STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2001
v	No. 219003 Saginaw Circuit Court
DESMOND MATTHEWS, Defendant-Appellant.	LC No. 98-015720-FC

Before: K. F. Kelly, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree, premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He appeals as of right and we affirm.

I

Defendant first argues that the prosecution presented insufficient evidence to support his conviction of first-degree murder and felony-firearm. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that each essential element of the crime was proven beyond a reasonable doubt. *Johnson*, *supra; People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, modified 441 Mich 1201 (1992). In doing so, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, *supra* at 514; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Additionally, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

First-degree premeditated murder is defined in MCL 750.316(1)(a) as a "willful, deliberate, and premeditated killing." Thus, a conviction of first-degree, premeditated murder requires proof "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) (emphasis added). The elements of first-degree murder may be inferred from the circumstances surrounding the killing. *People v Ortiz-Kehoe*, 237 Mich App 508, 520; 603 NW2d 802 (1999). However, those inferences must be supported by the record and cannot be based on mere speculation. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998).

With respect to the element of premeditation and deliberation, the satisfaction of this element requires a showing of a sufficient time to allow the defendant to take a "second look." *Kelly, supra* at 642. One cannot instantly premeditate a murder. *Plummer, supra* at 305. There must be "substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill." *Id.* at 301. Some factors that may be considered in determining whether premeditation and deliberation were established include, but are not limited to: "(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." *Id* .at 300. See also *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). However, the use of a deadly weapon is not, of itself, sufficient to infer premeditation, *People v Jones*, 115 Mich App 543, 553; 321 NW2d 723 (1982), affid 419 Mich 577; 358 NW2d 837 (1984), and only establishes premeditation where the circumstances show a motive or plan that would enable the trier of fact to infer that the killing was not a spur-of-the-moment decision. *Plummer, supra* at 305 n 1.

In the instant case, after viewing the evidence presented at trial, we conclude that the prosecution presented sufficient evidence that defendant killed the victim, that this killing was intentional, and that it was done with premeditation and deliberation.

The prosecution presented sufficient evidence to allow a reasonable jury to conclude that defendant shot the victim. A jailhouse informant testified that defendant told him that defendant had killed the victim. Additionally, although the time frames reported varied, numerous witnesses testified that they saw defendant with the victim before the shooting. The victim's father placed the two together shortly before the shooting, and the victim's girlfriend testified that the victim said he was going to meet defendant. The evidence showed that the victim was killed with a bullet from a .380 caliber weapon, and a number of witnesses testified that they observed defendant with a semiautomatic handgun, possibly a .380 caliber, shortly before the shooting. One witness also testified that, shortly after the shooting, defendant asked him if he wanted to use his gun and that this witness saw defendant reach for what appeared to be a handgun underneath his shirt. Defendant was seen by prosecution witnesses either walking or running from the area where the victim was shot shortly after the gunshot was heard. When taken as a whole, this evidence was sufficient to support a finding that the victim was killed by defendant.

Although a closer question, the evidence was also sufficient to allow a jury to find that the shooting was done with premeditation and deliberation. The testimony of the medical examiner established that the victim died of a gunshot wound to the face that lodged in his spine at the bottom of his skull. This wound was caused by a single shot fired from approximately six to thirty inches away from the victim's skull, with the medical examiner testifying that, in his opinion, the shot was more likely fired from a distance at the shorter end of the range. The

medical examiner found nothing else noteworthy in the external examination. The prosecution's blood pattern expert testified that, from the blood patterns on the porch door, the victim's head was approximately thirty inches from the floor of the porch and twenty-one inches from the door when the shot was fired, a position which suggests the victim was in a submissive or at least vulnerable position at the time of the shooting.

The jailhouse informant testified that defendant told him he was in jail because "he had to smoke a nigger." When the informant asked who, defendant identified the victim, whom the informant knew. Defendant also explained that he had to "smoke" the victim because "he had been beating on him."

Several witnesses who had been with the victim and defendant earlier in the day testified that defendant asked the victim more than once during the day about the victim accompanying him to a nearby house, where the shooting later occurred. Defendant came to the house where the victim was shot shortly after the shooting, while the police were still there. There was no indication that he looked as though someone had been beating on him.

Taken as a whole, the evidence was sufficient to support a finding that defendant formed the intent to shoot the victim before he accompanied the victim to the house where the shooting took place. Thus, there was sufficient evidence of premeditation and deliberation.

II

Defendant next argues that he was denied the effective assistance of counsel when his trial counsel failed to seek the introduction under MRE 803(24) of a hearsay statement by an eyewitness as related to a police officer that, shortly following the shooting, he had seen someone run through his yard in the opposite direction from that alleged to have been taken by defendant.[1] We disagree.

To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In the instant case, even assuming error in counsel's failure to seek the introduction of this evidence under MRE 803(24), the "catch all" exception to the hearsay rule, defendant has not shown the requisite prejudice. Counsel was able to elicit from the officer that as a result of what the witness told him, he investigated the area behind the house where the victim was shot, and observed the tall grass had been knocked down in the back of the witness' residence, and that "it appeared they were having somebody running southeast towards South Park Street." The officer drew the person's path on a diagram. Although defendant argues that the five hour time span between the witness' observation, not directly conveyed to the jury, and the officer's observation significantly

[1] Trial counsel sought the introduction of this evidence under MRE 803(1) but, because the statement was made some hours after the observation, the trial court properly ruled it inadmissible under that exception.

undercut the exculpatory effect of the evidence, we think it unlikely that the outcome was affected.

III

Defendant also argues that the prosecution committed numerous acts of misconduct which denied him the right to a fair trial. After thoroughly reviewing defendant's allegations concerning this issue, we find no evidence of outcome-determinative plain error which would cause us to conclude that defendant has avoided forfeiture of this unpreserved issue. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Michael J. Talbot