STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 31, 2002
v	No. 225043 Marquette Circuit Court
CHESTER WALENDZINSKI, Defendant-Appellant.	LC No. 99-035893-FC

Before: Griffin, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of first-degree felony murder, MCL 750.316, and conspiracy to commit unarmed robbery, MCL 750.157a; MCL 750.530. Defendant was sentenced to concurrent terms of life imprisonment for the murder conviction and eight to fifteen years' imprisonment for the conspiracy conviction. Defendant appeals as of right, and we affirm.

Defendant's convictions arose from the beating death of Robert Brey.[1] Brey was found dead in a motel room occupied by defendant and Wojciechowski. Witnesses testified that Brey went to the room to purchase a large quantity of marijuana from defendant and Wojciechowski.

Defendant first alleges that trial counsel rendered ineffective assistance by: (1) failing to request a change of venue in light of extensive pretrial publicity; (2) waiving a jury trial and agreeing to a bench trial in front of the judge who denied a motion to suppress an inculpatory statement; (3) failing to file a motion to quash the information following the preliminary examination; (4) failing to object to certain hearsay testimony; and (5) failing to object to certain bad acts evidence. We disagree in each instance.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that counsel's performance resulted in prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To meet the prejudice requirement, the defendant must demonstrate a

[1] Codefendant Jason Wojciechowski's convictions were affirmed in *People v Wojciechowski*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2001 (Docket No. 224773).

reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*. at 302-303. Counsel is presumed to have provided effective assistance, and a defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Counsel's performance must be measured without the benefit of hindsight. *Id*. at 76-77.

The existence of pretrial publicity alone does not necessitate a change of venue. *People v Jendrzejewski*, 455 Mich 495, 517; 566 NW2d 530 (1997). To secure a change of venue, a defendant must show the existence of a strong community feeling against him, or publicity that is so extensive and inflammatory that jurors could not remain impartial. *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995). Testimony at the *Ginther*[2] hearing established that trial counsel, who had extensive trial experience, considered a motion for change of venue, and determined, as a matter of trial strategy, that such a motion would not have been successful. In making this determination, trial counsel considered the possibility that jurors would admit bias and the fact that defendant would have to testify before the trier of fact to present his version of events. We decline to substitute our judgment for that of trial counsel on a matter of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Furthermore, defendant has failed to demonstrate prejudice by showing that, if counsel had obtained a change of venue, the results of the trial likely would have been different. *Toma, supra*.

A trial judge is presumed to be fair and impartial, *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810; 286 NW2d 34 (1979), and possess an understanding of the law that allows him to ignore errors and decide a case on evidence properly admitted at trial. *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Trial counsel testified that, after observing Wojciechowski's jury trial, he concluded that a bench trial would be more beneficial to defendant, notwithstanding the fact that the same trial judge presided over the pretrial *Walker*[3] hearing and denied defendant's motion to suppress his inculpatory statement. There is no absolute rule prohibiting a judge who conducts a *Walker* hearing, and necessarily hears inculpatory statements, from presiding at trial. *People v Boyd*, 49 Mich App 388, 403-404; 212 NW2d 333 (1973); see e.g., *People v Minier*, 100 Mich App 114, 121; 299 NW2d 383 (1980). Additionally, counsel's decision constituted trial strategy that we will not second-guess. *Rice*, *supra*. An unsuccessful strategy does not mandate a conclusion that counsel rendered ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Lastly, defendant has failed to demonstrate prejudice. Specifically, defendant failed to demonstrate that if he had been tried by a jury, it is likely that the result would have been different. *Toma, supra*.

The purpose of a preliminary examination is to determine if probable cause exists to believe that a crime was committed and that the defendant committed it. *People v Goecke*, 457 Mich 442, 469; 579 NW2d 868 (1998). Probable cause is defined as a "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that a person accused is guilty of the offense with which he is charged." *People*

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[3] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

v Dellabonda, 265 Mich 486, 490; 251 NW 594 (1933), quoting 3 Bouvier's Law Dictionary (Rawle's 3d Rev), p 2728. At a preliminary examination, the prosecution is not required to prove the defendant's guilt beyond a reasonable doubt, but must produce evidence of each element of the crime charged, or evidence from which the elements can be inferred. *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989). A defendant should not be discharged if the evidence conflicts or raises a reasonable doubt of guilt. *Id*.

Defendant was charged with open murder, MCL 750.318, unarmed robbery, MCL 750.530, and conspiracy to commit unarmed robbery. The evidence produced at the preliminary examination demonstrated that Brey died as a result of blunt force injuries to the head. Statements made by defendant and Wojciechowski were consistent in that both established that the pair planned to rob Brey of his money, but differed as to who hit Brey. The evidence showed that Brey had a large sum of money on his person shortly before he went to the motel. However, no money was discovered on his body. The prosecution presented evidence of each element of the charged offenses, or evidence from which those elements could be inferred. *Hill, supra*. Trial counsel indicated that he concluded that a motion to quash would have been denied. Counsel did not render ineffective assistance by failing to bring a meritless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

The issue of counsel's failure to object to certain hearsay statements regarding Brey's planned purchase of drugs from defendant was not addressed at the *Ginther* hearing. Accordingly, appellate review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). The trial court is presumed to possess an understanding of the law and rely on properly admitted evidence at trial. *Jones, supra*. Additionally, defendant has not established prejudice in that he has not shown that, if the trial court had excluded the statements based on counsel's objections, it is likely that the results of the trial would have been different. *Toma, supra*.

Defendant's assertion that counsel failed to object to certain bad acts evidence is erroneous. At a pretrial hearing, defense counsel argued that the evidence was inadmissible under MRE 404(b)(1). The trial court rejected the argument and admitted the evidence. The fact that counsel's argument did not prevail does not mandate a conclusion that counsel rendered ineffective assistance. *Stewart, supra*.

Defendant next alleges that the evidence produced at trial was insufficient to support his convictions. Specifically, defendant alleges that the evidence did not support a finding that: (1) Brey was put in fear, a required showing to establish unarmed robbery; (2) defendant kicked Brey in the face; (3) Brey was beaten until he died; and (4) defendant participated in taking any money from Brey. We disagree. When reviewing a challenge to the sufficiency of the evidence in a bench trial, we view the evidence presented in a light most favorable to the prosecution 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 Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The trier of fact may make reasonable inferences from evidence in the record, but may not make inferences completely unsupported by direct or circumstantial evidence. *People v Vaughn*, 186 Mich App 376, 379-380; 465 NW2d 365 (1990).

Defendant was charged with open murder, unarmed robbery, and conspiracy to commit unarmed robbery. The elements of murder are: (1) the killing of a human being; (2) with the

intent to kill, or to do great bodily harm, or with willful and wanton disregard of the likelihood that the natural tendency of one's actions will be to cause death or great bodily harm. *People v Johnson (On Rehearing)*, 208 Mich App 137, 140; 526 NW2d 617 (1994). Under the open murder statute, MCL 750.318, a defendant may be charged with murder without specification of the degree of murder. The degree of murder is determined by the trier of fact at trial. *People v Watkins*, 247 Mich App 14, 20; 634 NW2d 370 (2001). The elements of unarmed robbery are: (1) a felonious taking of property from another; (2) by force, violence, assault or putting in fear; and (3) being unarmed. *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). A criminal conspiracy is a partnership under which two or more persons voluntarily agree to effectuate the commission of a crime. *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The individuals intend to combine to purse the criminal objective, and the offense is complete upon the formation of the agreement. *Id*. at 345-347. A conspiracy may be proved by circumstantial evidence. *Id*.

The evidence was sufficient to support defendant's convictions. The undisputed evidence showed that Brey died as a result of blunt force injuries to the head. Defendant testified that Wojciechowski grabbed Brey and choked him. A pathology expert opined that Brey was kicked in the face, the kick contributed to his death, and the bruise pattern on Brey's face matched the pattern on boots known to have been worn by defendant on the day Brey was killed. We review the findings of fact of the trial court sitting without a jury under the clearly erroneous standard. *In re Forfeiture of 19203 Albany*, 210 Mich App 337, 342-343; 532 NW2d 915 (1995). The trial court was entitled to find this testimony credible, and we cannot conclude that the findings were clearly erroneous. *Id*. The evidence that defendant kicked Brey in the head under the circumstances supported an inference that defendant intended to create a very high risk of death or great bodily harm, and that he knew that death or great bodily harm could result from his actions. The evidence supported a finding that defendant and Wojciechowski murdered Brey. *Johnson, supra*; *Vaughn, supra*.

Furthermore, we cannot conclude that the trial court's finding, that the killing occurred during the commission of an unarmed robbery, was clearly erroneous. Defendant's statement and testimony established that he and Wojciechowski planned to rob persons, including Brey, of their money. A witness saw Brey in possession of a large sum of money before he went to the motel. Defendant testified that Wojciechowski searched Brey's pockets for money. A search of Brey's body revealed no money on his person. However, both defendant and Wojciechowski were found in possession of large sums of money when they were arrested. The evidence supported a finding that Wojciechowski took Brey's money from him by force or violence and that defendant aided and abetted in the offense. MCL 767.39; *People v Izarraras-Placante*, 246 Mich App 490, 495-496; 633 NW2d 18 (2001). A showing of force was sufficient, and an additional showing that the victim was put in fear was not required. *Johnson, supra*. The evidence supported the trial court's conclusion that defendant was guilty of felony murder. MCL 750.316; *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000). Defendant's statement and testimony established that he and Wojciechowski planned to travel to Marquette for the purpose of arranging sham narcotic transactions and then taking money from potential purchasers. At trial, defendant denied that he planned to rob Brey. The trial court, as finder of fact, was entitled to reject that portion of defendant's testimony. The evidence supported a finding that defendant was guilty of conspiracy to commit unarmed robbery. *Justice, supra*. The

evidence, viewed in a light most favorable to the prosecution, supported defendant's convictions. *Petrella, supra*.

Lastly defendant alleges that the trial court erred in denying his motion to suppress his inculpatory statement because: (1) the police made an improper warrantless entry into his home in order to arrest him, and (2) he was not afforded a meaningful opportunity to exercise his *Miranda*[4] rights. We disagree. A police officer may arrest an individual without a warrant if a felony has been committed, and the officer has probable cause to believe that the individual committed the felony. MCL 764.15(c); *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). The Fourth Amendment prohibits the warrantless entry into a home to make a routine felony arrest. US Const, Am IV; *Payton v New York*, 445 US 573, 576; 100 S Ct 1371; 63 L Ed 2d 639 (1980). However, the exclusionary rule does not bar the use of a statement made by a defendant outside his home, even if police officers made an unconstitutional entry into his home to arrest him, if the arrest is based on probable cause. *People v Dowdy*, 211 Mich App 562, 570; 536 NW2d 794 (1995).

The police had probable cause to arrest defendant. The Chicago police received information from the Marquette police that: (1) Brey's death did not appear to be natural or accidental; (2) Brey had arranged to purchase marijuana from defendant and Wojciechowski; (3) Brey had obtained the money to transact the purchase; (4) Brey met with defendant and Wojciechowski in their motel room; (5) no money had been found on Brey's body; and (6) defendant and Wojciechowski had left the motel shortly before Brey's body was discovered. These facts were sufficient to provide probable cause to believe that defendant was involved in Brey's killing. *People v DeGraffenreid*, 19 Mich App 702, 707-708; 173 NW2d 317 (1969). The police made a warrantless entry into the residence to arrest defendant. Assuming that this was improper, we cannot conclude that defendant's statement should have been suppressed because police had probable cause to arrest defendant. *Dowdy*, *supra*.

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Snider, supra*. The prosecution may not use a custodial statement unless it demonstrates that prior to questioning, the accused was informed of his rights. *Miranda, supra*. *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). A custodial interrogation is questioning initiated by law enforcement officers after the accused has been taken into custody or deprived of his freedom in some significant way. *Id*. at 395-396. To determine whether a person was in custody at the time of the interrogation, the court must look at the totality of the circumstances to ascertain whether the defendant reasonably believed that he was not free to leave. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). The ultimate question of whether a person was in custody and thus entitled to *Miranda* warnings before interrogation is a mixed question of law and fact that must be answered independently after de novo review of the record. *Id*. Absent clear error, we will defer to the trial court's historical findings of fact. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Compliance with *Miranda* does not dispose of the issue of the voluntariness of a confession. *People v Godboldo*, 158 Mich App

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

603, 605-606; 405 NW2d 114 (1986). To determine voluntariness, this Court considers the totality of the circumstances, including the duration of detention and questioning, the defendant's age, intelligence, and experience, the defendant's physical and mental state, and whether the defendant was threatened or promised leniency. *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). No single factor is determinative. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

The trial court did not err in denying defendant's motion to suppress his inculpatory statement. The trial court found that the investigating officer's testimony regarding defendant's treatment was more credible than that given by defendant. We give great deference to the trial court's assessment of the credibility of the witnesses. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). The trial court also found that the length of defendant's detention prior to questioning was due to staffing problems and not to an attempt to place psychological coercion on defendant. We conclude that the trial court's findings of fact are not clearly erroneous. *Mendez, supra*. The totality of the circumstances demonstrates that defendant knowingly and voluntarily waived his rights and made an inculpatory statement.

Affirmed.

/s/ Richard Allen Griffin
/s/ Harold Hood
/s/ David H. Sawyer