

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM SMITH,

Defendant-Appellant.

UNPUBLISHED

August 29, 1997

No. 182705

Oakland Circuit Court

LC No. 94-132153

Before: Bandstra, P.J., Griffin and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a). He was sentenced to life imprisonment without parole. Defendant now appeals as of right, and we affirm.

Defendant first argues that he was denied a fair trial because the prosecutor engaged in numerous instances of misconduct. We disagree. Because defendant failed to object to each instance of alleged misconduct, review is foreclosed unless the prejudicial effect of the prosecutor's remarks was so great that it could not have been cured by appropriate instructions to the jury. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). Having carefully reviewed the many instances of alleged prosecutorial misconduct, we conclude that the prosecutor's comments were either entirely permissible, or, if marginally improper, that the minimally prejudicial effect of such comments could have been cured by timely requested curative instructions. We therefore decline to further address this unpreserved issue.

Next, defendant argues that he received ineffective assistance of counsel at trial. Defendant moved for a hearing on this issue pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The trial court held a *Ginther* hearing and ultimately concluded that defendant received adequate assistance of counsel at trial. Therefore, this issue is preserved for our review. *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

To establish whether a defendant's right to effective assistance of counsel has been so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show (1) that

counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed

by the Sixth Amendment and (2) that the deficient performance prejudiced the defense. *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996). Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Moreover, resolution of this issue requires us to review the trial court's findings of fact. Factual findings are reviewed on appeal for clear error. MCR 2.613(C); *People v Truong (After Remand)*, 218 Mich App 325, 330; 553 NW2d 692 (1996). A finding is clearly erroneous if, after a review of the record, this Court is left with a definite and firm conviction that a mistake has been made. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

After a careful review of the lower court record and the record of the *Ginther* hearing, we are not left with a definite and firm conviction that the trial court was mistaken in its conclusion that defendant was afforded adequate representation. Defendant asserts that his attorney should have objected to the admission of evidence, which was otherwise admissible and minimally prejudicial, and to otherwise proper and minimally prejudicial prosecutorial comments. Defendant may not predicate his claim of ineffective assistance of counsel on his attorney's failure to lodge ultimately futile objections. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Further, defendant generally raises questions as to the effectiveness of his counsel's trial strategies. We have reviewed these matters and determine that, although imperfect, defense counsel chose sound trial strategies. We refuse to second-guess defense counsel's choices in this area, even where the strategies fail. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Accordingly, we refuse to reverse the trial court's determination that defendant received effective assistance of counsel.

Next, defendant contends that the trial court's instructions to the jury were erroneous because they failed to apprise the jury of the intent elements of aiding and abetting and first-degree premeditated murder. Absent manifest injustice, this issue is not preserved for review because defendant failed to object to the jury instructions. *People v Turner*, 213 Mich App 558, 573; 540 NW2d 728 (1995). After reading the jury instructions as a whole, we determine that they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Wolford*, 189 Mich App 478, 481; 473 NW2d 767 (1991). Accordingly, we address this unpreserved issue no further.

Next, defendant argues that the trial court clearly erred in finding that the prosecution expended due diligence in seeking Kim Gray's presence at trial, thus allowing the prosecutor to read a transcript of her preliminary examination testimony at trial. We disagree. Under the present res gestae witness statute, MCL 767.40a; MSA 28.980(1), a prosecutor is obliged to exercise due diligence to obtain an endorsed witness' presence at trial regardless of whether the endorsement was required. *Wolford*, *supra* at 483-484. Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). A trial court's determination of due diligence is a factual finding that will not be set aside unless clearly erroneous. *Wolford*, *supra* at 484.

Reviewing the transcript of the trial court's due diligence hearing, we are not left with the definite and firm conviction that the trial court erred in finding that the prosecutor expended due diligence to obtain Kim Gray's presence at trial. Unlike *People v Dye*, 431 Mich 58; 427 NW2d 501 (1988), the case relied upon by defendant, there is no indication that the prosecutor in this case should have

foreseen that Kim Gray would attempt to avoid testifying at defendant's trial. In *Dye, supra* at 67, the missing witnesses had been difficult to locate for the first trial. Moreover, the prosecutor was aware that the witnesses intended to leave the state, had an incentive to go into hiding, and feared being prosecuted as accomplices in the committed crimes. *Id.* In the present case, the police obtained Gray's presence at defendant's preliminary examination through ordinary means. There is no indication that the prosecutor experienced difficulty in obtaining Gray's presence at defendant's preliminary exam or that Gray would be unwilling to testify at trial.

With regard to the efforts made in the present case, the evidence showed that, beginning one week before trial was scheduled, police attempted to contact Gray at her last known place of employment. Additionally, police attempted to contact her at home many times, where they were told she had not been recently seen. However, it is clear that Gray was aware of the police efforts to locate her at the house she shared with her grandparents, because she contacted a police detective in response to one of these visits. Moreover, her grandparents told police that she had been threatened against testifying.

In light of these facts, it is safe to assume that Gray was intentionally hiding. Gray's grandparents seemed to have aided her. They stated several times that they had not spoken with Gray, yet it was clear that she received at least one of the messages police had left at her home. Additionally, the grandparents' reluctance to give police information about her whereabouts implies that they were possibly assisting Gray in her successful efforts to elude discovery. Therefore, we cannot agree with defendant's argument that it was unreasonable for police to forego asking the grandparents to identify Gray's other friends and relatives, as they were likely to have been uncooperative. Also, we are unable to agree with defendant that the prosecutor's failure to subpoena Gray at religious services was unreasonable. Moreover, Gray's grandmother stated that she only "thought" she saw Gray at church on the Sunday before trial began. Lastly, while defendant claims that the police failed to discover whether Gray had a new job, this is not accurate. Police asked at Gray's last known place of employment whether she had left a forwarding address, which she had not. We decline to reverse the trial court's due diligence determination.

Next, defendant argues that the prosecutor failed to submit sufficient evidence to establish his guilt of first-degree premeditated murder beyond a reasonable doubt. We disagree. In a criminal case, due process requires that the prosecutor introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). In reviewing the sufficiency of the evidence, this Court must view the evidence 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 Reeves*, 222 Mich App 32, 34; 564 NW2d 476 (1997).

Defendant generally argues that the prosecutor submitted insufficient evidence to obtain his conviction of first-degree premeditated murder, primarily because no eyewitness could testify that defendant actually shot Horace Kelly. What defendant fails to recognize is that circumstantial evidence and the reasonable inferences arising therefrom can constitute satisfactory proof of the elements of the

crime. *Truong, supra* at 337. With this principle in mind, we have no difficulty concluding that the prosecutor submitted sufficient evidence to submit defendant's case to the jury.

In order to prove defendant guilty of first-degree premeditated murder, the prosecution was required to establish beyond a reasonable doubt (1) that defendant intentionally killed Horace Kelly, and (2) that the act of killing was deliberate and premeditated. MCL 750.316; MSA 28.548; *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). The elements of premeditation and deliberation may be inferred from all the facts and circumstances surrounding the incident, including the parties' prior relationship, defendant's actions before and after the killing, and the circumstances of the killing itself. *Haywood, supra*. Because of the difficulty in 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's guilt of first-degree premeditated murder may also be established on an aiding and abetting basis if the prosecutor can show (1) that the crime was committed by 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 or encouragement. *Turner, supra* at 568.

The evidence showed that defendant and others waited for Horace Kelly at the hotel where Kelly was staying, attacked him in the hotel lobby, and then shot him to death in the hotel parking lot. Defendant was either one of the shooters, or aided the shooters in chasing Kelly when he attempted to escape. Defendant fled the scene and then attempted to conceal his real identity when he was apprehended. Viewed in a light most favorable to the prosecution, this evidence was sufficient from which a rational trier of fact could find defendant guilty of first-degree premeditated murder beyond a reasonable doubt. To the extent that the evidence submitted may have raised questions regarding credibility and intent, these were properly left to the jury for resolution. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988).

We affirm.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ E. Thomas Fitzgerald