

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN SCOTT HEARINGTON,

Defendant-Appellant.

UNPUBLISHED

August 10, 2004

No. 245015

Berrien Circuit Court

LC No. 2001-410812-FC

Before: Judges Whitbeck, CJ, and Owens and Schuette, JJ

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree felony murder, MCL 750.316(1)(b), second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment without parole for the first-degree felony murder conviction, 480 to 1,200 months' imprisonment for the second-degree murder conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm defendant's convictions and sentences of first-degree felony murder and felony-firearm, but vacate his conviction of second-degree murder.

I

Defendant argues that a new trial is required because the jury was exposed to extrinsic influences that affected its verdict. Specifically, defendant maintains that disruptions by Juror 33, which resulted in Juror 33's dismissal from the jury on the fourth day of trial, adversely affected the jury. We conclude that this issue is not preserved because defendant did not raise this issue at the time Juror 33 was dismissed. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995) (issues not considered by the trial court are unpreserved). Unpreserved issues, constitutional and nonconstitutional, are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

In *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997), our Supreme Court stated:

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial

possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt . . . because the error is constitutional in nature. [Citations omitted.]

Regarding the first part of the test articulated in *Budzyn*, it is apparent that the jury was exposed to disruptive comments by Juror 33 during the course of the trial. However, the second part of the test has not been established. Defendant has not shown that Juror 33's disruptive comments related to any material aspect of the case or that there was a direct connection between his comments and the adverse verdict. Defendant never requested a hearing to determine what Juror 33 said to the jury. Also, during a post-trial hearing, defendant failed to explore the issue with the other jurors. His appellate argument is based on unsupported speculation that Juror 33's disruptive comments may have influenced the jury's decision. But Juror 33 was removed from the jury several days before deliberations began, and the jury was given a cautionary instruction at that time. Under the circumstances, defendant has not met his burden of establishing that Juror 33's comments created a real and substantial possibility of affecting the verdict. *Budzyn, supra*. Because he has not met his initial burden of proof, a harmless error analysis is unnecessary. *Id.* Reversal on the basis of this issue is not warranted.

Defendant additionally argues that a communication between a court officer and another juror, which was heard by additional jurors, warrants reversal. Juror 32 questioned the court officer about whether defendant could be retried if the jury concluded that the charged offense did not occur in Michigan. The court bailiff informed Juror 32 that he believed double jeopardy would prevent a retrial. This extraneous influence, legal advice imparted to the jury by the bailiff, was the subject of defendant's motion for a new trial. Following an evidentiary hearing, the trial court denied the motion. We review a trial court's denial of a new trial motion for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

At a post-trial evidentiary hearing, the jurors were individually questioned. Their testimony reveals that the conversation between the bailiff and Juror 32 occurred before the jury was instructed or began deliberations.¹ Many of the jurors did not hear the conversation at all. Some of the jurors, who admitted to hearing Juror 32 ask the question, did not recall if the court officer answered the question or what he said. All of the jurors, both those who heard the conversation and those who did not, testified that the issues of double jeopardy, retrial possibilities, and comments made by, or information given by, the court officer were never raised during deliberations and were not a factor in their decision. Each of the jurors who

¹ The trial court relied on *People v France*, 436 Mich 138; 461 NW2d 621 (1990), when analyzing whether defendant was entitled to a new trial. That case involves communications with deliberating juries or jurors. *Id.* at 142. The communication at issue here did not involve a deliberating jury and is more properly treated as an extrinsic influence on the jury, i.e., extrinsic information learned during the course of trial.

deliberated and reached a verdict testified that they determined that the crime occurred in Michigan beyond a reasonable doubt based on the evidence presented at trial. Venue of the crime was questioned during deliberations only in conjunction with the testimony of one witness. The record reveals that the witness's testimony was unclear and determined not to be credible by the jury. None of the jurors considered double jeopardy when deciding the case, and the jurors unanimously testified that any improper communication with the court officer had no effect on their decision in any manner.

We conclude that the first part of the test articulated in *Budzyn, supra*, was met in this case. Some of the members of the jury were exposed to an extraneous influence, i.e., the court officer's opinion that defendant could not be retried if the jury found that the crime occurred in Indiana. The second part of the test, however, has not been established. Defendant was required to show a real and substantial possibility that the extraneous influence could have affected the verdict. This inquiry is an objective one. In *Budzyn, supra* at 89 n 10. When determining whether an extrinsic influence created a real and substantial possibility of prejudice, a court may consider: (1) whether the material was actually received by the jury, and if so how; (2) the length of time the information was available; (3) the extent to which the jurors discussed and considered it; (4) whether the material was introduced before the verdict was reached and if so, at what point during deliberation; and (5) any other matter "which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict." *Id* at 89 n 11, citing *Marino v Vasquez*, 812 F2d 499, 506 (CA 9, 1987).

In this case, not all of the jurors were exposed to the extraneous influence. Although the conversation occurred, the jurors did not discuss the information they received from the bailiff. Some of the jurors who heard the conversation could not recall if the bailiff answered or what his answer was. The court officer's statement, and related topic of whether defendant could be retried, was never discussed by the jury or considered during deliberations. Defendant offers no evidence or information to support his claims that the matter was considered, was or may have been an issue during deliberations, or possibly affected the verdict. Instead, his argument is based on unsupported speculation and innuendo.

In reaching our conclusion, we note that, while defendant raised venue as an issue, only one witness presented any testimony that arguably was relevant to the issue whether the crime occurred somewhere other than Buchanan, Michigan. The witness testified that, sometime before the victim's disappearance, he observed the victim driving his mother's car toward Indiana. But the witness was uncertain about his testimony. He could not state with any degree of certainty when he made his observation. It was never established that this observation occurred on the morning the victim disappeared. The evidence that the crime occurred on the property of defendant's brother on Rangeline Road in Buchanan, Michigan, however, was overwhelming. Defendant was aware of the property and its seclusion, and he had previously shot an animal on the property. On the morning of the victim's disappearance, shooting was heard coming from the property. A neighbor testified that he heard several shots, a pause, and one final shot. The forensic pathologist testified that the pattern of bullet wounds on the victim's head suggested that two bullets were fired rapidly in time and the third was fired separate in time. A car matching the description of the car the victim was using was observed leaving the property on the morning of the shooting. The witness who saw the car noted it because he thought it was odd that a luxury car was being driven in that area. When the victim's body was

subsequently found in the trunk of the car, several witnesses noticed that the undercarriage of the vehicle was dirty with debris. There was a fine layer of dirt on the car. The victim's body and the trunk of the car contained debris similar to that found near the brush pile on the Rangeline Road property, and drag marks were found near the brush pile on the property. The victim had drag marks on his back. In light of the substantial evidence pointing to the Rangeline Road property as the crime scene, and the absence of competent evidence suggesting another location, the jurors could easily have set aside any questions or thoughts about whether defendant could be retried if the crime occurred in Indiana. Contrast, for example, *Budzyn*, *supra* at 97-100 (wherein the Court found a real and substantial possibility existed that the jury considered extraneous influences when deliberating).

Accordingly, we conclude that defendant has not established that there was a real and substantial possibility that the court officer's communication with the jurors affected the verdict. Thus, reversal is not required.

II

Next, defendant argues that there was insufficient evidence to support his convictions for second-degree murder and felony murder.² We disagree. When reviewing the sufficiency of the evidence in a criminal case, the reviewing court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences drawn from it are sufficient to establish the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). We will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe*, *supra* at 514-515.

The elements of felony murder are (1) the killing of a human being, (2) with malice, which is defined as "the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge" that the act will probably result in death or great bodily harm, and (3) "while committing, attempting to commit, or assisting in the commission of any of the felonies enumerated" in MCL 750.316(1)(b), including robbery. *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000), citing *Carines*, *supra* at 758-759. "The facts and circumstances of the killing may give rise to an inference of malice." *Id.*, quoting *Carines*, *supra* at 759.

² In his argument, defendant also states that there was insufficient evidence to support his felony-firearm conviction. We find that this issue is abandoned because defendant does not discuss, explain, or support his position with authority. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, the issue was not raised in the statement of questions presented. Review is therefore inappropriate. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999).

Viewed in a light most favorable to the prosecution, the evidence was sufficient to establish that defendant killed the victim. Defendant and the victim were overheard by more than one witness, including defendant's brother, talking about a marijuana deal involving \$1,000. The night before he was killed, the victim possessed a large sum of cash and talked about meeting defendant the next morning to buy marijuana. The next morning, defendant spoke to the victim two times by telephone. In one of the conversations, the victim was overheard telling defendant that he would pick him up in a few minutes. On the same morning, defendant's girlfriend heard defendant speaking on the telephone. He told someone to wait fifteen or twenty minutes. The victim left his home after his second conversation with defendant. He thereafter stopped at an ATM machine and withdrew \$200. He was not seen again. On the same morning, defendant left his girlfriend's house after his telephone calls with the victim and after calling his brother about a boat motor.

The evidence was undisputed that the victim died of three gunshot wounds to the head on the morning of September 16, 1998. The victim was shot with .22 caliber bullets. Shane Hearington, Tim Freeman, and James Lawson all testified that defendant possessed a .22 caliber handgun, which was black with pearl or white handles. Defendant stored the gun at Shane's house. Lawson believed defendant had stolen the gun. Dale Nelson testified that his gun, a .22 caliber black handgun with pearl handles, was stolen along with other property, including a suitcase with identifiable initials. Nelson's suitcase was later recovered by the police at Shane's house based on information Shane provided, specifically that defendant was storing the suitcase at Shane's house.

At 10:29 a.m. on the morning of the offense, the victim's car was seen on videotape arriving at a Meijer parking lot in South Bend. Two minutes later, a man was captured on videotape entering the Meijer store. The man purchased items of clothing in the store. Defendant's girlfriend testified that she believed the man inside the store, who was depicted in photographs, was defendant. Moreover, when defendant arrived home later that day, he was wearing the same clothes that were purchased at Meijer. Defendant's girlfriend and Shane Hearington both remembered the clothing. Shane gave defendant a ride that morning and saw that he was wearing new clothes. Defendant paid Shane to drive him home from Kmart, and he told Shane to lie to the police about how he got to Kmart.

Defendant also told numerous different stories to different people throughout the days leading up to the discovery of the body and thereafter. He also provided information about the crime to his acquaintances before the information was reported by the media. Moreover, defendant's brother testified that, after finding out that the victim was missing, he searched his Rangeline Road property. He knew defendant and the victim were trying to engage in a drug transaction, and he believed they may have taken care of their business on his property. Defendant was familiar with the property and had access to it. Defendant tried to blame other people for the crime, but the police checked out the location and alibis of the others and found nothing tying them to the crime. Defendant also confessed the crime to Jerry Price while in a drunken state at a bar. Later, when defendant became aware that Price may try to identify him as the man who confessed, he changed his appearance before a lineup could be conducted. Defendant additionally asked Freeman to hide a gun on his property after the crime. Viewed most favorably to the prosecution, the evidence was sufficient to enable the jury to identify defendant as the victim's killer beyond a reasonable doubt.

There was also sufficient evidence of malice. The victim was shot in the back of the head three times by a .22 caliber weapon. The shooting occurred in a secluded area. There was evidence that the first shots were fired in rapid succession, followed by a pause, and then a final shot. Defendant was familiar with shooting a .22 caliber weapon and had previously killed a dog using the same weapon. The victim's body was dragged to the trunk of the car, locked inside, and left to rot. The trunk was wiped clean in the area where a hand would be placed to close it. The evidence supports the intent to kill.

Finally, there was evidence of robbery. Defendant and the victim discussed exchanging a pound of marijuana for \$1,000. Defendant tried to find marijuana and even went to the home of a distant relative to find a source. The victim was in possession of a large sum of money the night before he was killed, and he removed \$200 from an ATM machine within an hour of the shooting. When he was found, there was no money on his person or in his car. Nor was any marijuana found. After the crime, defendant was observed with a large sum of money. A gas station attendant testified that defendant always purchased coffee with change or single dollar bills. But on the Friday after the shooting, she noticed that he had a lot of cash. James Lawson also confirmed that defendant had a large sum of money during the week of the offense.

The evidence and reasonable inferences drawn from the evidence was sufficient to prove beyond a reasonable doubt that defendant was guilty of felony murder for the death of the victim.

Similarly, there was sufficient evidence to support defendant's conviction of second-degree murder. Second-degree murder is a general intent crime. *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). There are four elements: "(1) a death, (2) caused by an act of defendant, (3) with malice, and (4) without justification or excuse." *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999). It was undisputed that the victim was killed, and, as previously discussed, there was sufficient evidence that defendant killed the victim and acted with malice.³ There was also evidence that the victim was shot for money. There was no evidence of justification or excuse. The evidence and reasonable inferences drawn therefrom, viewed in a light most favorable to the prosecution, was sufficient to establish the elements of second-degree murder.

In challenging the sufficiency of the evidence, defendant asserts that the testimony of Price, Freeman, Lawson, and Shane Herrington should be disregarded as being inherently incredible and devoid of probative value. Defendant acknowledges that "absent exceptional circumstances, issues of witness credibility are for the jury." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). But conflicting testimony is an insufficient ground for granting a new trial. *Id.* at 647. Even when there is directly conflicting evidence and the testimony supporting the verdict is impeached, the credibility of witnesses is for the jury if "it cannot be

³ The malice element of second-degree murder is the same as that for felony murder. That element requires proof that defendant had an intent to kill, an intent to inflict great bodily harm or an intent to create a very high risk of death with the knowledge that the act probably would cause death or great bodily harm. *Aldrich, supra* at 123.

said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it.” *Id.* at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942). Exceptions to the general rule include circumstances where the testimony contradicts indisputable physical facts or laws, where the testimony is patently incredible or defies physical reality, where the testimony is so inherently implausible that it cannot be believed by a reasonable person, or where the testimony was seriously impeached and the case was marked by uncertainties and discrepancies. *Id.* at 643-644.

Defendant has not demonstrated that the testimony of Price, Lawson, Freeman or Shane Hearington was devoid of probative value. Defendant has not demonstrated that the evidence of his guilt was patently incredible or so marked by uncertainty or discrepancy that his convictions must be reversed. Indeed, in making his argument, he virtually ignores the testimony that supports the prosecution’s case. He ignores compelling testimony from several additional witnesses linking him to the victim, the crime scene, and the time frame of the offense. He also ignores the videotapes from the Meijer store, which place him at the store at virtually the same time that the victim’s dead body was brought to the parking lot and which show defendant purchasing new clothes that he immediately wore.

Furthermore, the testimony of Price was not inherently implausible or incredible. That Price was related to Shane Hearington, that he did not report his alleged conversation with defendant to police for a lengthy period of time, and that he made some inconsistent statements are not exceptional circumstances that would warrant this Court’s interference with the jury’s credibility determination. *Id.* The facts relevant to Price’s credibility were presented and argued to the jury, which decided the issues. Moreover, the testimony of Shane, Freeman, and Lawson was not impeached to the point that it was deprived of all probative value. It did not defy physical reality or physical facts or laws. Their testimony corroborated each other’s testimony in part, and other portions of their testimony were corroborated by others. We find no reason to second-guess or interfere with the jury’s role as factfinder.

III

Defendant next argues that reversal is required because of the admission of testimony about the breaking and entering that occurred at the Nelson home in August 1998. A trial court’s decision to admit evidence is reviewed for an abuse of discretion. *Herndon, supra* at 406. We find no abuse of discretion in the admission of the challenged evidence, but note that we believe it was unnecessary for the trial court to analyze the evidence under MRE 404(b).

In *People v Hall*, 433 Mich 573, 575; 447 NW2d 580 (1989), the defendant was convicted of the armed robbery of a video rental store. At trial, the prosecutor offered testimony from several witnesses about the defendant’s unrelated arrest on an unrelated charge. *Id.* at 577-578. A majority of the Supreme Court held that the evidence of the unrelated arrest and charge was relevant and admissible under MRE 401, without reference to MRE 404(b). *Id.* at 583-584 (Boyle, J.), 589 (Brickley, J.)

Evidence of a defendant’s possession of a weapon of the kind used in the offense with which he is charged is routinely determined by courts to be direct, relevant evidence of his commission of that offense. [*Id.* at 580-581.]

Specifically, the evidence was relevant to the defendant's identity. *Id.* at 581-583.

The fact that establishing defendant's possession of the shotgun also necessarily constitutes evidence of a separate crime, wrong, or act (possession of a sawed off shotgun) does not alone bring the proof within the compass of MRE 404 preclusion. Unlike the "exceptions" contained in MRE 404(b), in which relevance rests on a circumstantial inference from the other act to the fact in issue, the shotgun itself was equally as direct an item of evidence of defendant's commission of the charged robbery in this case as marked bills or identifiable jewelry would be in another, while the testimony by various witnesses to the circumstances of its seizure was relevant to connect the defendant to both it and the car. [*Id.* at 583.]

The evidence of the shotgun in *Hall* was not objectionable on the ground that it was never conclusively identified as being the same gun used in the robbery of the video store. *Id.* at 582 n 7. It was sufficient that the gun was seized from the defendant, was in the defendant's possession, and was of the same kind used during the charged offense. *Id.*

In this case, the evidence of the Nelson breaking and entering, and defendant's possible connection to that theft, was probative of defendant's possession and control of the same caliber weapon used to shoot the victim. The evidence made defendant's identity as a shooter in the charged crime more probable than it would be without the evidence. Several witnesses testified that they saw defendant in possession of the weapon. How defendant came into possession of the weapon, and the fact that other stolen items from the scene of the prior crime were found where defendant resided on a part-time basis, lent credence to the testimony that defendant possessed the gun. Without evidence of the robbery and related suitcase recovered from Shane's house, the jury had an incomplete picture of defendant's possession of the weapon. Several people lived at Shane's house and defendant suggested that the gun probably belonged to one of them. We also note that, contrary to what defendant asserts, the evidence presented at trial about the Nelson breaking and entering was minimal.

We also disagree that the evidence of the Nelson breaking and entering was extremely prejudicial and should have been excluded under MRE 403. The probative value was significant to establish defendant's identity as the shooter. There was little chance that the jury was confused by testimony related to the prior breaking and entering. And, the jury was provided with a specific cautionary instruction with respect to the evidence. In sum, the evidence was properly admitted. MRE 401; *Hall, supra*.

IV

Finally, defendant argues that his conviction of second-degree murder must be vacated. We agree. In *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000), this Court held that "multiple murder convictions arising from the death of a single victim violate double jeopardy." A defendant cannot be properly convicted of first-degree felony murder and second-degree murder for the death of a single victim. *Id.* Accordingly, we vacate defendant's conviction of second-degree murder. *Id.* at 429-430.

Affirmed in part and vacated in part. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette