STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFERY WOODARD,

Defendant-Appellant.

UNPUBLISHED
September 21, 2001

No. 221856
Wayne Circuit Court
LC No. 98-005993

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree murder, MCL 750.316, assault with intent to do great bodily harm, MCL 750.84, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life in prison without parole for the first-degree murder conviction, five to ten years in prison for his assault with intent to do great bodily harm conviction, eight to forty years in prison for his assault with intent to murder conviction, and two years in prison for his felony-firearm conviction. We affirm.

On May 8, 1998, defendant was smoking crack-cocaine, blowing heroin, and drinking alcohol at his house with his girlfriend, Latonya Thompson, and his friends Henry McHolmes, and Johnny McMillian. He did not appear to be drunk and appeared to be able to walk and talk without difficulty. The atmosphere at the house during the course of the night appeared to be friendly, although Thompson testified that at one point defendant got into an argument with McMillian. Later in the night, defendant unexpectedly picked up his gun and shot Thompson while she was dancing. He then shot McMillian, walked up to McHolmes, put the gun in McHolmes' stomach and shot him. Thompson and McHolmes survived the shooting, but McMillian was killed.

On May 10, 1998, defendant turned himself in to the police and told police that he had shot his girlfriend and two friends the night before. When the officers asked why he shot the people, defendant replied that he was mad because people were in his house smoking crack and because he and his girlfriend were smoking crack with them. Defendant stated that he went to the Belle Isle bridge[1] after the shooting and threw the gun into the Detroit River. The police then

[1] The bridge to Belle Isle is officially called the General Douglas MacArthur Bridge.

placed defendant under arrest and gave him his *Miranda*[2] warnings. Defendant repeated his story and told the police that he had shot people because he was angry about them smoking crack. He repeated that he had gone to the Belle Isle bridge after the shooting and threw the gun into the river. Defendant then signed a written statement that he had shot the victims, but stated that he did not know why he shot them and did not remember who he shot first or how many shots he had fired. In this statement, he repeated that he threw the gun over the Belle Isle bridge and then drove to Dayton, Ohio to get away. He returned to Detroit after "reality set in about what I had done."

Defendant first argues that there was insufficient evidence to show that he had the specific intent to commit first-degree murder where there was evidence that he was suffering from a blackout and a cocaine-induced psychosis. We disagree.

Due process requires that the prosecution introduce sufficient evidence that could justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 478, amended 441 Mich 1201 (1992). However, this Court should not interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses. *Wolfe, supra* at 514-515. The prosecution need not negate every reasonable theory consistent with innocence, but need only convince the jury of defendant's guilt in the face of whatever contradictory evidence the defendant may provide. *Nowack, supra* at 400. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

First-degree murder is "[m]urder perpetrated by means of poison, lying in wait, or any other willful, deliberate, and premeditated killing." MCL 750.316(1)(a). In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* The elements of premeditation and deliberation may be inferred from the surrounding circumstances. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). Premeditation and deliberation may be established by evidence of: (1) the previous relationship between the defendant and the victim; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the killing. *Abraham, supra* at 656. The elements of a crime may be proven by circumstantial evidence and reasonable inferences arising from the evidence. *Nowack, supra* at 400. Because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence has been found sufficient to establish the requisite intent to commit the offense. See *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Voluntary intoxication is a defense to first-degree premeditated murder if the defendant shows that his

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

intoxication prevented him from premeditating and deliberating. *People v LaVearn*, 201 Mich App 679, 684; 506 NW2d 909 (1993), rev'd on other grounds 448 Mich 207 (1995).

In the instant case, the circumstances surrounding the killing support a finding of premeditation. Evidence indicated that leading up to the shootings, defendant had wanted everybody to leave the house. The victims stayed, however, and defendant subsequently expressed anger at McMillian during an argument about money and trust. It was approximately one half hour after this argument that defendant shot Thompson in the stomach. He had an opportunity to reflect on his action before he shot McMillian. Moreover, defendant next walked up to McHolmes before purposely placing the gun in his stomach and shooting him.

Although some testimony did suggest that defendant was not angry with the victims and had no reason to shoot them, proof of motive is not essential for a first-degree murder conviction. *Abraham, supra* at 657. Viewing the remaining evidence in a light most favorable to the prosecution, *Nowack, supra* at 400, it is clearly sufficient for a jury to reasonably infer that defendant premeditated the killing of McMillian. Defendant shot the victims one after another, with time between to allow him the opportunity to reflect on what he was doing or to take a "second look." *Abraham, supra* at 656. Moreover, his acts of fleeing the scene, disposing of the weapon, and driving to a different state additionally support a finding of premeditation. *Id*.

Defendant's related contention that the prosecution's evidence was insufficient to rebut his intoxication defense, which he claims proved that he was unable to form the specific intent to kill, also fails. Defendant's expert witness testified that defendant had blacked-out after using drugs and alcohol and that he was out of touch with reality when he shot the victims. She opined that defendant did not have the capacity to form a specific intent to kill on the night of the shootings. The prosecution's expert, to the contrary, testified that defendant did not suffer from diminished capacity the night of the shootings.

Defendant argues that the prosecution's expert witness applied the wrong standard and did not understand the defense defendant was asserting. Thus, he contends, her testimony was not credible. However, regardless of the labels these experts placed on their conflicting opinions, their opposing conclusions on the question of defendant's ability to form the requisite specific intent were readily apparent. Moreover, additional testimony relevant to this issue was presented by the two surviving victims and by the police. The survivors testified that despite defendant's ingestion of substantial quantities of drugs and alcohol, he was able to walk and talk without difficulty and did not appear to be drunk in the hours leading up to the shootings. According to police officers, the day after the shooting defendant told them that he remembered shooting the victims, disposing of the weapon, and driving to Ohio.

This Court is not to interfere with the jury's role of determining the weight of the evidence or deciding the credibility of the witnesses. *Wolfe, supra* at 514-515. Further, conflicts in the evidence are to be resolved in favor of the prosecution. *Terry, supra* at 452. The jury clearly determined that the prosecution's expert witness was more credible than defendant's expert witness and that defendant's ingestion of intoxicants did not prevent him from premeditating the killing. We will not now interfere with the role of the jury by making a contrary determination.

Next, defendant argues that he was denied the effective assistance of counsel at trial. To establish effective assistance of counsel, a defendant must show that: (1) the performance of his counsel was below an objective standard of reasonableness under the prevailing professional norms, and (2) the representation was so prejudicial to him that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In applying this test, the reviewing court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and defendant bears the heavy burden of proving otherwise. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy. *Toma, supra* at 302. Under the first prong of the test, the alleged errors must be so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Mitchell, supra* at 164-165. Under the prejudice prong, the defendant must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Toma, supra* at 302-303.

Defendant first contends that trial counsel was ineffective for failing to move to suppress defendant's initial statements to police that he shot the victims because he was angry and that he threw the gun into the river. Defendant asserts that these statements were given as a result of custodial interrogation and that he was not given his *Miranda* warnings before he made these statements. However, the evidence shows that defendant repeated his story after the police gave him his *Miranda* warnings. Thus, even if defendant's first statements were the result of custodial interrogation, trial counsel's decision not to move to suppress these statements was sound. *Toma, supra* at 302. Defendant was not prejudiced by counsel's decision because the identical statements, made after he was given *Miranda* warnings, were clearly admissible.

Defendant also contends that trial counsel was ineffective because he asked the prosecution's expert witness, Edith Montgomery, a question that supported the case against defendant. We disagree. On direct and redirect examinations, Montgomery opined that defendant did not suffer from diminished capacity or psychosis the night of the shootings. Montgomery, however, never specifically opined that defendant had the specific intent to kill. On recross-examination, defense counsel asked Montgomery if she thought that defendant had had the chance to premeditate the killing. Montgomery replied, "From all the information I received, if he had chosen to made that intent, he could have."

Montgomery's response to defense counsel's question did not prejudice defendant. Montgomery had already testified that defendant did not suffer from diminished capacity and it would have been reasonable for the jury to infer that this meant that defendant could have premeditated the killing. Accordingly, Montgomery's response merely reaffirmed what she had opined on direct examination. Defendant has not demonstrated a reasonable probability that he would have been acquitted of first-degree murder, but for counsel asking this one question. *Toma, supra* at 302-303.

Defendant next claims that the trial court abused its discretion by denying his motion to sequester Montgomery. Again, we disagree.

A trial court may, for good cause shown, exclude witnesses from the courtroom when they are not testifying. MCL 600.1420; *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990). A trial court may order witnesses excluded so that they cannot hear the testimony of

other witnesses except in the case of a person whose presence is shown to be essential to the presentation of a party's case. MRE 615; *Jehnsen, supra*. One of the purposes of the sequestration of a witness is to prevent him from "coloring" his testimony to conform with the testimony of another. *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976). "The decision whether to order the sequestration of a witness is left to the discretion of the trial court." *Jehnsen supra* at 309. Traditionally, an abuse of discretion occurs when the result was "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *People v Babcock*, 244 Mich App 64, 76; 624 NW2d 479 (2000), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Here, defendant requested that Montgomery be sequestered so she would not hear the testimony of defendant's expert witness, Firosa Van Horn, before she took the stand herself. Defendant argues that the trial court abused its discretion in finding that it was required to deny defendant's request pursuant to MRE 703.[3] He also argues that it was unfair to allow Montgomery, who was the prosecution's rebuttal expert witness, to comment on Van Horn's testimony. Contrary to defendant's first argument, there is no indication that the court exercised its discretion on the basis of application of MRE 703. The court, in fact, did not give a specific reason for denying the motion, instead merely stating that it agreed with the prosecutor, who had set forth three general arguments in opposition to sequestration. As to defendant's second argument, the record fails to reflect any unfair coloring of Montgomery's testimony and suggests no overt attempt to more efficiently rebut Van Horn's testimony. It simply does not appear that Montgomery tailored her testimony to Van Horn's or changed her testimony because of what she heard Van Horn testify to. Ultimately, we conclude that the trial court did not abuse its discretion in denying defendant's request. Defendant did not present a compelling reason for sequestration and we can discern no prejudicial impact of the decision to allow Montgomery to sit in on Van Horn's testimony.

Finally, defendant argues that the seating arrangement at his trial denied his rights to due process and a fair trial.[4] Defendant contends that because he was seated in front of his attorney, in the middle of the courtroom, the jury could imply that he was untrustworthy. He claims that his presumption of innocence was extinguished. We once again disagree.

Defendant did not object to the seating arrangement in the courtroom at trial. Therefore, this issue was not preserved for appeal. However, because defendant alleges an error that is constitutional in nature, this Court will review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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[3] MRE 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence.

[4] Defendant makes this argument in propria persona in a supplemental brief on appeal.

Defendant's convictions may be reversed only if any error affected the outcome of the proceedings. *Id.*

A fair trial is a right guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *People v Ramsey*, 422 Mich 500, 510; 375 NW2d 297 (1985). "Due process of law is violated when there is a 'failure to observe that fundamental fairness essential to the very concept of justice.'" *People v Thompson*, 424 Mich 118, 133; 379 NW2d 49 (1985), quoting *Dodge v Detroit Trust Co*, 300 Mich 575, 618; 2 NW2d 509 (1942). Thus, because a defendant, pending and during his trial, is still presumed to be innocent, he is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man, except as the necessary safety and decorum of the court may otherwise require. See *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985).

In addressing the issue of a defendant's clothing at trial, this Court has ruled that the defendant is only denied due process when the clothing impairs the defendant's presumption of innocence. *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987). We believe that the location of defendant's seat at trial should be similarly analyzed to determine whether the arrangement impaired his presumption of innocence. We conclude that it did not. In any event, we are certain that any possible error in seating defendant in the middle of the courtroom did not affect the outcome of his trial. *Carines, supra* at 763-764. Defendant's claims of prejudice are indefinite and speculative. Meanwhile, the evidence that defendant shot the victims was overwhelming. Defendant has presented no viable argument suggesting that the outcome of his trial would have been different had he been seated next to his attorney.

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen