STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2007
v	No. 266277 Wayne Circuit Court
TYRONE ANTHONY BELL, Defendant-Appellant.	LC No. 03-012024-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and felony-firearm, second offense, MCL 750.227b, for which he was sentenced as a fourth felony offender, MCL 769.12. We affirm.

Defendant's convictions arise out of the murder of defendant's girlfriend, Lachon Smith, who was shot in the face with a shotgun. Her body was found in an alley in Detroit. Defendant raises several issues on appeal in his three briefs, involving both pre-trial and trial matters. None of the issues warrant appellate relief.

First, defendant claims that his motion to suppress the shotgun shells recovered during the execution of a search warrant at his house should have been granted because the affidavit supporting the warrant was defective. After review of the trial court's decision to determine whether there was a substantial basis for the magistrate's conclusion that there was a fair probability that evidence of a crime would be found in defendant's house, we disagree. See *People v Martin*, 271 Mich App 280, 297; 721 NW2d 815 (2006).

A search warrant must be supported by probable cause. US Const, Am V; Const 1963, art 1, § 11. Probable cause exists when the facts and circumstances would allow a reasonably prudent person to believe that the evidence of a crime or contraband is in the stated place. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). When probable cause is presented in the form of an affidavit, the affidavit must contain facts within the knowledge of the affiant, rather than mere conclusions or beliefs. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). These affidavits are to be read in a common-sense and realistic manner, not in a hyper-technical way. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992).

We have reviewed the affidavit in support of the warrant at issue here and conclude that it was sufficient. The affidavit indicated that the victim was found dead at 6:10 a.m. on August 2, 2003. An investigation revealed that the victim had worked the night shift, picked up her daughter from her mother's house, took her home, and put her to bed. The victim had not been seen alive again, which leads to an inference that someone she knew came to her house in the middle of the night and picked her up. Other information provided included that the victim was having a relationship with defendant at the time, but had had an argument with him about one week before she disappeared. And, contrary to routine, after the victim disappeared, defendant had not been to her house. Defendant was a felon on parole, having fairly recently gotten out of prison, yet he had been seen with a 12 gauge shotgun and handgun in his vehicle about two weeks before the victim's disappearance. These facts gave rise to a substantial basis for the magistrate's conclusion that there was a fair probability that evidence of a crime would be found at defendant's home, particularly because guns and ammunition are easily transportable and are normally kept in close proximity to the owner. See *People v Hellstrom*, 264 Mich App 187, 199-200; 690 NW2d 293 (2004).

Next, defendant argues that the admission of gunshot residue evidence constituted plain error because it was seized from defendant's vehicle during defendant's illegal arrest. However, defendant failed to raise this issue in the lower courts and the necessary facts, particularly the circumstances of defendant's arrest, are unavailable thus precluding appellate review.

Next, defendant argues that he was denied due process when he was held for more than eight hours before being arraigned. However, again, defendant failed to raise this issue in the lower courts and the necessary facts, particularly those relating to defendant's arrest, are not available. Accordingly, appellate review is precluded.

Defendant next argues that he was denied due process when his preliminary examination was not held within fourteen days of his arraignment. But, contrary to defendant's claim, there is no record of defendant moving to dismiss the charges on this ground. To preserve this issue for appellate review, it must be raised immediately before the commencement of the preliminary examination. See *People v Crawford*, 429 Mich 151, 157; 414 NW2d 360 (1987). Moreover, this Court will not reverse a defendant's conviction based on the failure to timely conduct a preliminary examination where the defendant has already been tried and convicted, i.e., the error, if any, was harmless. See *People v Hall*, 435 Mich 599, 605; 460 NW2d 520 (1990).

Next, defendant claims that the inadmissible statements of three witnesses were improperly admitted at his preliminary examination. But, the record does not support defendant's claim. To the contrary, the three witness statements at issue were not admitted into evidence at the preliminary examination. Therefore, this claim is without merit.

Defendant next argues that he was denied the effective assistance of counsel before, during, and after his preliminary examination. His claimed errors are premised on some of the issues discussed above, none of which are meritorious. Therefore, defendant has failed to show that his counsel's performance fell below an objective standard of reasonableness with regard to these claims. See *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Next, defendant argues that he was denied a "fair and impartial preliminary examination" because of prosecutorial misconduct. But, the test for prosecutorial misconduct is whether the

defendant was denied a fair and impartial trial. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Here, defendant has failed to establish that any prosecutorial misconduct at the preliminary examination denied him a fair and impartial trial. See *Hall*, *supra* at 613.

Defendant next argues that his convictions were based on insufficient or inadmissible evidence. Defendant argues that (1) testimony regarding letters found in his bedroom during the search of his house should not have been referenced at trial because the letters were not produced, and (2) the testimony of two crime scene witnesses should not have been relied on because they were admitted drug users. Contrary to defendant's claim, this evidence was admissible and the guilty verdicts were adequately supported by the evidence. See *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

The witness testimony regarding the fact that letters addressed to defendant were found in the same room as the shotgun shells was properly admitted. The Detroit Police Investigator who testified about the letters actually participated in the search and saw the letters. See MRE 602. Although the letters were not admitted into evidence, that they existed was proper trial testimony. And, that the two crime scene witnesses—who said they saw a vehicle fitting the description of defendant's vehicle speeding away after they heard a gunshot fired—were drug users does not render their testimony inadmissible. Whether the witness testimony was influenced by the use of drugs goes to the weight of the evidence and the credibility of the witnesses—issues for the finder of fact, not this Court. See *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

In a related issue, defendant argues that his right to confront the witnesses against him was violated when the police officer in charge of the search of defendant's home did not testify at trial. But, because no testimonial hearsay statements made by that police officer were admitted into evidence at trial, defendant's rights under the Confrontation Clause were not violated. See US Const, Am VI; Const 1963, art 1 § 20; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). Simply stated, the officer was not a witness against defendant.

Defendant next claims that reference to his "parole agent" during the bench trial constituted reversible error. Defendant failed to properly preserve this issue by objecting to the several references during the disputed testimony; therefore, our review is for plain error. See *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). But, because this was a bench trial and the trial judge is presumed not to be prejudiced and to know and follow the law, any such error was harmless. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992); *People v Oliver*, 170 Mich App 38, 49; 427 NW2d 898 (1988), modified by 433 Mich 862 (1989).

Next defendant argues that the trial court abused its discretion when it denied his request for additional DNA testing, denied his motion for a new trial on the ground that his attorney should have requested such testing, and denied his request for a *Ginther*[1] hearing. We disagree.

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

First, defendant claims that additional DNA testing should have been conducted on the victim's fingernail clippings. Only one of seven samples were tested and that test indicated that DNA material from someone other than the victim and defendant was present on or under the victim's fingernail. In denying defendant's request for this additional discovery, the trial court held that further testing would not make any difference to the outcome of this case. We agree. Even if all of the remaining six fingernail clippings revealed DNA material from a third source, defendant would be in no better position than he was before the additional testing. The DNA material recovered did not match defendant's DNA, therefore, he was already excluded as a source of the foreign DNA material recovered from the victim. Whether more foreign DNA material existed is irrelevant to the issue in dispute—defendant's identity as the killer. Because the victim's body was in a debris-strewn alley frequented by drug users, foreign DNA on or under her fingernails was not an unusual find. And, the DNA could have been deposited before the events associated with the crime even occurred. In other words, further testing—even if positive for more foreign DNA material—would not give rise to a reasonable doubt as to defendant's guilt for the murder. Thus, denying defendant's motion for further discovery did not constitute an abuse of discretion.

Second, the trial court also properly denied defendant's request for a *Ginther* hearing with regard to his claim that his counsel was ineffective for failing to request the additional DNA testing. The details of the alleged ineffectiveness were apparent in the record therefore no such hearing was necessary. See *People v Michael Anthony Williams*, 391 Mich 832 (1974).

Third, defendant has failed to overcome the presumption that his counsel's performance was effective and that his conduct constituted sound trial strategy. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Because defendant was already excluded as a contributor of the DNA found on the victim's fingernails, further testing would not have been helpful to defendant's defense. Instead, further testing could have implicated defendant if defendant's DNA material was found on any of the six remaining fingernail clippings. And, requesting additional testing would have eliminated defendant's claim that the investigation of this crime was misdirected at him from its inception. Accordingly, defendant's argument is not persuasive.

Next, defendant argues that several instances of prosecutorial misconduct denied him a fair and impartial trial, including failing to correct false testimony, using inadmissible testimony, and misleading the court with regard to certain facts of the case. We disagree. Contemporaneous objections and requests for curative instructions were not made with regard to any of the claimed errors; therefore, our review is for plain error. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). And, after extensive review of defendant's several claims, many of which involve issues discussed above, we conclude that plain error warranting relief was not established.

Defendant also argues that his motion for directed verdict as to the first-degree murder charge should have been granted. However, even if defendant is correct, because he was properly convicted of second-degree murder, any such error was harmless. See *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988).

Finally, defendant argues that the cumulative effect of errors denied him a fair trial. However, because no actual errors have been identified, this issue is without merit. See *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello