STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 9, 2001
v	No. 214804 Macomb Circuit Court
JAMES LEE BLAKIE, Defendant-Appellant.	LC No. 97-000924-FC

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree premeditated murder, MCL 750.316(1)(a); MSA 28.548(1)(a), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1); MSA 28.424(2)(1). The trial court imposed the mandatory sentences of imprisonment for life without the possibility of parole for each murder conviction and two years for each felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in admitting physical evidence recovered by the police from the house where defendant was found. At the suppression hearing, the trial court found that the officers reasonably believed a break-in was occurring or had recently occurred, and therefore a warrant was not required to enter the house because of the exigent circumstances.

A lower court's factual findings in a suppression hearing are reviewed for clear error and will be affirmed unless the reviewing court has a definite and firm conviction that a mistake has been made. *People v Cheatham*, 453 Mich 1, 29-30, 44; 551 NW2d 355 (1996).

The right against unreasonable searches and seizures is guaranteed by both the state and federal constitutions. US Const, AM IV; Const 1963, art 1, ¶ 11. The constitutions do not forbid all searches and seizures, only unreasonable ones. *Harris v United States*, 331 US 145, 150; 67 S Ct 1098; 91 L Ed 2d 1399 (1947), overruled in part on other grounds *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969). Reasonableness depends upon the facts and circumstances of each case. *Cady v Dombrowski*, 413 US 433, 440; 93 S Ct 2523; 37 L Ed 2d 706 (1973). Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and circumstances establishing an exception to the warrant requirement. *In*

re Forfeiture of $176,598, 443 Mich 261, 265; 505 NW2d 201 (1993); *People v Jordan*, 187 Mich App 582, 586; 468 NW2d 294 (1991). Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. *People v Williams*, 160 Mich App 656, 660; 408 NW2d 415 (1987). Whether probable cause exists depends on the information known to the officers at the time of the search. *Jordan, supra* at 586-587. Among the recognized exceptions to the warrant requirement are exigent circumstances, searches incident to a lawful arrest, stop and frisk, consent, and plain view. *Forfeiture, supra* at 266; *Jordan, supra* at 587.[1] Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause. *Id.*

The exigent circumstances exception allows the police to enter and search the premises, without a warrant, where probable cause exists to believe that a crime was recently committed on the premises and that evidence or perpetrators of the crime are contained on the premises. *Forfeiture, supra* at 275; *People v Davis*, 442 Mich 1, 24; 497 NW2d 910 (1993). However, "[t]he police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *Forfeiture, supra* at 275. The officers' actions must be objectively reasonable in light of all the facts confronting them on the scene. *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989).

The trial court found that, under the totality of the circumstances, the police had probable cause to believe that a break-in was in progress at the house. The police had gone to the address because one of the suspects had lived there, and they hoped to find the suspected getaway car parked there. One of the two officers who went to the house remembered being called to that same house once in the past when a woman in her fifties who lived there reported a break-in. The padlock hasp was broken on the door to the enclosed porch, and the porch door was open more than halfway. The door from the porch into the house had only a hole where the doorknob and lock should be. The police saw someone inside the house, but the murder suspect who possibly lived there was already in custody. As the officers waited for a backup unit, a utility truck stopped briefly at the house; as he was leaving, the driver told the police that he had just turned on the electricity to the house. These facts gave the police a reasonable belief that this was an unoccupied house that had been broken into, and that at least one perpetrator was still in the house.

The trial court further found that these same facts indicated an emergency requiring immediate action. Although one officer testified that he did not believe the house contained evidence of the homicide, it still would have held evidence of the break-in as well as a potential

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[1] The introduction into evidence of materials seized and observations made during an unlawful search is inadmissible under the exclusionary rule. *Mapp v Ohio*, 367 US 643, 654-655; 81 S Ct 1684; 6 L Ed 1081 (1961). The rule also prohibits the introduction of materials and testimony that are the products or indirect results of an illegal search, the so-called "fruits of the poisonous tree." *Wong Sun v United States*, 371 US 471, 488; 83 S Ct 407; 9 L Ed 2d 441 (1963).

perpetrator. The officers were justified in entering the house to secure the premises as quickly as possible and to ascertain the presence of intruders.

These facts are similar to those in *Forfeiture* and *Williams*. In *Forfeiture*, *supra* at 272, police officers responded to a residential security alarm in the middle of the night. When the officers arrived, they noticed a light on inside the house and saw that a window had been broken and the security bars inside the frame had been pushed away. The officers also found a lug wrench, a bar, and a skull cap on the ground beneath the window. The alarm was still sounding. Under those circumstances, the Supreme Court held that the police had probable cause to believe a crime had been committed on the premises and the premises contained evidence or the perpetrator of the suspected crime. Likewise, in *Williams*, *supra* at 660-661, this Court concluded that probable cause existed where police officers investigated a home where the security alarm was sounding and found a partially open window, visible pry marks, and footprints in the snow near the window. Defendant argues that these cases illustrate that probable cause did not exist in the instant case because there was no alarm sounding. However, an activated security alarm is not a prerequisite to finding probable cause to believe a break-in has occurred. The proper inquiry is not whether an alarm was sounding, but whether the totality of the circumstances, as viewed by the police, supports a finding of probable cause. *People v Snider*, 239 Mich App 393, 409, 411; 608 NW2d 502 (2000). The totality of the circumstances in the instant case justified the police officers' belief that a crime had been committed and that the perpetrator was inside the premises.

Probable cause alone is not enough, however. The police must also demonstrate, on the basis of specific and objective facts, the existence of an actual emergency to justify their failure to obtain a warrant before entering. *Forfeiture*, *supra* at 275; *People v Blasius*, 435 Mich 573, 593-594; 459 NW2d 906 (1990). Typically, three emergency situations will justify entry without a warrant: (1) preventing the imminent destruction of evidence, (2) protecting the safety of police officers or others, or (3) preventing the escape of a suspect. *People v Cartwright*, 454 Mich 550, 559; 563 NW2d 208 (1997); *Forfeiture*, *supra* at 275. Here, as in *Forfeiture* and *Williams*, the police believed that a break-in was in progress in an otherwise unoccupied home; they were fairly sure the perpetrator was still inside but they could not be certain what other exigencies might exist without further investigation. It would not have been reasonable for them to merely sit and wait to see what, if anything, developed outside the house. They were justified in entering the house immediately to assess the situation and secure the premises in order to prevent potential destruction of evidence, injury to other persons, or escape of the suspect.

Once the police had validly entered the house, they asked the person inside if he lived there and if there was anyone else in the house. He answered both questions in the negative, but the officers could see into an adjacent bedroom where defendant lay asleep. In plain view in the same room were drugs and drug paraphernalia. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). At this point, the officers decided to obtain a search warrant and left the house. Before they actually had the warrant, however, a detective reentered the house and pointed out the handle of a gun sticking out of a dresser drawer. This gun, which was the murder weapon, was the physical evidence defendant sought to suppress. Defendant only challenges the initial entry of the police into the house and not the subsequent seizure of the gun, thus waiving that issue on appeal. *In re Subpoena Duces Tecum to the Wayne Co Pros (On Remand)*, 205

Mich App 700, 704; 518 NW2d 522 (1994). Regardless, we note that the gun would have been admissible as having been discovered in a search incident to an arrest or because it would have been inevitably discovered during the search authorized by the warrant. *Chimel v California*, 395 US 752, 762-763; 89 S Ct 2034; 23 L Ed 2d 685 (1969); *Nix v Williams*, 467 US 431, 443-444; 104 S Ct 2501; 81 L Ed 2d 377 (1984); *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996). The trial court did not err in admitting the physical evidence recovered by the police because they were justified in entering without a warrant by the exigent circumstances of the situation.

Defendant next argues that he should have been granted a mistrial because the prosecutor violated an informal discovery agreement by using an out-of-court identification, which was based on a suggestive photographic line-up. Defendant, as the appellant, bears "the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated." *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant has not presented this Court with a sufficient record of the discovery agreement. Furthermore, since the information was not a written report and was not exculpatory or favorable to the accused, the prosecutor did not have a duty to turn the information over to the defense. MCR 6.201; *Elston*, *supra*. The trial court did not abuse its discretion in finding no discovery violation warranting mistrial.

However, we agree with defendant that the identification procedure was impermissibly suggestive. A photographic identification procedure that is unduly suggestive violates a defendant's right to due process of law. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The test is whether the procedure "is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification." *Id.* The witness was shown photographs of only the two suspects. In *People v Hess*, 39 Mich App 28, 32; 197 NW2d 118 (1972), this Court held that a photographic identification procedure where the witness was shown the photographs of only the two suspects "in and of itself" rendered the procedure impermissibly suggestive so as to give rise to a substantial likelihood of irreparable misidentification. *Id.* Here, the witness was not asked if the person he saw on the night of the murder was one of those in the photographs, but rather, which of the two photographs most resembled the composite (drawn from that witness' description), "if [he] had to pick one." He was not given the option of choosing neither photograph. At trial, the prosecutor asked the witness whether the person in the photograph was in the courtroom. We find this identification procedure impermissibly suggestive. We also disagree with the trial court's determination that there was an independent basis for the identification. Although the witness had seen defendant a few times around the apartment building, he did not know who defendant was, and he based his identification at least in part on the impermissibly suggestive pretrial photographic line-up. The trial court abused its discretion in denying defendant's request for a mistrial

However, reversal is not required in this case because the error was harmless. There was overwhelming evidence of defendant's guilt from the testimony of his associates, who described admissions defendant made to them. The uncertain identification testimony given by a witness who only had a casual glance at the perpetrator paled in comparison. There is no reasonable possibility that the tainted in-court identification contributed to the conviction.

Finally, defendant argues that the prejudicial impact of certain evidence photographs depicting the murder scene and the victims' autopsies outweighed their probative value, and inflamed the emotions of the jurors. We disagree.

Photographs that are otherwise admissible for a proper purpose are not rendered inadmissible simply because they vividly portray the gruesome or shocking details of the crime. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909, modified 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998); *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997). The proper analysis is whether the photographs are relevant under MRE 401 and, if so, whether their probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, *supra* at 66.

The photographs at issue were relevant to show the corpus delicti of the crime – that two people were killed as a result of criminal agency. *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985). Although graphic, they were probative of the layout of the crime scene, the positions of the victims, and the nature and extent of their injuries. The photographs were prejudicial to defendant to some extent, but the evil to be avoided is *unfair* prejudice that substantially outweighs the probative value of the evidence; these photographs do not rise to that level of prejudice. *Mills*, *supra* at 75. In any event, any error in the admission of the photographs would be harmless in light of the overwhelming testimonial evidence of defendant's guilt. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Gary R. McDonald