STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2008
v	No. 276589 Wayne Circuit Court
RUDDENE MILLER, Defendant-Appellant.	LC No. 06-004925-01

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant was convicted of first-degree murder, MCL 750.316(1)(a), first-degree home invasion, MCL 750.110a(2), felony murder, MCL 750.316(1)(b), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's first-degree home invasion conviction was vacated at sentencing. The trial court sentenced defendant to life in prison without parole for each murder conviction and two years in prison for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I. FACTS

This case arises out of a shooting incident that resulted in the death of Antoine Webb. The shooting occurred at the home of Brenda Grissom, located at 9072 Burt Road, Detroit, Michigan, in the early evening of October 3, 2005. Defendant's girlfriend, Veronica Driskill, lived directly across the street from Grissom, at 9079 Burt Road. On October 3, 2005, defendant visited Driskill's home to work on a van. Witnesses heard a gun shot from the Driskill home as they sat on the front porch of the Grissom home. They then saw Webb run from the Driskill's backyard to the Grissom home. Defendant and another man, who was only identified as Marshall, chased Webb. Webb ran to the Grissom porch and entered the Grissom home. Witnesses saw defendant with a weapon. Defendant and Marshall then forced the front door open to follow Webb. Two gunshots were heard from inside the Grissom home. Then, defendant dove out a screen window, ran back to the Driskill home and drove off in a van.

Defendant denied shooting Webb. Instead, he claimed that Webb and Marshall had exchanged swear words in the van at the Driskill garage, and a defense witness testified that he saw Marshall shoot Webb in the van. Defendant claimed he chased Webb to protect Webb from Marshall. Defendant also asserted that Marshall stuck the gun inside the door jam and shot twice.

Officers obtained a warrant to search the residence where the defendant was located. Defendant was arrested in his home on March 25, 2006. Defendant had been hiding in the attic.

II. SUFFICIENCY OF THE EVIDENCE

Defendant's first argument on appeal is that there was insufficient evidence to convict him, as a principal or aider and abettor, of first-degree murder, either on the theory that he acted with premeditation or that he committed the crime in the course of another felony, in this case, first-degree home invasion. We disagree.

A. Standard of Review

This Court reviews sufficiency of the evidence claims de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002).

B. Analysis

"The elements of first-degree 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), quoting MCL 750.316(1)(a). The defendant must have had the specific intent to kill. *People v Graham*, 219 Mich App 707, 710-711; 558 NW2d 2 (1996). To show premeditation and deliberation, "'"some time span between [the] initial homicidal intent and ultimate action is necessary . . . ."'" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (citations omitted). "The interval between the initial thought and ultimate action should be long enough to afford a reasonable person time to take a '"second look."'" *Id.* (citations omitted).

Defendant and Webb were together in Driskill's backyard shortly before Webb was killed. A shot was fired in Driskill's backyard. Then, Webb ran across the street to Grissom's porch. He was visibly unharmed, but yelling for help to Ashley Hampton and Necolas Cooper, who sat on Grissom's porch. Without permission, Webb barricaded himself inside Grissom's front door. Defendant and Marshall chased Webb to the porch. Hampton observed that defendant wore a basketball jersey and had a gun. Although Cooper could not identify defendant, he testified that the man wearing the jersey was armed. Defendant and Marshall forced Grissom's door open. Seconds later, more shots were fired. Webb subsequently died as a result of two gunshot wounds, one to the head and one to the abdomen.

Defendant's pursuit of Webb across the street to Grissom's home and his concerted effort to force Grissom's door open can also be used to infer that the defendant had time to take a "second look." *Gonzalez*, *supra* at 641. Further, defendant's actions following Webb's murder are consistent with premeditation. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). After the shooting, defendant escaped through Grissom's window and ran across the street to Webb's van, in which he and an unidentified passenger sped away. Later, defendant called Driskill to check on Webb's status and inform her that he was leaving town, suggesting consciousness of guilt. Defendant also hid from police in an attic when they arrived at his home with an arrest warrant. Viewed in a light most favorable to the prosecution, this evidence is sufficient to establish premeditation beyond a reasonable doubt.

Alternatively, the jury was instructed that defendant could be convicted of first-degree murder as an aider and abettor. To convict a defendant of aiding and abetting a crime, a prosecutor must prove that: "'(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'" *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (alteration by *Moore* Court).

