STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 9, 2001
v	No. 218214 Jackson Circuit Court
ROBERT LONA REYNOLDS, JR., Defendant-Appellant.	LC No. 98-090801-FC

Before: Murphy P.J., and Griffin and Wilder, 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). The trial court sentenced defendant to life without parole for the first-degree murder conviction and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant argues that he was denied a fair trial because he was forced to wear leg irons during trial. We disagree. This Court reviews a decision to restrain a defendant during trial for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Shackling of a defendant during trial is permitted only in extraordinary circumstances to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. *Id.*

In this case, the record indicates that defendant was a flight risk[1] and had a history of violent crimes. The trial court determined that leg restraints were necessary for security purposes, particularly in light of the configuration of the court room and the lack of security personnel to cover all exits. Further, the trial court took precautions to see that the leg irons could not be viewed by the jury, and there is no evidence that any juror ever observed the leg irons on defendant.[2] *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). Under

[1] Defendant fled to Louisiana after a warrant was issued for his arrest.

[2] The trial court made sure that defendant was seated comfortably in the witness box before the jury was brought in and, at the completion of his testimony, the trial court dismissed the jury before defendant left the stand to return to his seat.

these circumstances, the trial court's decision to restrain defendant with leg irons during trial was not an abuse of discretion.

Next, defendant contends that the trial court made a number of erroneous evidentiary rulings that denied him a fair trial. The decision whether to admit or exclude evidence is within the trial court's discretion. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). An abuse of discretion is found only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

First, defendant argues that the trial court abused its discretion in admitting evidence of defendant's flight to Louisiana after an arrest warrant was issued. We disagree. It is well settled that evidence of flight may properly be considered as evidence of guilt. *People v Cipriano*, 238 Mich 332, 336; 213 NW 104 (1927); *People v Cutchall*, 200 Mich App 396, 398-399; 504 NW2d 666 (1993); *People v Lytal*, 119 Mich App 562, 575; 326 NW2d 559 (1982); *People v Casper*, 25 Mich App 1, 7; 180 NW2d 906 (1970). In this case, evidence of defendant's flight was relevant and material to the issue of defendant's consciousness of guilt, and its probative value sufficient to withstand a challenge under MRE 403. *Cutchall, supra* at 399-491. Further the risk of any undue prejudice arising from evidence of defendant's flight was eliminated by the trial court's cautionary instruction to the jury advising of the limited purpose of the evidence. Accordingly, we find no error.

Second, defendant argues that the trial court abused its discretion in allowing testimony that defendant had purchased a .380 semiautomatic handgun, similar to the weapon used in the shooting, at a gun and knife show approximately one year earlier. We disagree. In *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989), this Court observed that "[e]vidence of a defendant's possession of a weapon of the kind used in the offense with which he is charged is routinely determined by the courts to be direct, relevant evidence of his commission of that offense." Here, police testimony revealed that the shooting was committed with a .380 caliber automatic handgun. Testimonial evidence that defendant had purchased a similar weapon prior to the shooting was directly relevant to make "defendant's identity as the gunman in the charged [crime] 'more probable . . . than it would be without the evidence.'" *Hall, supra* at 582-583. That defendant's ex-wife testified that defendant sold the gun shortly after he purchased it was a credibility issue for the jury to resolve. *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998). Accordingly, the trial court did not abuse its discretion in admitting this evidence.

Third, defendant argues that the trial court abused its discretion in excluding evidence of a fake driver's license used by defendant's brother Rodney. We agree but find the trial court's error harmless. At trial, defendant sought to introduce evidence of a driver's license with the face of his brother Rodney but defendant's personal information on it to show that Rodney had access to defendant's personal belongings and to support defendant's theory of the case that Rodney committed the murder. The trial court excluded the evidence on the basis that it was "not satisfied that [the evidence was] material or relevant." In light of defendant's theory of the case and the eyewitness' inability to positively identify defendant as the perpetrator, we find that evidence of a driver's license containing Rodney's picture with defendant's statistics was relevant to the disputed issue of identification in this case. However, although the trial court's

ruling excluding the evidence may have been erroneous, because the excluded evidence was merely cumulative to other evidence establishing Rodney's access to defendant's property and his similarity in appearance to defendant, we are not convinced that exclusion of the evidence affected the outcome of trial. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Accordingly, the error was harmless. MCR 2.613(A).

Defendant next claims that the trial court abused its discretion in denying his request for a brief continuance to locate a missing witness, Ronny Webb, who defendant claims was a principal alibi witness. We disagree. A trial court's decision to grant or deny a motion for a continuance is reviewed for an abuse of discretion. *Lansing v Hartsuff*, 213 Mich App 338, 350; 539 NW2d 781 (1995). Melissa Pickrell, an eyewitness to the crime, testified that the shooting occurred around 8:50 p.m. and the perpetrator quickly left the scene in a Chevy Blazer. Kena Wilson, with whom defendant had an "open relationship," testified that defendant visited her at her apartment between 8:45 and 8:50 p.m. on the evening of the murder and stayed about fifteen or twenty minutes. Defendant testified that after he returned to his apartment from visiting Wilson, he noticed that his Blazer had a flat tire. Defendant's telephone records introduced at trial showed that he called Ronny Webb to help him fix the flat tire at approximately 9:45 p.m. that evening. Detective Rogers testified that the driving distance from the parking lot in Jackson where the murder occurred to the intersection closest to defendant's residence in Lansing was thirty-eight miles, about a forty minute drive at the posted speed limit. Based on this evidence, defendant could have committed the murder at 8:50 p.m. in Jackson and arrived home in Lansing in time to make the telephone call to Webb at 9:45 p.m. Accordingly, we reject defendant's contention that Webb was a principal alibi witness. Because there was no reasonable probability that Webb's testimony could have affected the outcome of the trial, *Lukity, supra* at 495-496; *People v Hubbard*, 209 Mich App 234, 243; 530 NW2d 130 (1995), we conclude that the trial court's decision to deny defendant a brief continuance in order to locate Webb, or to allow defendant to reopen proofs after the defense rested, was not an abuse of discretion. *Lansing, supra*.

Next, defendant contends that the evidence was insufficient to convict him of first-degree murder. Specifically, defendant argues that the evidence failed to establish his identity as the shooter and failed to demonstrate that the shooting was premeditated and deliberate. We disagree. To determine whether sufficient evidence has been presented, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *People v McMillan*, 213 Mich App 134, 139; 539 NW2d 553 (1995). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514; *Terry, supra* at 452.

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 Graves*, 224 Mich App 676, 678; 569 NW2d 911 (1997), modified on other grounds 458 Mich 476 (1998). Premeditation and deliberation require sufficient time to allow

the defendant to take a "second look." *Id.* These elements may be inferred from circumstantial evidence and reasonable inferences arising therefrom. *Id.* Premeditation and deliberation may be established by evidence of (1) the prior relationship of the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing itself, and (4) the defendant's conduct after the homicide. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

In this case, the eyewitness' description of the shooter, particularly his hair style, conformed to defendant's appearance at the time of the murder as described by friends, family and coworkers. Other evidence identifying defendant as the shooter included: (1) eyewitness testimony that the perpetrator's vehicle matched the vehicle driven by defendant; (2) undisputed testimony that defendant had purchased a handgun similar to that used in the crime; (3) bloodstains on defendant's pants matching the victim's blood, and (4) evidence that defendant fled to Louisiana after a warrant was issued for his arrest. Viewed most favorably to the prosecution, the foregoing evidence was sufficient to establish defendant's identity as the shooter beyond a reasonable doubt.

Further, the circumstances of the shooting, including the use of an automatic handgun, the fact that eight shots were fired and five bullets entered the victim's back, and evidence of close range firing, viewed most favorably to the prosecution, were sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that the murder was deliberate and premeditated. Additionally, eyewitness testimony that after the shooting ended, the perpetrator leaned down over the victim's body and "began to beat the victim in his chest over and over and over with his fist" further support the conclusion that the perpetrator had sufficient time to take a "second look." Accordingly, we reject defendant's challenge to the sufficiency of the evidence.

In a supplemental brief, defendant argues that the search warrant was invalid and that the police improperly exceeded the scope of the search warrant. We disagree. The validity of the search was not challenged in the trial court. Thus, defendant must show a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Reversal is appropriate only if defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*.

When reviewing a magistrate's conclusion that probable cause to search existed, a reviewing court must read the search warrant and the underlying affidavit in a common-sense and realistic manner. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995), overruled on other grounds 460 Mich 118, 123 (1999); *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). See also *People v Whitfield*, 461 Mich 441; 607 NW2d 61 (2000). Reviewing courts must afford deference to a magistrate's determination that probable cause existed. This deference "requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *Russo, supra* at 603, quoting *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983). This Court must focus on facts and circumstances that support the magistrate's probable cause determination and may consider only those facts that were presented to the magistrate. The magistrate's decision must be based on actual facts, not merely conclusions of the affiant. *Sloan, supra* at 168-169; *Russo, supra* at 603-604. A sufficient affidavit must present facts and circumstances on which a magistrate can rely to make an independent probable cause determination. *Sloan, supra* at 169.

In *People v Sellars*, 153 Mich App 22, 27; 394 NW2d 133 (1986), this Court observed:

> [A] warrant may issue on probable cause if the police have conducted an independent investigation to confirm the accuracy and reliability of the information regardless of the knowledge and reliability of the source. This rule is clearly set forth in both federal and state Supreme Court decisions.

See also *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991) (recognizing that a search warrant may be issued on the basis of an affidavit that contains hearsay as long as the police have conducted an independent investigation to verify the information).

In this case, defendant has not demonstrated any plain error with the search warrant affidavit. The record clearly establishes that the facts stated in the affidavit were confirmed by independent police investigation. *Sellars*, *supra* at 27. Moreover, viewing the affidavit in a common-sense and realistic manner, a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause to issue a search warrant. *Russo, supra* at 603.

Further, our review of the record reveals that the police did not impermissibly exceed the scope of the search warrant during their search of defendant's home by seizing two pairs of pants worn by defendant. *People v Whalen*, 390 Mich 672; 213 NW2d 116 (1973); *People v Secrest*, 413 Mich 521, 525-529; 321 NW2d 368 (1982); *People v Ward*, 133 Mich App 344, 353-354; 351 NW2d 208 (1984).

The search warrant, attached to defendant's supplemental brief, provided in relevant part:

> The property to be searched for and seized, if found, is specifically described as:
>
> The items to be seized are hand guns, ammunition, controlled substances, phone bills, pagers, cellular phones, answering machines, address books, caller ID boxes, shoes, *clothing with blood type coloring on it*, Gatzby hat. [Emphasis added.]

The police were lawfully on the premises to execute a lawful search, and searching through the clothes hamper did not exceed the scope of the search. Moreover, even if blood spots on the pants were not obvious to the naked eye, the incriminating character of the pants seized by the police, which were confirmed to have been the most recently worn by defendant, was "immediately apparent." *Horton v California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112, 123-124 (1990), citing *Coolidge v New Hampshire*, 403 US 443, 446; 91 S Ct 2022; 29 L Ed 2d 564 (1971). Considering "what the executing officers knew [at the time of the search] concerning the nature of that crime, its elements and possible means of proving those elements," we conclude that the police officers did not exceed the scope of the search warrant. *Andresen v Maryland*, 427 US 463; 96 S Ct 2737; 49 L Ed 2d 627, 644 (1976). Thus, defendant has failed to show a plain error that affected his substantial rights. *Carines*, *supra*.

Finally, defendant claims that he was denied the effective assistance of counsel. We disagree. Because defendant did not move for a new trial or request an evidentiary hearing in the trial court, our review of this issue is limited to any mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy, *Ho, supra* at 191, and must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag, supra* at 6, citing *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

First, we reject defendant's claim that defense counsel was ineffective for failing to subpoena Ronny Webb as an alibi witness. As discussed previously, the record clearly demonstrates that Webb could not have supplied defendant with an alibi for the time of the charged crime. Further, although defendant claims that counsel was ineffective for failing to subpoena "the rest of the witnesses," his failure to identify those witnesses or provide any information as to what they may have testified precludes appellate relief.

Second, we are not convinced that defense counsel was ineffective for failing to object to evidence that the police seized a .38 revolver from defendant's apartment. The record reveals that defense counsel successfully elicited testimony from a police officer that the .38 revolver was not linked to the charged crime. Moreover, in view of the other evidence substantiating defendant's guilt, any prejudice to defendant from counsel's failure to object to admission of the evidence was harmless.

Third, defense counsel was not ineffective for failing to object to having defense witness Edward Robinson brought into court in shackles and irons in full view of the jury. *People v Dunn*, 446 Mich 409, 426, n 28; 521 NW2d 255 (1994). Although the record suggests that this issue was discussed at a sidebar conference, the reasons for requiring Robinson to be shackled are not apparent from the record; thus, we are unable to further review this claim of error. In any event, Robinson's testimony was merely cumulative to other testimony and supplied no exculpatory value. Accordingly, any prejudice that inured to defendant was minimal and would not have affected the outcome of trial. *Hoag, supra* at 6; *Johnson, supra*.

Last, defendant complains that defense counsel was ineffective for not requesting a mistrial when the prosecutor questioned defendant and Edward Rodriguez, another alibi witness, about their involvement with drugs and where they met. A review of the record reveals that defense counsel objected to the question posed by the prosecution to defendant concerning his relationship with Rodriguez and their involvement with drugs, a sidebar discussion was held, and the objection was sustained. Defense counsel again objected to the prosecutor's inquiry on this subject posed to Rodriguez, a bench discussion was held, and the trial court stated, "the question is not allowed." Thus, because the trial court sustained defense counsel's objections to the prosecutor's inquiries, thereby foreclosing any further questioning on the subject, we find no basis for concluding that a mistrial was warranted. *People v Griffin*, 235 Mich App 27, 36; 597

NW2d 176 (1999); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Accordingly, defendant has not established a claim of ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Richard A. Griffin
/s/ Kurtis T. Wilder