STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN RICARDO RAGAN, a/k/a QUAN RAGAN, BENJAMIN REAGAN, ARON WALKER, BILL WALKER, BERNARD RENEGAN, BENJAMIN ALLEN, TONY SWANGING, TONY SWING, and BENJAMIN R. RAGAN,

Defendant-Appellant.

UNPUBLISHED
September 17, 2002

No. 229922
Washtenaw Circuit Court
LC No. 99-012514-FC

Before: Holbrook, Jr., P.J., and Zahra and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316, first-degree felony murder, MCL 750.316b, and first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant to life imprisonment for the first-degree murder conviction[1] and a concurrent term of nine to twenty years' imprisonment for the first-degree home invasion conviction. Defendant appeals as of right. We affirm.

Defendant contends that the court erred in denying his motion to suppress the admission of his boots, which were seized when he was released after his initial arrest. Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 122; 605 NW2d 28 (1999). To the extent that the trial court's decision is based on an interpretation of law, we review the issue de novo. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999).

The United States and Michigan Constitutions guarantee the right to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Warrantless searches and seizures are per se unreasonable, unless a recognized exception applies. *People v*

[1] The trial court vacated defendant's first-degree felony murder conviction to avoid punishing defendant twice for the same criminal transaction.

Champion, 452 Mich 92, 98; 549 NW2d 849 (1996). Police officers may seize items in plain view without a warrant if they are lawfully in a position to view the item and the item's incriminating character is immediately apparent. *Id.* at 101. An incriminating character is "immediately apparent" when officers have probable cause to believe that an item is seizable without further search. *Id*. at 102.

Here, the officer that seized defendant's boots testified that he noticed the similarity between the tread on defendant's boots and the boot prints at the murder scene. The officer further testified that he noticed the tread pattern when defendant had his ankles crossed so that the soles of his boots were visible. The evidence established that defendant was already a suspect when the officer made this determination. As such, we believe that the officer had probable cause to believe that the boots were connected to the murder.[2] Therefore, the seizure of the boots without a warrant was proper under the "plain view" doctrine, and the trial court did not err in denying defendant's motion to suppress the evidence.

Defendant next argues that all evidence discovered after his first arrest should have been excluded because both the stop of the car he was riding in and his subsequent arrest were illegal. Defendant did not raise this issue below; therefore, our review is only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In order to justify an investigatory stop, the police must have "'a particularized suspicion, based on an objective observation, that the person stopped has been, is, or is about to engage in criminal wrongdoing."' *People v Peebles*, 216 Mich App 661, 665; 550 NW2d 589 (1996), quoting *People v Shabaz*, 424 Mich 42, 59; 378 NW2d 451 (1985). We review a stop, search, or seizure of a motor vehicle and its contents to determine whether it was reasonable under the facts and circumstances of the case. *Peebles, supra* at 665, quoting *People v Christie (On Remand)*, 206 Mich App 304, 308-309; 520 NW2d 647 (1994). "'Fewer foundation facts are necessary to support a finding of reasonableness when moving vehicles are involved, than if a house or a home were involved.'" *Peebles, supra* at 665, quoting *Christie, supra* at 308-309.

Here, a police officer was at defendant's apartment searching for evidence in connection with the homicide. The officer was aware that defendant was a suspect in the homicide. The officer had seen a photograph of the defendant and had been provided a description of him. The officer saw a car drive through the parking lot, and the passenger in the car resembled defendant. The officer noted that he was in plainclothes and driving an unmarked car, so he directed another officer to stop the car. Under the facts and circumstances of this case, we do not believe that it was at all unreasonable for the police officer to have the vehicle stopped to determine whether the passenger was, in fact, defendant. Therefore, defendant may not avoid forfeiture of this issue.

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[2] Because of this fact, the instant matter is distinguishable from *People v Trudeau*, 385 Mich 276; 187 NW2d 890 (1971), where the defendant was in custody on one charge and the seizing officer only suspected that the defendant was somehow involved in a second crime.

Defendant also contends that his arrest for having an open intoxicant was illegal because the beer bottle was empty. In other words, defendant contends that a misdemeanor did not occur in the officer's presence, thereby preventing the officer from arresting defendant without a warrant. However, a police officer "may arrest a person *without* a warrant if a misdemeanor is committed in the officer's presence or if there is reasonable cause to believe a felony was committed and that the person arrested committed it." *People v Manning*, 243 Mich App 615, 622; 624 NW2d 746 (2000) (emphasis in original). Here, two witnesses provided statements to the police indicating that defendant was inside the victim's apartment right before the victim's murdered body was found. Thus, we believe that the police had probable cause to believe that defendant committed a felony. Accordingly, even if we were to accept defendant's argument that the arresting officer lacked probable cause to arrest defendant based on the possession of an open intoxicant, defendant's arrest was, at the very least, harmless error. Consequently, we find no error.[3] Having found no error, defendant may not avoid forfeiture of the issue of the admissibility of the post-arrest evidence. *Carines, supra* at 763-764.

Finally, defendant contends that the trial court erred in prohibiting him from impeaching a witness with a prior conviction. One of the witnesses was convicted of criminal sexual conduct when he was sixteen years old. The trial court granted the prosecutor's motion in limine to prevent defendant from cross-examining the witness regarding the prior conviction because the conviction did not involve an issue of theft or dishonesty. We review de novo a trial court's conclusion that a rule of evidence precludes the admission of evidence. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

MRE 609(a) states in pertinent part as follows:

> For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) the crime contained an element of dishonesty or false statement or
>
> (2) the crime contained an element of theft . . . .

Here, there is no question that the witness was not convicted of a crime that contained an element of dishonesty, false statement, or theft. Accordingly, the trial court properly concluded that evidence of the witness's conviction was inadmissible pursuant to MRE 609(a).

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[3] Defendant also argues that his trial counsel was ineffective for failing to move to suppress all evidence introduced after defendant's initial arrest. However, it is well established that trial counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Because we have concluded that the evidence was properly admitted, defendant's counsel was not ineffective for failing to make a motion challenging the admissibility of the evidence.

Moreover, we note that defendant's reliance on *Layher* is misplaced. In *Layher*, our Supreme Court explained that "evidence of bias arising from past arrest without conviction is admissible if relevant, as long as its probative value is not substantially outweighed by the danger of unfair prejudice." *Layher*, *supra* at 768, citing MRE 403. Where, as here, the witness's purported bias results from a *conviction*, MRE 609(a) plainly prevents the admissibility of that evidence for impeachment purposes. Consequently, the trial court did not err in granting the prosecutor's motion in limine to prevent defendant from impeaching the witness regarding the prior conviction.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ Donald S. Owens