

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL BERNARD PROFIT,

Defendant-Appellant.

UNPUBLISHED

May 20, 2004

No. 246412

Wayne Circuit Court

LC No. 02-001890

Before: Saad, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree premeditated murder, MCL 750.316, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to mandatory life imprisonment for the first-degree premeditated murder conviction, thirty-eight months to five years' imprisonment for the felon in possession of a firearm conviction, and to a consecutive sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant's first issue on appeal is whether sufficient evidence existed for a reasonable jury to convict defendant of first-degree premeditated murder. This Court reviews a claim of insufficient evidence de novo. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). This Court "must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Defendant argues that testimony of the witnesses was inconsistent and did not support a determination of premeditation. Specifically, defendant contends that the jury relied upon testimony that defendant said, "hey, my man, watch this," as evidence of premeditation. Defendant argues that this testimony is inconsistent from the same witness' statement to police where it was indicated defendant only said, "hey, my man." In addition, defendant asserts another witness, at trial, denied his statement to police regarding having observed the victim reach toward his ankles, where the victim had previously been observed carrying a handgun, prior to defendant shooting.

To demonstrate premeditation, "[t]he interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a 'second look.'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003). Defendant was seen to remove a gun from his pocket and was the only person observed holding a gun at the time of the shooting.

Five spent shell casings were recovered from the lawn of defendant's home and the victim died of multiple gunshot wounds. Two witnesses testified they observed the victim bent over and moving away from defendant, when defendant aimed at the victim and fired an additional shot. Any of these time periods are sufficient to infer a "second look" or time for premeditation and deliberation on the part of defendant. Ultimately, defendant's argument can be reduced to one of witness credibility, which is solely within the province of the jury. *People v Lemmon*, 456 Mich 625, 642-643, 647; 576 NW2d 129 (1998). If the jury determined the witnesses to be credible, there was sufficient evidence to convict defendant of first-degree premeditated murder.

Defendant's second issue on appeal is whether the trial court erred when it denied his motion for a directed verdict. When reviewing a trial court's decision on a motion for directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Defendant argues that the trial court employed the incorrect standard in denying the directed verdict and that there was insufficient evidence to support a conviction for first-degree premeditated murder. Viewing the testimony in a light most favorable to the prosecution, a rational finder of fact could have found that the essential elements of the crime had been proven beyond a reasonable doubt particularly when, given the deferential standard of review, a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant also asserts the trial court used the incorrect standard in ruling on his motion for a directed verdict. Defendant contends the trial court ruled based upon whether an issue of fact existed for the jury's determination, rather than basing the decision upon the sufficiency of the evidence. While the court referenced the issue of witness credibility and the existence of a question of fact as appropriate for jury determination, the ruling by the court does not suggest that as the basis for its ruling. Rather, the court indicated that, if the testimony of the witness were believed, the words he overheard spoken by defendant, just prior to the shooting, were sufficient to show premeditation. The judge indicated that the absence of a weapon on the victim would also support a determination of premeditation. Even if in denying a directed verdict the trial court only stated that a question of fact existed, there was sufficient evidence to support defendant's convictions.

Defendant's third issue on appeal is whether the trial court erred in failing to engage in an inquiry regarding the potential for jury exposure to extraneous information from courtroom spectators. As the issue is unpreserved, it is reviewed for plain error affecting defendant's substantive rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant asserts the trial court erred by failing to develop a record and inquire into the possibility that the jury was exposed to extraneous information that may have impacted its verdict. Defendant refers only to a courtroom incident that is unspecified with regard to any details, which led the judge, outside the purview of the jury, to instruct the attorneys to advise and admonish spectators regarding their behavior.

The test for determining whether extrinsic influences impacted a jury's verdict, requiring reversal, requires proof that the jury was exposed to extraneous influences and that the extraneous influences created a real and substantial possibility that they could have affected the

jury's verdict. *People v Fletcher*, 260 Mich App 531, 540; ___ NW2d ___ (2004). Defendant must demonstrate that the extraneous influence was substantially related to a material aspect of the case or that there is a direct connection between the extrinsic material and the adverse verdict. *Id.* at 4. The record provides no indication that the jury was exposed to extraneous facts and defendant cannot elucidate any occurrence within the courtroom that impacted the jury. Interruptions by spectators within a courtroom do not necessarily rise to the level of extraneous facts or "evidence." *People v Duby*, 120 Mich App 241, 250-251; 327 NW2d 455 (1982). The court's statements were general in nature and not directed to a specific individual and did not reference a particular action or outburst. Defendant provides no factual basis to conclude that anything seen or heard by the court, if it occurred, was prejudicial to the defense or that the jury was affected by it. Further, the trial court instructed the jury at the beginning of trial, and at the close of proofs, to only consider the evidence properly presented within the court during trial. *People v Van Epps*, 59 Mich App 277, 284-285; 229 NW2d 414 (1975).

Defendant's fourth issue on appeal is a claim of ineffective assistance of counsel, based upon defense counsel's failure to act to insure an adequate inquiry and curative action following the court's instruction to counsel regarding spectator behavior in the courtroom. As the issue was not properly preserved by timely motion for a new trial or an evidentiary hearing, this Court reviews it only to the extent that claimed counsel mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985). Defendant argues counsel was ineffective for failing to seek further investigative proceedings or moving for a mistrial based on an unspecified occurrence in the courtroom. The record fails to provide a factual basis for his claim, as it is completely silent except for the court's instruction to counsel. As defendant is unable to demonstrate that something inappropriate occurred in the courtroom, counsel could not be ineffective in failing to address it. Trial counsel is not required to advocate meritless positions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). As the issue is neither preserved, nor properly presented, it should not be considered further by this Court. MCR 7.212(C)(6)(c), (g).

Defendant's final issue on appeal is whether the trial court erred in denying defendant's pretrial motion to remand for further preliminary examination proceedings. This Court reviews the trial court's decision under an abuse of discretion standard. *People v Oliver*, 170 Mich App 38, 43; 427 NW2d 898 (1988), modified and remanded 33 Mich 862 (1989). Defendant asserts that failure to have a specific witness testify at the preliminary examination was an error, necessitating re-opening of the preliminary examination. After reviewing the preliminary examination testimony, the trial court noted the omission of the testimony would not serve to negate the evidence provided that was sufficient to bind defendant over for first-degree premeditated murder. Even if conflicting evidence exists, or evidence exists that raises a reasonable doubt with regard to defendant's guilt, a defendant should still be bound over for trial for resolution of the issue by the trier of fact. *People v Selwa*, 214 Mich App 451, 457; 543 NW2d 321 (1995).

Even if an evidentiary deficiency had existed at defendant's preliminary examination, reversal of his conviction is not mandated. In *People v Hall*, 435 Mich 599, 601-603; 560 NW2d 520 (1990), our Supreme Court ruled that "an evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." *Id.* at 601. An erroneous conclusion

that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *Id.* at 602-603; *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). The witness sought by defendant ultimately testified at trial. As defendant received a fair trial and has not demonstrated any prejudice, reversal in this case would not be required even if the evidence presented at the preliminary examination were insufficient. *Hall, supra*, 435 Mich 601.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Karen M. Fort Hood