and because of the massive internal injuries. Dr. Davidson also testified that he had served in Vietnam, and the injuries to the victim were similar to the types of injuries caused by assault rifles that he had observed in soldiers. Under cross-examination, Davidson acknowledged that he was present in the courtroom and heard testimony that an AK-47 was involved in the killing.

Defendant argues that Dr. Davidson's violation of the trial court's order to sequester witnesses constituted grounds for a mistrial; however, defendant did not move to strike the medical testimony or request a mistrial in the trial court. Further, there is no evidence that the trial court was aware that Dr. Davidson was in the courtroom before he testified. The trial court does not have a sua sponte duty to question witnesses who may have violated a sequestration order. *People v King*, 215 Mich App 301, 309; 544 NW2d 765 (1996). Finally, defendant has not demonstrated that he was prejudiced by the coroner's violation of the sequestration order. See *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). Dr. Davidson explained that his knowledge about the victim's wounds and their

cause was attributable to his personal performance of the autopsy and his prior service in the Vietnam War, rather than to testimony he heard in the courtroom.

VI

Finally, defendant argues that the trial court erred in admitting into evidence his second custodial statement because it was not voluntary and was procured by undue influence. We disagree. When reviewing a trial court's determination that a defendant's confession was voluntary, this Court must examine the entire record and make an independent determination of the issue as a question of law. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). However, deference is given to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id.*

Defendant moved to suppress his confession before his first trial, and the trial court held a hearing in which testimony was received from Sergeant Butler, who took both of defendant's statements, and from defendant. The court found that defendant's statements were voluntarily given. This finding is not clearly erroneous. Defendant was given the opportunity to have other police witnesses testify, but asked only for Sergeant Butler, the officer who took defendant's two statements. Defendant's testimony contradicted that of Sergeant Butler on important points, and the trial court found the officer's testimony to be more credible. Defendant's claim that he believed that he would be killed by the police if he did not give a second statement incriminating his two companions is not credible, particularly considering that defendant agreed to ride along with the officers after he had allegedly been threatened. Further, we do not find credible defendant's argument that he believed that the officers would immediately allow him to leave the station if he confessed to knowingly driving two shooters to the scene where an eleven-year-old child was fatally shot and transporting them to safety afterwards. We find no clear error in the trial court's determination that defendant's second statement was voluntarily given. *Id.*

We affirm.

/s/ Jane E. Markey

/s/ Roman S. Gibbs

/s/ Richard Allen Griffin