

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN EMMANUEL JACOBS,

Defendant-Appellant.

UNPUBLISHED

May 12, 2009

No. 283056

Wayne Circuit Court

LC No. 07-013349-FC

Before: Wilder, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree murder, MCL 750.317,¹ assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 23 to 45 years for the murder conviction and 15 to 25 years for the assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from an altercation with three men, Irvin Smith, Roy Portis, and Eric Murrow. The prosecution's theory at trial was that defendant became involved in a fight with Portis and Smith near Murrow's house and left the fight to retrieve an assault rifle from his vehicle, which was parked on the street. Smith ran to a nearby house, and Portis ran to Murrow's house. Defendant began firing the rifle toward Murrow's house. Portis was not hit, but Murrow was struck by three bullets while standing near the front door and died from his wounds. Gunshot residue was detected on Murrow's hands and face. Defense witnesses testified that Murrow also fired a gun during the confrontation, but no gun was recovered.

I. Effective Assistance of Counsel

Defendant argues that he is entitled to a new trial because his trial attorney was ineffective for failing to file appropriate pretrial motions. We disagree.

¹ The jury acquitted defendant of an original charge of first-degree premeditated murder, MCL 750.316(1)(a).

Because defendant did not raise this issue in a motion for a new trial or request an evidentiary hearing in the trial court, our review is limited to errors apparent from the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Motion to Suppress Photographic Identification

Defendant argues that defense counsel was ineffective for not moving to suppress Irvin Smith's identification of defendant from a single photograph on the grounds that the identification procedure was unduly suggestive and was improperly conducted in the absence of counsel. We disagree.

Shortly after the offense, Smith gave a statement to the police in which he reported that defendant, whom Smith knew from the neighborhood, was the shooter. However, Smith only knew defendant's address and first name at the time. Smith was shown a photograph from defendant's driver's license or state identification card, which he identified as the person he knew as the shooter.

An identification procedure can violate a defendant's right to due process when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). Showing a witness a single photograph is considered one of the most suggestive identification procedures that can be used. *Id.* To establish a due process violation, a "defendant must show that the pretrial identification procedure was so suggestive in light of the totality of the circumstances that it led to a substantial likelihood of misidentification." *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993).

The fairness or suggestiveness of an identification procedure is reviewed in light of the total circumstances to determine if the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification. *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). Relevant factors to review include: (1) the witness's opportunity to view the suspect at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of a prior description from the victim; (4) the witness's level of certainty at the time of the pretrial identification; and (5) the amount of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). If a procedure is found to be impermissibly suggestive, an in-court identification by the witness is inadmissible unless the prosecution can demonstrate, by clear and convincing evidence, that the witness had an independent basis for the identification. *Gray, supra* at 114-115. A court should weigh the following factors to determine

if an independent basis exists for the admission of an in-court identification: (1) prior relationship with or knowledge of the defendant; (2) opportunity to observe the offense, including length of time, lighting, and proximity to the criminal act; (3) length of time between the offense and the disputed identification; (4) accuracy of description compared to the defendant's actual appearance; (5) previous proper identification or failure to identify the defendant; (6) any prelineup identification lineup of another person as the perpetrator; (7) the nature of the offense and the victim's age, intelligence, and psychological state; and (8) any idiosyncratic or special features of the defendant. *Gray, supra* at 116; see also CJI2d 7.8. In *Kurylczyk, supra* at 307-308, the Court also noted that delays as long as eighteen months after a crime do not necessarily invalidate an eyewitness identification. [*People v Thomas Davis*, 241 Mich App 697, 702-703; 617 NW2d 381 (2000).]

In this case, Smith was familiar with defendant and had known him for about a year before the charged offense, but only knew him by his first name and where he lived. Because Smith did not know defendant's last name, the police used defendant's driver's license photograph only to confirm that he was the same person Smith was referring to. Thus, it is apparent that Smith had an independent basis for identifying defendant, and any motion to suppress Smith's identification testimony would have been futile. Counsel was not ineffective for failing to file a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

In addition, because defendant was not in custody at the time of the identification, defendant's right to counsel had not attached. *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001).² Accordingly, there was no violation of defendant's right to counsel and counsel was not ineffective for failing to challenge Smith's identification on that basis.

B. Motion to Suppress Evidence

Defendant next argues that counsel was ineffective for not moving to suppress from evidence bullets that were recovered from defendant's home approximately a week after the offense without a warrant.

The testimony at trial indicated that approximately a week after the offense, following defendant's identification as a suspect, the police went to his family's home and observed that there were lights on inside the home, but the front door was damaged and appeared to have been kicked in. After receiving no response to their knocks, they entered the home to determine if anyone was inside who might be injured or in need of aid. While inside, they observed three live bullets on the floor.³

² Moreover, counsel is only required at corporeal identifications if adversarial judicial criminal proceedings have commenced. *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004).

³ The bullets were of the same caliber and made by the same manufacturer as the shell casings
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Searches conducted without a warrant are per se unreasonable under the Fourth Amendment unless the officers' conduct falls under an exception to the warrant requirement. *People v Beuschlein*, 245 Mich App 744, 749; 630 NW2d 921 (2001). An exception to the warrant requirement involves the rendering of emergency aid. This exception allows the police to

“enter a dwelling without a warrant when they reasonably believe that a person within is in need of immediate aid. They must possess specific and articulable facts that lead them to this conclusion. In addition, the entry must be limited to the justification therefor, and the officer may not do more than is reasonably necessary to determine whether a person is in need of assistance, and to provide that assistance.” [*Id.* at 756, quoting *People v Davis*, 442 Mich 1, 25-26; 497 NW2d 910 (1993) (footnotes omitted).]

This exception may only be invoked when the police are not engaged in crime-solving activities. *In re Forfeiture of \$176,598*, 443 Mich 261, 274; 505 NW2d 201 (1993).

In this case, the record discloses that the police went to defendant's home intending to arrest him. There is no evidence that they went there intending to gather or search for evidence of a crime. When they arrived, they observed that lights were on inside the house, leading them to believe that someone was there, but they received no response to their knocks. In addition, they were aware that defendant was a suspect in a fatal shooting, and they observed that the front door of the home was damaged and appeared to have been kicked in. Defendant's mother stated in her testimony that the front door had been kicked in earlier that week and the house ransacked, but she did not report the vandalism to the police. Given the condition of the house when the police arrived and the indications that someone was present inside but did not respond to the officers' knocks, the police had specific and articulable facts to reasonably lead them to believe that someone might be inside in need of immediate aid. Therefore, the officers were justified in entering the home to determine if anyone there required assistance. While inside, the police observed the bullets lying on the floor. Because the bullets were in plain view and were contraband, they could properly be seized without a warrant. See *People v Lapworth*, 273 Mich App 424, 430; 730 NW2d 258 (2006) (“[a] police officer is authorized to seize without a warrant an item in plain view if the officer is lawfully in the position to observe the item and the item's incriminating nature is immediately apparent”). Accordingly, any motion to suppress would have been futile. Thus, counsel was not ineffective for failing to file a motion to suppress the bullets. *Darden*, *supra* at 605.

C. Motion to Quash the Bindover

Defendant next argues that counsel was ineffective for not moving to quash the information. He contends that there was insufficient evidence of premeditation and deliberation to support his bindover on first-degree murder. We disagree.

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that were recovered from the crime scene.

To bind a defendant over for trial, the district court must find that a felony was committed and that there is probable cause to believe that the defendant committed the crime. MCL 766.13; *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). A reviewing court may only reverse a bindover decision when it appears from the record that the district court abused its discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997).

Probable cause to bind a defendant over for trial exists “where the court finds a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious person to believe that the accused is guilty of the offense charged.” *Id.* at 558. There must be some evidence from which to infer each element of the crime, but the prosecution is not required to prove each element beyond a reasonable doubt. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). If there is credible evidence offered to both support and negate an element of the crime, a factual question exists that should be left to the jury. *Id.*

To convict a defendant of first-degree premeditated murder, the prosecution is required to prove that the defendant intentionally killed the victim and that the killing was premeditated and deliberate. Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Where a killing arises from a fight, there must be evidence of “a thought process undisturbed by hot blood” to prove first-degree murder. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998), quoting *People v Morrin*, 31 Mich App 301, 329-330; 187 NW2d 434 (1971). Circumstantial evidence and any reasonable inferences that can be drawn from the evidence may be sufficient to prove the elements of the crime. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999).

At the preliminary examination, Smith and Portis testified generally consistent with their trial testimony that defendant wanted to talk to them about an earlier encounter at a party store. When they arrived at Murrow’s house, they began talking, but then a fight broke out and defendant was knocked to the ground. Defendant’s brother continued fighting with Smith and Portis while defendant left to go to his van to retrieve an assault rifle, and then began shooting it. Defendant was observed firing the gun into Murrow’s house where the men had fled.

The evidence that defendant brought a loaded assault rifle when he went to Murrow’s house to talk about the earlier conflict with Smith and Portis, and that he had an opportunity to contemplate what he was doing during the time he went back to his van to retrieve the rifle and before he began shooting, established probable cause to believe that defendant had time to premeditate and deliberate his actions. Although the evidence created a question of fact regarding defendant’s intent and state of mind at the time of the shooting, those were questions for the jury to decide. *Reigle, supra*. Thus, counsel was not ineffective for failing to file a motion to quash.

Defendant alternatively requests this Court to remand this case for an evidentiary hearing on his ineffective assistance of counsel claim, but he fails to explain what additional facts he could establish at an evidentiary hearing. We therefore decline his request for a remand. *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

II. Prosecutor’s Conduct

Defendant next argues that the prosecutor's conduct at trial denied him a fair trial. We disagree.

Defendant did not object to the challenged conduct at trial. Therefore, this issue is not preserved. Unpreserved issues involving the prosecutor's conduct at trial are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case-by-case and challenged comments must be considered in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A prosecutor is afforded great latitude in closing argument. Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is permitted to argue the evidence and reasonable inferences that arise from the evidence in support of his theory of the case. *Bahoda, supra* at 282. While the prosecutor has a duty to see that a defendant receives a fair trial, he may use "hard language" when it is supported by the evidence, and he is not required to phrase his arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). But the prosecutor must refrain from making prejudicial remarks. *Bahoda, supra* at 283.

A. Arguing Facts Not Supported by the Evidence

Defendant asserts that the prosecutor improperly argued during closing argument that apparent bullet strike marks observed on the wall of Murrow's house were caused by the gun fired by defendant. Defendant argues that these remarks were not supported by the evidence because a police evidence technician testified that in order to confirm that the marks were caused by bullets, it would be necessary to break open the wall to determine whether there were bullet fragments inside the wall, which was not done. In addition to the evidence technician's testimony, however, Smith and Portis both testified that defendant fired his gun toward Murrow's house and that the apparent bullet strike marks on the wall were not present before the shooting. It was reasonable for the prosecutor to infer from this evidence that the marks on the wall were caused by shots from defendant's gun. Therefore, the prosecutor's argument was not improper.

Defendant also argues that it was improper for the prosecutor to argue that Murrow likely possessed a gun that was probably removed from the scene by either Smith or Portis. Defendant asserts that this argument was improper because there was no testimony that a gun was removed. We find no merit to this argument. First, because there was evidence that Murrow possessed a gun and that gunshot residue was detected on his hands and face, but no gun was found at the scene, it was reasonable to infer that he possessed a gun that was removed by either Smith or Portis, the last two men known to have been with him. Second, it was defense counsel who first suggested in her closing argument that either Smith or Portis removed any additional guns that were at the scene. The challenged remarks by the prosecutor were responsive to defense counsel's argument. Otherwise improper remarks by the prosecutor may not require reversal where they are made in response to defense counsel's argument. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Because the prosecutor essentially agreed with the

defense position that Murrow likely possessed a gun and that either Smith and Portis probably removed it before they left, there is no basis for finding that the prosecutor's remarks affected defendant's substantial rights. We therefore reject this claim of error.

B. Appealing to Civic Duty

Defendant next argues that the prosecutor improperly appealed to the jurors' civic duty when he questioned both the firearms examiner and the medical examiner about how their case numbers are generated. "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). A prosecutor may not intentionally interject inflammatory comments with no apparent justification except to arouse the jurors' prejudices. *Bahoda, supra* at 266. Civic duty arguments are considered improper when jurors are asked to decide the case based on their fears or prejudices or other issues broader than the defendant's guilt or innocence. *Id.* at 282-285.

Defendant argues that the prosecutor's questioning was intended to inform the jury of the number of crimes committed in Detroit and Wayne County, and to improperly emphasize the senseless violence in the community, thereby inviting the jury to convict him out of a sense of civic duty. However, a review of the questioning reveals that it was limited to explaining background information about the case numbering systems. There was no clear or obvious effort to link the file numbers to criminal activity, to suggest that the file numbers somehow reflected senseless violence in the community, or to argue that the jury should convict defendant out of a sense of civic duty or to protect society. Thus, no plain error has been shown.

C. Vouching for Credibility

Lastly, defendant argues that the prosecutor improperly vouched for the credibility of Police Officer Cory Karssen when he argued that Karssen's testimony was credible, but defendant's mother's testimony was not. The prosecutor stated:

What does defendant's mother suggest to you? Some people just came up there and threw them [the bullets] in the house and left them there. In other words: oh, sure, they are setting us up by [sic] way. I submit you to [sic], ladies and gentlemen, that that testimony is not worthy of belief.

Testimony of Sergeant Karssen corroborates this incident in this case, and that's a very important piece of testimony. He has got no ax to grind. He is not here on behalf of anybody. He is here testifying about what he saw, and what he found, and I submit to you, ladies and gentlemen, that's a very important piece of corroboration. Same type of bullets as were used to kill the deceased found in the defendant's home; coupled with flight. [Emphasis added.]

A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witness's truthfulness. *Bahoda, supra* at 276. However, he may argue that, based on the facts, a witness should be believed. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). In this case, the prosecutor did not suggest that he had personal knowledge that Karssen's testimony was credible. Rather, he argued from the evidence

why the jury should believe Karssen's testimony over that of defendant's mother. The prosecutor's argument was not improper.

III. Newly Discovered Evidence

Defendant argues that he is entitled to a new trial based on newly discovered evidence. A motion for a new trial based on newly discovered evidence must first be brought in the trial court in accordance with the Michigan Court Rules. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998); MCR 6.431 and 6.502. Here, defendant did not move for a new trial. Therefore, this issue is not preserved and we limit our review to plain error affecting defendant's substantial rights. *Carines, supra*.

To be entitled to a new trial based on newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). "Newly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes." *People v David Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

The alleged new evidence in this case is the closure of the Detroit Police Department's Forensic Services Division, which was closed in September 2008 because of errors and inconsistencies by firearms examiners. In particular, the work of Tenisha Bridgewater, who testified in this case, was called into question in the case that led to the closing of the department's crime laboratory. However, defendant does not explain how any police testing of physical evidence in this case may have affected the jury's verdict. No firearm was recovered, so no comparison of any recovered shell casings or spent bullets to an actual firearm was ever performed. Further, the spent bullets that were recovered from the victim's body were too damaged to make any comparison. Although Bridgewater compared the live bullets found in defendant's home with the shell casings recovered from the scene, this comparison did not involve any physical testing of evidence, but was based only on a comparison of the caliber and manufacturer of the bullets. Defendant has not offered any reason to question the accuracy of the examiner's testimony in this regard. For these reasons, defendant has not shown a likelihood of a different result on retrial.

Furthermore, as the prosecution points out, any new information about Bridgewater's conduct in other cases would only be admissible as impeachment testimony, which typically is insufficient to support granting a new trial. *Davis, supra*. Accordingly, defendant has not demonstrated a basis for relief.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood