STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2002
v	No. 233756 Wayne Circuit Court
JAMES KELLEY, a/k/a JAMES KELLY, Defendant-Appellant.	LC No. 99-012588-01

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a term of twenty to forty years' imprisonment for the second-degree murder conviction and two consecutive years' imprisonment for the felony-firearm conviction. We affirm.

I. Basic Facts and Procedural History

On November 9, 1999, Senita Bentley sustained multiple gunshot wounds that resulted in her death. Earlier that evening, Bentley's friend, Sheila Smith, saw defendant at Bentley's house. Several hours later, Smith returned to Bentley's house and heard two sounds, which she later believed to be gunshots. Smith went to the door and rang the bell. No one answered, but Smith observed a man looking out the window. While Smith was unable to see the man's face, she noticed that he was wearing the same clothes that she had observed defendant wearing earlier that evening. Smith then observed the man running from Bentley's house to a burgundy car that she had observed defendant driving in earlier that evening.

When the police arrived, the living room of Bentley's home displayed signs of a struggle. Blood found on the doorknob was linked to defendant by DNA testing. Defendant, who had a previous sexual relationship with Bentley, was arrested on November 22, 1999. A warrant was issued the next day. On November 24, 1999, defendant made a statement to the police in which he denied killing Bentley. The following colloquy was contained in defendant's statement:

Q. Why did you kill [Bentley]?

A. I didn't.

Q. Why is everyone saying you did?

A. I have no idea. Maybe because I did not come back over to the house on Ward and for not coming around after.

No objection was made to this portion of the statement at trial.

At the conclusion of trial, the trial court convicted defendant of second-degree murder and possession of a firearm during the commission of a felony.

II. Ineffective Assistance Of Counsel

Defendant first argues that he was denied the effective assistance of counsel. Because this Court denied defendant's motion to remand this case to the lower court for a *Ginther*[1] hearing[2], our review of this issue is limited to errors apparent on the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Effective assistance is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We will not reverse a conviction based on ineffective assistance of counsel unless the defendant establishes (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. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

A. Pre-Arraignment Delay

Defendant first contends his trial counsel was ineffective because he failed to move to suppress his custodial statement on the ground that it was illegally obtained during an unreasonable pre-arraignment delay. We disagree.

A delay of more than forty-eight hours between arrest and arraignment is presumptively unreasonable and violative of the Fourth Amendment. *Riverside Co v McLaughlin*, 500 US 44, 56-57; 111 S Ct 1661; 114 L Ed 2d 49 (1991); *People v McKinney*, 251 Mich App 205, 208; 650 NW2d 353 (2002); *People v Manning*, 243 Mich App 615, 631, 643; 624 NW2d 746 (2000).[3]

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

[2] *People v Kelley*, unpublished order of the Court of Appeals, entered February 19, 2002 (Docket No. 233756).

[3] Further, if the police arrest a person without a warrant, that person must be brought before a magistrate for arraignment without unnecessary delay. MCL 764.13; *Manning, supra* at 622. In (continued…)

Because defendant did not raise this issue below, the exact time between his arrest and the arraignment is unknown. However, the record indicates that defendant was arrested on November 22, 1999, at 2:15 p.m. A warrant was issued on November 23, 1999. Defendant was arraigned on November 24, 1999. Trial testimony indicated that defendant made his statement on November 24, 1999, "at about 9:40 a.m." Accordingly, the length of detention was approximately forty-three to forty-four hours and thus, was not presumptively unreasonable. *Riverside, supra* at 55-57; see also *Manning, supra* at 628-629.

However, a delay of less than forty-eight hours may also be unreasonable. *Manning, supra* at 630-631. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id.* at 630, quoting *Riverside, supra* at 56-57. The record in this case does not suggest that the police were improperly motivated by a desire to gain additional information for the arrest such that they intentionally delayed arraignment to elicit an incriminating statement. *People v McCray,* 210 Mich App 9, 12; 533 NW2d 359 (1995). To the contrary, an arrest warrant based on a probable cause determination by a magistrate had already been issued the day before defendant made his statement to the police. Thus, a magistrate found probable cause to arrest defendant without considering his statement.

Furthermore, we find defendant's reliance on *Riverside,* for the proposition that his arrest was constitutionally unreasonable, to be misplaced. In *Riverside,* the Court held that the failure to provide a judicial determination of probable cause within forty-eight hours of an arrest is presumptively unreasonable and violative of the Fourth Amendment. *Riverside, supra* at 55-57, see also *Manning, supra* at 628-629. In *Manning,* this Court explained *Riverside* as follows:

> When a person is arrested without a warrant, . . . no judicial officer has yet found that there was reasonable cause for his arrest. Thus, while all accused persons are "presumptively innocent until proven guilty," when a person is being held without a warrant or probable cause hearing, a judicial officer has not yet determined that there is even reasonable cause to believe the person committed a crime. Therefore, when Justice Scalia referred in his dissent in *Riverside Co* to an "innocent arrestee," he was quite literally correct. [*Manning, supra* at 622].

Here, the day after defendant's custodial arrest, and *before* he made his statement, a magistrate issued an arrest warrant based on probable cause. Therefore, a judicial determination of probable cause was made well within the presumptively unreasonable forty-eight hours. Therefore, defendant was not an "innocent arrestee" at the time of his arraignment. *Manning, supra* at 622.

Finally, a delay, standing alone, does not necessarily require the suppression of statements obtained while a person is in police custody during the delay. Instead, the proper analysis is

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(…continued)

addition, a person charged with a felony must be brought before a magistrate for arraignment without unnecessary delay. MCL 764.26.

whether the person's statement was obtained voluntarily as determined by the factors listed in *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Unreasonable delay before arraignment is but one factor that should be considered in determining whether a defendant's custodial statement was voluntary. *Manning, supra* at 643.

The Michigan Supreme Court in *Cipriano* set forth the following nonexclusive list of factors to determine whether a statement is voluntarily made:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bring him before a magistrate before he gave his confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Cipriano, supra* at 334.]

Considering the evidence in light of these factors, we find that defendant's statement was voluntarily given. First, the record indicates that defendant received and understood his *Miranda*[4] rights. Defendant never requested an attorney. Second, the record does not indicate that defendant was uneducated, illiterate or unintelligent. Defendant was age twenty-eight, could read and write and completed a ninth grade education. Defendant read his statement and made several changes, in his handwriting, to the typed copy of his statement before he signed it. Third, there is no indication that defendant was ill, physically abused or threatened when he gave the statement. Fourth, defendant told the officer taking the statement that he was not under the influence of alcohol, narcotics or prescription medication. His statement indicated that the last time he smoked crack was a month ago and that he never smoked marijuana. Fifth, there was no indication that defendant had been deprived of food, water or sleep before making his statement. Sixth, defendant had prior experience with the police because he was convicted of receiving and concealing stolen property in 1997.

Because we find that defendant's statement was voluntary, defense counsel was not ineffective for failing to move to suppress it. Defense counsel was not required to bring a frivolous or meritless motion. *People v Darden,* 230 Mich App 597, 605; 585 NW2d 27 (1998).

B. Witness Opinion and Hearsay

Defendant also argues his trial counsel was ineffective because he did not object to the portion of the custodial statement that he alleges reveals inadmissible witness opinions that defendant killed Bentley. Although the admission of defendant's statement improperly revealed witness opinions concerning defendant's guilt or innocence, *People v Bragdon*, 142 Mich App

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

197, 199-200; 369 NW2d 208 (1985), defendant fails to demonstrate that the admission of the witness opinions prejudiced him so as to deny him a fair trial, *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994).

First, we find the isolated reference to the witness opinions that defendant killed Bentley, coupled with defendant's denial of guilt, is not "tantamount to the transformation of this proceeding from a jury trial to a guilty plea situation" warranting reversal. *Bragdon, supra* at 199. Moreover, a judge, not a jury, tried defendant. "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

In addition, our review of the trial court's factual findings indicates that the trial court did not consider defendant's statement, but instead convicted defendant based on the strong DNA evidence and witness testimony linking defendant to the scene. As such, defendant failed to demonstrate a reasonable probability that, but for defense counsel's failure to move to suppress the portion of defendant's statement revealing the improper opinion evidence, the result of the trial would have differed. *Toma, supra* at 423.

Defendant also contends that the statement is inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). In this case, the statement "Why is everyone saying you did?" was not offered for the purpose of showing the guilt of defendant. Instead, viewing the statement in context, it is evident that the statement was offered to explain why defendant denied killing Bentley. Accordingly, the statement did not constitute inadmissible hearsay.

III. Sufficiency of the Evidence

Defendant next asserts that the evidence did not support a conviction of second-degree murder. Instead, defendant contends that the evidence supported a finding of provocation and a conviction of voluntary manslaughter. We disagree. When reviewing a challenge to the sufficiency of the evidence, we must determine whether the evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find that the prosecution proved the essential elements of the offense beyond a reasonable doubt. *People v Toole*, 227 Mich App 656, 658; 576 NW2d 441 (1998). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *In re Abraham*, 234 Mich App 640, 656-657; 599 NW2d 736 (1999), citing *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

"The offense of second-degree murder consists of the following elements: '(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.'" *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), quoting *People v Mayhew*, 236 Mich App 112, 124-125; 600 NW2d 370 (1999), quoting *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). "Voluntary manslaughter is an intentional killing committed under the influence of passion or hot blood produced by adequate provocation and before a reasonable time has passed for the blood to cool." *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332

(1995). "Murder and voluntary manslaughter are both homicides and share the element of being intentional killings. However, the element of provocation that characterizes the offense of voluntary manslaughter separates it from murder." *Id.*

Viewed in the light most favorable to the prosecution, the evidence supports defendant's conviction of second-degree murder. First, the testimony at trial linking defendant to the homicide scene is circumstantial evidence that defendant caused Bentley's death. Moreover, there was compelling physical DNA evidence linking defendant to the crime. Second, we find the evidence sufficient to support a finding that defendant acted with the requisite malice. Malice may be inferred from the facts and circumstances of the killing. *People v Wofford*, 196 Mich App 275, 278; 492 NW2d 747 (1992). "The 'malice' required to prove murder requires either: 1) an intent to kill, 2) an intent to cause great bodily harm, *or* 3) wanton and wilful disregard that the natural tendency of defendant's behavior is to cause death or great bodily harm." *People v Nowack*, 462 Mich 392, 408; 614 NW2d 78 (2000). Firing a gun at a person is a force that is likely to cause death or great bodily harm. *Id.* Furthermore, based on the fact that Bentley suffered multiple gunshot wounds and the location of those shots, in her face and her chest area, a rational trier of fact could reasonably infer that defendant also possessed the intent to kill. Finally, no evidence was presented to establish an excuse or justification for the killing. Accordingly, we find that there was sufficient evidence, when viewed in the light most favorable to the prosecution, to establish the elements of second-degree murder beyond a reasonable doubt.

Furthermore, we find that the evidence does not support mitigating murder to voluntary manslaughter. We find nothing in the witnesses' testimony, or any reasonable inferences from it, indicating that Bentley provoked defendant such that he killed in the heat of passion. None of the witnesses had any knowledge concerning the events that transpired inside Bentley's house when she was killed. Although there were signs of a struggle or physical confrontation between defendant and Bentley, it is pure speculation to conclude that the shooting was the result of adequate provocation.

IV. Illegality of Arrest

Defendant finally claims that his statement should have been suppressed because his arrest was not supported by probable cause. However, defendant failed to preserve this issue for our review. To avoid forfeiture of an unpreserved issue on appeal, a defendant must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

Because defendant failed to move for a suppression hearing, the record does not indicate what evidence supported the magistrate's probable cause determination. Thus, our review is limited to the trial record. It is evident from the trial record that the warrant was issued before defendant gave his statement to the police. It is also apparent from the record that the DNA evidence connecting defendant to the scene of the crime did not exist at the time of defendant's arrest. Therefore, we consider this issue without taking into account the DNA evidence or defendant's statement.

For an arrest to pass constitutional muster, it must be supported by probable cause that a crime has been committed at the moment that the officer makes the arrest. *People v Lyon*, 227

Mich App 599, 611; 577 NW2d 124 (1998). "Probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of criminal activity." *Lyon, supra* at 611, citing *Illinois v Gates,* 462 US 213, 243, n 13; 103 S Ct 2317; 76 L Ed 2d 527 (1983). "Probable cause exists where the facts and circumstances within the police officer's knowledge are sufficient to lead the police officer to believe that the suspect has committed or is in the process of committing a felony." *People v Heard*, 178 Mich App 692, 701; 444 NW2d 542 (1989). However, "[w]hile guilt need not be established beyond a reasonable doubt, there must be evidence of each element of the crime charged, or evidence from which the elements may be inferred." *Abraham, supra* at 656.

The evidence demonstrates that there was probable cause to support a charge of first-degree murder. As we addressed *supra*, Smith's testimony established that defendant caused the killing. Based on the fact that Bentley suffered from multiple gunshot wounds in the face and her chest area, one could reasonably infer that defendant intended to kill Bentley. Furthermore, the evidence regarding the timing and number of gunshot wounds demonstrated probable cause that the killing was premeditated and deliberate.[5] See *People v Coy*, 243 Mich App 283, 315-316; 620 NW2d 888 (2000). Smith testified that she only heard two sounds at the house, while Bentley had three gunshot wounds. Defendant had sufficient time to "take a second look" before shooting Bentley again. In sum, the facts and circumstances, in this case, were sufficient to lead the police to believe that defendant committed murder. *Heard, supra* at 701. Accordingly, we find there was probable cause to support defendant's arrest. As such, defendant failed to establish plain error affecting his substantial rights. *Carines, supra* at 761-764.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Pat M. Donofrio

[5] "Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *Abraham, supra* at 656, quoting *People v Schollaert,* 194 Mich App 158, 170; 486 NW2d 312 (1992).