STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 9, 2009
v	No. 282697 Kalamazoo Circuit Court
EMMANUEL JAMARR ATKINS, Defendant-Appellant.	LC No. 07-000624-FC

Before: Beckering, P.J., and Wilder and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree, premeditated murder, MCL 750.316(1)(a), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, second offense, MCL 769.11, to life imprisonment for the murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I

On March 29, 2007, at approximately 10:00 p.m., a Chevrolet Suburban with approximately 11 young men inside, including defendant, drove by a house located near the corner of Mills and Washington in Kalamazoo, Michigan. According to witness testimony, defendant, who was seated closest to the passenger-side window of the vehicle's second row, fired one shot out of a gun toward a group of people gathered on the porch. The shot struck 14-year-old William Berry in the eye, killing him. Witness testimony supported that the shooting was the culmination of an earlier altercation between rival street gangs.

At the start of trial, over defendant's objection, the prosecutor sought to have the courtroom closed because several prosecution witnesses had been harassed and threatened, and several threatening messages were posted to some of the witnesses' Internet pages. In addition, the prosecution indicated that a person with a baseball bat had chased one of the witnesses after that witness testified at the preliminary examination. Another witness moved from the area, and still another witness dropped out of school because of intimidation. The prosecutor noted that two-thirds of the prosecution's witnesses were minors who after the trial would come into contact with many of the spectators in the courtroom at school and in the community. The trial court declined to close the courtroom at that time, but indicated that it would monitor the situation, including the conduct of the spectators in the courtroom.

After approximately 11 witnesses testified, including two who were in the Suburban at the time of the shooting, the prosecutor renewed his request for a closed courtroom, particularly during the testimony of four witnesses who were in the vehicle with defendant. The court noted that several spectators who had been sitting in the courtroom throughout the trial became quite interested whenever gang references were made; that four spectators were removed from the courtroom for making comments about the deputies' guns; that spectators were removed despite the presence of additional security at the trial; that the jurors had become somewhat concerned and requested assistance to their vehicles; that witnesses had been threatened in the past and there were ongoing concerns about the safety of witnesses and intimidation regarding potential consequences for their testimony; and that the case involved a neighborhood crime, including several young witnesses and spectators who attended the same high school, which could also lead to threats, intimidation, and concern for the integrity of the proceedings. The trial court concluded that under the presenting circumstances there was a substantial reason to allow for a partial closure of the courtroom in order to protect the integrity of the judicial system and ensure that witnesses were comfortable and testifying truthfully. The court kept the courtroom open to the parents of the witnesses, defendant, and the victim, as well as the media.

Defendant declined the court's offer to open the courtroom for the testimony of police officers because he believed it would be prejudicial to open the courtroom for some witnesses and close it for others. After taking the testimony of several witnesses, the trial court stated that the courtroom would remain partially closed for the remainder of the trial and restated its previous reasoning. The trial court also noted as additional concerns a report by a juror regarding an episode where individuals standing by the elevator appeared to be taking a "head count" of the jurors as they returned from lunch, as well as a report of ongoing Internet threats to witnesses. The court indicated that the family members (not just the parents) of defendant, the witnesses, and the victim were welcome to sit in the trial, as was the media. The courtroom remained partially closed for the remainder of the trial, which included the testimony of nine witnesses (including defendant) who were in the Suburban at the time of the shooting and six other witnesses. Several witnesses testified to various threats and repercussions of their potential testimony, including one witness who dropped out of school due to the fighting, harassment, and threats, one who moved out of the area, and one who was chased by an individual with a baseball bat following his testimony at the preliminary examination.

II

On appeal, defendant contends that the trial court denied him his constitutional right to a public trial when it partially closed the courtroom. Whether a trial court denied a criminal defendant the right to a public trial involves a question of constitutional law which this Court reviews de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001). The denial of a criminal defendant's Sixth Amendment right to a public trial constitutes a structural error warranting automatic reversal. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994), citing *Waller v Georgia*, 467 US 39, 49 n 9; 104 S Ct 2210; 81 L Ed 2d 31 (1984).

A defendant in a criminal proceeding has both a state and federal constitutional right to a public trial. US Const Am VI; Const 1963, art 1, § 20; *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). "Although the right to an open trial is not absolute, that right will only

rarely give way to other interests." *Id*. The United States Supreme Court in *Waller*, *supra* at 48, set forth the requirements for the total closure of a trial:

> [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

However, this Court in *Kline*, *supra* at 169-170, explained the difference between a partial closure and a total closure as follows:

> *Waller* addressed total closure of a suppression hearing, and does not necessarily govern partial closures. Because the impact of a partial closure does not reach the level of total closure, only a substantial, rather than a compelling, reason for the closure is necessary. [Citations and footnote omitted.]

"A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain . . . ." *Id*. at 170 n 2 (citations omitted).

In this case, the trial court only partially closed the courtroom because it allowed defendant's relatives, relatives of the victim and the testifying witnesses, and members of the media to remain in the courtroom. *Id*. Thus, a substantial interest, as opposed to a compelling interest, was necessary to implement the partial closure. *Id*. at 170.

The record indicates that the nature of this offense involved two neighborhood street gangs, and there was a high likelihood of influence and intimidation from spectators. The shooting was the culmination of a clash between geographically based neighborhood street gangs, and the trial court and prosecutor noted that there were many young people in the courtroom, many of whom appeared to be from the same high school as the witnesses. In addition, threats were posted on the Internet, and, according to the prosecutor, some of the witnesses indicated they were afraid to testify in court. The threats posted online warned some witnesses that there would be retaliation depending on who testified and who "snitched." One witness testified that his parents forced him to leave the city, another admitted during testimony that a person chased him with a baseball bat after he testified at the preliminary examination, and another testified that he dropped out of school after being harassed. Furthermore, the prosecutor indicated that witnesses were being threatened as they left the courtroom. The trial court also noted that four individuals were removed from the courtroom for inappropriate comments about weapons carried by deputies, that jurors were being escorted out of the courthouse as a safety precaution, and that a juror complained about a remark directed at the jury during a break. Under these circumstances, we find there was a substantial interest in partially closing the courtroom to ensure that witnesses were testifying without threats or intimidation and to protect the integrity of the judicial system.

Additionally, the closure was narrowly tailored, the trial court properly articulated findings on the record, and it considered alternatives to a total closure. *Waller*, *supra* at 48; *Kline*, *supra* at 169. Here, the trial court narrowly tailored the closure to allow relatives of defendant, the victim, and the testifying witnesses, as well as members of the media to remain in the courtroom. The trial court properly articulated findings on the record; specifically, the trial

court discussed that threats were being made against several witnesses, that the crime was a "neighborhood crime," that rival gangs and many high school-aged individuals were involved, that threatening messages were posted online, that a comment was directed at a juror, and that several individuals were removed from the courtroom for inappropriate remarks about weapons. This record is sufficient to allow this Court to determine that the closure was proper. *Waller*, *supra* at 45 (citations omitted). Furthermore, the trial court properly considered alternatives to totally closing the courtroom. The court left the courtroom open for the first 11 witnesses, it offered to open the courtroom during the testimony of police officers, and it allowed relatives and media members to remain.

III

Defendant also contends that there was insufficient evidence to show that he acted with premeditation and deliberation when he fired a gunshot out of the window of the Suburban at the porch. We review a challenge to the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In determining whether the prosecution presented sufficient evidence to sustain a conviction, this Court must construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding that all of the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

In order to prove first-degree, premeditated murder, MCL 750.316(1)(a), the prosecution must prove beyond a reasonable doubt 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). Under the doctrine of transferred intent, if evidence shows that a defendant intended to kill *someone*, yet accidentally killed someone else, the evidence is sufficient to establish the intent element of first-degree murder. *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988). To show premeditation and deliberation, there must be some time span between the initial homicidal intent and the ultimate action. *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). The facts and circumstances surrounding the killing, including evidence of motive as a result of a previous relationship between the parties, can establish premeditation and deliberation. *Youngblood*, *supra* at 387. Moreover, "[c]ircumstantial evidence and reasonable inferences drawn from the evidence may constitute satisfactory proof of premeditation and deliberation." *People v Unger*, 278 Mich App 210, 229; 749 NW2d 272 (2008). And, "[b]ecause of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

In this case, the evidence viewed in a light most favorable to the prosecution showed that defendant had a motive to commit the murder. Several witnesses testified at trial that the group inside the Suburban was involved in an altercation with a rival street gang earlier in the day. Following the altercation, certain members of the group wanted to return to the area to fight the rival gang. Defendant was informed of the earlier altercation and joined the others in the Suburban. Defendant himself acknowledged during his testimony that certain members of the group informed him they wanted to return to fight the other group, and asked him if he had a gun.

Additionally, the evidence viewed in a light most favorable to the prosecution showed that defendant planned to shoot someone that night and that he had adequate time for a "second look." Defendant brought a gun with him in the Suburban after he was informed that the group wanted to fight. Defendant had time during the ride from his residence to the scene of the shooting to contemplate and reflect upon his actions. According to witnesses' testimony, the Suburban drove past Mills, where the group inside the vehicle observed a crowd of people gathered on a porch, some of whom were involved in the earlier altercation. The Suburban then turned around in a driveway and circled back, turning onto Mills. During this time, defendant had an opportunity for a "second look" and time to contemplate his actions. According to the testimony of the witness who was seated next to defendant in the Suburban, as the vehicle approached the house, defendant's window rolled down, and defendant pointed a gun out of the window and fired a shot at the porch where the kids were gathered. As defendant's window rolled down and he pointed the gun, he had yet another opportunity for a "second look" and to reflect on his actions before he fired the weapon into the crowd of people on the porch.

In reaching our conclusion that the evidence was sufficient to establish the elements of first-degree, premeditated murder, we will not interfere with the factfinder's role of determining the weight of the evidence or credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). "It is the function of the jury alone to listen to testimony, weigh the evidence and decide the questions of fact. . . . Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony." *Id.*, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Reviewing the evidence in a light most favorable to the prosecution, and considering that only minimal circumstantial evidence is needed to prove a defendant's state of mind, we find there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of first-degree, premeditated murder.

Affirmed.

/s/ Jane M. Beckering
/s/ Kurtis T. Wilder
/s/ Alton T. Davis