

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT REEVES,

Defendant-Appellant.

UNPUBLISHED

October 12, 2001

No. 218205

Wayne Circuit Court

Criminal Division

LC No. 98-004378

Before: Owens, P.J., and Holbrook, Jr. and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony-murder, MCL 750.316(1)(b), arson of a building, MCL 750.73, discharging a firearm at a dwelling, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court vacated the first-degree premeditated murder conviction, and sentenced defendant to concurrent prison terms of natural life for the felony-murder conviction, five to ten years for the arson conviction, and two to four years for the discharging a weapon conviction. In addition, defendant was sentenced to a consecutive, two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm in part and vacate in part.

Defendant argues that the evidence was insufficient to support his convictions because the prosecutor's principal witness, although having given testimony establishing defendant's involvement in the charged crimes at defendant's preliminary examination, recanted this prior testimony at trial. We disagree. The gravamen of defendant's argument addresses matters of weight and credibility. However, the resolution of weight and credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). Moreover, a challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). Here, resolving the weight and credibility issues in the light most favorable to the prosecution, the principal witness's testimony provided sufficient evidence to enable the jury to find, beyond a reasonable doubt, that defendant committed the crimes charged.

Next, defendant argues that the prosecutor committed misconduct during closing argument by disparaging defense counsel and by urging the jury to consider impeachment evidence as substantive evidence. Because defendant did not object to the challenged remarks at trial, appellate relief is not warranted absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

First, the prosecutor's remarks regarding defense counsel were responsive to defense counsel's own arguments concerning the prosecutor's case. Considered in this context, the remarks were not plainly improper. See *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

We agree, however, that the prosecutor impermissibly urged the jury to consider the police statements of two witnesses, which were introduced solely for impeachment purposes, as substantive evidence. This was plain error because the police statements were admitted only for impeachment, and would have been hearsay if admitted for their truth. See *Merrow v Bofferding*, 458 Mich 617, 631-632; 581 NW2d 696 (1998). Nevertheless, the statement about the weapons was cumulative of other properly admitted testimony, and the reference to defendant's shoes was innocuous. Further, the trial court provided a cautionary instruction concerning the limited use of impeachment evidence. Accordingly, we cannot conclude that defendant's substantial rights were affected. *Carines*, *supra* at 763.

Defendant next argues that evidence of his drug dealing was improperly admitted. Because defendant failed to object to this evidence at trial, he must show a plain error affecting his substantial rights. *Carines*, *supra* at 763. A review of the record reveals that the evidence was highly relevant to explaining the animosity between the men involved in this case, providing both context and a motive for the charged crimes. Moreover, there is no indication that the evidence was used for an improper character purpose. MRE 404(b). Therefore, defendant has failed to show a plain error affecting his substantial rights.

Next, defendant argues that he was denied his constitutional right to effective assistance of counsel. Generally, there is a strong presumption that counsel was effective. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). To overcome this presumption, defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable probability exists that, but for counsel's unprofessional error, the outcome of the proceedings would have been different." *Id.* Because defendant did not raise this issue in an appropriate proceeding in the trial court, our review is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant specifically claims that defense counsel failed to adequately prepare the defense witnesses for trial because the prosecution was able to impeach portions of their testimony. However, in the absence of proceedings below, the record does not indicate the scope of defense counsel's preparatory efforts, much less that they were deficient. The successful impeachment of witnesses alone does not demonstrate that counsel's preparatory efforts were deficient. Therefore, we are not persuaded that defendant has overcome the presumption that counsel effectively prepared the witnesses. Defendant's remaining allegations of ineffectiveness relate to the issues previously addressed in this opinion. With regard to these matters, we

conclude that defendant has failed to show either that counsel was deficient, or that he was prejudiced by any alleged deficiency. *Rice, supra* at 444. Consequently, we conclude that defendant's contention that he was deprived of his constitutional right to effective assistance of counsel is without merit.

Finally, we note that defendant was convicted of arson, as well as felony-murder with arson serving as the predicate felony. It is well established that it violates this state's constitutional prohibition against double jeopardy for a defendant to be convicted of both felony-murder and the underlying felony. *People v Minor*, 213 Mich App 682, 690; 541 NW2d 576 (1995). Therefore, although not raised by appellate counsel, we vacate defendant's arson conviction and remand for correction of the judgment of sentence.

Affirmed in part, vacated in part, and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Talbot