STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2010
v	No. 287724 Oakland Circuit Court
RODNEY O. HARRIS, Defendant-Appellant.	LC No. 91-106220-FC

Before: BANDSTRA, P.J., and BORRELLO and SHAPIRO, JJ.

PER CURIAM.

In October 1992, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), at a jury trial in Oakland Circuit Court. On November 9, 1992, defendant was sentenced to life in prison. Defendant timely filed a claim of appeal but the appeal was involuntarily dismissed for failure to file a brief. No further action was taken for approximately ten years, until November 2005, when defendant filed a circuit court motion to restart the appeal. The circuit court denied that motion and defendant sought leave to appeal. In lieu of granting leave to appeal, this Court remanded the case to the trial court for the appointment of counsel, "who then can file a motion for relief from judgment in the trial court."[1] Instead, defendant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. This case is now before this Court pursuant to federal district court Judge George Steeh's August 18, 2008, order conditionally granting defendant's petition and permitting his appeal by right to be reinstated.[2] For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

Defendant's conviction arises from the shooting death of Giordanio "Danieo" Tyler in Southfield, Michigan, during the early morning hours of January 2, 1991. Defendant and a relative, Chaton Hardiway, agreed to pick up Tyler from the residence of Robin Twilley and drive Tyler to visit with Hardiway's family. Before going to Twilley's residence, Hardiway

[1] *People v Harris*, unpublished order of the Court of Appeals, entered November 14, 2006 (Docket No. 272763).

[2] *Harris v Booker*, unpublished order of the United States District Court for the Eastern District of Michigan, entered August 18, 2008 (Case No. 07-13250).

asked defendant to pick up two other men, identified only as "Poem" and "Crazy Guy." At some point, defendant realized that Hardiway, "Poem," and "Crazy Guy" intended to kill Tyler, but he proceeded with their plan to pick up Tyler from Twilley's home. After Tyler entered the car, "Crazy Guy" shot him. Defendant drove into the parking lot of a Southfield office building, where "Crazy Guy" pushed Tyler's body out of the car.

Defendant gave differing accounts to police as to his role in the murder. Initially, he told police that when he became aware of the plan to kill Tyler, the two unidentified men threatened to kill him if he interfered with their plan in any manner. In a later interview, defendant told police that Hardiway told him that he was going to "set someone up," and that defendant agreed to assist Hardiway in exchange for $500. Defendant stated that after picking up "Poem" and "Crazy Guy," Hardiway produced a gun and passed it to the other two men. According to defendant, a discussion then ensued as to whether the gun was of sufficient caliber to kill Tyler as he had previously survived a shooting. During his second interview, defendant never mentioned that he was threatened or that he was acting under duress.

Defendant then stated that after the group picked up Tyler, one of the men shot Tyler twice in the head. Tyler's body was then dumped in the parking lot of a nearby office building. Defendant also admitted that later that day, he and Hardiway met an unidentified man who gave Hardiway $9,000 in $100-dollar bills. After Hardiway gave $500 to defendant, he and Hardiway went to a used car dealership and used some of the remaining money to purchase a used Ford Mustang.

On appeal, defendant first argues that he was prejudiced by the introduction into evidence of inflammatory photographs that had no relevance. Thus, he argues that reversal is required because the admission of three-crime scene photographs and three autopsy photos denied him a fair trial. Defendant objected to three of the crime scene photos but stated on the record that he had no objection to the admission of the autopsy photographs.

This Court reviews a trial court's decision to admit photographs for an abuse of discretion. *People v Cervi*, 270 Mich App 603, 625; 717 NW2d 356 (2006). Photographs are admissible if substantially necessary or instructive to show material facts or conditions. If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. *People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994), lv den 449 Mich 853 (1995). Autopsy photographs are relevant where they are instructive in depicting the nature and extent of the victim's injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997), lv den 456 Mich 953 (1998). Photographic evidence is admissible for the purpose of corroborating the testimony of a witness. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Photographs are not deemed inadmissible simply because other testimony or evidence encompasses the same issue, or simply because they are gruesome or difficult to view. *Id.*; *People v Unger (On Remand)*, 278 Mich App 210, 257; 749 NW2d 272 (2008), lv den 482 Mich 1027 (2008).

The initial question presented is whether the challenged photographs were relevant. Defendant asserts that none of the photographs were relevant because the issue of whether Tyler was shot in the head was never contested. Relevant evidence is evidence "having any tendency

to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Fletcher*, 260 Mich App 531, 552-553; 679 NW2d 127, lv den 471 Mich 900 (2004). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence that is not relevant is not admissible. MRE 402; *Fletcher*, 260 Mich App at 553. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Fletcher*, 260 Mich App at 553.

From the outset we note that defendant's acquiescence to the autopsy photographs constituted waiver of the issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). See also, *People v Riley*, 465 Mich 442, 448-450; 636 NW2d 514 (2001) (distinguishing waiver which is "the intentional relinquishment or abandonment of a known right," from forfeiture which is "the failure to make the timely assertion of a right.") Waiver extinguishes any error and precludes a party from seeking appellate review of a claimed deprivation of the rights that he waived. *Id.* Based on defendant's stated admission that he had no objection to the autopsy photographs, any error related to their admission has been waived and consequently, we limit our review of this issue to the three crime scene photographs.

The crime scene photographs were probative of the issues of premeditation and deliberation. The photographs reveal that Tyler was shot in the back of the head, suggesting that the shooter shot from behind, when Tyler was unaware of what was happening. Tyler's position on the pavement reveals that his body was abandoned, presumably because the persons responsible wanted to avoid detection. These matters make it more probable than not that Tyler's shooting was planned rather than committed in the heat of passion, and deliberate rather than accidental. Accordingly, the photographs were admitted for the proper purpose of proving the elements of first-degree murder. *Hoffman*, 205 Mich App at 18.

Next, we examine whether the photographs were unduly prejudicial relative to their probative value. Although the photographs depict blood smears on the pavement and on Tyler's head, they are not markedly gory or gruesome. The blood is not copious, and no gaping wounds are apparent. The photographs are disturbing in that they depict a dead man unceremoniously dumped in a parking lot, but their overall appearance would not inflame passions or cause the jurors to disregard their duty to determine defendant's guilt based on the evidence.

Defendant argues that the photographs were not probative of any material issue because he did not dispute that Tyler died of gunshot wounds. Nonetheless, the prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate to any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Moreover, the question whether the shooter acted deliberately and with premeditation was still relevant to the degree of defendant's guilt, even under an aiding and abetting theory.

Defendant also argues that the photographs were unnecessary because the witnesses' testimony established the location of Tyler's wounds and the trajectory of the bullets. However, photographs may be admitted as evidence to corroborate a witness's testimony. *Unger*, 278 Mich App at 257. Because the photographs pertained to a proper purpose, and any prejudicial

effect did not substantially outweigh the probative value, the trial court did not abuse its discretion in admitting them.

Defendant next argues that the prosecution failed to exercise due diligence in its efforts to produce Francis "Frank" Aiello for trial. Defendant also argues that the trial court erred in introducing the preliminary examination testimony of Aiello under MRE 804(b)(1). Lastly, defendant argues that the trial court abused its discretion in declaring that Aiello was not available for trial.

This Court reviews preserved evidentiary issues for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). More specifically, a trial court's determination that diligent, good-faith efforts were made to produce a witness before declaring the witness "unavailable" for purposes of allowing his testimony under MRE 804(b)(1) is reviewed for an abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 804(b)(1) provides the following exception for an unavailable witness's prior testimony:

> Testimony given as a witness at another hearing of the same or a different proceeding; if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

MRE 804(a) provides that a witness is unavailable for purposes of this rule if the witness "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." Defendant contends that the prosecutor failed to show that due diligence was exercised to attempt to locate Aiello.[3]

Whether diligent, good faith efforts were made to produce a witness depends on the particular facts of each case. *People v Dye*, 431 Mich 58, 67; 427 NW2d 501 (1988), cert den sub nom *Michigan v Dye*, 488 US 985; 109 S Ct 541; 102 L Ed 2d 571 (1988). In *Dye*, the

[3] Defendant argues that the prosecutor was required to exercise due diligence to locate Aiello because he was an endorsed res gestae witness. This argument invokes a previous version of MCL 767.40a, which required a prosecutor to locate, list, and produce at trial all persons, known or unknown, who might be res gestae witnesses. Under that rule, if the prosecutor failed to produce the res gestae witnesses and failed to exercise due diligence to do so, the trial court was required to hold a post trial hearing to determine the extent of any prejudice and provide an appropriate remedy for any prejudice caused by the failure to exercise due diligence. See *People v Cook*, 266 Mich App 290, 294; 702 NW2d 613 (2005). The current version of MCL 767.40a, enacted in 1986 only requires a prosecutor to "'provide notice of *known witnesses* and *reasonable assistance* to locate witnesses *on defendant's request.*'" *Cook*, 266 Mich App at 295 (emphasis added by *Cook*).

Supreme Court concluded that the prosecution failed to exercise due diligence in locating three witnesses. *Dye*, 431 Mich at 78, 91-93. The witnesses all had an incentive to go into hiding to avoid harm from other members of their biker club and to avoid prosecution for their own criminal conduct. *Dye*, 431 Mich at 67. The prosecution failed to stay in contact with authorities from California, the probable location of one of the witnesses, and they failed to follow other leads. *Dye*, 431 Mich at 69, 70-71, 91-93.

In *Bean*, 457 Mich 677, our Supreme Court held that the prosecution failed to exercise due diligence in locating Martez Pryor, a key witness who had observed the shooting for which the defendant was convicted of murder. *Id.* at 678-679. The police received information that Pryor had relocated with his mother to the District of Columbia, but they failed to follow up with this information, or with other relatives who might have known Pryor's whereabouts. *Id.* at 686-688.

Michael Cischke, a Southfield police officer, tried to locate Aiello through his father, who reported that he did not know Aiello's whereabouts. Cischke traced Aiello to an address in Detroit, but learned that he had moved out a few days before. Our review of the record leads us to conclude that there was no suggestion that Cischke had information from anyone else who may have known where Aiello had gone and no leads to Aiello's location. Unlike the circumstances presented in *Bean* or *Dye*, there was no evidence that Cischke had reason to suspect that Aiello was a flight risk, or that he had any disincentive to testify at trial.

Moreover, any error in admitting Aiello's prior testimony was harmless. An error in the admission of evidence is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26. Under this statute, reversal is required only if an error is prejudicial. *People v Mateo*, 453 Mich 203, 212 n 215; 551 NW2d 891 (1996). The defendant claiming error must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight and strength of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 427-428; 635 NW2d 687 (2001). Aiello was a comparatively unimportant witness. He had no knowledge pertaining to the events surrounding Tyler's death. His only information related to the purchase of a used Mustang on the day of Tyler's death. This information pertained to defendant's receipt of payment for his role in Tyler's death, and it also suggested that defendant wanted to distance himself from the vehicle in which the killing took place. However, both of these matters were proven by testimony that defendant admitted receiving payment and that defendant admitted buying the Mustang. Under these circumstances, it is not more probable than not that the admission of Aiello's testimony affected the outcome of this trial. *Whittaker*, 465 Mich at 427-428. Accordingly, we find no error in the trial court's rulings.

Defendant next argues that the trial court erred by refusing to instruct the jury on a defense of duress to the charge of first-degree murder or the lesser included offense of second-degree murder. However, defendant waived this issue by assenting to the prosecutor's request to revise the jury instructions so that the defense of duress applied only to accessory after the fact. Waiver extinguishes any error and precludes a party from seeking appellate review of a claimed deprivation of the rights that he waived. *Riley*, 465 Mich at 448-450; *Carter*, 462 Mich at 215-16.

Even if we were to consider this issue, we would conclude, based on long-standing legal precedent that the trial court did not err in disallowing the defense of duress to first- and second-degree murder.

In *People v Dittis*, 157 Mich App 38, 41; 403 NW2d 94 (1987), this Court stated:

> Some states have, by statute, diverged from the common law rule and allowed duress to be used as a defense to homicide. However, Michigan has no statutory provision governing the defense of duress in homicide cases. In the absence of statutory authority, we conclude that duress is not a valid defense to homicide in Michigan. Our conclusion is supported by Judge Beasley's dissenting opinion in *People v Young*, 120 Mich App 645, 653; 327 NW2d 329 (1982), where he stated "duress is never a defense to murder."

More recently, in *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1992), lv den 454 Mich 876 (1997), cert den sub nom *Gimotty v Elo*, 537 US 894; 123 S Ct 168; 154 L Ed 2d 160 (2002), this Court rejected a claim of duress as an affirmative defense to first-degree felony murder because "[i]t is well settled that duress is not a defense to homicide." It is clear from this case law that defendant was not entitled to present a defense of duress to murder and, therefore, the trial court did not err by refusing to instruct the jury on that defense with respect to the charges of first- and second-degree murder.

Defendant also argues on appeal that the evidence presented at trial was insufficient to support his conviction of first-degree murder. When a defendant challenges the sufficiency of the evidence in a criminal case, this Court considers whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Sexton*, 250 Mich App 211, 222; 646 NW2d 875 (2002), lv den 467 Mich 949 (2003). Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. *Nowack*, 462 Mich at 400. Conflicting evidence should be resolved in favor of the prosecution. *Fletcher*, 260 Mich App at 561-562. Thus, a reviewing court must defer to the jury's credibility choices and its reasonable inferences drawn from the evidence. *Nowack*, 462 Mich at 400.

A conviction of first-degree premeditated murder requires evidence 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 requires "sufficient time to allow the defendant to take a second look." *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780, lv den 450 Mich 931 (1995). Premeditation and deliberation can be established through "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736, lv den 461 Mich 851 (1999).

A person who aids or abets the commission of a crime may be convicted as if he directly committed the crime. MCL 767.39; *People v Izarraras-Placante*, 246 Mich App 490, 495; 633 NW2d 18 (2001), lv den 466 Mich 853 (2002). "To support a finding that a defendant aided and abetted a crime, the prosecution must show that (1) the crime charged was committed by the

defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement." *Id.* Aiding and abetting describes all forms of assistance rendered to the perpetrator, including any words or deeds that may support, encourage, or incite the commission of a crime. *People v Youngblood*, 165 Mich App 381, 387; 418 NW2d 472 (1988). Thus, to prove that defendant was guilty as an aider or abettor of first-degree murder, the prosecutor was required to show that, at the time of the killing, defendant either had the premeditated and deliberate intent to kill the victim or participated in the crime knowing that the principal possessed this specific intent. *Id.* "Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required." *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005), lv den 483 Mich 1073 (2008).

There was sufficient evidence for the jury to find that defendant participated in the crime knowing that the principals possessed a premeditated intent to kill Tyler. Defendant admitted to the police that Hardiway asked if he would help in a plan to "set someone up." According to Cischke, defendant was vague with respect to how he responded to this request. Hardiway then asked defendant if he was interested in earning $500, and defendant responded affirmatively. The jury could infer from these events that defendant agreed to help Hardiway set someone up after Hardiway offered payment of $500. The jury could also infer that defendant knew that the two men he picked up were connected to the set-up plan. Defendant admitted that he knew of the men's plan from their discussion of the gun as they were driving to Twilley's residence, including whether it was powerful enough to kill Tyler, but he continued to drive there. He went along with their plan to wait in the parking lot with the men while Hardiway brought Tyler to the car, all the while knowing that the men planned to shoot Tyler.

Defendant contends that he knew nothing of the plan to kill Tyler until after the killers were in his car and he had no way of thwarting their plan. Even if the jury believed that defendant did not initially realize that the two men he picked up intended to kill Tyler, evidence that defendant continued to drive according to Hardiway's instructions after overhearing their plans to kill Tyler was sufficient to establish that he aided and abetted a first-degree murder. He did not refuse to drive to Twilley's residence, or make any attempt to extricate himself from the situation while Hardiway went to Twilley's apartment. Although defendant argues that he could not do so safely, as previously stated, duress is not a valid defense to homicide. Moreover, the version of events that defendant related to Cischke did not include any mention of duress or threats. Accordingly, there was sufficient evidence to support defendant's conviction of first-degree murder.

Affirmed.

/s/ Richard A. Bandstra
/s/ Stephen L. Borrello