STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT KARLEESE BURTLEY,

Defendant-Appellant.

UNPUBLISHED
June 20, 1997

No. 183144
Ingham Circuit Court
LC No. 94-067057-FH

Before: O'Connell, P.J., and Smolenski and T.G. Power,* JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317; MSA 28.549, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and felon in possession of a weapon, MCL 750.224f; MSA 28.421(6). Defendant was thereafter convicted by the court of third-offense habitual offender, MCL 769.11; MSA 28.1083. Defendant was sentenced to concurrent terms of two years' imprisonment for the felony-firearm conviction and three to five years' imprisonment for the felon-in-possession conviction, such sentences to served consecutively to a sentence defendant received in an unrelated case, and a term of sixty to ninety years' imprisonment, as enhanced by the habitual-offender conviction, for the murder conviction., such sentence to be served consecutively to the felony-firearm sentence. Defendant appeals as of right. We affirm.

Defendant's convictions arise out of an incident that occurred when defendant became involved in a verbal altercation with the victim in the parking lot of a Lansing convenience store. Defendant ultimately pulled a gun from his waistband and shot the victim in the back. Defendant's theory at trial was self defense.

Defendant first argues that the trial court erred in denying his motion for a directed verdict on the charge of first-degree murder because there was insufficient evidence to establish that he acted with premeditation and deliberation. We disagree. In reviewing a trial court's denial of a motion for a directed verdict, we consider the evidence presented up to the time the motion was made in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the

* Circuit judge, sitting on the Court of Appeals by assignment.

essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). The crime of first-degree murder requires proof of an intentional killing with premeditation and deliberation. *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995). Premeditation and deliberation may be inferred from all the facts and circumstances surrounding the killing, including the prior relationship of the parties, the defendant's actions before and after the killing, and the circumstances of the killing itself. *Haywood*, *supra*.

We hold that the evidence presented, when viewed in a light most favorable to the prosecution, was sufficient to justify the submission of the first-degree murder charge to the jury. Evidence was presented that defendant initiated contact with the victim, first by attempting to stare down the victim and his friends and later by issuing a verbal challenge to the victim. When neither the victim nor his friends responded, defendant got in his girlfriend's car and, at defendant's request, the girlfriend reversed out of her parked position at a high rate of speed, stopping a short distance from the victim and his friends. Defendant exited from the vehicle and exchanged words with the victim. Evidence was presented that the victim lifted his arms in a gesture of "universal surrender" and walked away from defendant. Notwithstanding the victim's attempt to avoid the confrontation, defendant removed a gun from his waistband and fired a single fatal shot into the victim's back. Then, defendant jumped into his girlfriend's car and fled the scene. Premeditation and deliberation can be inferred from these circumstances and, therefore, we conclude that the prosecution presented sufficient evidence to prove the elements of first-degree murder beyond a reasonable doubt. Accordingly, the trial court did not err in denying defendant's motion for a directed verdict on the first-degree murder charge.

Next, defendant raises an alleged error of constitutional magnitude. As background, we note that before defendant testified at trial, the prosecutor moved the court for a ruling that he be permitted to cross-examine defendant concerning defendant's silence with respect to defendant's claim of self-defense:

> Case law says that I may cross-examine the Defendant as to pre-arrest, pre-*Miranda*[1] silence. There's about 30 days with this warrant outstanding for his arrest where there's no contact with him, no overture to have the self-defense defense made, and it's my understanding – and we can prove that *Miranda* was read to him when he was arrested, after he was arrested, and he refused to make a statement at the time.
>
> Your Honor, I move the Court for permission to make those facts known to the jury in evaluating what I suspect is going to be [defendant's] claim of self-defense. Thank you.

Defense counsel objected to any such impeachment on the ground that it would violate defendant's constitutional right to remain silent. The trial court ruled that defendant's silence could be used for impeachment purposes.

During direct examination, defendant testified that he shot the victim in self-defense, i.e., that he shot the victim during the course of their verbal altercation when the victim turned to obtain a gun

allegedly possessed by one of the victim's companions. During defendant's cross-examination, the following exchange occurred:

> *Q.* [*The Prosecutor*]: You talked to Detective Delamarter on September the 10th, 1993, didn't you?
>
> *A.* [*Defendant*]: Yes.
>
> *Q.* This fellow right here? (Indicating)
>
> *A.* Yes.
>
> *Q.* Did you choose to tell him that you shot [the victim] in self-defense?
>
> *A.* No.

Defendant claims that as a result of this exchange he was impermissibly impeached with evidence of post-arrest, post-*Miranda* silence in violation of his constitutional rights to remain silent and to due process. As explained in *People v Dixon*, 217 Mich App 400; 552 NW2d 663 (1996):

> A defendant waives his privilege against self-incrimination when he takes the stand and testifies. . . . Consequently, the defendant may be impeached with evidence of both prearrest and postarrest silence without violating the Fifth Amendment as long as the silence precedes the advising of the defendant of his rights pursuant to *Miranda*, [*supra*]. . . . Where silence follows the receipt of *Miranda* warnings, however, the Fourteenth Amendment right to due process bars the use of such silence to impeach the defendant's exculpatory explanation at trial provided the defendant does not claim to have told the police the same version upon arrest . . . or to have cooperated with the police . . . . Generally, when a prosecutor cross-examines a defendant regarding the defendant's failure to advance his exculpatory explanation upon arrest and the record is unclear regarding whether, and, if so, when, the defendant received his *Miranda* warnings, the procedure is to remand the case to the trial court for an evidentiary hearing. . . . The defendant may forfeit his right to an evidentiary hearing, however, if the defendant fails to allege sufficient facts to justify a remand, i.e., that any comment was made in the presence of the jury regarding the defendant's silence following the receipt of *Miranda* warnings. . . . [*Dixon, supra* at 405-406 (citations omitted).]

The prosecutor contends that no error occurred either because the record indicates that any statement made by defendant must have preceded his receipt of *Miranda* warnings or because, regardless of the timing of the statement, defendant, as indicated by his testimony, did not claim to have remained silent but rather acknowledged making a statement to the detective. After reviewing the record, we conclude that it is not clear concerning whether the silence referred to by the prosecutor during his cross-examination of defendant occurred before or after defendant's receipt of *Miranda* warnings. Thus, we would normally remand for an evidentiary hearing in such circumstances. *Dixon, supra* at 406. However, we note that the constitutional error complained of by defendant has been

subject to an harmless error analysis by other panels of this Court. See *People v Vanover*, 200 Mich App 498, 504; 505 NW2d 21 (1993); *People v Davis*, 191 Mich App 29, 37; 477 NW2d 438 (1991). Thus, before finding that a remand on this ground is necessary in this case, we believe that in the interest of judicial economy we should first conduct an harmless error analysis premised on the assumptions that the constitutional error complained of by defendant did occur and that defendant's complaint of error was properly preserved.

The standard for our harmless error analysis is whether the error complained of by defendant was harmless beyond a reasonable doubt. *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891 (1996); *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994). In making our determination, we must review the entire record and determine beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the verdict. *Anderson, supra* at 405-407.

In this case, defendant's credibility was crucial to his theory of self-defense. However, the prosecutor also brought out other evidence that defendant failed to assert a claim of self-defense before he was arrested by the police. Specifically, defendant acknowledge on cross-examination that he had asked his sister to act as a contact for people with information about his case, and that he knew his sister was involved in efforts to help him find witnesses to the shooting, including being involved in circulating a flier offering a reward for information. However, defendant testified that he only told his sister that the killing "didn't happen the way they said it was," and that he had not told his sister that he had killed the victim in self defense. We note that defendant raised no objection to the introduction of this evidence below and he asserts none on appeal.

