STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 23, 2001
v	No. 223448 Wayne Circuit Court
ROBERT MARTIN, Defendant-Appellant.	LC No. 98-008752

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to natural life in prison without the possibility of parole for the first-degree murder conviction, twenty-five to fifty years in prison for each assault with intent to commit murder conviction, and two years for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is that there was insufficient evidence for the trier of fact to find that the essential elements of the crime were proven beyond a reasonable doubt. We disagree. Because this issue involves the sufficiency of evidence, it is subject to de novo review. *People v Hawkins*, 245 Mich App 439, 443; 628 NW2d 105 (2001).

When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution. *People v Hampton*, 407 Mich 354, 366-368; 285 NW2d 284 (1979). The concept of sufficiency of the evidence focuses on whether the evidence, taken as a whole, justifies the verdict. *People v Clark*, 172 Mich App 1, 6; 432 NW2d 173 (1988). In a criminal case, due process requires that the prosecution introduce evidence sufficient to justify a rational trier of fact in concluding that the defendant was guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415; 615 NW2d 691 (2000).

First-degree murder is the intentional killing of another, done with premeditation and deliberation. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). Intent and

premeditation may be inferred from all the facts and circumstances, *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987); *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Defendant argues that his identification as the perpetrator of the murder was not proven beyond a reasonable doubt, and therefore, the evidence did not substantiate a finding of guilt. Nevertheless, the trier of fact determined that first-degree murder was proven beyond a reasonable doubt in that it was established by the witnesses' direct testimony, and the inferences drawn from the evidence. Defendant's own statement that "he knew that he had shot three of 'em, for a fact" because, "he had fifteen shots . . . and the other guy had three," combined with defendant's subsequent "bragging" about shooting the victims, provided circumstantial evidence to support the jury's finding. The evidence presented by the prosecution in the drive-by shooting death of the victim gave rise to the inference of malice, premeditation, and deliberation on the part of defendant. The trier of fact could infer from the totality of the evidence presented that defendant intentionally set in motion actions likely to cause the death of the victim. *People v Turner*, 213 Mich App 558, 577; 540 NW2d 728 (1995).

As the Michigan Supreme Court commented in *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974), "it is the function of the jury alone to listen to testimony, weigh the evidence, and decide questions of fact. Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *Id.* Here, the evidence showed that defendant retrieved his gun, enlisted help, and got into the back seat of the white Neon from which shots were fired, killing the victim. Defendant then bragged of his accomplishment. The compilation of evidence, and all reasonable inferences arising from the witnesses' testimony, revealed that a sufficient factual basis was established to sustain the verdict, and correctly identified defendant as the architect of the victim's murder.

Defendant next argues that his right to a fair trial was denied because he was forced to appear in front of the jury wearing jail slippers. We disagree. A trial court's failure to act upon a request to change clothes, based upon the appearance of the defendant's prison garb, is reviewed for an abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996); *People v Lee*, 133 Mich App 299, 300; 349 NW2d 164 (1984). This Court reviews the decision for an abuse of discretion based on the totality of the circumstances. *People v Julian*, 171 Mich App 153, 160-161; 429 NW2d 615 (1988).

Generally, a defendant can be denied due process of law by being compelled to go to trial wearing prison clothing. *Lee*, *supra*, 133 Mich App 300. Only if a defendant's clothing can be said to impair the presumption of innocence is there a denial of due process, and a defendant is not deprived of due process by the casualness of his civilian attire, or by wearing jail garb that appears to be civilian clothing. *People v Lewis*, 160 Mich App 20, 30-31; 408 NW2d 94 (1987). Here, defendant's claim is limited in that he had "jail slippers" on. The record fails to include a description of the footwear worn by defendant, but the remainder of his attire was civilian clothing. It is unclear whether the jury was able to see defendant's footwear, and the record does not state whether the jury was present when the issue was raised.

To justify reversal of a conviction on the basis of being improperly attired, defendant must show that prejudice resulted. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390

(1988); *People v Meyers (On Remand)*, 124 Mich App 148, 164; 335 NW2d 189 (1983); *People v Herndon*, 98 Mich App 668; 296 NW2d 333 (1980). This, defendant has not done. The trial court, after seeing defendant's attire and learning that defendant's clothing had been lost at the jail, stated it would "look into it." It appears from the trial court's remarks that it believed defendant's clothing was of little consequence. Nothing in the record indicates that the trial court found that the "slippers" were so negative or distracting as to require the court's intervention.

Here, the trial court's alleged failure to further "look into it" does not establish prejudicial error. *Robinson, supra*, 172 Mich App 654; *People v Moore*, 164 Mich App 378, 385; 417 NW2d 508 (1987), modified 433 Mich 851; 442 NW2d 638 (1989); *People v Marsh*, 108 Mich App 659, 677-678; 311 NW2d 130 (1981); *People v Smith*, 87 Mich App 18, 26; 273 NW2d 573 (1978). Defense counsel requested that an attempt be made to provide street shoes, but failed to make a proper objection. *Robinson, supra*, 172 Mich App 654. Defendant's footwear, if it were perceptible at all, did not brand him as a criminal to the trier of fact. Simply because defendant was dressed in slippers does not mean his due-process rights were violated. Only if a defendant's clothing can be said to impair the presumption of innocence will there be a denial of due process. *Lewis, supra*, 160 Mich App 30-31. Consequently, defendant's appearance did not undermine the integrity of the trial process, and did not result in manifest injustice. Because defendant's right to a fair trial was not diminished, the trial court did not abuse its discretion when it allowed defendant's trial to proceed.

Next, defendant argues that his due-process rights were infringed upon when the trial court allowed the late endorsement of a witness by the prosecution. Defendant asserts that there was a lack of timely notice, no time to properly prepare for the witness' testimony, and an inability to address the witness' proposed testimony during its opening statement. We disagree. This Court reviews the trial court's decision to allow a late endorsement of a witness for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32; 592 NW2d 75 (1998).

The res gestae witness statute, MCL 767.40a, provides:

> (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.
>
> (2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.
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> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court for good cause shown or by stipulation of the parties.

The witness in this case observed events in the continuum of the criminal transaction. *People v*

Long, 246 Mich App 582, 585; ___ NW2d ___ (2001); *People v Calhoun*, 178 Mich App 517, 521; 444 NW2d 232 (1989). Persons present at the scene of a crime are presumed to be res gestae witnesses, *People v Lamar*, 153 Mich App 127, 137; 395 NW2d 262 (1986), superseded by statute as stated in *Calhoun*, *supra*, 178 Mich App 521.

The prosecution, upon request, must provide a defendant with (1) any exculpatory information the prosecutor knows; (2) police reports concerning the case; (3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective trial witness; (4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and (5) any plea agreement, grant of immunity, or other agreement for testimony in the case. MCR 6.201(B); *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). Due process requires disclosure of evidence in the prosecution's possession, which is exculpatory or material, regardless whether the defendant requests the disclosure. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Here, the prosecution did not suppress the evidence of the witness' testimony and promptly, upon discovering the witness' statement in its file, provided full and complete discovery to defense counsel who had one week to prepare. There is no evidence that earlier disclosure would have changed the result of defendant's trial, nor was there evidence that the witness' testimony favored defendant, or was evidence of an exculpatory nature. MCL 767.40a(4) provides that a trial court may allow the endorsement of a witness anytime for good cause. In following MCL 767.40a(4), the court found that the witness' testimony "would be appropriate," and that she could testify. The court, in making its ruling, commented, "I believe that counsel did have an opportunity to review her statement and to prepare."

Without a showing of prejudice to defendant, the trial court's ruling cannot be considered an abuse of discretion. The witness' testimony merely reiterated the prosecution's theory of the case as established by other prosecution witnesses. As to evidence of unknown probative value, which is thus only potentially exculpatory, delay or loss of the evidence denies due process only when the prosecution or police act in bad faith. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989). Here, there was no exculpatory evidence, no bad faith on the part of the prosecution or the police, and full disclosure was made to defendant upon discovery of the information by the prosecution. The trial court had wide discretion in allowing the testimony of the witness, and defendant's counsel had an opportunity to review the witness' statement and to prepare. Absent the intentional suppression of evidence, or a showing of bad faith, the late endorsement of a witness by the prosecution does not require reversal. Consequently, we find that there was no abuse of discretion on the part of the trial court.

Defendant's final issue on appeal is that the trial court erred when it denied defendant's motion to suppress his custodial statement. We disagree. The issue of the voluntariness of a statement is a question of law. In reviewing the trial court's findings, this Court examines the entire record de novo. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). This Court gives deference to a trial court's factual findings unless there is clear error. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997).

The right against self incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17; *Dickerson v United States*, 530 US 428; 120 S Ct 2326; 147 L Ed 2d 405 (2000); *People v Watkins*, 247 Mich App ___; ___ NW2d ___ (Docket No. 225572, issued 7/24/01), slip op, p 3. A defendant may not be compelled to

testify against himself, or involuntarily provide evidence of a testimonial or communicative nature. *United States v Hubbell*, 530 US 27; 120 S Ct 2037, 2042; 147 L Ed 2d 24 (2000); *People v Burhans*, 166 Mich App 758, 761-762; 421 NW2d 285 (1988).

When defendant challenged the admissibility of his statements, the trial court heard testimony regarding the circumstances of defendant's statements outside the presence of the jury. *Walker, supra*, 374 Mich 338. An evidentiary hearing was held to determine the admissibility of defendant's statements. The court found that defendant was properly advised of his constitutional rights under *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996); *People v Snider*, 239 Mich App 393, 416; 608 NW2d 502 (2000). Whether a defendant has validly waived his *Miranda* rights depends on the totality of the circumstances surrounding the interrogation. *Cheatham, supra,* 453 Mich 27.

A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether a statement was voluntary is determined by examining police conduct; whether it was made knowingly and intelligently depends in part upon the defendant's capacity. *Howard, supra,* 226 Mich App 538. Defendant's *Miranda* rights were communicated to him both verbally and in writing. The police made sure that defendant could read and understand his rights. Defendant's interrogation lasted only a few hours, and no physical, mental, or other coercive tactics were used during the interrogation process. It was established during testimony that the police administered the required warnings, sought to insure that defendant understood each warning by inquiring whether defendant understood what the warning meant, and obtained an express written confirmation when defendant signed the written warnings before questioning. The trial court, after hearing testimony, found that no impropriety occurred, and that defendant's statements had been voluntarily given. Proceeding on the premise that a "knowing and intelligent" waiver is required in situations where the statement is wholly voluntary, and there is no evidence of police misconduct, it is clear in this case that defendant understood his rights and that he could, and did, provide a valid waiver. *Cheatham, supra*, 453 Mich 27.

At the conclusion of defendant's evidentiary hearing, the trial court held that, "[b]ased on the testimony, and the exhibits admitted today, this court is of the opinion that the statement of defendant was voluntarily made; that is, that defendant did in fact knowingly and intelligently waive his right to remain silent." *Miranda, supra*, 384 US 444; *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999); *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997); *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995). Consequently, the trial court did not err when it admitted defendant's statement.

Affirmed.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens