STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY SCOTT VANVELS,

Defendant-Appellant.

UNPUBLISHED
September 22, 2009

No. 285138
Kent Circuit Court
LC No. 07-008657-FC

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder of a peace officer, MCL 750.316(1)(c), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment for the first-degree murder conviction to run consecutively to his sentence of two years' imprisonment for the felony-firearm conviction. We affirm.

Defendant argues that the prosecutor presented insufficient evidence to support a conviction for first-degree murder. In reviewing a sufficiency of the evidence claim, this Court views the evidence "in a light most favorable to the prosecution [to] determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Jermell Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant argues that there was insufficient evidence of premeditation to support the jury's verdict. However, defendant was convicted of first-degree murder under MCL 750.316(1)(c), which requires the prosecution to establish four elements: "First, that the defendant committed a murder. Second, that the victim was a 'peace officer or corrections officer.' Third, that the victim was 'lawfully engaged in the performance of any of his or her duties as a peace officer or corrections officer.' Fourth, that the defendant knew the victim was a peace officer or corrections officer performing lawful duties at the time of the murder." *People v Herndon*, 246 Mich App 371, 385-386; 633 NW2d 376 (2001). Contrary to defendant's assertion, the prosecution is not required to provide evidence of premeditation to warrant a conviction under MCL 750.316(1)(c); it may instead establish that defendant acted with the requisite intent for second-degree murder, or if applicable, felony-murder, together with the aggravating circumstance of the victim's status as a peace officer, defendant's knowledge of that status and defendant's knowledge that the officer was lawfully performing his duties at the time

of the killing. *Id*. at 387-388. For second-degree murder, the prosecutor must prove: "(1) death, (2) caused by defendant's act, (3) with malice, and (4) without justification." *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003).

Defendant does not dispute that he fired the shot that killed the victim or that he had no legal justification for doing so. Rather, defendant asserts that he shot the victim accidentally. Therefore, only the malice element is at issue. "Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm." *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998); see also, *People v Carines*, 460 Mich 750, 758; 597 NW2d 130 (1999) (malice is demonstrated by showing an intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result). "A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon." *Carines*, *supra* at 759 (citations omitted).

We conclude the prosecution produced sufficient evidence of malice to support the jury's verdict. Intent to kill may be inferred from any facts in evidence. *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). Shooting from a close range, intentionally and directly, is strong evidence of such intent. See *People v George Johnson*, 54 Mich App 303, 304; 220 NW2d 705 (1974). Defendant discharged a shotgun at the victim, Officer Robert Kozminski, from approximately 10-18 feet away, while the officer was looking in the window of the garage where defendant was hiding. Defendant was an award winning skeet shooter, and his shot struck the victim directly in the face. In addition, defendant had motive, and motive is relevant on the issue of intent. See *Unger*, *supra* at 223. Defendant was going through a turbulent divorce and had previously been arrested and jailed. At the time of the shooting, defendant was in violation of the conditions attached to his bond. Defendant's ex-wife testified that defendant had previously commented that he would not leave his home without a fight and he had talked about not wanting to return to jail and about shootouts with the police. And, on the night in question, defendant stated that if the police were called, he might "take out a couple of cops" and "people would die." Then, when the police arrived at the scene, defendant commented "oh no, not the cops" and "I'm ready" before hiding in the garage with his shotgun. Defendant believed the police were "out to get" him and admitted that he fired the shotgun when he heard the police radio outside the garage. This evidence, viewed in a light most favorable to the prosecution, was sufficient to establish that defendant intentionally set in motion a force likely to cause death or great bodily harm. *Carines*, *supra* at 759-760. Further, during his statement to police following the shooting, defendant stated that his intent in firing the shotgun was to fire a "warning shot" in the direction of the officer after hearing his police radio as he approached the garage. Accepting defendant's explanation, a rationale jury could conclude under the circumstances presented that such an act, of intentionally firing a shotgun in the direction of the unsuspecting officer as he approached the garage in which defendant was hiding, was in wanton and wilful disregard of the likelihood that the natural tendency of that act was to cause death or great bodily harm. *Goecke*, *supra* at 464. Therefore, there was sufficient evidence to support the conclusion that defendant had the requisite malice for conviction under MCL 750.316(1)(c).

Having established the requisite malice for second-degree murder, the prosecution proved that defendant knew that the victim was a peace officer performing his lawful duties at the time of the murder, elevating the offense to first-degree murder of a peace officer. *Herndon*, *supra* at 385-386. The evidence clearly established that the victim was a Grand Rapids Police Officer responding to a domestic violence call and was attempting to secure the rear of defendant's residence when he was shot. The jury could infer that defendant knew that the victim was a police officer because defendant knew that the police were approaching and heard the victim's police radio outside the garage. Moreover, defendant admitted that he knew that a police officer was outside the garage when he discharged the shotgun. We affirm defendant's conviction for first-degree murder of a peace officer.

We reject defendant's unpreserved claim that the verdict was against the great weight of the evidence. Defendant has failed to show that the evidence preponderates heavily against the verdict such that a gross miscarriage of justice would otherwise result if it were not reversed, or that the testimony offered by the prosecution's witnesses was impeached to the extent that it was deprived of all probative value so that the jury could not believe it. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Here, the jury, through its deliberations, found the prosecution's version of events credible, and upon reviewing the record, we do not conclude that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand.

Defendant next argues that his statements to the police were involuntary, and he did not knowingly and intelligently waive his *Miranda*[1] rights because during the interrogation he was physically battered by the police, in distress, and intoxicated. We review de novo the determination that a statement was voluntary; however, we will not disturb the trial court's factual findings absent clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). Statements made by a defendant "during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights." *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999), quoting *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Based on the totality of the circumstances, the trial court must determine whether a statement is "'the product of an essentially free and unconstrained choice by its maker,' or whether the accused's 'will has been overborne and his capacity for self-determination critically impaired . . . . '" *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), quoting *Culombe v Connecticut*, 367 US 568, 602; 81 SCt 1860; 6 L Ed 2d 1037 (1961).

Defendant's claim that his confession was involuntary is without merit. The trial court found that defendant was given his *Miranda* warnings and that he voluntary gave two statements to the police. Although defendant claims he was intoxicated, intoxication by itself does not render a statement involuntary. *People v Tierney*, 266 Mich App 687, 709; 703 NW2d 204 (2005). As in *Tierney*, *supra*, the bulk of the evidence shows that defendant was coherent, rational, and understood the questions asked of him. *Id.* Moreover, there is no causal connection between the injuries defendant received at the time of his arrest and his giving of a subsequent

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

statement. *People v Wells*, 238 Mich App 383, 389; 605 NW2d 374 (1999). The evidence indicated that the injuries defendant received before the interrogation were sustained in an effort to remove him from what the police considered a potentially dangerous situation, and defendant was not interviewed by the same officers who arrested him. In addition, the interviewing detectives made attempts to make defendant comfortable, including providing him with additional clothing, coffee and water. Defendant's age, intelligence, and experience with the criminal justice system coupled with the relatively short period of time when defendant was advised of his constitutional rights and the time defendant admitted to shooting the shotgun also all weigh in favor of defendant's statements being voluntary. Nothing on the record indicates that defendant's will had been overborne and his capacity for self-determination critically impaired. *Cipriano*, *supra* at 333-334. We will not disturb the trial court's finding that defendant's statement was voluntary because that finding was not clearly erroneous. *Daoud*, *supra* at 629.

Defendant next argues that the trial court erred in admitting evidence of defendant's previous police contact for domestic violence in violation of MRE 404(b). We review the trial court's evidentiary decision for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 116; 631 NW2d 67 (2001). Except as allowed by MRE 404(b), the use of other crimes, wrongs or uncharged bad acts as evidence is excluded to avoid the danger of conviction based on a defendant's past conduct. *People v Werner*, 254 Mich App 528, 539; 659 NW2d 688 (2002); MRE 404(b)(1). Under MRE 404(b), the evidence is admissible if offered for a proper purpose, if relevant to an issue or fact of consequence at trial, and if it is sufficiently probative to outweigh the danger of unfair prejudice pursuant to MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994).

We hold that the trial court did not err in admitting evidence of defendant's previous police contact for domestic violence. The prosecution offered the evidence for proper purposes, and it was relevant to an issue of fact. "A proper purpose is a noncharacter purpose, one that does not risk impermissible inferences of character to conduct." *People v Ortiz*, 249 Mich App 297, 305; 642 NW2d 417 (2001). If the proposed evidence is relevant only to the defendant's character or propensity to commit the crime, the evidence must be excluded. *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004). In this case, the evidence of defendant's prior police contact for domestic violence was proper and relevant to establish his knowledge that the victim was a police officer lawfully engaged is the performance of his duties at the time of the shooting and to demonstrate defendant's motive for the shooting. MRE 404(b)(1). Knowledge and motive were directly relevant to the elements of the crime, *Herndon*, *supra* at 385-386, and the prosecutor had to prove all of the elements beyond a reasonable doubt. *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). Additionally, the probative value of the challenged bad-acts evidence was not substantially outweighed by the danger of unfair prejudice. In this case, the prior police contact for domestic violence was highly probative to demonstrate defendant's knowledge and motive, and it is unlikely that the jury gave undue or preemptive weight to the testimony regarding defendant's alleged domestic violence because the acts are dissimilar to the crime charged. See *Ortiz*, *supra* at 307. Accordingly, the trial court did not commit plain error in admitting the challenged evidence.

Defendant next argues that the trial court erred in denying his motion to change venue because of extensive pretrial publicity. We disagree. We review the denial of a motion for a change of venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997). Pretrial publicity alone does not necessitate a change of venue. *Id.* at 502. When determining whether a defendant has been deprived of a fair trial by virtue of pretrial publicity, we must consider the totality of the circumstances and determine whether the pretrial publicity was so unrelenting and prejudicial that "the entire community [is] presumed both exposed to the publicity and prejudiced by it." *Id.* at 501-502; *People v Hack*, 219 Mich App 299, 311; 556 NW2d 187 (1996), or "that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a probability of prejudice," *Id.* We must also "distinguish between largely factual publicity and that which was invidious or inflammatory." *Jendrzejewski*, *supra* at 504. Although the media coverage of this incident was extensive, the news reports attached to defendant's motion for a change of venue were primarily factual, rather than invidious or inflammatory. Defendant points out that many of the articles describe his actions as "lying in wait" and assert that he "ambushed" the victim. Some of the articles describe defendant as having an "explosive temper," prone to "conspiratorial rants," and having an aversion to the police. However, the media coverage as a whole did not rise to the level of invidious or inflammatory publicity such that it mandates a presumption that the entire jury pool was tainted. There is no indication that the publicity resulted in a veritable circus or "kangaroo court," or focused exclusively on details that all but solidified defendant's guilt before the trial began. See *Sheppard v Maxwell*, 384 US 333, 338-342; 86 S Ct 1507; 16 L Ed 2d 600 (1966); *Rideau v Louisiana*, 373 US 723, 724, 727; 83 S Ct 1417; 10 L Ed 2d 663 (1963); *Marshall v United States*, 360 US 310, 312-313; 79 S Ct 1171; 3 L Ed 2d 1250 (1959); *People v DeLisle*, 202 Mich App 658, 664-665; 509 NW2d 885 (1993).

After reviewing the quantum and quality of the pretrial publicity to determine whether it was of a kind and extent to presume prejudice, "[t]he reviewing court must also closely examine the entire voir dire to determine if an impartial jury was impaneled." *Jendrzejewski*, *supra* at 516; see also, *Hack*, *supra* at 311. Our Supreme Court has suggested three possible approaches to determine if a potential juror's impartiality has been destroyed by exposure to pretrial publicity: "1) questionnaires prepared by the parties and approved by the court, 2) participation of attorneys in the voir dire, and 3) sequestered questioning of each potential juror." *Id.* at 509; *People v Tyburski*, 445 Mich 606, 619, 623-624; 518 NW2d 441 (1994). Generally, "if a potential juror, under oath, can lay aside preexisting knowledge and opinions about the case, neither will be a ground for reversal of a denial of a motion for a change of venue." *Jendrzejewski*, *supra* at 517; *Hack*, *supra* at 311. Here, both the trial court and the parties performed an extensive voir dire to ensure that defendant had a fair and impartial jury, including sequestering and individually questioning each potential juror to determine the extent of their exposure to the facts of the case and their responses to the questionnaire. Nine jurors were excused after indicating they could not be impartial. Of the 14 jurors selected, none had extensive exposure to the facts of the case before the proceedings began, and the minimal exposure they did have was primarily from fleeting radio and local television news reports. Six of the jurors had no exposure or could not remember anything relating to the case and did not exhibit a bias towards either side. The remaining eight jurors recalled minor facts but did not appear predisposed towards either party. Moreover, each of the jurors individually and as a group asserted on the record that they would be able to fulfill their jury duties and be impartial. This assertion was sufficient to permit each person to sit as a juror. *Tyburski*, *supra* at 623-624.

The trial court did not abuse its discretion in denying defendant's motion for a change of venue because defendant failed to establish that, under the totality of the circumstances, he was denied a fair trial before a panel of impartial jurors. *Jendrzejewski*, *supra* at 500-501.

Defendant finally argues that the trial court abused its discretion in admitting photographs of the crime scene and the victim's autopsy because they were highly prejudicial. However, at the time the photographs were introduced into evidence, defendant indicated that he had "no objection" to the trial court's entering them into evidence. Therefore, this issue is waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Moreover, we have reviewed the photographs and find no abuse of discretion in the trial court's decision. *People v Mills*, 450 Mich 61, 68-69, 71-72, 75-79; 537 NW2d 909 (1995); *Herndon*, *supra* at 413-414.

We affirm.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra