STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 28, 2004
v	No. 250029 Wayne Circuit Court
MARVIN HOTCHKISS, JR., Defendant-Appellant.	LC No. 03-002803-01

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction, to thirty-eight months to five years imprisonment for the felon in possession of a firearm conviction, and to two years imprisonment for the felony-firearm conviction. We affirm.

I

This case arises out of the shooting death of Rasool Husain inside Husain's house in Detroit on February 1, 2003. Husain was shot in the back of the head. There was no known witness to the shooting and no physical evidence connected defendant to the crime. On appeal, defendant first raises a challenge to the sufficiency of the evidence at trial, arguing there was insufficient evidence to establish defendant's identity as the perpetrator.

We review the sufficiency of the evidence de novo in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell,* 260 Mich App 261, 270; 677 NW2d 66 (2004).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

As noted, there was no direct evidence showing that defendant shot and killed Husain. However, there was considerable circumstantial evidence that defendant committed the crime, and it is well settled that circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

A. Motive

The prosecution offered evidence that money was the motive for the crime. The day of the incident defendant drove Husain to his workplace to pick up his paycheck. Husain's sister, Patricia Hinson, was the manager and she gave the victim cash for the paycheck and a receipt for the money received. Hinson overheard a conversation between Husain and defendant after she cashed the paycheck. Hinson testified that defendant told Husain that defendant wanted his "motherfucking" money, with Husain replying that defendant had to wait because Husain had to get his truck out of the shop. Defendant testified that the two of them left together and went to Husain's house, and that he stopped in briefly to use the bathroom. Later, Husain was discovered dead in his house. The police found the receipt for $206 but the money was missing.

B. Opportunity

Defendant's own testimony, and that of a neighbor, established defendant's opportunity to commit the crime. Defendant admitted that he was in Husain's house after he drove Husain home. In addition, the neighbor from across the street testified that she saw defendant use a key to unlock the front door of Husain's house at approximately 5:00 p.m. on the day of the incident, and this timing generally coincides with the testimony of Hinson and defendant about when the paycheck was cashed and the two returned to Husain's house. The neighbor saw defendant enter the house, but she did not see him leave. The neighbor also testified that when defendant entered Husain's house, Husain's car was in the driveway with the engine running, giving credence to the conclusion that Husain was in the house when defendant entered. The neighbor also testified that two other persons approached Husain's house before 5:00 p.m., but they did not enter the house. Husain was found dead by his girlfriend and a friend at 10:00 p.m.

C. Inconsistency

Defendant gave inconsistent statements about when he last saw Husain on the day of the incident. Defendant told Husain's girlfriend that he had seen Husain at 2:00 p.m., but later told her that he had seen Husain at 3:30 p.m. Defendant's two different statements are also inconsistent with the testimony of Hinson and the neighbor. Hinson testified to seeing Husain and defendant leave Husain's job after 4:15 p.m. and the neighbor testified to seeing defendant enter Husain's house at approximately 5:00 p.m. Defendant's statements, if believed, tend to lead suspicion and investigation in another direction. *People v Wolford*, 189 Mich App 478, 482; 473 NW2d 767 (1991). An exculpatory statement which proves to be false and which relates to the elements of the crime may be considered as substantive evidence of guilt." *People v Dandron*, 70 Mich App 439, 441-445; 245 NW2d 782 (1976).

D. Flight

Defendant ran when he saw the police. On February 2, 2003, as the police approached defendant and his cousin standing on the porch, the two ran into the house, locked the door and refused to let the police come into the house for forty-five minutes until the cousin's step-father came home and allowed the police to enter the house. Although defendant's flight itself was not sufficient to support defendant's conviction, "It is well established in Michigan law that evidence of flight is admissible" to support an inference of "consciousness of guilt." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Considering the totality of the circumstantial evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to conclude that defendant was the perpetrator.

II

Defendant next argues that there was insufficient evidence of premeditation and deliberation to support his first-degree premeditated murder conviction. We disagree.

The offense of first-degree premeditated murder is a specific intent crime and requires proof that the defendant had an intent to kill. *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001). In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation characterize a thought process undisturbed by "hot blood." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998). Premeditation and deliberation require sufficient time to allow the defendant to take a second look and can be inferred from the circumstances surrounding the killing. *Kelly, supra* at 642.

In determining whether a defendant acted with premeditation, the trier of fact may consider (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 Moorer*, 262 Mich App 64, 77; 683 NW2d 736 (2004). After reviewing the record in light of these factors, we conclude that the prosecutor presented sufficient evidence of premeditation and deliberation.

Defendant and Husain had been friends over ten years. However, the evidence adduced at trial demonstrated that earlier on the day of the incident, defendant demanded money from Husain and Husain indicated that defendant would have to wait for his money. Later, Husain was found dead without the money he received from his paycheck.

The evidence also shows that defendant and Husain left Husain's job location and went to Husain's house where the shooting occurred. The brief journey from Husain's job to Husain's house would have given defendant enough time to take a "second look" at his intended conduct necessary to a finding of premeditation. Defendant testified in his own behalf and denied shooting his friend, Husain, so there is nothing in the record from which to conclude that the killing was carried out in the heat of passion, in self-defense or accidentally. Taken as a whole,

the evidence was sufficient to support a finding of premeditation and deliberation either before the men entered Husain's house or after they were inside.

Also, defendant's action after the shooting supports an inference of premeditation and deliberation. Defendant attempted to conceal his involvement in the murder by lying to Husain's girlfriend, stating that he last saw Husain at 2:00 p.m. or 3:30 p.m. at work and the prosecutor presented evidence showing defendant's lack of remorse over Husain's death, which was relevant to whether the killing was sufficiently premeditated and deliberate to establish first-degree murder. *People v Paquette*, 214 Mich App 336, 442-443; 543 NW2d 342 (1995). In addition, defendant ran away when he saw the police approaching him the day after the incident. Defendant's evasive conduct following a homicide supports an inference of premeditation and deliberation. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995).

Perhaps most telling on the issue of premeditation and deliberation are the circumstances surrounding the killing. Husain was shot at close range. The spent casing from a .25 caliber revolver was found approximately seven feet from his body. Husain had an elongated abrasion on the inner portion of the left ear, which could be consistent with a pistol whip. The testimony of the medical examiner established that Husain died of a gunshot wound on the back of the head, raising an inference that the death was an execution. The bullet traveled from the back to the front of the head and from the right to the left and slightly upward, suggesting that defendant was at least in a vulnerable position at the time of the shooting. There was no evidence of a struggle, an attack by Husain, or any other occurrence that would prompt any unthinking use of the firearm. The jury could certainly infer that shooting a person in the back of the head is a deliberate, cold-blooded act that suggests premeditation.

We conclude that the circumstantial evidence presented at trial, and reasonable inferences drawn from that evidence, were sufficient for the jury to find that defendant killed Husain and that the killing was deliberate and premeditated.

III

Defendant's third issue on appeal is that the trial court abused its discretion in allowing the prosecutor to impeach defendant with his prior armed robbery conviction. Defendant argues that the prejudicial effect of the admission of his prior conviction outweighed its probative value. We disagree.

The issue of improper impeachment by prior conviction was preserved because defendant testified at trial and moved to suppress his prior conviction record prior to the trial. We thus review a trial court's decision to allow impeachment with prior convictions for an abuse of discretion. *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999).

A witness may be impeached with a prior conviction if 1) the crime contained an element of dishonesty or false statement, or 2) the crime contained an element of theft, and the crime was punishable by imprisonment for more than one year, and the court determines that the evidence has significant probative value on the issue of credibility. MRE 609(a); *Nelson, supra* at 460. Crimes of theft are minimally probative, and are thus admissible only if the probative value outweighs the prejudicial effect. *People v Allen*, 429 Mich 558, 595-596, 605-606; 420 NW2d

499 (1988); MRE 609(b). Under *Allen*, a court, in admitting evidence of a prior conviction, must consider the vintage and the degree to which a crime is indicative of veracity on the probative value side of the equation. On the prejudice side, a court must consider the similarity of the offenses and the importance of defendant's testimony to the decisional process.

In this case, defendant's prior armed robbery conviction involves theft and is therefore minimally probative. *Allen*, *supra* at 595-596. However, defendant's armed robbery conviction is only five years old,[1] adding to the probative value. Moreover, the dissimilarity between the armed robbery and the first-degree premeditated murder reduces the prejudicial effect. *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991) (finding that the prejudice is minimal because there is no similarity between murder and armed robbery).[2]

However, on the facts of this case, the importance of defendant's trial testimony was not great. Defendant's testimony regarding his alibi and his reaction to the death of Husain was corroborated by the defense's other witnesses, Renaldo Barnes, Carol Hotchkiss and Diane Minor, reducing the prejudicial effect of the prior conviction evidence.

Therefore, when applying *Allen* factors, we find that the prejudicial impact of the admission of defendant's prior armed robbery conviction did not outweigh its probative value as impeachment evidence. As such, the criteria set forth in MRE 609 were satisfied and the trial court did not abuse its discretion in admitting defendant's prior conviction.

IV

Next, defendant asserts that he was denied a fair trial because the prosecutor's remarks during his closing argument constitute misconduct. We disagree. Defendant failed to preserve his claim for review on appeal because he failed to object to the prosecutor's statements in the trial court. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). We review an unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of a judicial proceeding independent of the defendant's innocence. If a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

A prosecutor is afforded great latitude in closing argument. He is permitted to argue the evidence and make reasonable inferences to support his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). While a prosecutor has a duty to see to it that a defendant receives a fair trial, he may use "hard language" when it is supported by the evidence

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[1] Defendant's armed robbery conviction was in 1998 and the trial in this case was in 2003.

[2] We acknowledge that the facts of this case suggest that defendant robbed Husain of the cash he received from his paycheck which lends an inference that the armed robbery conviction is somewhat similar to the first degree murder prosecution in this case.

and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Prosecutorial misconduct issues are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*

Here, the prosecutor's remarks at issue were:

> "So are they kind of building [sic] a lily for you? Maybe. Does that mean, he deserves to be shot down and gunned down in his house? No. But we are aware that this case stinks of motive. It stinks of opportunity. And it stinks of people that have presented themselves before you and have blatantly lied to you right from that stand.
>
> Celestine Teague is the fiancée of Rasool Husain. She has a child by him. On February 1st, she calls over when she goes to the house, cannot find Rasool. She does not know where he is. She finds him with obviously, checks with a friend Marvin Hotchkiss, as any normal person I suppose would do. Calls him up. Haven't seen him. Haven't seen him since 2:00. Liar."

With regard to remarks that the case "stinks" of people who blatantly lied, the prosecutor was referring to Anthony Millefoglie and Renaldo Barnes. The prosecutor cited to the instances in Millefoglie's testimony to show that Millefoglie blatantly lied to conceal his involvement in trafficking of narcotics at Husain's house[3], i.e., Millefoglie testified that he was at Husain's house once at 7:00 p.m. when the neighbor testified to seeing him there at multiple times. With regard to Barnes, defendant's cousin, the prosecutor pointed out all of the discrepancies between Barnes' statement to the police and his testimony to show that Barnes lied at trial to cover up for defendant. The prosecutor's remarks, supported by the evidence, were thus proper. *Ullah, supra* at 678-679.

Also, the prosecutor's remarks on the credibility of defendant were proper. This Court has held that the prosecutor may argue from the facts that a witness, including the defendant, was worthy or not worthy of belief. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecutor's remarks were based on the evidence that defendant gave two different statements about when he last saw Husain, which were shown to be false by the testimony of the neighbor.

Therefore, viewed as a whole, the prosecutor's remarks during closing argument were proper. Even if the prosecutor's remarks were improper, we do not find that defendant's substantial rights were affected by the prosecutor's isolated remarks, and, again, a curative instruction, if requested, could have eliminated any undue prejudice to defendant. *Carines*,

[3] There was testimony about a quantity of crack cocaine found at Husain's home after his death and suggestions that there was drug trafficking going on there, but no hard evidence of this.

supra at 763; *Ackerman*, *supra* at 448-449. Therefore, we hold that there was no plain error requiring reversal of defendant's convictions.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs