STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2001
v	No. 222463 Kent Circuit Court
TIMOTHY BETTEN, a/k/a TIMOTHY BETTIN Defendant-Appellant.	LC No. 98-011381-FC

Before: Gage, P.J., and Jansen and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a). The trial court sentenced him as a fourth habitual offender, MCL 769.12, to life imprisonment without parole. Defendant appeals as of right. We affirm.

I

Defendant first contends that insufficient evidence of premeditation and deliberation supported his conviction of first-degree murder. The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). All conflicts in the evidence must be resolved in favor of the prosecution. This Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. Premeditation and deliberation may be established by evidence of (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 (1999).

Evidence indicated that before the victim was killed, snoring could be heard from outside his bedroom door, thus raising the inference that the victim was asleep when defendant entered the residence through a bedroom window. No defensive marks appeared on the victim's body,

indicating that the victim was not killed during an altercation. While the victim was alive, he was struck three times on the head with a blunt object, possibly a four-way tire iron like the one that the police recovered from the apartment shared by defendant and the victim. The victim also was alive when he was stabbed in the heart with a kitchen knife, before he was strangled with a clothesline. This sequence of events reflects the killer's opportunity between each method of assault to reflect on his actions. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998).

Further evidence indicated that the victim dealt drugs from his bedroom and that defendant, who had money problems, was angry that the victim had taken over the apartment and did not contribute rent money. After the victim was killed defendant told acquaintances that the victim had gone home to Detroit, and that he (defendant) no longer had any financial problems. Defendant had so much crack cocaine that he uncharacteristically shared it with his friends. Defendant was discovered attempting to cover the victim's body with dirt, and admitted that he had gone to great efforts to hide and dispose of all traces of the body. Contrary to defendant's argument, his conduct in disposing of the body and other evidence may be considered in determining whether premeditation and deliberation existed. *Abraham*, *supra*.

Viewing this abundant evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to enable the jury to reasonably find the elements of premeditation and deliberation beyond a reasonable doubt.

II

Defendant also argues that the trial court improperly refused to admit testimony by two of defendant's neighbors that three days after the estimated time of the murder they heard an unidentified voice inside defendant's residence say, "Jackie, you killed the son of a bitch," "The bitch did it," and "They killed him." Defendant contends that the statements, although hearsay, were admissible under MRE 803(2), (3) and (24).

With respect to MRE 803(2), no indication existed that the statements arose out of a startling event, particularly considering that they were made several days after the likely time of the victim's murder. Moreover, because the declarant and the circumstances surrounding the statements were unknown, it was not established that the declarant lacked the capacity for contrivance or misrepresentation. Thus, we conclude that the trial court did not abuse its discretion in finding the statements inadmissible as excited utterances. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998); *People v Kowalak (On Remand)*, 215 Mich App 554, 557-558; 546 NW2d 681 (1996).

The statements also were inadmissible under the state of mind exception, MRE 803(3), because the unidentified declarant's state of mind was not at issue, and no indication existed that the unidentified declarant acted in accordance with his or her stated intention. *People v Brownridge*, 225 Mich App 291, 305; 570 NW2d 672 (1997), rev'd in part on other grounds 459 Mich 456; 591 NW2d 26 (1999); *McCallum v Dep't of Corrections*, 197 Mich App 589, 605; 496 NW2d 361 (1992).

We further conclude that the trial court did not abuse its discretion in refusing to admit the statements pursuant to MRE 803(24) because defendant failed to show that the statements

possessed adequate indicia of reliability to fall within the catch all exception. *People v Lee*, 243 Mich App 163, 170-178; 622 NW2d 71 (2000).

III

Defendant next asserts that the trial court erred in permitting the prosecutor to inquire on redirect examination of a witness into certain matters that allegedly exceeded the scope of defense counsel's cross examination. Because defense counsel had the opportunity to conduct recross examination and because defendant has demonstrated no prejudice from the allegedly improper testimony that was permitted on redirect, we conclude that defendant has failed to show that the trial court abused its discretion in permitting an open redirect examination. MRE 611(a), (b); *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

IV

Defendant additionally submits that the trial court improperly permitted the prosecutor to present evidence of his postarrest silence to rebut defense counsel's opening statement that, "once defendant was apprehended . . ., he summoned the police to him and told them exactly what his involvement was." The trial court permitted a police officer to testify that shortly after defendant was arrested on August 31, 1998, he questioned defendant about the body, and that defendant would not discuss the matter until he gave a statement approximately one week later.

A defendant's silence may be used to impeach his testimony that he gave an exculpatory statement to the police. *People v Sutton (After Remand)*, 436 Mich 575, 579; 464 NW2d 276, amended on other grounds 437 Mich 1208 (1990); *People v Allen*, 201 Mich App 98, 102; 505 NW2d 869 (1993). In this case, defendant through his counsel expressed his intent to prove that "once he was apprehended" he advised the police "exactly what his involvement" was in the victim's murder. See MCR 6.414(B) (providing that a defendant's opening statement "must make a full and fair statement of the [defendant]'s case and the facts the [defendant] intends to prove"). In light of defendant's proposal to demonstrate his postarrest cooperation with the police, we find that the trial court properly permitted the prosecutor to rebut defendant's allegations of willing cooperation with evidence of defendant's post arrest silence. *Allen*, *supra* at 103-104.

We further note that even assuming the trial court erred in admitting references to defendant's post arrest silence, any nonstructural constitutional error that occurred was harmless beyond a reasonable doubt in light of the abundant and overwhelming other evidence of defendant's guilt. *People v Duncan*, 462 Mich 47, 51-52; 610 NW2d 551 (2000).

V

We next reject defendant's contention that the trial court erred in admitting the irrelevant and unfairly prejudicial testimony of a sanitation worker who found a knife in a sewer drain approximately six months after the victim's murder. Evidence regarding the discovery of the knife in a sewer drain behind a bar was relevant because it tended to establish the credibility of a jail inmate who testified that defendant advised him of the knife's whereabouts, and likewise

tended to tie the knife to defendant as one of the murder weapons he employed.[1] MRE 401; *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990). Furthermore, we are unable to conclude that the probative value of this evidence was substantially outweighed by some unfair prejudice to defendant given his failure to specifically allege what prejudice he endured. MRE 403. Accordingly, we cannot conclude that the trial court abused its discretion in admitting the testimony regarding the knife's discovery. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

VI

Defendant also challenges the validity of a witness' on-the-scene identification of him as improper and unduly suggestive. Defendant failed to preserve this issue, however, with an appropriate trial court objection to the identification testimony. Therefore, appellate review is foreclosed absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because defendant does not claim that the on-the-scene identification was untimely conducted, and because the record contains no indication that the identification was unduly suggestive, we conclude that defendant has failed to show plain error. *People v Winters*, 225 Mich App 718, 721-728; 571 NW2d 764 (1997).

VII

Defendant next contends that two jail inmate witnesses against him were acting as agents of the state, and therefore should have advised him of his *Miranda* rights before questioning him about the murder. Defendant also suggests that he had a right to have counsel present during this questioning. Defendant's failure to preserve these issues by raising them below forecloses appellate relief absent a plain error affecting his substantial rights. *Carines*, *supra*.

After reviewing the record, we find absolutely no indication that either inmate acted as an agent for the police. Furthermore, even if defendant could prove that the inmates acted as police agents, they were not required before speaking with defendant to provide him with *Miranda* warnings or otherwise announce that they were police agents of the police. *People v Fox (After Remand)*, 232 Mich App 541, 552-553; 591 NW2d 384 (1998).

With respect to defendant's claim that he was entitled to counsel when talking with the inmates, we note that "the Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is until the initiation of adversary criminal proceedings by a formal charge, a preliminary hearing, an indictment, an information, or an arraignment." *People v Riggs*, 223 Mich App 662, 676; 568 NW2d 101 (1997). Defendant was not charged with murder until after most of the information obtained by the inmates had been elicited.

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[1] We note that the sanitation worker's testimony at trial to his belief that the knife had been in the drain for "at least a couple months because of the amount of dirt that was above it" did not preclude the possibility that the knife, which the worker recovered in February 1999, had been placed there more than two months before it was discovered, i.e., before defendant's arrest on August 31, 1998.

Regarding the Fifth Amendment right to counsel, this Court in *People v Williams*, 244 Mich App 533, 539; 624 NW2d 575 (2001), stated the following:

> The right to counsel found in the Fifth Amendment "is designed to counteract the 'inherently compelling pressures' of custodial interrogation," *McNeil v Wisconsin*, 502 US 171, 176; 111 S Ct 2204; 115 L Ed 2d 158 (1991), citing *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), and to secure a person's privilege against self-incrimination by allowing a suspect to elect to converse "with the police only through counsel." *McNeil, supra* at 176. The procedural safeguards for this right to counsel adopted in *Miranda* require that the police discontinue the questioning of a suspect when a request for counsel is made. These safeguards, however, apply only when there is a custodial interrogation of a suspect.

In order for the Fifth Amendment right to counsel to attach, defendant must show that the inmates were agents of the police. Because the record does not support defendant's claim that the inmates who questioned him were police agents, thus invoking the Fifth Amendment, defendant's Fifth Amendment right to counsel claim necessarily fails.

Accordingly, we find that defendant has failed to show any plain error affecting his substantial rights arising from the inmates' discussions with and questioning of defendant.

VIII

Defendant further asserts this Court should remand the case for an evidentiary hearing to determine whether the tire iron the police found inside defendant's apartment had been cleaned, consistent with a jail inmate's testimony that defendant told him that the police would find nothing on the tire iron because defendant had cleaned it. In support of his request for a remand, defendant offers nothing beyond complete speculation that the tire iron might not have been washed, which speculation is insufficient to satisfy MCR 7.211(C)(1)(a)(ii). Given the overwhelming evidence of defendant's guilt, he has failed to demonstrate that the jury's hearing of testimony that the tire iron was not clean would have altered the outcome of the case. *Carines*, *supra* at 774.

IX

We next reject defendant's various contentions that he was denied the effective assistance of counsel. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Defendant's claim that his counsel ineffectively failed to file a motion to quash the search warrant because the affiant did not have personal knowledge of the facts alleged lacks merit. To prevail on a motion to suppress evidence seized pursuant to a search warrant procured by a defective affidavit, the defendant must show by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit or made material omissions and that the false or omitted material was necessary to a finding of probable cause. *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). Defendant's reliance on *People v Mackey*, 121 Mich App 748, 753-755; 329 NW2d 476 (1982), is misplaced because the affidavit in this case clearly demonstrates that whatever information the affiant did not personally obtain he acquired

from fellow officers. Furthermore, the affidavit provided probable cause to search defendant's residence. *People v Snider*, 239 Mich App 393, 406-407; 608 NW2d 502 (2000). Defendant has failed to demonstrate any basis on which defense counsel successfully could have moved to quash the search warrant.

Defense counsel did not betray attorney-client confidentiality when she provided the prosecutor with a copy of the report prepared by defendant's private investigator, as required by MCR 6.201(A)(2). *People v Holtzman*, 234 Mich App 166, 189; 593 NW2d 617 (1999). Defendant has not shown that the investigator's report contained any "mental impressions, conclusions, opinions, or legal theories . . . concerning the litigation." MCR 2.302(B)(3).

We also find that defense counsel was not ineffective for failing to object to the prosecutor's insinuation that a witness had not told the truth. The prosecutor is permitted to comment on the testimony in a case and to argue on the basis of the facts presented that a witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

Defendant failed to show that his counsel rendered ineffective assistance by not objecting to the court's instructions to the jury. After reviewing the instructions as a whole, we find that they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999).

The record also belies defendant's assertion that counsel inadequately investigated the case. Furthermore, after reviewing defendant's numerous other claims of ineffective assistance, we find that defendant's remaining claims involve matters of trial strategy, which we will not second guess. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

We conclude that defendant has not overcome the presumption that he received the effective assistance of counsel. *Williams*, *supra*.

X

Defendant lastly argues that his due process rights were violated because his arrest for cocaine possession was used as a pretext to search for evidence that he murdered the victim. Defendant claims that the prosecutor utilized the undue delay to place an informant, whom the police directed and manipulated, near him to learn his defense strategies.

Pretext arrests occur when an officer, although making an apparently lawful arrest, is making the arrest to conduct a search for which there is no independent probable cause, in violation of the basic principle that an arrest may not be used as a pretext to search for evidence. *People v Holloway*, 416 Mich 288, 306 (Levin, J., dissenting); 330 NW2d 405 (1982); *People v Haney*, 192 Mich App 207, 209; 480 NW2d 322 (1991). The factors to be considered in determining whether a stop or arrest was a mere pretext include the following:

> [T]he reasonableness of an arrest depends on the existence of two objective factors. First, did the arresting officer have probable cause to believe that the defendant had committed or was committing an offense? Second, was the

> arresting officer authorized by state or municipal law to effect a custodial arrest for the particular offense? If these two factors are present, we believe that a stop or arrest is necessarily reasonable under the Fourth Amendment. In other words, as long as the police are doing no more than they are legally permitted and objectively authorized to do, a stop or arrest is constitutional. [*Haney*, *supra* at 210.]

We find that at the time of defendant's arrest for cocaine possession the police had probable cause to believe that he had committed an offense because he fit the description of the man seen using a shovel at the site where the victim's body was found and because the car that the man was driving was registered to defendant's wife and was discovered parked in front of defendant's residence. When defendant saw the police, he ran. On defendant's capture, a search of his person yielded crack cocaine, and defendant was arrested and charged for possession of cocaine. No question exists that under these circumstances the police officers were authorized to arrest defendant for possession of cocaine. We therefore conclude that the arrest for possession of cocaine was reasonable. *Haney*, *supra*.

We also find defendant's suggestion of undue delay without merit. On August 31, 1998, defendant was arrested and immediately charged with possession of cocaine. In light of defendant's status a murder suspect, which was solidified after the police searched his apartment on the day of his arrest, later that same day two detectives approached defendant in jail to talk about the victim's body. Because defendant would not talk about the body, the police investigation into the murder continued. On September 7, defendant made it known that he wanted to talk to the police about the body, and the police visited the jail the next day and took defendant's statement. The record shows that the police did not start talking with the jail informant until after defendant had made his statement.

The threshold test for determining whether a delay constitutes a denial of due process is whether the defendant suffered prejudice. *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989). The defendant must show substantial prejudice to his right to a fair trial and an intent by the prosecution to gain a tactical advantage. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994). The defendant must demonstrate "actual and substantial" prejudice to his right to a fair trial, which requires more than generalized allegations. *People v Adams*, 232 Mich App 128, 134-135; 591 NW2d 44 (1998).

We find that defendant has offered nothing more than mere allegations in support of his claim that his arrest constituted a pretext to permit the police to gather information by placing an informant near defendant in the jail. Consequently, we conclude that defendant was not denied his due process rights.

Affirmed.

/s/ Hilda R. Gage
/s/ Kathleen Jansen
/s/ Peter D. O'Connell