STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE EDWARD HALL,

Defendant-Appellant.

UNPUBLISHED
December 28, 2004

No. 251050
Wayne Circuit Court
LC No. 03-004131-01

Before: Neff, P.J., and Cooper and R. S. Gribbs*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of life without parole for the murder conviction, three to twenty years for the felon in possession conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the afternoon shooting death of Curtiss Triplett, on a street in Ecorse in February 2003. The incident began when defendant fired his gun into the air. The victim, Triplett, stopped his car and admonished defendant not to play with guns. According to witnesses, defendant then walked over to the car and shot Triplett. Defendant was identified as the shooter by Triplett's girlfriend, who was in the car with Triplett and had known defendant for many years, and by another man who was standing a block away, but who also knew defendant. Defendant was also identified as the shooter by another woman, Leniece Hopkins, who testified at trial that she was a block away from the shooting and knew defendant. Defendant presented alibi witnesses and testimony that a former police officer, Derrick Lyons, was the shooter.

I

Defendant first argues that there was insufficient evidence of premeditation and deliberation to support his conviction of first-degree murder. We disagree.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The standard of review is deferential, and requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To establish first-degree murder, the prosecution must prove "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate." *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). "To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem . . . . [P]remeditation and deliberation characterize a thought process undisturbed by hot blood." *People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971).

> To show first-degree premeditated murder, "'[s]ome time span between [the] initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation.'" *People v Tilley*, 405 Mich 38, 45; 273 NW2d 471 (1979), quoting *People v Hoffmeister*, 394 Mich 155, 161; 229 NW2d 305 (1975). The 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).]

"A sufficient time lapse to provide an opportunity for a 'second look' may be merely seconds, or minutes, or hours, or more, dependent on the totality of the circumstances surrounding the killing." *People v Conklin*, 118 Mich App 90, 93; 324 NW2d 537 (1982). But one "cannot instantaneously premeditate a murder." *People v Plummer*, 229 Mich App 293, 305; 581 NW2d 753 (1998). "A pause between the initial homicidal intent and the ultimate act may, in the appropriate circumstances, be sufficient for premeditation and deliberation." *Id.* at 301. There must be "substantially more reflection on and comprehension of the nature of the act than the mere amount of thought necessary to form the intent to kill." *Id.*

In the present case, although the encounter between defendant and Triplett was brief, the evidence indicated that defendant left a sidewalk and proceeded toward Triplett's car with a gun in his hand and his arm outstretched. The evidence did not suggest that this was a "heated situation," such as where a defendant is responding to a brawl and has no time "to take a second look at the nature of his actions, 'undisturbed by hot blood.'" *Id.* at 303, 305. Further, Triplett was unarmed, and his remarks were not so provocative that defendant's thought process should have been disturbed "by hot blood." *Id.* at 300. This Court has recognized that a "pause" or "seconds" may be sufficient for premeditation and deliberation. *Id.* at 301; *Conklin*, *supra* at 93. Under the circumstances, the interval involved in this case, while short, was nevertheless adequate for defendant to have taken a second look at the nature of his actions. Viewed in a light most favorable to the prosecution, the evidence was sufficient to allow the jury to find that the essential elements of premeditation and deliberation were proven beyond a reasonable doubt.

II

Defendant argues that the trial court abused its discretion by admitting evidence that a defense witness, Carey McDaniel, had been convicted several years earlier and sentenced to prison for shooting former police officer Lyons. The prosecution offered the conviction to show that McDaniel was biased against Lyons, and thereby attack the credibility of McDaniel's testimony that he saw Lyons shoot Triplett, even though the conviction did not fall within the category of offenses prescribed in MRE 609.

We need not resolve whether evidence of the conviction was improperly admitted because any error would not require reversal. See *People v Whittaker*, 465 Mich 422; 635 NW2d 687 (2001) (declining to determine whether evidence was properly admitted because the alleged error would not require reversal). Defendant has not shown that it is more probable than not that the conviction affected the outcome of the trial. *Id*. at 427; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The crux of the attack on McDaniel's credibility was established by the evidence that McDaniel had previously shot Lyons and the circumstances of the shooting. MRE 609 did not preclude that evidence. It is not more probable than not that the jury's assessment of McDaniel's credibility was affected by the additional evidence that McDaniel was convicted in connection with that shooting incident and served time in prison as a result. Because any error was harmless, this issue does not warrant reversal.

III

Defendant argues that the prosecutor improperly denigrated defense counsel during his rebuttal argument by using a "red herring" analogy to argue that the evidence presented by the defense was not material to the case and by implying that defense counsel was trying to distract the jury from the facts and the law.

"A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). But see *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996), holding that an argument that defense counsel was trying to "confuse the issue" was not improper where it did not personally attack defense counsel or shift the focus from the evidence. Here, the prosecutor's argument, viewed in relation to the evidence and the defense argument, was not so prejudicial that it denied defendant a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003); *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003).

With regard to defendant's other allegations of prosecutorial misconduct, to which defendant did not object at trial, defendant has not shown a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

IV

Defendant argues that he is entitled to a new trial because Leniece Hopkins, one of the prosecution witnesses who identified him as the shooter, subsequently admitted in an affidavit that she lied at trial and was not even present at the scene. Defendant argues that this newly discovered evidence warrants a new trial.

Generally, the issue of newly discovered evidence comes before this Court in the context of a trial court's ruling granting or denying a defendant's motion for a new trial. In that situation, "[t]his Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion . . . . A trial court's factual findings are reviewed for clear error." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Here, defendant first raised this issue in a motion to remand, which this Court denied for failure to persuade the Court of the need for remand at that time.[1] Where, as here, the trial court has not had an opportunity to decide the issue initially or to determine whether an evidentiary hearing is necessary under MCR 7.211(C)(1), this Court examines the proffered evidence under the standard for granting a new trial to determine whether a remand is necessary.

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [*Cress, supra* at 692 (citations omitted).]

"Michigan courts have expressed great reluctance to grant new trials on the basis of recanting testimony." *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992) (citations omitted).

Upon review of the complete record and arguments advanced by the parties, we conclude that the fourth part of the test for granting a new trial based on newly discovered evidence cannot be met because the new evidence clearly would not make a different result probable on retrial. The victim's girlfriend was in the passenger seat of the victim's car when the events of this case unfolded. She had known defendant for several years and positively identified him as the person who walked over to the car and shot the victim. Another witness, who also saw the shooting, albeit from a longer distance, testified that he was certain that it was defendant who shot the victim. This witness had known defendant for a long time and also recognized one of the other two men with defendant. Accordingly we deny defendant's request for a new trial on the basis of newly discovered evidence.

V

Defendant argues that the trial court abused its discretion in admitting Alean Walker's statement to the police that "Dwayne shot my boyfriend." The trial court determined that the statement, although hearsay, was admissible as an exited utterance under MRE 803(2).

In *People v McLaughlin*, 258 Mich App 635, 659-660; 672 NW2d 860 (2003), this Court set forth the law pertinent to this issue as follows:

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[1] Because the previous denial of defendant's motion expressed no opinion on the merits, the law of the case doctrine does not affect this Court's review of this issue. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000).

> MRE 803(2) provides an exception to the hearsay rule for a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." "The rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19. The pertinent inquiry is not whether there has been time for the declarant to fabricate a statement, but whether the declarant is so overwhelmed that she lacks the capacity to fabricate. *Id.* at 551.

After the circumstances surrounding the statement were explored in a separate record, the trial court concluded that the declarant, Walker, was still under the stress of the event when she made the statement. This Court gives "wide discretion" to that determination. *Smith, supra* at 552 (citation omitted).

In the separate record, Officer Howard testified that when he first approached Walker at the hospital, she was with friends and family members. She was "very upset," "crying," "shaking" and "very nervous." Although Officer Howard stated that he calmed Walker down before asking her questions, he also said that she was "very excited" when she made the statement, "Dwayne shot my boyfriend." Further, while Walker was not crying at that point, she still had tears on her face and in her eyes. In light of this testimony, the trial court's determination that Walker was still under the stress of the shooting was not an abuse of discretion.

VI

Defendant argues that the trial court abused its discretion by denying his pretrial motion to remand the case to the district court to enable him to use the transcript of an investigative subpoena hearing to show discrepancies in the testimony of the prosecution's witnesses.

The trial court correctly determined that a remand was unnecessary. Even if defendant had shown inconsistencies in the accounts of the prosecution's witnesses, those conflicts would not have been a basis for the magistrate to refuse to bind defendant over for trial. Where there is evidence that a felony has been committed and probable cause to believe that the defendant was the perpetrator, the defendant must be bound over for trial, even if the evidence conflicts or raises a reasonable doubt. *People v Selwa*, 214 Mich App 451, 456-457; 543 NW2d 321 (1995).

VII

Defendant claims that he was denied the effective assistance of counsel. Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court's review of this issue is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant has submitted affidavits from three individuals indicating that they would have provided testimony favorable to the defense. Those affidavits were not presented below and,

therefore, are not part of the existing record. MCR 7.210(A)(1); *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981). Accordingly, we may not consider them for purposes of determining that reversal is warranted because trial counsel was ineffective. Even if considered in the limited context of determining whether defendant has made an adequate showing to support his alternative request for a remand for an evidentiary hearing the affidavits are not persuasive that a remand is required. MCR 7.211(C)(1)(a)(ii). Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), and the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Id.*

One of the affidavits is from an individual, Ricky Scott, who was listed as a witness by both the prosecution and the defense. Scott avers that he witnessed the shooting and saw the perpetrator from a close vantage point. He further states that he had never seen the perpetrator before, but the affidavit does not indicate that Scott knew or was familiar with defendant. Scott's testimony would be cumulative to that of two other witnesses presented by the defense (defendant's uncle and McDaniel), who testified that defendant was not the shooter. The other two affidavits purport to provide alibi testimony, but they, too, are merely cumulative of other testimony offered at trial on defendant's behalf.

Defendant was not deprived of a substantial defense. We conclude that defendant has not made the necessary showing to warrant an evidentiary hearing to develop the factual basis for his claim of ineffective assistance of counsel.

Affirmed.

/s/ Janet T. Neff
/s/ Jessica R. Cooper
/s/ Roman S. Gribbs