

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN CHRISTOPHER HUGHES,

Defendant-Appellant.

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UNPUBLISHED

October 19, 2006

No. 261895

Wayne Circuit Court

LC No. 04-011325-01

Before: Murray, P.J., and O'Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life in prison for his first-degree premeditated murder conviction, and two years in prison for his felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that there was insufficient evidence presented to support his first-degree premeditated murder conviction. We disagree. We review sufficiency of the evidence claims de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We view the evidence presented 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 charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

The elements of first-degree premeditated murder are that the defendant killed the victim and that the killing was willful, deliberate, and premeditated. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002); MCL 750.316(1)(a). Premeditation and deliberation require sufficient time to permit the defendant to reconsider his actions; they may be established by evidence of the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing itself including the weapon used and the location of the wounds inflicted, and the defendant's conduct after the homicide. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Circumstantial evidence and reasonable inferences from the evidence can be sufficient to prove the elements. *Id.* Proof of motive is not required. *Id.* at 657. This Court must afford deference to the trier of facts special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Here, three eyewitnesses, Ricky Johnson (Ricky), Kevin Johnson (Kevin) and Charles Williams (Charles), testified that they were gathered by a gas station with the victim when defendant and his friends walked by and exchanged words with the victim and his friends. The three eyewitnesses all testified that before defendant and his friends walked away, defendant stated that somebody was going to get shot. Furthermore, the evidence establishes that approximately five to ten minutes after words were exchanged, defendant returned to the area, walked up to the victim, made a motion like he was going to punch the victim, and shot the victim in the back of the head, causing the victim's death. Furthermore, shortly after the shooting, Ricky picked defendant out of a photo lineup as the man who shot the victim, and defendant was not found until he was extradited back to Detroit from Minnesota on September 25, 2004. Therefore, we conclude that, viewing the evidence presented in a light most favorable to the prosecution, a rational trier of fact could have found that defendant acted deliberately and with premeditation when he shot the victim, *Abraham, supra*, and accordingly, could have found that the essential elements of first-degree premeditated murder were proven beyond a reasonable doubt, *Bowman, supra*; MCL 750.316(1)(a). Therefore, there was sufficient evidence presented to support defendant's first-degree premeditated murder conviction. *Johnson, supra*.

Defendant next argues that he was denied his constitutional right to a fair and impartial trial through misconduct of the prosecutor. We disagree. We review claims of prosecutorial misconduct on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001); *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Rice (On Remand), supra* at 438. An attorney may not knowingly offer or attempt to elicit inadmissible evidence. *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). A prosecutor may not argue facts not in evidence nor mischaracterize the evidence, but may argue reasonable inferences from the evidence. *Watson, supra* at 588. However, when evidence of a defendant's other wrongful acts has been admitted for a limited purpose, it is improper for the prosecutor to argue that the jury should consider the evidence for a different purpose. *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992). Further, it is not proper for a prosecutor to comment on the defendant's character when his character is not in issue. *Id.*

Here, the victim's friends, Ricky, Kevin and Charles, testified that five to ten minutes before the shooting in question, defendant threatened to kill someone. Ricky testified that he told the police about defendant's aforementioned threat, but admitted that there was no mention of the threat in his three-page police statement. Furthermore, there was no evidence to establish that Kevin told the police about the aforementioned threat. Furthermore, officer Barbara Simon (Simon) testified that Ricky never told her about defendant's alleged threat. Additionally, Charles testified that Officer Al Newman (Newman) took a signed statement from him on the night of the incident. Thus, in an effort to corroborate the victim's friends' testimony regarding defendant's aforementioned threat, the prosecutor first asked Simon if she was working with Newman, and then stated, "[a]nd that sort of statement that you were going to get shot appears in the other statement?" The prosecutor's question was referencing Officer Newman's report in regard to the interviews he conducted with the victim's friends at the crime scene. We conclude that the question was posed in an effort to get Simon to testify to the contents of Newman's

report. Defendant and the prosecution agree that it would have been improper for Simon to testify to the contents of Newman's report. See *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, defense counsel's objection to the prosecutor's aforementioned question was sustained, and the prosecutor's question was not answered. Thus, Simon never testified regarding the contents of Newman's report, and therefore, we conclude that defendant was not prejudiced by the prosecutor's aforementioned actions.

Furthermore, after the prosecutor withdrew his aforementioned question he stated, "I think everybody testified about that," and "[n]o, everybody did." Taking the prosecutor's subsequent statements in context, we conclude that the statements are merely suggesting that the victim's friends already testified that defendant made the aforementioned threat, and not suggesting that the victim's friends told Newman about the aforementioned threat. Given that the victim's friends had testified that defendant made the aforementioned threat, the prosecutor's subsequent comments were truthful, and thus, we conclude that the comments did not prejudice defendant. Moreover, given that the trial judge subsequently instructed the jury that it could only base its verdict on properly admitted evidence and that the lawyers' statements, arguments, and questions were not evidence, the prosecutor's aforementioned question and comments did not deny defendant his right to a fair and impartial trial. Thus, defendant's prosecutorial misconduct argument based on the prosecutor's aforementioned question and comment, fails. *Watson, supra*.

We likewise reject defendant's argument that he was denied his right to a fair and impartial trial on the basis of the prosecutor's use of improper character evidence. Here, the photo lineup that was shown to Ricky, which included an alleged "mug shot" of defendant, was admitted into evidence to establish what Ricky was looking at when he picked defendant out as the individual that shot the victim. During the prosecutor's closing argument, he referenced the admitted photograph and commented that defendant looked "menacing" in the photo and did not look like "someone who would be walking through the church as an usher." Defense counsel objected to the prosecutor's comments, and his objection was sustained. Assuming that defendant's mug shot is other act evidence because it establishes that defendant has been previously convicted of some crime, then the prosecutor's reference to the mug shot and subsequent aforementioned comments in an effort to imply that defendant looks guilty, were improper. *Quinn, supra*. However, as discussed, *supra*, defense counsel's objection to the prosecutor's comments was sustained, and the trial judge subsequently instructed the jury that it could only base its verdict on properly admitted evidence and that the lawyers' statements, arguments, and questions were not evidence. Furthermore, as discussed, *supra*, the prosecution presented an abundance of evidence that established that defendant was guilty of the charged crimes. The prosecutor's aforementioned comments did not deny defendant his right to a fair and impartial trial. Thus, defendant's prosecutorial misconduct argument, that is based on the prosecutor's aforementioned comments, fails. *Watson, supra*.

Finally, we reject defendant's argument that he was denied his right to a fair and impartial trial on the basis of the prosecutor's alleged deliberate action of soliciting information from Officer Alfred Thomas (Thomas) regarding the fact that defendant's brother had been arrested on the night in question on an unrelated charge. Here, the prosecutor elicited information that Thomas got a description of defendant, was looking for defendant and did not find defendant in the first location that he searched. The prosecutor subsequently asked Thomas,

“[w]hat did you do after you received that information and noticed that this individual would not be here at that location,” to which Thomas responded, “I then um, checked a wider area just east of Dexter and Burlingame and Lynwood area and located” defendant’s brother, Daniel, who “was arrested on an unrelated charge.” After an objection to the fact that defendant and Daniel were brothers, the court asked the prosecutor to move on and the prosecutor finished his examination of Thomas by eliciting information that defendant was not present at his brother’s house and could not be found. Given that defendant was not found until he was extradited back to Detroit from Minnesota on September 25, 2004, and the parties had not yet stipulated to this fact, we conclude that the prosecutor’s aforementioned question was posed in an effort to elicit further information from the police regarding their unsuccessful efforts to find defendant, which would help establish that defendant fled after the incident at hand. Accordingly, we further conclude that the aforementioned question was not asked in an effort to elicit information that defendant’s brother was arrested on an unrelated matter. Our conclusions are further supported by the fact that during the prosecutor’s closing argument, he referenced the fact that after the shooting took place, the police went to defendant’s brother’s house and could not find defendant, and that “the next time anybody would see the defendant is after he is extradited back from Minnesota in 2004.” Therefore, the prosecution did not knowingly offer or attempt to elicit the potentially inadmissible evidence that defendant’s brother was arrested on an unrelated charge. *Dyer, supra*. Accordingly, the prosecutor’s actions in this regard did not deny defendant his right to a fair and impartial trial, and therefore, defendant’s prosecutorial misconduct argument that is based on the prosecutor’s aforementioned question to Thomas fails. *Watson, supra*.

Defendant’s final argument on appeal is that he was denied his constitutional right to the effective assistance of counsel. We disagree. Defendant failed to properly preserve this argument by filing a motion for a new trial or an evidentiary hearing before the trial court. *People v Rodriquez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). When reviewing a claim of ineffective assistance of counsel, when an evidentiary hearing is not previously held, our review is limited to the facts contained on the record. *Id.* Factual findings are reviewed for clear error, and constitutional challenges are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel’s performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel’s performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel’s actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to present additional evidence only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Id.* The failure to make a reasonable investigation can constitute ineffective assistance of counsel. See *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

We reject defendant’s arguments that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to request funds to have a private

investigator appointed to question all of the individuals who witnessed the event in question, and failed to present any witnesses or a viable defense on defendant's behalf. The evidence indisputably establishes that Ricky, Kevin and Kelvin were present when defendant shot the victim. Ricky and Kevin testified and defense counsel did his best to defend defendant by effectively cross-examining both witnesses by impeaching their testimony and, in turn, attempting to establish that defendant's actions were not deliberate or premeditated. Defense counsel specifically questioned Ricky's testimony by establishing that his written statement did not contain any information regarding the fact that defendant threatened to kill someone approximately ten minutes prior to the shooting when he reportedly relayed the threat to police. Defense counsel specifically impeached Kevin's testimony by establishing that he never gave a statement to the police. Thus, we conclude that the record reflects that defense counsel adequately investigated the police reports and, in turn, adequately cross-examined the two eyewitnesses that testified. Therefore, we conclude that defendant's performance in this regard did not fall below an objective standard of reasonableness. Furthermore, defendant has failed to establish what witnesses defense counsel should have called to the stand and what those witnesses would have testified to that would have changed the outcome of the proceedings. Defendant has failed to rebut the presumption that defense counsel's decision not to present any witnesses on defendant's behalf was sound trial strategy. Moreover, defendant has failed to establish what additional information a private investigator could have discovered and how that information could have been used to change the outcome of the proceedings. Thus, defendant's arguments fail. *Toma, supra; McGhee, supra; Dixon, supra.*

We also reject defendant's argument that he was denied his constitutional right to the effective assistance of counsel when his trial counsel failed to request a flight instruction that would have showed the jury how to properly view/use the stipulation that defendant was not found until he was extradited back to Detroit from Minnesota on September 25, 2004. In Michigan, it is well established that evidence of flight is admissible. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). Such evidence is probative because it may indicate consciousness of guilt, although evidence of flight itself is not sufficient to sustain a conviction. *Id.* A flight instruction can be supported by evidence that a defendant fled the scene itself, ran from the police, resisted arrest, attempted to escape custody, or left the state. *Id.* However, mere departure from a crime scene is insufficient to support a jury instruction on flight. *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989) (evidence that the defendant walked away from the crime scene was insufficient to support a flight instruction). Here, the parties stipulated that defendant was extradited back to Detroit from Minnesota on September 25, 2004. During the prosecutor's closing and rebuttal arguments, he used the aforementioned stipulation as one of the reasons that he believed the jury could imply that defendant was guilty of the charged crimes. However, a flight instruction was never requested and, accordingly, a flight instruction was never given to the jury. Given that the incident at hand occurred on November 20, 2002, and it was stipulated that defendant was not found until he was extradited back to Detroit from Minnesota on September 25, 2004, a flight instruction would have been supported by the evidence. *Coleman, supra.*

A proper flight instruction may have helped the jury determine how to use the aforementioned stipulation during its deliberations. However, a flight instruction could have been unfavorable to defendant because it could have persuaded the jury to use the aforementioned stipulation as further evidence that defendant was guilty of the charged crimes.

Thus, it may have been sound trial strategy for defense counsel to not request the instruction. Thus, defense counsel's failure to request the instruction did not fall below an objective standard of reasonableness. *Toma, supra*. Moreover, as discussed, *supra*, the prosecution presented an abundance of evidence that established that defendant was guilty of the charged crimes. Therefore, even if it were found that defense counsel's action of not requesting the instruction fell below an objective standard of reasonableness, defense counsel's aforementioned action did not effect the result of the proceedings. Thus, defendant's argument, that he was denied of his constitutional right to the effective assistance of counsel when his trial counsel failed to request a flight instruction, fails. *Id.*

Affirmed.

/s/ Christopher M. Murray

/s/ Peter D. O'Connell

/s/ Karen M. Fort Hood