STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 14, 2001
V MARCO L. TAYLOR, Defendant-Appellant.	No. 220102 Wayne Circuit Court Criminal Division LC No. 98-009305

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree, premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b(1). Defendant was sentenced to life imprisonment for the first-degree murder conviction and two years' consecutive imprisonment for the felony-firearm conviction. We affirm.

I. Sufficiency of the Evidence

Defendant first argues that the prosecutor presented insufficient evidence of premeditation and deliberation to support his conviction of first-degree murder. We disagree.

An insufficiency of the evidence claim is subject to de novo review. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). In determining whether sufficient evidence was presented in a criminal case, we view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). As the Court in *Nowack* explained:

> The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. . . .
>
> . . . [The prosecution] is not obligated to disprove every reasonable theory consistent with innocence to discharge its responsibility; it need only convince the

jury "in the face of whatever contradictory evidence the defendant may provide." [*Id.* at 400 (citations omitted).]

First-degree, premeditated murder is defined by MCL 750.316(1)(a) as a "willful, deliberate, and premeditated killing." A conviction of first-degree, premeditated murder thus requires proof "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998) ("Premeditation and deliberation require sufficient time to allow the defendant to take a second look.") Some factors that may be considered to establish premeditation are: "(1) the previous relationship between the defendant and the victim; (2) the defendant's actions before and after the crime; and (3) the circumstances of the killing itself, including the weapon used and the location of the wounds inflicted." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). After reviewing the record in light of these factors, we conclude that the prosecutor presented sufficient evidence of premeditation and deliberation.

The previous relationship between defendant and the victim supports an inference of premeditation. Defendant testified that the victim had previously threatened and shot at him and had even hired someone to kill him. This relationship could have provided a motive for the killing. See *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988).

Additionally, defendant's actions before and after the shooting support an inference of premeditation. An eyewitness testified that she saw a car pull into the Amoco station, drop defendant off, and pull around the corner. She further testified that defendant "walked straight to [the victim] and shot him" and that defendant then ran through an alley to the area where the car was waiting. From this evidence, the jury could infer that defendant planned to kill the victim and had arranged for a car to help him get away. This demonstrates that defendant acted willfully and deliberately.

The circumstances of the killing itself also support an inference of premeditation. Defendant correctly noted that the brutality of the killing and the fact that a deadly weapon was used is not enough, alone, to prove premeditation. *People v Hoffmeister*, 394 Mich 155, 159; 229 NW2d 305 (1975). However, the type of weapon used and the location of the wounds inflicted are factors to consider. *Plummer*, *supra* at 300. According to eyewitness testimony, defendant shot the victim in the leg as the victim was running away. Defendant then pursued the victim and shot him in the neck and head as he lay on the ground. This account was supported by the medical examiner's testimony that the victim was likely shot in the leg before he was shot in the head. The medical examiner also testified that the victim's gunshot wound to the head was a "contact wound," indicating that the barrel of the gun was pressed against the victim's head when defendant pulled the trigger. The jury could certainly infer that placing the barrel of a gun against a person's head and pulling the trigger is a deliberate, cold-blooded act that suggests premeditation. This is especially so where defendant first shot the victim in the leg.

Defendant argues that the evidence showed that he either acted in self-defense or that he shot the victim because he panicked. However, the jury was free to believe or disbelieve, in whole or in part, any of the evidence presented. *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975). Thus, the jury was not required to accept defendant's version of the events, which contradicted the testimony of eyewitnesses to the shooting. This Court will not interfere with the

jury's role of weighing the evidence and determining the credibility of the witnesses. *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). In any event, the prosecutor was not required to disprove defendant's theory of innocence. *Nowak, supra*, at 400. The prosecutor met the requisite burden of presenting evidence from which a rational trier of fact could conclude that all the elements of first-degree, premeditated murder were proved beyond a reasonable doubt.

II. Admission of Photographic Evidence

Defendant next contends that the trial court erroneously admitted a photograph depicting the victim's gunshot wound to the head. We disagree. A trial court's decision to admit photographic evidence is reviewed for an abuse of discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995).

Photographs that are calculated solely to arouse the sympathies and prejudices of the jury may not be admitted. *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). However, photographs that are otherwise admissible for a proper purpose are not rendered inadmissible simply because they vividly portray the gruesome or shocking details of the crime. *Mills*, *supra* at 76; *Ho*, *supra* at 188. Rather, the trial court should seek to exclude only those photographs that "could lead the jury to abdicate its truth-finding function and convict on passion." *People v Coddington*, 188 Mich App 584, 598; 470 NW2d 478 (1991). The requisite analysis is whether the photographs are relevant under MRE 401 and, if so, whether their probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, *supra* at 66.

In this case the photograph was relevant because it depicted the nature and extent of the injury suffered by the victim—a gunshot wound to the head. This was probative of an intent to kill. *Id*. at 71. Moreover, the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice. The photograph is not overly gruesome and it clearly depicts the victim's gunshot wound to the head. The photograph was not designed to inflame the passions of the jury. Thus, we cannot conclude that the trial court abused its discretion by admitting the photograph.

III. Denial of Motion for New Trial

Defendant next asserts that the trial court should have granted his motion for judgment notwithstanding the verdict or a new trial, on the ground that the verdict was against the great weight of the evidence. We disagree. A trial court's decision regarding whether the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Brown*, 239 Mich App 735, 744-745; 610 NW2d 234 (2000).

A motion arguing that the verdict was against the great weight of the evidence may be properly granted only where the evidence preponderates so heavily against the verdict that allowing it to stand would result in a serious miscarriage of justice. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). In this case, the prosecutor presented testimony from several

eyewitnesses that saw defendant shoot the victim in the head after first shooting him in the leg. The medical examiner testified that the victim's gunshot wound to the head was a "contact wound," indicating that defendant placed the barrel of the gun against the victim's head and pulled the trigger. An eyewitness testified that this shot was fired while the victim was lying on the ground. This was compelling evidence that defendant intentionally killed the victim with premeditation and deliberation. The jury was free to disbelieve defendant's claim of self-defense. *Fuller*, *supra* at 453. Absent exceptional circumstances, the credibility of witnesses is a matter for the jury to decide. *Lemmon*, *supra* at 642. We do not find that the trial court abused its discretion by deferring to the jury's verdict and denying defendant's motion for a new trial.

IV. Admission of Defendant's Inculpatory Statements

Defendant also argues that his statements made to the police should have been suppressed because they were taken after he asserted his right to remain silent and were induced by promises of leniency. We disagree. We review the trial court's factual findings for clear error and its interpretation and application of the law de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

Defendant was advised of his constitutional rights pursuant to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and signed a written waiver of those rights. Defendant does not claim that his waiver was invalid, but asserts that the police officer improperly continued to question him after he invoked his right to remain silent. Where a suspect unequivocally invokes his or her right to remain silent, the police must stop questioning and must honor the suspect's demand. *Michigan v Mosley*, 423 US 96, 103; 96 S Ct 321; 46 L Ed 2d 313 (1975); *People v Adams*, 245 Mich App 226, 230-231, 234; 627 NW2d 623 (2001).

Defendant claims that he repeatedly told the police officer that he had nothing more to say. However, the officer denied this and the trial court expressed doubt about defendant's credibility on the matter. We defer to the trial court's credibility assessment. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1998). In any event, even if defendant told the officer that he had "nothing more to say," this would not constitute an unequivocal invocation of the right to remain silent. Rather, defendant simply communicated his opinion to the officer that he had revealed all pertinent information and had nothing more to add.

Defendant further suggests that the police officer improperly induced his statements by promising to write up a statement to make the case look like manslaughter, not murder. A suspect's inculpatory statements, induced by a police officer's promises of leniency, are not inadmissible per se. *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997). Rather, such promises are one factor to consider when determining if the statement was voluntary. *Id*. Here, the officer denied ever promising defendant anything, and the trial court believed the officer's testimony. See *Howard*, *supra* at 543. Defendant has failed to show that he was promised anything in exchange for his statements. Thus, the trial court did not err by denying defendant's motion to suppress.

V. Evidence of a Witness's Prior Contacts with Police

Defendant claims that the trial court improperly allowed the prosecutor to impeach a defense witness with evidence of prior arrests that did not result in a conviction. We disagree. We review the trial court's evidentiary rulings for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999), amended 459 Mich 1276 (1999).

A witness' credibility may not be impeached with evidence of a prior arrest that failed to result in a conviction. *People v Layher*, 238 Mich App 573, 577; 607 NW2d 91 (1999), aff'd ___ Mich ___; ___ NW2d ___ (Docket No. 116315, issued 7/17/2001). However, the record belies defendant's claim that the prosecutor used prior instances of arrest to impeach defendant's witness. Although the prosecutor asked the witness about his past contact with homicide detectives, the prosecutor carefully avoided informing the jury that these contacts were arrests. In fact, the prosecutor was responding to the witness's testimony that, although he allegedly knew about the victim's plan to kill defendant, he neglected to inform the police because he did not know who to contact. The prosecutor suggested that the witness could have informed the homicide detectives that he knew from prior contacts. This was a proper line of questioning because the prosecutor never mentioned, or suggested, that the witness had prior arrests. Therefore, we do not find an abuse of discretion.

VI. Prosecutorial Misconduct

Defendant contends that the prosecuting attorney made disparaging statements during closing arguments such that defendant was denied a fair trial. We disagree. Defendant failed to preserve this issue by objecting to the alleged misconduct during trial. Therefore, "appellate relief is precluded unless an instruction could not have cured the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice." *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999). We review this unpreserved issue for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

According to defendant, he was denied a fair trial when the prosecutor belittled his defense by commenting, "[t]he defendant would have you think that this was somehow some sort of half baked self-defense situation." However, the record shows that the prosecutor never disparaged defendant or his defense counsel. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Instead, the prosecutor's comment was an appropriate attack on the viability of defendant's theory of the case. The prosecutor did not shift the jury's focus away from the evidence to the personality of defendant or defense counsel; rather, the prosecutor directed the jury's attention to the evidence of the case. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). Defendant has not shown plain error affecting his substantial rights. In any event, had defendant objected, a timely instruction could have cured any prejudice resulting from the prosecutor's comment. *Schutte*, *supra* at 721.

VII. Ineffective Assistance of Counsel

Lastly, defendant argues that he was denied the effective assistance of counsel by trial counsel's several errors. We disagree.

Effective assistance of counsel is presumed and the defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To justify reversal, the defendant must prove that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). In so doing, defendant must overcome the strong presumption that counsel's performance was not sound trial strategy. *Id*. Secondly, the defendant needs to establish that the deficient performance prejudiced him to the extent that, "but for counsel's error, the result of the proceeding would have been different." *Id*.

Defendant maintains that his counsel was ineffective for failing to file a motion to quash the information. However, the evidence was more than adequate to support a bindover on first-degree, premeditated murder. Thus, a motion to quash would have been futile. Counsel is not required to file meritless motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant also claims that counsel failed to investigate the circumstances surrounding his allegedly illegal arrest and prearraignment detention. However, defendant's claims are not supported by any factual record. In fact, defendant's inculpatory statement and lineup identification occurred only one day after his arrest. See *People v Manning*, 243 Mich App 615, 638-645; 624 NW2d 746 (2000); *People v Lewis*, 168 Mich App 255, 260-264; 423 NW2d 637 (1988). Likewise, defendant's claim that counsel failed to investigate the criminal histories of prosecution witnesses lacks factual support. Where, as here, no evidentiary hearing on defendant's claims was held, our review is limited to counsel's mistakes apparent from the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). The record does not demonstrate that the performance of defendant's counsel prejudiced defendant to the extent that the outcome of the trial would have been different. See *Carbin, supra* at 600.

Defendant further opines that counsel was ineffective for stipulating to waive the testimony of an evidence technician. However, the technician's sketches of the crime scene were admitted into evidence. Defendant has not shown that the technician's testimony would have added anything of value to his defense. Thus, defendant has not overcome the presumption that counsel's decision whether to call or question this witness was a matter of trial strategy. *Rockey, supra* at 76. Also, in light of the overwhelming evidence of defendant's guilt, defendant has not shown that the result of the proceeding would have been different had counsel called certain expert witnesses. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Finally, counsel was not ineffective for failing to request an in-camera hearing to determine how much evidence a sequestered witnesses heard. The challenged witness was the first witness to testify;

therefore, it can be readily ascertained that he heard no evidence at all. Counsel is not required to make meritless motions. *Darden, supra* at 605.

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper