STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY LEE BONGA,

Defendant-Appellant.

UNPUBLISHED
December 19, 2000

No. 214387
Macomb Circuit Court
LC No. 98-000534 FH

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to life imprisonment for the murder conviction, and a consecutive two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court improperly denied his motion for new trial because the verdict was against the great weight of the evidence presented. A trial court may grant a new trial on the basis that a verdict is against the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). We review for an abuse of discretion a trial court's decision regarding a motion for new trial. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Defendant's suggestion that "[a] real concern exists from the record that an innocent person has been convicted based on a superficial analysis of physical facts" wholly lacks merit. Here, the evidence amply demonstrates that defendant with premeditation killed the victim. Testimony showed that on the morning of the murder defendant and the victim were involved in a fight that ended with defendant's eviction from the victim's house, and that defendant threatened to return and kill everyone present. Some time thereafter, several witnesses saw defendant standing on the porch of the victim's house holding a gun. A different witness observed a lone man wearing a varsity style jacket and standing over another man shoot the other man twice, and further testimony established that the varsity type jacket admitted into evidence resembled the jacket that defendant owned. Yet another witness recalled that she heard gunshots and saw a man running toward her, and that he wore a varsity jacket similar to the jacket admitted into evidence. An autopsy indicated that the victim died from two gunshot wounds to the back, and laboratory tests revealed the presence of gunshot residue on samples taken from defendant's hands. In light of this evidence, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial.[1] *People v Ross*, 145 Mich App 483, 494; 378 NW2d 517 (1985) (noting that an abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence).

---

[1] The trial court did not, as defendant suggests, apply an inappropriate standard in reviewing defendant's motion or inadequately express its reasoning in denying defendant's motion. Though the court in ruling did not specifically enumerate each piece of evidence it believed established defendant's guilt, the court's statement that "the Court has (continued…)

Defendant next argues that insufficient evidence supported his murder conviction because "'[n]ot one person could identify him as the person who shot [the victim]." We conclude that, viewing the aforementioned evidence[2] and the reasonable inferences arising therefrom in the light most favorable to the prosecution, a rational jury could find that the elements of first-degree murder were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992).

Defendant also asserts that the prosecutor during closing argument improperly shifted the burden of proof by commenting on defendant's failure to produce (i) an alibi[3] witness, (ii) witnesses substantiating (a) defendant's inability to utilize his right hand or (b) that defendant never possessed or used a gun, or (iii) an expert witness explaining the presence of chemicals detected by the gunshot residue test. Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). We conclude after reviewing the record that the prosecutor's challenged remarks, made during his rebuttal closing argument, constituted proper responses to arguments or suggestions raised by defense counsel during his closing statements. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977) (noting that even where "[c]ertain of the [prosecutor's] remarks . . . if standing alone could be seen as improper, [they] do not constitute reversible error in this case because of their responsive nature"); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Moreover, even assuming that some improper argument occurred, in light of the evidence already discussed we would not conclude that the prosecutor's statements affected the outcome of defendant's trial. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999).

Defendant lastly contends he received ineffective assistance of counsel because his attorney failed to object to the admission of (i) unspent shells found in the jail holding cell where defendant was placed after the shooting, or (ii) the results of the gunshot residue tests. In the absence of a *Ginther* hearing, this Court's review is limited to errors appearing on the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

We find no ineffective assistance of counsel arising from defense counsel's failure to object to the gunshot residue test results because chain of custody testimony at trial connected the gunshot residue samples to defendant. *People v White*, 208 Mich App 126, 130-133; 527 NW2d 34 (1994) ("The threshold question remains whether an adequate foundation for admission of the evidence has been laid under all the facts and circumstances of each individual case. Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence."); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991) (defense counsel need not argue frivolous or meritless motions). Furthermore, we find that defense counsel's decision to refrain from objecting to admission of the shells discovered in the jail holding cell and instead utilize cross examination to demonstrate the shells' lack of connection with defendant constituted sound trial strategy, which we will not second

---

(…continued)

considered the motion, has considered and did indeed sit within this courtroom throughout the entire trial" clearly indicated the court's awareness and consideration of the evidence presented. To the extent that defendant asserts that the jury should have viewed the evidence differently, according to the defense theory of the case, the trial court properly refused to revisit the jury's credibility determinations, as do we. *Lemmon*, *supra* at 627, 636, 642-647; *People v McCumby*, 130 Mich App 710, 717; 344 NW2d 338 (1983).

[2] We note that the record also contained evidence of defendant's flight from police, which the jury properly could have considered as additional evidence of defendant's guilt. *People v Ranes*, 63 Mich App 498, 500-501; 234 NW2d 673 (1975).

[3] We note for clarity that the prosecutor incorrectly utilized the term "alibi". No evidence indicated that defendant was not present at the scene of the murder. The prosecutor's statement that defendant failed to produce "alibi" witnesses apparently meant to cast doubt on defendant's suggestion that someone else present at the scene, the victim's roommate for example, shot the victim.

guess on appeal. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage