STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2011
v	No. 294584 Wayne Circuit Court
DERRICK DONALD GREEN, Defendant-Appellant.	LC No. 09-000574-FC

Before: O'CONNELL, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions for first degree murder, MCL 750.316(1)(a), possession of a firearm by a person convicted of a felony (felon in possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to life in prison for the first-degree murder conviction, five to seven and a half years in prison for the felon in possession conviction, and two years in prison for the felony-firearm conviction. For the reasons set forth below, we affirm.

Defendant argues that he was denied the effective assistance of counsel. "Because defendant failed to move for a new trial or for a *Ginther*[1] hearing, our review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the record." *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). As our Supreme Court explained in *People v Petri*, 279 Mich App 407, 410-411; 760 NW2d 882 (2008):

> Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. [*People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).] To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

> NW2d 557 (2007). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant claims that, at the preliminary examination, trial counsel failed to hold the prosecutor to his obligation under the spousal privilege statute. MCL 600.2162(2) states that, "[i]n a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent . . . ." The marital communications privilege, MCL 600.2162(7), provides that, "a married person . . . shall not be examined in a criminal prosecution as to any communication made between that person and his or her spouse or former spouse during the marriage without the consent of the person to be examined." Under both sections of the statute, the privilege belongs to the testifying spouse, not to the criminal defendant. *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004); *People v Dolph-Hostetter*, 256 Mich App 587, 589; 664 NW2d 254 (2003).

Defendant's wife, Tanya Green, testified under subpoena at the preliminary examination, and offered incriminating evidence against her husband. Defense counsel did not object to her testimony, but attempted to assert the marital privilege when he began his cross-examination of Ms. Green. The court pointed out to defense counsel that the privilege belonged to Ms. Green, not to defendant, and that Ms. Green had not asserted the privilege. Nothing in the preliminary examination record indicates that Ms. Green did not provide her testimony willingly at the hearing. Therefore, defense counsel is not ineffective for failing to make a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Were we to agree that defense counsel's failure to raise the privilege earlier in the proceeding was somehow erroneous, defendant cannot show that he was denied a fair trial. "Although longstanding in the law, the spousal privilege has no constitutional foundation." *People v Wadkins*, 101 Mich App 272, 283; 300 NW2d 542 (1980). Thus, if the admission of Ms. Green's testimony violated the spousal privilege statute, the admission was "not 'illegal' as an infringement of a basic constitutional right or as unreliable evidence which would deny defendant a fair trial." *People v Armentero*, 148 Mich App 120, 129; 384 NW2d 98 (1986).

Furthermore, defendant cannot show prejudice because, even without Ms. Green's testimony, the prosecution presented overwhelming evidence of defendant's guilt. Defendant's stepdaughter, Antoinette Mitchell, testified about defendant's strained relationship with the victim, Raymond Lewis, stemming from Mr. Lewis's relationship with defendant's daughter, Tiffani Green. Ms. Mitchell further testified that, on the day of the crime, defendant and Mr. Lewis had a heated argument in front of defendant's house. Mr. Lewis walked away and, a short time later, defendant left the house in a white truck he used for work at a cable company. Ms. Mitchell tried to call Mr. Lewis to warn him that defendant had left the house and, a short time later, Ms. Mitchell learned that Mr. Lewis had been shot. Ms. Mitchell also testified that defendant owned a "long gun." Tiffani Green testified that defendant was unhappy about her

relationship with Mr. Lewis. Shortly before the shooting, she saw defendant drive away in his work truck in the direction Mr. Lewis had headed on foot.

Other evidence showed that, after the shooting, defendant did not pick up his last two paychecks from work, and defendant admitted that he never returned home after the shooting. Detroit Police Sergeant Joe Wright testified that he saw a black male shoot Mr. Lewis in the head with a long gun, and then drive away in a white truck matching the description of defendant's work truck. Another witness, Gerald Day, also described a white cable truck fleeing the scene. Officer Donald Rem, the evidence technician, found a live shotgun shell 18 feet from defendant's garage, in the alley. Similar shotgun shells were recovered in defendant's bedroom. Although one bullet recovered by the evidence technicians was of the sort that typically came from a handgun, a second wound was caused by a lead-fired shotgun slug. The technician also recovered several other components of a fired shotgun shell. The medical examiner subsequently recovered shotgun shell material from Mr. Lewis's body. Thus, even without Tanya Green's testimony, overwhelming evidence established defendant's guilt, and any error in admitting her testimony was not outcome determinative. Therefore, defendant cannot show he was prejudiced by any error of defense counsel.

In his Standard 4 brief, defendant also claims he is entitled to a new trial on this basis and because the prosecutor should have informed Ms. Green about the privilege. "We review a trial court's decision to grant or deny a new trial for an abuse of discretion. An abuse of discretion occurs when the trial court's decision is outside the principled range of outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error, MCR 2.613(C)." *People v Terrell*, __ Mich App __; __ NW2d __ (Docket No. 286834, issued August 26, 2010), slip op, pp 3-4 (internal citations omitted). As discussed, the privilege belonged to Ms. Green and Ms. Green consented to waive the privilege at the preliminary examination by appearing and testifying. See *People v Brownridge*, 225 Mich App 291; 570 NW2d 672 (1997), rev'd in part on other grounds 459 Mich 456 (1999). Further, as also noted above, there could be no miscarriage of justice because any violation of the spousal privilege statute does not constitute "an infringement of a basic constitutional right" and is not "unreliable evidence which would deny defendant a fair trial." *Armentero*, 148 Mich App at 128-129.

Were we to agree that, at the preliminary examination, the district court had some obligation to inform Ms. Green about the privilege, defendant cannot show that the bindover decision was prejudiced by her testimony.[2] Though Ms. Green testified that defendant owned a

[2] "The purpose of a preliminary examination is to determine whether there is probable cause to believe that a crime was committed and whether there is probable cause to believe that the defendant committed it." *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003), citing MCR 6.110. "[E]rrors in the preliminary examination proceedings do not require reversal per se on an appeal from a subsequent trial." *People v Hall*, 435 Mich 599, 609; 460 NW2d 520 (1990). Rather, "an error in the preliminary examination procedure must have affected the bindover and have adversely affected the fairness or reliability of the trial itself to warrant

gun and that he admitted he was in the alley with Mr. Lewis, ample other testimony at the preliminary examination was sufficient for defendant's bindover. At a preliminary examination, the court must consider:

> . . . whether there is evidence regarding each of the elements of the offense, after examining the whole matter. The evidence that factors into the magistrate's decision may be direct or circumstantial, and it meets the probable cause standard when, by a reasonable ground of suspicion, it is supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged. [*People v Hudson*, 241 Mich App 268, 278-279; 615 NW2d 784 (2000) (internal citations and punctuation omitted).]

Defendant was charged with first-degree murder, which is murder that "is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate" an enumerated felony. *People v Garcia (After Remand)*, 203 Mich App 420, 424; 513 NW2d 425 (1994), quoting MCL 750.316. The prosecution must prove "that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look." *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). Premeditation and deliberation "may be established by evidence of (1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. Proof of motive is not essential." *Id.* (internal citations omitted). In considering the third factor, the facts and circumstances of the killing, the trier of fact may consider "the type of weapon used and the location of the wounds inflicted." *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993).

Here, Ms. Mitchell testified at the preliminary examination, as she did at trial, that she witnessed defendant engage in a verbal altercation with Mr. Lewis, after which Mr. Lewis headed to a store on Eight Mile. A short while later, Ms. Mitchell saw defendant leave the house in his white work truck. Ms. Mitchell indicated that, at the time defendant left, she was concerned for Mr. Lewis's safety and tried to call him. Moments later, however, she learned that Mr. Lewis had been shot. Sergeant Wright also testified at the preliminary examination, as he did at trial, that, while in the area of Eight Mile and Brock, he heard what sounded like an explosion. He turned to see a man crawling around in the alley and then saw a second man shoot him in the back of the head with a long gun. The detective then saw the shooter drive away in a white utility truck.

Thus, regarding the relationship between the parties and defendant's actions before the killing, this testimony showed that defendant and Mr. Lewis knew each other and had argued shortly before the shooting. With respect to the circumstances of the crime, the shooting took

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reversal." *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003), citing MCL 769.26.

place after the argument but with enough time for defendant to "take a second look," because he went back inside his house for a few minutes. Further, the shooting occurred a short distance from defendant's home, soon after defendant was seen leaving his home, and the perpetrator drove a truck matching the description of defendant's vehicle. Finally, the fact that Mr. Lewis was crawling on the ground when he was shot in the head is evidence that the shooter intended to kill. Thus, even without Ms. Green's testimony, there was evidence tending "to warrant a cautious person in the belief that" defendant killed Mr. Lewis with premeditation and deliberation. *Hudson*, 241 Mich App at 278-279. Therefore, the bindover was not improper. Finally, as discussed, any violation of the spousal privilege statute did not affect the fairness of the subsequent trial, and therefore, this alleged error in the preliminary examination does not warrant reversal. *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003), citing MCL 769.26.

Defendant claims that trial counsel was ineffective for failing to object when the trial court gave a cautionary instruction that the jury could consider defendant's prior felony conviction for attempted carrying a concealed weapon "in deciding whether you believe the defendant is a truthful witness." According to defendant, this undermined the credibility of his own testimony, which was crucial because he denied any involvement in Mr. Lewis's death.

The parties stipulated, and the jury was informed, that defendant was convicted of an unspecified felony and was ineligible to carry a firearm. The trial court instructed the jury as follows:

> There is evidence that the defendant has been convicted of a crime in the past. You may consider this evidence only in deciding whether you believe the defendant is a truthful witness. You may not use it for any other purpose. A past conviction is not evidence the defendant committed the alleged crime in this case.

Pursuant to MRE 609(a)(1), a witness may be impeached by evidence of a felony conviction, but the crime must contain "an element of dishonesty or false statement," or, under MRE 609(a)(2)(A), a defendant may be impeached by evidence of a conviction for a crime that contains "an element of theft." Defendant's prior crime did not involve an element of dishonesty or theft and the parties agree that the trial court's instruction was erroneous.

Defense counsel did not object to the trial court's instructions, but defendant is not entitled to relief because any alleged error was not outcome determinative. With respect to a violation of MRE 609, even if the trial court committed error in admitting the prior convictions, any error is harmless and does not require reversal if the defendant cannot demonstrate prejudice. *People v Ortiz*, 249 Mich App 297, 312; 642 NW2d 417 (2001). Further, there was substantial evidence establishing defendant's guilt independent of the error. *Id*. We also note that, although the court did not mention the nature of the offense at issue, defendant, in fact, provided several unsolicited details (including the fact that he was also carrying a knife) in his testimony regarding the circumstances of the previous offense. Furthermore, regarding the issue of defendant's credibility, we observe that defendant's testimony conflicted with that of his only other witness. Therefore, characterizing defendant's prior conviction as impeachment evidence rather than mere evidence that defendant was ineligible to carry a firearm was not prejudicial.

Defendant argues in his Standard 4 brief that he is entitled to a new trial because he alleges that the prosecutor elicited inflammatory and prejudicial testimony. "[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). This Court considers issues of prosecutorial misconduct "on a case-by-case basis . . . ." *Thomas*, 260 Mich App at 454. Curative instructions, however, "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

Defendant bases his argument on the follow exchange between the prosecutor and Detroit Police Lieutenant Charles Flanagan:

> *Q.* And while you're already at the Carlisle address, some information comes out about a possible stolen vehicle, is that right? . . . . Information about what comes out?
>
> *A.* Dispatch run on a stolen car came out while I was engaged in a conversation with [Tanya].
>
> *Q.* Are you familiar with Officer Cross-Nelson?
>
> *A.* Yes.
>
> *Q.* And did you see him at the 15417 Carlisle address?
>
> *A.* Yes.
>
> *Q.* At any point in time, did you ever see him on a cell phone?
>
> *A.* Yes, I directed him to try to lure the suspect back to the scene so we could take his *false* police report. [Emphasis added.]

Defense counsel objected to the testimony and the court responded, "Sustained. Also stricken." "[U]nresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Lieutenant Flanagan's statement was plainly unresponsive, and there is no evidence that the prosecutor knew Lieutenant Flanagan would give the above answer or that he conspired with him to do so. Furthermore, it is not necessary "to reverse a conviction where isolated, improper remarks did not cause a miscarriage of justice." *People v Seals*, 285 Mich App 1, 24; 776 NW2d 314 (2009).

We also reject defendant's claim that the prosecutor elicited irrelevant and misleading testimony while he questioned Officer Wright, Ms. Green, and Ms. Mitchell. To support his argument, defendant simply includes a list of unidentified transcript pages with references to what he describes as "prosecutor leading," "prosecutor hearsay," "prosecutor redundant practice," and "prosecutor misleading." Defendant includes no argument or applicable legal authority to explain how these citations amount to prosecutorial misconduct. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis

for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005). In any case, the judge instructed the jury that the attorneys' statements and questions are not evidence, and "curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *Seals*, 285 Mich App at 21.[3]

Affirmed.

/s/ Peter D. O'Connell
/s/ Henry William Saad
/s/ Jane M. Beckering

[3] Defendant also contends that, at the preliminary examination, the court erred when it allowed the admission of a prior consistent statement. Defendant cites a question from the prosecutor to Ms. Green about whether the statement she gave to the police was consistent with her testimony in court. Ms. Green replied in the affirmative. We reject defendant's argument because this does not constitute a prior consistent statement under MRE 801(d)(1)(B). Moreover, this would not have affected the finding of probable cause at the preliminary examination or the fairness of the subsequent trial. *McGee*, 258 Mich App at 698.