In addition, defendant also testified on cross-examination that during the three- to four-week period between the killing and his arrest he never contacted the police, either in person or by telephone, to assert his claim of self defense, i.e., that the victim's companion had a gun, and that he believed that the victim was going to take the gun and use it against him. We find no constitutional error in the admission of this evidence. *Dixon, supra* at 406. In addition, although not raised by defendant, we find no evidentiary error in the admission of this prearrest evidence. *People v Collier*, 426 Mich 23; 393 NW2d 346 (1986); see also *People v Sholl*, 453 Mich 730, 735; 556 NW2d 851 (1996). Thus, even assuming that defendant was improperly impeached with evidence of post-*Miranda* silence, this evidence was cumulative of other evidence also indicating that defendant had not asserted a claim of self defense under circumstances where it would have been natural for him to do so. See, e.g., *Collier, supra* at 35.

Moreover, the prosecutor's questioning of defendant concerning his alleged post-*Miranda* silence was brief. During closing argument, the prosecutor referred to defendant's failure to tell his sister of his claim of self defense but did not refer to defendant's prearrest or postarrest failure to contact or inform the police of his claim of self-defense. Finally, the testimony of the four eyewitnesses to the shooting constituted overwhelming evidence that defendant instigated the confrontation with the victim, that neither the victim nor any of his companions were armed with a gun, that neither the victim nor any of his companions threatened defendant, and that the victim had turned around and was walking away from defendant when defendant shot him in the back. Accordingly, even assuming that the prosecutor

improperly impeached defendant with evidence of post-*Miranda* silence, we conclude beyond a reasonable doubt that there is no reasonable possibility that the evidence complained of might have contributed to the verdict in this case. *People v Smith*, 158 Mich App 220, 236-237; 405 NW2d 156 (1987). Therefore, remand for an evidentiary hearing on this issue is not necessary.

Next, defendant argues that the trial court abused its discretion in denying his motion for a mistrial because he was significantly prejudiced when the testifying officer referred to the photographic array as a collection of "mug shots." We disagree. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id*. In this case, the officer's reference to defendant's "mug shot" was brief, isolated, nonresponsive to the question asked, and, by itself, raised no obvious inference that defendant had a criminal record. The reference did not impair defendant's ability to get a fair trial. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Next, defendant argues that the trial court erred in denying his request for substitute counsel where his request was timely made, his attorney had a conflict of interest, and there was a breakdown in the attorney-client relationship. We disagree. Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. We review a trial court's decision regarding a substitution of counsel for an abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). In this case, defendant cites no authority for his allegation that counsel's representation of the victim's stepbrother in an unrelated matter constituted a conflict of interest and, instead, simply states that counsel could have developed a fondness for the stepbrother or other family members We conclude that defendant has failed to establish how counsel's representation of the victim's stepbrother in an unrelated proceeding adversely affected him or violated any ethical rule or legal duty owed defendant. See *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606, 620-621; 532 NW2d 547 (1995), rev'd in part on another ground 453 Mich 413 (1996); see also MRPC 1.7, 1.9. Moreover, we note that the trial court stated that any potential conflict of interest had been known to defendant for some months. In addition, although defendant alleges a breakdown in the attorney-client relationship, the court stated below that during the time it had recently presided over another trial involving defendant in an unrelated matter it had observed that counsel's representation of defendant was vigorous and that counsel and defendant had cooperated during that trial. Accordingly, we conclude that that trial court did not abuse its discretion in denying defendant's request for substitute counsel.

Last, defendant argues that the trial court erred in attempting to remedy its violation of the two-thirds rule enunciated in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972), by increasing the maximum term of his sentence for the murder conviction, as enhanced by his habitual offender conviction, from eighty to ninety years. We disagree. In this case and unlike *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994), the trial court properly corrected its *Tanner* error apparently before entering the judgment of sentence. See MCR 6.435(B)..

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Thomas G. Power

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