STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 27, 2009
v VINCE ALLEN MANN, Defendant-Appellant.	No. 281673 Wayne Circuit Court LC No. 07-005003-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v THOMAS REED BUTLER, Defendant-Appellant.	No. 281674 Wayne Circuit Court LC No. 07-005003-FC

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In these consolidated appeals, defendants Vince Allen Mann and Thomas Reed Butler appeal as of right their convictions and sentences. Following a trial before Wayne Circuit Judge Vera Massey Jones and separate juries, both defendants were convicted of second-degree murder, MCL 750.317. Thereafter, the trial court sentenced Mann as an habitual offender, third offense, MCL 769.11, to 32 to 70 years' imprisonment. The court sentenced Butler as an habitual offender, second offense, MCL 769.10, to 337 months' (28 years and one month) to 60 years' imprisonment. We affirm.

I. Facts and Procedural History

This case arises out of the November 2006, death of Ricky Arquette. Marisa Michalak testified that at approximately 2:30 a.m. on November 20, 2006, Randall Davis, along with Robert Ashby and David Cochran, picked her up to take her to Butler's house. Butler was Michalak's boyfriend. En route to Butler's house, Michalak had Davis stop at a condominium complex. At the complex, Arquette approached the vehicle and offered Davis money for a ride.

Davis agreed, although none of them had ever met Arquette before, and Arquette entered the vehicle. They then drove directly to Butler's house.

Butler's house was located on Mercedes Street in Redford, Michigan. When Davis and his passengers arrived at the house, Butler was not at home. A few minutes later, however, Butler arrived with his cousin Joseph Schork and roommates Larnie Neal and Mann. Everyone conversed and then went inside the house. Michalak and Butler went upstairs to Butler's bedroom. Shortly thereafter, Michalak heard commotion downstairs and someone say, "Hey you gotta get the f**k out of here," or words to that effect. She then heard Mann call to Butler. Butler told Michalak to stay upstairs and he went downstairs.

While Butler and Michalak were upstairs, everyone else "hung out" downstairs. Arquette was loud, obnoxious, and tried to do karate moves. When Arquette pushed Mann in the chest, Mann told him not to put his hands on him. When Arquette pushed him again, Mann told him to leave the house. Mann then yelled upstairs to Butler and removed his shirt in his bedroom. While in the bedroom, Mann told Schork that Arquette had swung at him and said, "Let's get him." Mann then grabbed a glass beer bottle from the kitchen, walked into the living room, and hit Arquette on the left side of the head with the bottle when Arquette's back was turned. The bottle shattered and Arquette fell to the floor. Schork testified that Butler kicked Arquette in the head as he was falling, and Butler later admitted to the same to three additional witnesses. Several other witnesses testified that as Arquette lay on the floor, Mann, Butler, Schork, Ashby, and Davis surrounded him. They repeatedly kicked him in the body, face, and head.

Thereafter, Mann, Butler, and possibly others carried Arquette, who appeared unconscious, outside. They left Arquette across the street on the neighbor's lawn and then returned to the house. After a few minutes, Schork and Davis went back outside because they saw Arquette walking around. Davis then punched Arquette in the face. Arquette's head and shoulder hit the neighbor's SUV. He fell to the ground and hit his head on the cement with a loud thud. Davis and Schork left Arquette unconscious on the neighbor's driveway.

In the early morning hours of November 20, police and paramedics arrived on the scene and took Arquette to the hospital for treatment. Sergeant Eric Kapelanski subsequently conducted a canvas of the neighborhood and spoke to Mann and Butler. Butler told the sergeant that at approximately 3:00 a.m., they saw four or five men assaulting someone across the street, but that the men had run away. Mann confirmed Butler's story. Neal testified that after the sergeant left, he, Mann, and Butler decided to remove a piece of the living room carpeting because Arquette's blood was on it.

Arquette died in the hospital on November 28. Francisco Diaz, an assistant medical examiner for Wayne County, performed the autopsy on Arquette. Arquette had several cuts, abrasions, and bruises on his face and head. Diaz found an accumulation of blood under the scalp, primarily on the left side. There was a one-inch linear fracture of the skull, a fracture of the right orbital roof, a subdural hematoma on the left side, bleeding into the coverings of the brain, and contusions on the brain as a result of blunt trauma. Diaz explained that blunt force means force applied with a non-sharp object or surface. He opined that Arquette sustained multiple inflicted blunt injuries due to being struck several times and that the cause of death was inflicted blunt trauma, mainly to the brain, and the complications resulting from being placed on a ventilator. Diaz testified that the fracture to Arquette's skull could have been caused by falling

unimpeded and hitting his head on an unyielding surface such as a vehicle, concrete, or a foot kicking his head while he was falling. He further testified that striking a person on the head with a thick bottle and with enough force and velocity could cause a subdural hematoma.

Ljubisa Dragovic, the chief medical examiner for Oakland County and the only defense witness called, opined and testified that the cause of death was blunt trauma to the head and that the injuries to the base of Arquette's skull resulted from Arquette's head striking an unyielding surface, such as a floor, cement, or a metal structure. According to Dragovic, Arquette's injuries were not the result of being struck with a beer bottle or kicked in the head. Dragovic explained that the injuries were the result of a moving head striking an unyielding surface, as opposed to a stationary head being struck by a moving object.

On the afternoon of November 29, Sergeant Kapelanski again visited the Mercedes Street house. He told Butler, Mann, and the other people present that Arquette had died and asked if they knew anything else about the men who assaulted him. Butler told the sergeant the same story. Neal and Michalak indicated that they had not observed anything that night. Later on November 29, Sergeant Kapelanski returned to the Mercedes Street house after being called there by fellow officers executing an unrelated search warrant in the house. Based on the evidence Sergeant Kapelanski observed–blood on the wall and bloody clothes in the washing machine–he obtained a search warrant for the house. During the search of the house, officers took photographs of the evidence. Then, during a subsequent search, pursuant to a different warrant, officers seized blood samples and a section of carpeting showing that some of the carpeting had been cut out and replaced.

On November 30, Officer Eric Norman of the Redford Police Department interviewed Mann and Butler individually while they were in custody at the Redford jail. During Mann's interrogation, he admitted to punching Arquette. Butler admitted, in a written statement and during the interrogation, to kicking Arquette in the head or neck once or twice.

Mann and Butler were tried together before separate juries on final charges of second-degree murder. Mann and Butler were each convicted of that offense and sentenced as indicated. They now appeal as of right.

II. Issues in Docket No. 281673

A. Sufficiency of the Evidence

Mann first argues that the evidence presented at trial was insufficient to support his second-degree murder conviction, as either a principal or an aider and abettor. We disagree.

When reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

"[T]he elements of second-degree murder are as follows: (1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70;

731 NW2d 411 (2007). Malice or "[t]he intent necessary for second-degree murder is the intent to kill, the intent to inflict great bodily harm, or the willful and wanton disregard for whether death will result." *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006). "This Court has defined the intent to do great bodily harm as 'an intent to do serious injury of an aggravated nature.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (citation omitted). Great bodily harm has also been defined as "a physical injury that could seriously and permanently harm the health or function of the body." CJI2d 17.7(4).

Our Supreme Court has held that to convict a defendant of aiding and abetting a crime, the prosecution must, in general, establish that "'(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'" *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999) (altered by *Moore*).

On appeal, Mann all but concedes that he intended to inflict great bodily harm on Arquette. He states in his brief, "Mann hit Arquette with the bottle and that could have caused great bodily harm," and there is no indication that he did not so intend. Trial testimony established that after Arquette pushed Mann in the chest, Mann called upstairs to Butler saying, "[W]e have a problem," "I need you to come down here," and "We're going to have to get him," referring to Arquette. Mann then entered his bedroom, removed his shirt, and said to Schork, "Let's get him." He walked into the kitchen and grabbed a glass beer bottle, later admitting to Schork that he selected a 22-ounce bottle because it hurt more than a 40-ounce bottle. Mann then hit the left side of Arquette's head with the bottle while Arquette's back was turned. The bottle shattered and Arquette fell to the floor unconscious, indicating that Mann had used significant force in striking Arquette. As Arquette lay on the floor, Mann and several others surrounded him. Although there was conflicting testimony about who actually kicked Arquette, at least two witnesses saw Mann kick him. Schork testified that Mann kicked Arquette in the head and Davis testified that Mann stomped on Arquette's face two or three times. This evidence, taken together, was more than enough for a rational jury to find that Mann intended to inflict great bodily harm, or "'serious injury of an aggravated nature,'" on Arquette. *Brown*, *supra* at 147.

Mann's primary argument on appeal is that his actions did not cause Arquette's death. Mann asserts that Arquette died as a result of being punched in the face by Davis and then striking his head on the SUV and cement, all of which occurred during a separate incident not involving Mann. Mann bases this assertion on Dragovic's testimony that the injuries to Arquette's skull resulted from his head striking an unyielding surface, such as a floor, cement, or a metal structure, while his head was in motion, not from being struck with a beer bottle or kicked in the head.

As the prosecution points out, however, Diaz offered a different opinion regarding the cause of Arquette's injuries. Both Dragovic and Diaz testified as expert witnesses in the field of forensic pathology. Dragovic was also admitted as an expert in neuropathology. "When experts offer conflicting opinions, it is for the jury to decide which testimony to believe." *People v Unger*, 278 Mich App 210, 230; 749 NW2d 272 (2008). Based on Diaz's testimony, a rational

jury could have concluded that Mann's acts caused Arquette's death. Diaz testified that Arquette suffered multiple inflicted blunt injuries and that the cause of Arquette's death was inflicted blunt trauma, mainly to the brain, along with resulting complications. Diaz explained that striking a person on the head with a thick bottle and with enough force and velocity could cause a subdural hematoma–a traumatic brain injury in which blood gathers in the inner layer of the dura–and that loss of consciousness was a symptom of a subdural hematoma. The evidence presented at trial established that Mann hit Arquette in the head so hard with the glass beer bottle that the bottle shattered and Arquette fell to the floor unconscious. Additionally, Davis testified that when Arquette fell, he hit his head on the lower, wooden portion of the couch. Both Diaz and Dragovic testified that the injuries to Arquette's skull could have been caused by his head hitting an unyielding surface while he was falling. A rational jury could have concluded that the wooden portion of the couch was the unyielding surface.

Even if the jury did not conclude that Mann directly caused Arquette's death, a rational jury could have concluded that Mann "'performed acts or gave encouragement that assisted the commission of the crime.'" *Moore*, *supra* at 67-68. As indicated, shortly before striking Arquette in the head with the bottle, Mann asked Butler to come downstairs and said, "We're going to have to get him," referring to Arquette. Mann then entered his bedroom and said to Schork, "Let's get him." Several witnesses testified that when Mann struck Arquette with the bottle, Arquette fell and Butler kicked him in the head as he was falling. Then, Mann, Butler, Schork, and others surrounded Arquette and kicked him in the head, face, and body, as he lay on the floor unconscious. Diaz testified that Arquette suffered multiple inflicted blunt injuries that caused his death and that the fracture to Arquette's skull could have been caused by a foot kicking Arquette's head while he was falling. Based on this evidence, a rational jury could have concluded that Mann's act of striking Arquette with the bottle, or encouraging Butler and Schork to "get" Arquette, assisted in bringing about Arquette's death.

Additionally, Mann impliedly asserts in his brief on appeal that his actions were justified because he was acting in self-defense. To establish self-defense, the evidence must show that: (1) the defendant honestly believed that he was in danger, (2) the danger feared was death or serious bodily harm, (3) the action taken appeared at the time to be immediately necessary, and (4) the defendant was not the initial aggressor. *People v Deason*, 148 Mich App 27, 31; 384 NW2d 72 (1985). There is some evidence on the record that Mann was not the initial aggressor, in that multiple witnesses observed Arquette push Mann twice in the chest. But, Mann has presented no evidence that he honestly believed he was in danger of death or serious bodily harm from Arquette's pushing. Moreover, Mann did not hit Arquette in the head with the bottle immediately after Arquette pushed him. As indicated, before hitting Arquette, Mann first called upstairs to Butler, went into his bedroom and removed his shirt, and went into the kitchen and retrieved the bottle. Mann then entered the living room and struck Arquette while his back was turned. Mann did not present sufficient evidence to establish his claim of self-defense.

In sum, viewed in the light most favorable to the prosecution, the evidence presented at trial was sufficient for a rational jury to convict Mann of second-degree murder as either a principal or an aider and abettor. A rational jury could have concluded that Mann acted with intent to inflict great bodily harm and either caused Arquette's death or performed acts or gave encouragement that assisted in the commission of the murder.

B. Evidence of Mann's Prior Incarceration

Mann next argues that the trial court abused its discretion when it permitted the prosecution to play the DVD of his interrogation without first redacting statements regarding his prior incarceration. We find that the trial court did not abuse its discretion in admitting the challenged evidence. But, even if the trial court had abused its discretion, Mann has not established that it is more probable than not that the admission of the evidence affected the outcome of the case.

On the fourth day of trial, before the DVD was played for the jury, defense counsel moved to exclude the DVD because the statements regarding Mann's incarceration, and several other statements on the DVD, were improper. Therefore, the issue is preserved for appellate review. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006), quoting *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). ("In order to properly preserve an issue for appeal, a defendant must 'raise objections at a time when the trial court has an opportunity to correct the error . . . .'"). We review preserved challenges to the admission or exclusion of evidence by a trial court for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005). An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The DVD of Mann's interrogation was approximately one hour in length and was played, in its entirety, for Mann's jury. Close to the beginning of the interrogation, Officer Norman said, "I've got a guy who's been in prison," and "You've been in prison." Then, close to the end of the interrogation, Mann said, "I did it before for five years." The officer then indicated that Mann would probably spend more than five years in prison this time. Throughout the interrogation, the officer made only one other general reference to Mann having "been through this before." Mann made similar general statements. He said, "I've been through this shit before. I know how this works."

On the fourth day of trial, when defense counsel moved to exclude the DVD of Mann's interrogation, he stated that the DVD included several improper references to Mann's prior incarceration, inaccurate facts of the case, and Officer Norman's assessment of Mann's credibility. Counsel admitted that the prosecution gave him the DVD before the preliminary examination, which began almost nine months before the trial commenced, and that he missed the trial court's cut-off date for filing motions. When the trial court questioned him about his failure to file a motion in limine, counsel claimed that he was unaware the prosecution intended to admit the DVD into evidence until the prosecution's opening statement on the second day of trial. Counsel further claimed that because there was no counter on the DVD, it would be very difficult to redact specific portions of the DVD.[1]

[1] We note that even though the DVD does not include a counter, which would appear on the screen when the DVD is played, most DVD players are equipped with a counter feature.

The trial court denied defense counsel's motion to exclude the DVD and allowed the DVD to be played without any redactions. The court based its decision, in part, on the fact that defense counsel's motion was late, but primarily on the fact that redacting certain portions of the DVD would cause jurors to speculate about what evidence had been redacted. The court explained:

> You could have made a motion for redaction . . . months ago. I could have gone into–sat right here and had them play the tape before me, and then I could make notes and could say, "okay, this has got to come out. That's got to come out."
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> * * *
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> It doesn't matter when you were put on notice. There's a motion cut-off date.
>
> But there is another reason why I'm not going to do this. Because the jurors will wonder, what did they take out of this tape that I'm not getting to hear? Because if I had time to redact it, we probably could have had someone do it in such a way that it sounds like it goes all together. Whereas now, the way it's going to be, they're going to say, "Well, what are they taking out? What really happened? How many times did they beat this guy to get him to say that?"
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> * * *
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> But, I'm not going to let them put it in because it was late, but because, very frankly, I believe that the People have a right to put in the entire thing so that the jury doesn't think that we're trying to hide something from them.
>
> So your motion is denied.

Unless a trial court specifically rules otherwise, references to a defendant's prior incarceration are generally inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). "It is well settled that evidence of a prior conviction may be prejudicial to the accused, the danger being that the jury 'will misuse prior conviction evidence by focusing on the defendant's general bad character . . . .'" *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). Further, to the extent the statements regarding Mann's prior incarceration may be considered 404(b) evidence, MRE 404(b) prohibits evidence of prior bad acts to prove a person's character and only permits the admission of such evidence for purposes such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. The evidence must be offered for a proper purpose, it must be relevant under MRE 402, and its probative value must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509-510; 674 NW2d 366 (2004).[2]

[2] Although Mann suggests in his brief on appeal that the references to his prior incarceration constitute MRE 404(b) evidence, defense counsel did not raise that argument before the trial (continued…)

The prosecution does not argue that the statements regarding Mann's prior incarceration were in any way relevant to establishing its case. However, defense counsel conceded at trial, and Mann does not now dispute, that the prosecution was entitled to play the portions of the DVD when Mann voluntarily described the night of Arquette's death, admitted to punching Arquette, and, at one point, admitted to hitting him with the bottle. Such evidence was highly relevant to the prosecution's case. Defense counsel argued that the DVD should be excluded in its entirety only because the improper statements included on the DVD were prejudicial and could not be easily redacted from the DVD. But, counsel waited until the fourth day of trial to move to exclude the DVD, despite having possessed the DVD for several months. As the trial court explained, because of the lateness of counsel's motion, it would have been difficult to redact the challenged statements from the DVD in a seamless manner–although it may have been possible had counsel raised the issue sooner–and the jury would be left to wonder what evidence was missing from the DVD.

Moreover, although references to a defendant's prior incarceration may be prejudicial, not every brief reference is unfairly prejudicial. *Griffin*, *supra* at 36-37. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); MRE 403. During Mann's interrogation, he and Officer Norman specifically referenced his prior incarceration only twice. Those references occurred during an hour-long interrogation, which was played for the jury in the middle of a ten-day trial. Mann has presented no evidence that the references to his incarceration were given undue weight by the jury. The trial court instructed the jury before the DVD was played and again before deliberations that it must not consider evidence of Mann's prior convictions for any reason. Jurors are presumed to follow the trial court's instructions. *Bauder*, *supra* at 195. Under the circumstances, the court's instruction reduced the potential for unfair prejudice. *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Blackston*, 481 Mich 451, 467; 751 NW2d 408 (2008). Therefore, we find that the trial court did not abuse its discretion in admitting the challenged evidence.

Even if the trial court had abused its discretion in playing the DVD, or failing to redact the offending statements from the DVD before allowing it to be played for the jury, reversal would not be required. Considering the limited number of references to Mann's prior incarceration, the trial court's instruction to the jury, and the properly admitted evidence of Mann's guilt previously described, any error in admitting the challenged evidence was harmless. Mann cannot establish that it is more probable than not that the outcome of the case would have been different, but for the limited references to his prior incarceration included on the DVD. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

C. Alleged Ineffective Assistance of Counsel

Alternatively, Mann argues that his trial counsel was ineffective for failing to file a motion in limine to redact the statements regarding his prior incarceration from the DVD. Again, we disagree.

(…continued)

court.

A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Because Mann failed to raise this issue in a motion for a new trial or a *Ginther* hearing, our review of the issue is limited to the existing record. *Id*.

To establish ineffective assistance of counsel, a defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him or her a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, the defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, the defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*.

Mann is correct that his trial counsel failed to file a motion in limine to redact the offending statements from the DVD. As Mann concedes, however, his trial counsel did move to exclude the DVD before it was played for the jury. Moreover, even though counsel's motion was late in coming, Mann has not established that it is more probable than not that the admission of the evidence affected the outcome of the case. Therefore, he cannot establish his claim of ineffective assistance of counsel.

III. Issues in Docket No. 281674

A. Sufficiency of the Evidence

Butler first argues that the evidence presented at trial was insufficient to support his second-degree murder conviction. We disagree. There was sufficient evidence for a rational jury to find Butler guilty of second-degree murder as either a principal or an aider and abettor.

As indicated, when reviewing the sufficiency of the evidence in a criminal case, we review the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Johnson*, *supra* at 723. The elements of second-degree murder are: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *Smith*, *supra* at 70. To convict a defendant of aiding and abetting a crime, the prosecution generally must establish that "'(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement.'" *Moore*, *supra* at 67-68.

First, the prosecution presented sufficient evidence for a rational jury to find that Butler intended to inflict great bodily harm on Arquette. In his brief on appeal, Butler claims that he lacked the "mens rea" to be guilty of second-degree murder, but the trial testimony established that after Mann struck Arquette with the beer bottle, Butler violently kicked Arquette's head as he was falling to the floor and continued to do so as he lay on the floor unconscious. Schork testified that from what he was able to observe, Butler first kicked Arquette in the head as

Arquette was falling to the floor. Then, once Arquette was lying on the floor, Butler kicked him once more in the head or near his head. Davis testified that he observed Butler kick Arquette in the head violently as he lay on the floor unconscious. After the incident, Butler told Michalak that he had kicked Arquette in the head as Arquette was falling. Butler told Schork's brother that he had kicked Arquette twice in the head as hard as he could, so hard that Arquette's head snapped forward and Butler's foot was "killing him." Butler said that Arquette was falling to the floor the first time he kicked him. Stephen Farhat testified that when Butler told him about the incident, Butler said he had kicked Arquette in the back of the head "on his way down" and that he kicked him so hard that Arquette's head snapped forward and his chin touched his chest. Even Butler admitted in his written statement and during his interrogation that he kicked Arquette in the head or neck once or twice. This evidence is more than sufficient for a rational jury to find that Butler acted with malice and more specifically, the intent to inflict great bodily harm, i.e., the "'intent to do serious injury of an aggravated nature.'" *Brown*, *supra* at 147.

Like Mann, Butler argues that he could not have caused Arquette's death. Butler bases his argument, by implication, on Dragovic's testimony. Although Dragovic testified that the injuries to Arquette's skull resulted from his head striking an unyielding surface, such as a floor, cement, or a metal structure, and not from being kicked in the head, Diaz testified otherwise. According to Diaz, the fracture to Arquette's skull could have been caused by a foot kicking his head while he was falling. As indicated, "[w]hen experts offer conflicting opinions, it is for the jury to decide which testimony to believe." *Unger*, *supra* at 230. Moreover, based on the evidence presented, a rational jury could have concluded that as Arquette was falling to the floor, Butler kicked him in the head and then Arquette struck his head on the lower, wooden portion of the couch, i.e., an unyielding surface. Thereafter, Butler continued to kick Arquette violently in the head. Based on this evidence, a rational jury could conclude that Butler caused Arquette's death or that his actions assisted in the commission of the crime.

Viewed in the light most favorable to the prosecution, the evidence presented at trial was sufficient to convict Butler of second-degree murder, as either a principal or an aider and abettor.

B. Alleged Extrinsic Influence on the Jury

Butler next argues that the trial court should have *sua sponte* granted a mistrial when the court was informed that Arquette's mother allegedly exposed some of the jurors to photographs of Arquette lying in the hospital. We disagree.

Although Mann's counsel raised the issue of the photographs at trial, neither Mann's counsel nor Butler's counsel moved for a mistrial. We review defendant's unpreserved claim that a mistrial was warranted for plain error. *Carines*, *supra* at 766-768. A *sua sponte* decision to grant a mistrial "is within the sound discretion of a trial judge." *People v Clark*, 453 Mich 572, 581 n 6; 556 NW2d 820 (1996). Such a decision is allowable if "'justice . . . cannot be achieved without aborting the trial . . . .'" *Id*., citing *People v Henley*, 26 Mich App 15, 29; 182 NW2d 19 (1970).

In *People v Budzyn*, 456 Mich 77, 88-90; 566 NW2d 229 (1997) (citations omitted), our Supreme Court stated the standard for claims of error for extrinsic influences on a jury:

> A defendant tried by jury has a right to a fair and impartial jury. During their deliberations, jurors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.
>
> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. We examine the error to determine if it is harmless beyond a reasonable doubt because the error is constitutional in nature. The people may do so by proving that either the extraneous influence was duplicative of evidence produced at trial or the evidence of guilt was overwhelming.

On the second day of trial, after the juries were impaneled and Mann's counsel gave his opening statement, but before Butler's counsel gave his, Mann's counsel informed the court that Arquette's mother had allegedly shown jurors photographs of Arquette. The following exchange occurred, in part:

> *Defense Counsel*. It's come to my attention that apparently, and I think I'm hearing it was occurring yesterday, Mr. Arquette's mother was following jurors around and showing them pictures of Ricky Arquette. I can only presume in an attempt to enlist sympathy from the jurors.
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> * * *
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> *Court*. I would have assumed that if such a thing had happened, the People who have told you about it would have told you as soon as they saw you this morning or last night as you were going home. That's what I would have assumed if it was true, because they'd be very concerned. Especially since I know you told everybody don't talk to witnesses, didn't you?
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> * * *
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> *Defense Counsel*. I did. . . .
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> * * *
>
> *Court*. So, I tell you what. If you think you can prove it, then you get the prosecutor to issue a warrant against her.

* * *

> But I am not going to even talk to you about it, because I don't believe it at this point. . . .

* * *

Defense counsel. The Court's not even going to admonish Ms. Arquette?

Court. Why should I?

Defense counsel. Or ask her if it's occurring, not to do it?

Court. No, I'm not going to do that.

Defense counsel. Okay. Well, just for the record, Judge the only reason I didn't raise the issue earlier is I don't like to make accusations without having some foundation for what I'm saying. I didn't have an opportunity–

Court. What kind of foundation do you have, other than somebody tells you at the last minute, rather than telling you when they saw it, or telling you at a time when we could have done something; at a time when the jury wasn't even sworn? When I could have gotten down more jurors. When your client wasn't in jeopardy.

Have a nice lunch.

After Butler filed his claim of appeal, he moved this Court to remand for an evidentiary hearing to make a record of evidence of Arquette's mother's contact with the jurors. Attached to Butler's motion were letters from eight people claiming they observed Arquette's mother with photographs just outside the courtroom. Butler attached the same letters to his brief on appeal.[3] A panel of this Court granted Butler's motion to remand for an evidentiary hearing. The proceedings on remand were limited to the question whether Butler should be granted a new trial because of extrinsic influences on the jury. *People v Butler*, unpublished order of the Court of Appeals, entered October 20, 2008 (Docket No. 281674). At the evidentiary hearing, 13 of the

[3] In the letters, five out of the eight people said they observed Arquette's mother with the photographs, but they did not include the date or time that this allegedly occurred. Two people said they observed her with the photographs on September 11 (the third day of trial), and one person said it was on September 12 (the fourth day of trial). Defense counsel raised this issue before the court on September 5 (the second day of trial). Four people said that the photographs depicted Arquette in the hospital, or that they heard they were photographs of Arquette in the hospital. Three people described the photographs as "graphic." Two people said that when Arquette's mother was showing the jurors the photographs, she made statements such as, "Look what they did to my son Ricky," and "How can they get away with what they did to my son Ricky." Two people said that they only observed Arquette's mother holding photographs and thumbing through them near the jurors, not actually showing the photographs to the jurors.

14 members of Butler's jury appeared and were individually questioned by the court and defense counsel, outside the presence of the other jurors. All 13 jurors stated that although they recognized Arquette's mother from the courtroom and may have seen her outside of the courtroom over the course of the trial, she never approached them, she did not speak to them, and she did not show them or attempt to show them anything, including photographs.[4] The court subsequently issued an opinion and order stating that a letter was sent to the final juror and that the juror "returned the letter signed as requested."[5] The court denied Butler's motion for a new trial because all of the jurors at the evidentiary hearing stated that no photographs of Arquette were shown to them and "because of the timing of trial counsel Hart's informing the court of this supposed undue influence, that could not have occurred as told."[6]

In light of the evidentiary hearing held on remand, we find that Butler has failed to meet his initial burden of proving that his jury was exposed to an extraneous influence. *Budzyn*, *supra* at 88. There is no indication in the lower court record that Butler ever presented the trial court with the letters from the eight people who allegedly observed Arquette's mother with the photographs.[7] If the letters were not presented to the trial court, the record may not be so enlarged on appeal. See *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000). Regardless, 13 members of Butler's jury stated at the evidentiary hearing that Arquette's mother never showed them any photographs, nor did they see her showing any of their fellow jurors photographs. Moreover, even if Arquette's mother had shown jurors the photographs, defendant has not established a real and substantial possibility that the jury's verdict could have been affected. *Budzyn*, *supra* at 89. The jury was made aware, through trial testimony, that Arquette was severely beaten and spent several days in the hospital before his death. The prosecution also admitted 16 photographs of Arquette's autopsy, depicting several angles of Arquette's body and close-ups of his face and head. It is, therefore, unlikely that exposing the jury to a few additional photographs depicting Arquette's injuries altered the outcome of the case. Therefore, while the trial court could have handled the matter differently during trial, it did not err in failing to *sua sponte* grant a mistrial and denying Butler's post-conviction motion for a new trial.

C. Evidence of Butler's Prior Incarceration and Drug Use

Butler argues that the trial court abused its discretion in playing the DVD of his interrogation for the jury because of the references on the DVD to his prior incarceration and

[4] The trial court indicated that the remaining member of the jury had relocated to Texas.

[5] The court's opinion and order states that the letter is attached, but the letter could not be located in the lower court file.

[6] The trial court subsequently issued a similar opinion and order denying Mann's motion for a new trial. The court stated that an evidentiary hearing was held and all but one of the members of Mann's jury appeared and indicated that no one had showed them photographs of Arquette.

[7] The letters were not attached to Butler's December 5, 2009, motion for an evidentiary hearing and production of jurors filed in the trial court, and the letters could not be located elsewhere in the record. The trial court did not make any mention of the letters at the evidentiary hearing or in its opinion and order.

drug use. We agree. Nonetheless, we find that the trial court's error was harmless and, therefore, that reversal is not required.

Defense counsel objected to the prosecution playing the DVD of his interrogation for the jury. Therefore, the issue is preserved for appellate review. See *Pipes*, *supra* at 277. We review preserved challenges to the admission or exclusion of evidence by a trial court for an abuse of discretion. *Bauder*, *supra* at 179.

The DVD of Butler's interrogation was approximately two hours in length and was played, in its entirety, for Butler's jury. For approximately one hour, however, Butler was alone in the interrogation room.[8] At the beginning of the interrogation, Officer Norman asked Butler, "Why are you here? Do you think it's just because of the narcotics?" Butler responded that he believed he had been arrested for narcotics, or "weed," until an officer told him otherwise. Butler said that he had weed in his possession and that he smoked weed, but that he did not sell weed. He believed that he might be charged with possession with intent to deliver. Officer Norman explained that drugs played a part in Butler's arrest and that drugs were the reason his house was initially searched. The officer said that clothing and other evidence was seized from the house. Later, Butler again stated he believed he had been arrested for drugs. Shortly thereafter, he said that he had already been to prison for seven and one-half years. Officer Norman then said, "I see you've been to prison, but I see what you've been to prison for." Butler later stated that he had been in prison with Mann and that Mann was still on parole. A few minutes later, Butler asked Officer Norman several questions about the drug charges he may be facing. Butler then stated, "I smoke weed. You can drug test me. I don't sell weed." Then, near the end of the interrogation, Butler volunteered that he had spent time in jail for the Friend of the Court.

On the eighth day of trial, defense counsel moved to exclude the DVD of Butler's interrogation. Defense counsel argued that the DVD was cumulative to the relevant information in Butler's written statement, which had already been read to the jury, and that the DVD was more prejudicial than probative. The trial court denied the motion to exclude the DVD and allowed the DVD to be played without any redactions. The court stated:

> Well, I'm consistent if nothing else. We've already brought up this issue. It just happened to be with another DVD.
>
> And I brought up the issue, first of all, when cases come in here they're supposed to be ready for trial. You had notice about the DVD. If you wanted the People not to play it, you should have filed a Motion in Limine requesting that they not do so.
>
> Very frankly, it is this court's opinion that jurors want to know, you know, the entirety because the things you were saying could have been taken out.

[8] Officer Norman excused himself from the room several times, including once for approximately 50 minutes while Butler wrote his statement.

> But I'm not going to try to take them out because they want to know well, gee whiz, how come we're not hearing it all. It's number one, very late. And number two, I think it is more probative than prejudicial. And therefore I won't grant the request.

As indicated, unless a trial court specifically rules otherwise, references to a defendant's prior incarceration are generally inadmissible. *Spencer*, *supra* at 537. Further, MRE 404(b) prohibits evidence of prior bad acts to prove a person's character and only permits the admission of such evidence for purposes such as proof of motive, opportunity, intent, preparation, scheme, plan, or system. The evidence must be offered for a proper purpose, it must be relevant under MRE 402, and its probative value must not be substantially outweighed by the danger of unfair prejudice under MRE 403. *Knox*, *supra* at 509-510.

In this instance, the trial court abused its discretion in playing the DVD of Butler's interrogation to the jury. During the interrogation, Butler admitted he was involved in assaulting Arquette inside the house. Specifically, Butler admitted that he kicked Arquette in the head or neck once or twice. Butler does not dispute that this evidence was highly relevant to the prosecution's case. However, it is also undisputed that the statements regarding illicit drugs and Butler's prior incarceration included on the DVD were completely irrelevant. Unlike the DVD of Mann's interrogation, which contained only two isolated references to Mann's prior incarceration, the DVD of Butler's interrogation, played in its entirety, was more prejudicial than probative. The DVD contained at least three references to Butler's prior incarceration, including that Butler was in prison with Mann and served over seven years, and several exchanges regarding drugs, wherein Butler admits to possessing and using drugs, but not selling drugs, Butler expresses concern that he will be charged with intent to deliver drugs, and Officer Norman states that a drug-related search was conducted at Butler's house and evidence was seized. Moreover, the most relevant information on the DVD–Butler admitting that he kicked Arquette in the head or neck once or twice–was also included in Butler's written statement, which was read aloud to the jury. Thus, even considering the trial court's limiting instructions to the jury, any probative value in playing the DVD of Butler's interrogation was substantially outweighed by the danger of unfair prejudice. See *Ortiz*, *supra* at 306; MRE 403. If the court believed that the improper statements included on the DVD could not be redacted in an acceptable manner–given the lateness of defense counsel's objection–the court should have excluded the DVD altogether.

That said, however, we find that the trial court's error was harmless. As indicated, the prosecution presented more than enough evidence for a rational jury to convict Butler of second-degree murder as a principal or an aider and abettor. Given the ample evidence of Butler's guilt, he cannot establish that it is more probable than not that the outcome of the case would have been different if the DVD of his interrogation had not been played for the jury. Therefore, reversal is not required. *Lukity*, *supra* at 495-496.

D. Judicial Misconduct

Butler argues that the trial court's hostility toward defense counsel deprived him of a fair trial. We disagree.

Butler did not object to the trial court's conduct at trial. Although some older cases have held that an objection is not necessary to preserve such an issue for appeal, see, e.g., *People v Sterling*, 154 Mich App 223, 231; 397 NW2d 182 (1986), more recent cases have held that an objection is necessary to preserve a challenge concerning the trial court's conduct, see *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995), and *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). These post-1990 cases are controlling. See MCR 7.215(J)(1). Therefore, because there was no objection at trial, this issue is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *Carines*, *supra* at 763-764.

"A defendant in a criminal trial is entitled to a neutral and detached magistrate." *People v McIntire*, 232 Mich App 71, 104; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147 (1999). "Judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases do not generally support a challenge for partiality." *Id*. However, a trial court's excessive interference in the examination of witnesses or disparaging remarks directed at defense counsel may demonstrate partisanship that denies a defendant a fair trial. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). "A trial court [] . . . pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Paquette*, *supra* at 340. "The test is whether the judge's questions or comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996).

Based on our own thorough review of the trial transcripts, Butler is correct that the trial court did, in fact, interrupt defense counsel–counsel for both Mann and Butler–numerous times when they were questioning witnesses. The trial court interrupted when defense counsel spoke too quickly or too loudly, asked compound or lengthy questions, questions that called for speculation or a conclusion, questions outside the scope of redirect, or questions without a proper foundation. The trial court also interrupted to instruct witnesses to answer questions verbally, clearly, or in response to the questions, to instruct defense counsel on impeaching witnesses or allowing witnesses to finish answers, to clarify defense counsel's questions, ask defense counsel to rephrase questions, or rephrase them herself, to ask defense counsel to move on or stop repeating questions, and to challenge the relevancy of defense counsel's questions.

On the other hand, however, Butler's assertion that the trial court only ever interrupted the prosecution to assist the prosecution is incorrect. While the prosecutor was questioning witnesses, the trial court interrupted to instruct the prosecutor to cite transcript pages, to clarify the prosecutor's questions or restate the questions herself, to instruct witnesses to answer questions verbally, clearly, or in response to the prosecutor's questions, to question the relevancy of the prosecutor's questions, to instruct the prosecutor on impeaching and refreshing witnesses' memories, to instruct the prosecutor to move on and not to interrupt witnesses' answers, and when the prosecutor asked questions without the proper foundation.

The trial court interrupted, criticized, and responded harshly to both defense counsel and the prosecution on other occasions in the presence of the jury. The trial court informed the jury that the attorneys for both parties would be fined $250 if they arrived late even once for proceedings and that counsel for Butler had already been late once, treated the prosecutor with sarcasm when a witness was not immediately ready to appear, instructed both parties not to argue

over objections in the presence of the jury, repeatedly interrupted during objections from both parties, but primarily from the prosecution, and said "nobody pays much attention to me," when the prosecutor asked the trial court a question, and "pretend I'm a real judge and I just ruled."

There were numerous other instances when the trial court acted in a harsh, rude, and argumentative manner to counsel, as well as other people present in the courtroom. However, these instances occurred outside the presence of the jury and the trial court behaved in the same manner to both parties. The trial court treated Mann's counsel with sarcasm when he requested that Mann be allowed to change clothing, told a spectator not to raise her hand because it was not a schoolroom, told another spectator not to wipe her eyes or otherwise display emotion, bullied Mann's counsel when he suggested that jurors may have been shown pictures of the victim, told the prosecutor that the trial schedule would not be changed and the court did not care about his witnesses' schedules, intentionally left the courtroom when Mann's counsel was attempting to put an objection on the record, scolded Butler's counsel for not informing the court of his schedule ahead of time, although he explained it would have been impossible for him to do so, repeatedly interrupted and scolded Mann's counsel when he moved to exclude the interrogation DVD, scolded the prosecutor when he failed to properly impeach or refresh a witness's memory, repeatedly interrupted Mann's counsel and the prosecutor when they raised the issue of Butler's contact with a witness, instructed both parties to "go away" and "not speak to her" or she would "yell" at them, instructed both parties that if any attorney interrupted a witness they would be fined $250, that the judge runs the courtroom, and that counsel should never argue with the court, told the prosecutor that she could not "see into the future" when he asked about the schedule for calling witnesses, and, on other occasions, repeatedly told both parties not to interrupt her, to stop talking after she had ruled, and to "pretend I'm a real judge."

In sum, Butler is correct that the trial court acted in a harsh, argumentative, and sometimes sarcastic manner throughout the proceedings–certainly in a manner that this Court does not condone. In addition, the trial court excessively interrupted counsel during the examination of witnesses. However, because the trial court's most egregious behavior occurred outside the presence of the jury and the court behaved in the same manner to both parties throughout the proceedings, there is no support for Butler's assertion that the trial court's conduct influenced the jury against him. The court displayed no partiality. The court's excessive interruptions and critical remarks made in the presence of the jury were directed, almost equally, at both parties. Therefore, defendant cannot establish that he was denied a fair and impartial trial. See *Davis*, *supra* at 50; *Paquette*, *supra* at 340; *Cheeks*, *supra* at 480.

E. Probable Cause to Search the Mercedes Street House

Butler next argues that the trial court erred in denying his motion to suppress the evidence seized at the Mercedes Street house because the search warrant affidavit failed to establish probable cause that evidence of a crime would be presently found in the house. We disagree. The evidence was seized pursuant to valid search warrants.

At the pretrial hearing on Butler's motion to suppress, John Butler, a Redford police officer, testified that on November 29, 2006, he obtained a search warrant for the Mercedes Street house. At that time, Officer Butler was unaware an assault had occurred at the house. He obtained the warrant to search for drugs and other drug-related evidence. Before executing the warrant, however, Officer Butler spoke to Officer Kapelanski. Officer Kapelanksi asked that

Officer Butler and the other officers look out for evidence related to an assault when they searched the house and to notify him if they observed anything. During the search, officers seized marijuana and evidence that Butler and Mann resided in the house. They also observed blood evidence in the house. Thereafter, Officer Kapelanski observed the evidence himself and obtained a search warrant for the Mercedes Street house to search for evidence of an assault.[9] Before trial, Butler moved to suppress the assault-related evidence seized from the Mercedes Street house, arguing that the initial drug-related search warrant for the house was invalid for lack of probable cause. The trial court denied the motion.

We review a trial court's ruling on a motion to suppress de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). On appeal from a finding of probable cause, a reviewing court must afford great deference to the magistrate's determination. *People v Keller*, 479 Mich 467, 477; 739 NW2d 505 (2007); *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008). Review is limited to the facts that were presented to the magistrate and are contained on the record. *People v Sloan*, 450 Mich 160, 168, 172-173; 538 NW2d 380 (1995), overruled in part on other grounds in *People v Wagner*, 460 Mich 118; 594 NW2d 487 (1999), and *People v Hawkins*, 468 Mich 488; 668 NW2d 602 (2003).

Both the United States and Michigan Constitutions "guarantee the right of persons to be secure against unreasonable searches and seizures." US Const, Am IV; Const 1963, art 1, § 11; *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004) (internal quotations and citation omitted). "A search or seizure is considered unreasonable when it is conducted pursuant to an invalid warrant . . . . Generally, in order for a search executed pursuant to a warrant to be valid, the warrant must be based on probable cause." *Hellstrom*, *supra* at 192 (citations omitted). Probable cause exists when the facts and circumstances would allow a reasonable person to believe that the evidence of a crime or contraband sought is in the stated place. *Id*.; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant rather than mere conclusions or beliefs. *Martin*, *supra* at 298. The affiant may not draw his own inferences, but must state the matters that justify the inferences. *Id*. However, the affiant's experience is relevant to establishing probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997). A magistrate's finding of probable cause must be based on all the facts related in the affidavit. MCL 780.653; *Keller*, *supra* at 482. The affidavits are to be interpreted with common sense and in a realistic fashion. *Martin*, *supra* at 298.

In this case, the magistrate determined that probable cause existed to search the Mercedes Street house for drugs and other drug-related evidence based on an affidavit submitted by Officer Butler, dated November 29, 2006. The officer averred that over the previous three weeks, an unnamed informant and several anonymous callers notified him that the residents of the house

[9] During his trial testimony, the officer clarified that he actually obtained two search warrants– one for the blood evidence on the wall and the clothes in the washing machine and then another for the carpeting.

were involved in the illegal possession/sale of marijuana at that location. They indicated that several vehicles often stopped at the house late at night, entered the residence for a short period of time, and then left. Officer Butler confirmed that the police had been dispatched to the house 11 times in the previous four months for a variety of complaints, including loud parties and the odor of marijuana. The officer further averred that on November 27, 2006, at approximately 11:30 p.m., he observed a vehicle park in front of the house. Two men exited the vehicle, left the engine running and headlights on, entered the house, and three to five minutes later drove away in the vehicle. Based on his training and experience, Officer Butler found this activity consistent with a possible drug transaction. Shortly thereafter, another officer stopped the vehicle, arrested the occupants, and seized a bag of marijuana from under the gearshift. Finally, Officer Butler averred that in his experience, illicit drugs and other contraband would be found at the Mercedes Street house.

Butler argues that the magistrate's probable cause determination was invalid because the information provided to Officer Butler by the unnamed sources was not proven to be credible or reliable. Probable cause may be founded on hearsay. *People v Harris*, 191 Mich App 422, 425; 479 NW2d 6 (1991). In determining whether hearsay provides the constitutionally required probable cause, the magistrate must consider whether all the circumstances set forth in the affidavit establish a fair probability that evidence of a crime or contraband will be found in a particular place. *Ill v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *Hawkins*, *supra* at 502 n 11. In addition, MCL 780.653 provides:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> * * *
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Police officers are presumptively reliable and self-authenticating details also establish reliability. *Ulman*, *supra* at 509; *People v Powell*, 201 Mich App 516, 523; 506 NW2d 894 (1993). An independent police investigation that verifies information provided by an informant can also support issuance of a search warrant. *Ulman*, *supra* at 509-510; *Harris*, *supra* at 425-426.

The prosecution does not dispute that there is no record evidence indicating that the unnamed informant and anonymous callers had provided the police with any valid information in the past or were otherwise credible. But, records confirmed that the police were called to the Mercedes Street house on several occasions for a variety of complaints, including the smell of marijuana in the air. Moreover, less than 48 hours before the search warrant was issued, Officer Butler observed activity at the house indicative of an illegal drug transaction–two men exited a vehicle late at night, left the engine running and headlights on, entered a house reported as a place where marijuana is sold, and three to five minutes later drove away in the vehicle. Almost immediately thereafter, another officer stopped the vehicle, arrested the occupants, and seized a

bag of marijuana from under the gearshift. Officer Butler's personal observation of the vehicle at the Mercedes Street house and the subsequent discovery of marijuana in the same vehicle, verified the reports of the unnamed informant and anonymous callers. The evidence included in the affidavit, taken together, supported the magistrate's probable cause determination.

Butler further argues that even if probable cause existed to search the Mercedes Street house at one time, the evidence supporting a probable cause determination had grown stale. The passage of time is a valid consideration when deciding whether probable cause exists. The measure of the staleness of information in support of a search warrant rests on the totality of the circumstances, including the criminal, the thing to be seized, the place to be searched, and the character of the crime. *People v Russo*, 439 Mich 584, 605-606; 487 NW2d 698 (1992); *People v Brown*, 279 Mich App 116, 128; 755 NW2d 664 (2008). Considering the ongoing nature of drug trafficking and the fact that Officer Butler observed a possible drug transaction at the Mercedes Street house less than 48 hours before the warrant was issued, the information in the affidavit was not stale. Cf. *People v David*, 119 Mich App 289, 296; 326 NW2d 485 (1982).

A reasonable person could believe, based on Officer Butler's affidavit, that evidence of illegal drug activity or other related contraband would presently be found at the Mercedes Street house. Therefore, probable cause existed to issue the initial search warrant and the trial court properly denied Butler's motion to suppress the evidence seized during the subsequent searches of the house.

F. Alleged Violation of Butler's Right to Silence and Counsel

Finally, Butler argues that the trial court erred in denying his motion to suppress the statements he made during his interrogation because he was denied his constitutional right to silence and counsel. We disagree.

This issue was raised before the trial court by way of a pretrial motion to suppress. Following an evidentiary hearing pursuant to *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965), the trial court denied the motion. In reviewing a trial court's ultimate decision on a motion to suppress, we conduct de novo review of the entire record. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). This Court will not disturb a trial court's factual findings with respect to a motion to suppress unless those findings are clearly erroneous. *Id*. A finding is clearly erroneous if it leaves this Court with a definite and firm conviction that a mistake has been made. *Id*. at 564.

The right against self-incrimination is guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. Generally, statements of an accused made during custodial interrogation are inadmissible unless, prior to any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to counsel, and that the accused voluntarily, knowingly and intelligently waived his rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). The right to counsel is also guaranteed by both the United States and Michigan Constitutions. US Const, Ams V, VI; Const 1963, art 1, §§ 17, 20. An advice of rights that satisfies the Fifth Amendment warning requirements of *Miranda*, *supra*, can also sufficiently apprise the accused of his Sixth Amendment rights and the consequences of

waiver of those rights. *People v McElhaney*, 215 Mich App 269, 276-277; 545 NW2d 18 (1996).

After Butler's arrest, Officer Norman questioned him about his involvement in Arquette's death. As indicated, the DVD of the interrogation was played for the jury. Before the questioning began, Officer Norman advised Butler of his *Miranda* rights, including his right to silence and counsel. The officer first allowed Butler to read his rights and then Butler signed a form indicating that he understood those rights. The officer then read the rights aloud to Butler and Butler verbally indicated that he understood them. When Officer Norman asked him if he had any questions, Butler stated that he had not yet made a phone call, but then said, "I'm just gonna wait and see what happens with this shit." Butler does not dispute that he initially waived his right to silence and counsel.

Approximately nine minutes into the questioning, Butler said, "I just need to speak to my ma to see where my lawyer's at before I really say anything." Officer Norman did not respond and Butler continued speaking. Butler said, "I know what happened. I absolutely know what happened." Officer Norman then said, "Mm, hm," and Butler continued speaking. He talked about his prior incarceration, his girlfriend, and the fact that he was not violent, among other topics. Then, an exchange occurred wherein Officer Norman stated he was giving Butler the opportunity to explain himself in regard to Arquette. The officer then said, "Whether you say anything or not, I got a real good idea what happened." Butler asked, "Can I hear what your idea is what happened?" When Officer Norman began to describe what had happened to Arquette, at approximately 13 minutes into the questioning, Butler said, "I'm gonna go ahead and tell you everything." Butler made no other mention of counsel, other than stating that the day before, his mother had said she would hire him an attorney.

According to Butler, he invoked his right to counsel when he said, "I just need to speak to my ma to see where my lawyer's at before I really say anything." Butler argues that anything he said after that point should have been suppressed because Officer Norman did not honor his request for counsel. During a custodial interrogation, the police must immediately cease questioning a suspect who has clearly asserted his right to have counsel present until counsel has been made available, unless the accused himself initiates further communication, exchanges, or conversations with the police. *People v Tierney*, 266 Mich App 687, 710-711; 703 NW2d 204 (2005). Conversely, if an accused validly waives his rights, the police may continue questioning him until and unless he clearly requests an attorney. An ambiguous statement regarding counsel does not require the police to cease questioning or to clarify whether the accused wants counsel. *Davis v US*, 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994); *People v Adams*, 245 Mich App 226, 237-238; 627 NW2d 623 (2001). Rather, as the *Davis* Court explained:

> Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . .
>
> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." Although a suspect need not "speak with the discrimination of an Oxford

> don," . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards*[10] does not require that the officers stop questioning the suspect. [*Davis*, *supra* at 459 (citations omitted; emphasis in original).]

Applying the foregoing principles, the *Davis* Court held that the defendant's statement, "Maybe I should talk to a lawyer," was not a request for counsel, and that there was no requirement that law enforcement officers cease his interrogation. *Id*. at 462. Citing *Davis*, this Court held in *Tierney*, *supra* at 711, that the defendant's statements, "Maybe I should talk to an attorney," and "I might want to talk to an attorney," did not constitute unequivocal invocations of the right to counsel. Similarly, in *Adams*, *supra* at 238, this Court held that the defendant's statement, "Can I talk to him [a lawyer] right now . . ." was insufficient to invoke the defendant's right to counsel, where that statement was precipitated by "inquiries into the way the process worked" and where the defendant requested a break to think about whether he wanted to speak to a lawyer.

Butler's statement, "I just need to speak to my ma to see where my lawyer's at before I really say anything," did not constitute an unambiguous, unequivocal invocation of his constitutional right to counsel. Butler did not clearly state that he wanted counsel present during the questioning. He only referenced needing to speak to his mother to see where his lawyer was located, or possibly to inquire whether his mother had hired him a lawyer yet. Moreover, it is clear from the context that Butler made the statement in passing. Officer Norman did not respond to the statement and Butler continued speaking. Butler did not say anything more about a lawyer or contacting his mother. At the Walker hearing, Officer Norman testified that Butler did "a lot of [thinking] out loud. I didn't pose any questions to him. I didn't jump in."

Under the circumstances, a reasonable officer would have, at most, understood Butler's statement to mean that he *might* be invoking the right to counsel. Therefore, Officer Norman was not required to cease questioning Butler or to clarify whether he wanted counsel. See *Davis*, *supra* at 459; *Adams*, *supra* at 237-238. The trial court did not err in declining to suppress Butler's statements during the remainder of the interrogation.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[10] *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981).