A reasonable jury could have found that Marshall was the principal and defendant was an aider and abettor to Webb's murder. Defendant's witnesses claimed that Marshall shot at Webb in Driskill's backyard. Then, both men entered Grissom's home before the subsequent shots. No witnesses observed the shooting. However, defendant testified that Marshall shot at Webb through Grissom's door. Even if Marshall was the shooter, there was evidence that defendant's acts encouraged and assisted Marshall. Defendant carried a gun. Defendant chased after Webb, side by side with Marshall. Both men also struggled to open Grissom's door to reach Webb. After Webb was killed, defendant sped away with an unidentified occupant in Webb's van. Defendant's knowledge of Marshall's intent could be inferred from the assistance he provided to Marshall. Therefore, there was also sufficient evidence to convict defendant of premeditated first-degree murder as an aider and abettor.

In addition, there was sufficient evidence to conclude beyond a reasonable doubt that the murder was committed in the course of a first-degree home invasion. A person who commits murder in the perpetration of first-degree home invasion is guilty of felony murder. *People v Akins*, 259 Mich App 545, 552; 675 NW2d 863 (2003). The elements of first-degree home invasion are: (1) a person enters a dwelling without permission or breaks and enters a dwelling; (2) with intent to commit a felony, larceny or assault in the dwelling, or who commits a felony, larceny or assault while entering, present in, or exiting the dwelling; and (3) the person is armed with a dangerous weapon, or another person is present in the dwelling at any time during the intruder's entering, presence in, or exiting. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004). Defendant entered Grissom's home without permission, armed, and with the intent to kill or assault Webb.

Defendant maintains that he did not enter the home with the necessary intent for first-degree home invasion. Instead, defendant claims that he entered the home, under duress, to protect Webb from Marshall. However, any threat by Marshall to defendant occurred after they entered the home. "[D]uress is not a defense to homicide." *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). Even if duress can operate to excuse the predicate felony of a felony murder charge, the prosecutor presented sufficient evidence to disprove the defense of duress. Specifically, defendant carried the gun, chased Webb side by side with Marshall, and forced Grissom's door open to reach Webb.

Defendant also maintains that there was insufficient evidence to convict him of felony-firearm. However, defendant did not include this claim in his statement of questions presented. Therefore, it is not properly before this Court. See MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000).

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant's second argument on appeal is that he was denied the effective assistance of counsel at trial. We disagree.

A. Standard of Review

When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* at 484-485.

B. Analysis

Effective assistance is strongly presumed and the reviewing court should not evaluate an attorney's decision with the benefit of hindsight. *Id.* at 485; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant*, *supra* at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486.

In his first ineffective assistance claim, defendant attempts to negate the intent element of home invasion by arguing that his attorney failed to request instructions on duress and the defense of others.

To properly raise a defense of duress, a defendant has the burden to show some evidence that:

> "A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm." [*People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997).]

Defendant did not establish the elements of duress in this case. Rather, defendant claims that Marshall threatened Webb and defendant entered Grissom's home to protect Webb. However, because the threat was directed at Webb, not defendant, a reasonable person would not fear death or serious bodily harm in this situation. Therefore, trial counsel's failure to request an

instruction, inapplicable to the facts, does not constitute ineffective assistance of counsel. *People v Truong*, 218 Mich App 325, 341; 553 NW2d 692 (1996).

When a defendant uses nondeadly force, the test for determining whether he acted in lawful defense of others has four parts: (1) that the defendant honestly and reasonably believed that force was necessary for protection of another, (2) that the defendant used only the amount of force that reasonably seemed necessary to repel the apprehended harm, (3) that the defendant confined the use of force to the duration of the apprehended threat, and (4) that the defendant did not trigger the apprehended harm through his or her own misconduct. CJI2d 7.22.

Defendant's testimony presented some facts to support a defense of others instruction. He testified that he only went into Grissom's house to "to stop anything that was going on" because he "wouldn't let nothing happen to nobody I wouldn't want to happen to myself." He claimed that he jammed Marshall's hand in the door to protect Webb. He also testified that he did not intend to commit any offenses when he entered Grissom's house.

Despite these facts, trial counsel's failure to request an instruction on the defense of others did not prejudice defendant so that he was deprived of a fair trial. *Grant*, *supra* at 485-486. The trial court instructed the jury that it could find defendant guilty of first-degree home invasion only if he entered the home with the intent to inflict injury upon an individual. The jury is presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). If the jury believed defendant's testimony that he was trying to protect Webb, and only entered Grissom's home to stop Marshall, it would not have convicted him of first-degree home invasion. Presumably, however, the jury found testimony that defendant chased Webb side by side with Marshall, carried a gun, and forced Grissom's door open to be sufficient to prove defendant's intent for the home invasion conviction. Therefore, we conclude that defendant's trial counsel's failure to request an instruction on defense of others did not deprive defendant of a fair trial.

In his second ineffective assistance claim, defendant argues that his arrest was unlawful and his trial counsel was ineffective for failing to move to suppress evidence that defendant hid in the attic before his arrest. Specifically, defendant argues that the arrest warrant only provided access to the first floor of the home at 14010 Goddard Street and that defendant's mother, Deborah Coleman, did not consent to the search of the first or second floors of her home.

There is no evidence in the lower court record to substantiate defendant's claims. *Rodriguez*, *supra* at 38. An arrest warrant carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. See *People v Gillam*, 479 Mich 253, 260-261; 734 NW2d 585 (2007). Here, a felony arrest warrant was issued well before defendant's arrest and Officer Ronald Hopp was informed that defendant was inside the home. The police had authority to enter defendant's home; therefore, his arrest was lawful. Consequently, a motion to suppress evidence obtained from a lawful arrest would have been futile and defendant's trial counsel's failure to make such a motion was not ineffective. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003) (counsel renders effective assistance even if counsel fails to raise futile objections).

In his final ineffective assistance claim, defendant contends that trial counsel failed to investigate and call res gestae witnesses, Coleman, Keira Miller, Senita Upshaw, and alibi

witness, Mercedes Steffer. There is no evidence in the lower court record that Coleman, Miller, or Upshaw were present during the shooting, or its aftermath, to add relevant testimony. Similarly, there is no evidence in the lower court record, or defendant's brief, regarding Steffer or defendant's alleged alibi. Given that there was no evidentiary hearing and no factual support concerning Coleman, Miller, Upshaw or Steffer's alleged testimony, there are no mistakes apparent on the record with respect to counsel's failure to call these witnesses. Thus, defendant is unable to establish an ineffective assistance of counsel claim as it relates to the purported alibi or res gestae testimony.

IV. PROSECUTORIAL MISCONDUCT

Defendant's third argument on appeal is that the prosecutor committed misconduct during his closing argument and defendant's trial counsel was ineffective for failing to object to that misconduct. We disagree.

A. Standard of Review

This Court reviews unpreserved claims of prosecutorial misconduct for plain error. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

B. Analysis

Generally, prosecutors are afforded great latitude in their closing arguments. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Rice* (*On Remand*), 235 Mich App 429, 434; 597 NW2d 843 (1999).

Defendant claims that, during the prosecutor's rebuttal to defendant's closing argument, he improperly argued facts that were not in evidence by stating that both Cooper and Hampton testified that defendant carried the gun. However, a prosecutor is free to argue that the evidence and all reasonable inferences arising from it that demonstrates that the defendant is guilty. *Bahoda*, *supra* at 282. Hampton testified that defendant held a gun. Cooper could not identify defendant at trial. Nevertheless, the evidence showed that defendant wore a basketball jersey on the day of the shooting. Cooper claimed that the person wearing the jersey carried the gun. Therefore, it could be reasonably inferred from Cooper's testimony that defendant carried the gun and the prosecutor's statement was not improper. *Bahoda*, *supra* at 282.

Defendant also claims that, during the prosecutor's closing argument, he improperly bolstered or vouched for his witnesses and argued that defendant, Christan Hardy and Sebroyn Washington lied. A "prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecutor may also argue that "the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, a prosecutor may not improperly vouch for the defendant's guilt by using the prestige of his office. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

During his closing argument, the prosecutor did not imply that he had some special knowledge of the witnesses' truthfulness. In fact, the prosecutor made no comments at all about his personal knowledge or beliefs. Instead, the prosecutor argued that Cooper and Hampton had no reason to lie. He relied on evidence that defendant "had no issues with them" and they were merely neighbors who observed the incident. The prosecutor also argued that defendant, Hardy, and Washington were not worthy of belief. Defendant's testimony was self-serving. Hardy did not report to the police her claim that Marshall, not defendant, carried the gun. Similarly, Washington did not contact authorities until the week of trial, after he had visited defendant in jail several times. Further, Hardy's and Washington's close relationships with defendant provided motivation to protect him. Given that conflicting evidence made credibility important to the prosecutor's burden of proof in this case, his closing argument, highlighting evidence of credibility, was not improper.

Further, the trial court's instructions before and after trial, that the attorney's arguments did not constitute evidence, were sufficient to cure any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

Defendant also contends that he was denied the effective assistance of counsel because his trial counsel did not object to the prosecutor's closing argument. However, because we concluded above that the prosecutor's conduct was not improper, objections to the prosecutor's statements would have been futile and defendant's attorney's failure to object was not ineffective.

Finally, defendant claims that the prosecutor abused his discretion by overcharging defendant. Defendant failed to support this claim with facts in the record or provide citation to authority to sustain it. Rather, defendant makes one passing reference to excessive charges in his brief. Therefore, defendant has abandoned this claim on appeal and the Court need not address it. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Affirmed.

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette