STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY DARNELL SMITH, JR.,

Defendant-Appellant.

UNPUBLISHED
April 25, 1997

No. 183431
Recorder's Court
LC No. 94-003857

Before: Wahls, P.J., and Gage and W.J. Nykamp,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 424(2). He was sentenced to life imprisonment for the murder conviction and a consecutive term of two years' imprisonment for the felony-firearm conviction. He appeals as of right, and we affirm.

I

Defendant argues that the trial court erred in denying his motion to suppress two custodial statements. First defendant contends that a statement he made to Officer Childs, that witnesses to the murder could not identify him because he was wearing a hood, was not voluntarily given and should have been suppressed. We disagree.

When reviewing a trial court's determination of the voluntariness of a confession, this Court must examine the entire record and make an independent determination. The trial court's findings of fact will not be reversed unless they are clearly erroneous. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992). In examining the admissibility of a custodial statement, we consider the totality of the circumstances surrounding the making of the statement to determine whether it was freely and voluntarily made. *People v Haywood*, 209 Mich App 217, 225-226; 530 NW2d 497 (1995).

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

The evidence adduced at the suppression hearing shows that defendant was advised of his *Miranda*[1] rights, and he initialed and signed the rights form. Defendant did not request counsel when he signed the form nor did he refuse to speak with Childs. After reviewing the lower court record, we find no evidence that Childs exerted psychological or physical coercion on defendant. Although defendant claims that Childs forced him into making a statement, no evidence beyond defendant's own testimony supports this contention. Moreover, the trial court made specific findings of fact that demonstrated a careful analysis of all the testimony presented. In cases such as this, where our independent review of the record is in accord with the findings of the trial court, we defer to the trial court's superior ability to view the evidence and the witnesses. *People v Marshall*, 204 Mich App 584, 587-588; 517 NW2d 554 (1994). Accordingly, we affirm the trial court's decision to admit defendant's statement to Childs into evidence.

Defendant also contends that the trial court should have suppressed his statement to Officer Henahan because defendant asserted his right to counsel before he made the statement. Henahan testified that, pursuant to what he believed was the prosecutor's policy, he did not allow an attorney to see defendant because, although the attorney claimed that defendant's mother had retained him, he could not state defendant's mother's name or telephone number. Nonetheless when defendant indicated that he wished to speak to an attorney, Henahan stopped questioning him. According to the officer's testimony, defendant, on his own initiative, told Henahan that he could "let Jay go. He didn't do anything."

The Michigan Supreme Court has held that the failure of the police to inform a defendant that counsel has been retained and is immediately available to him precludes a knowing and intelligent waiver of counsel and of the right to remain silent. *People v Bender*, 452 Mich 594, 597, 620; 551 NW2d 71 (1996). However, in this case, defendant *asserted* both his right to counsel and to remain silent upon being read his *Miranda* rights by Henahan. According to the testimony of both the officer and defendant, Henahan complied with defendant's assertion of his rights and did not continue to interrogate defendant. Therefore, defendant's right to counsel was not violated.

Moreover, defendant's statement to Henahan was a product of his own initiation. If an accused who has previously invoked his Fifth Amendment right to counsel initiates further communication with the police, the statements made as a result of that communication are admissible because defendant is deemed to have waived his previously invoked right to counsel. *People v Crusoe*, 433 Mich 666, 693 n 44; 449 NW2d 641 (1989). Because defendant's statement to Henahan was a product of his own initiation, rather than the result of police questioning, the trial court properly found that the statement was admissible.

Finally, we note that defendant testified at the hearing to a somewhat different rendition of the facts. In its detailed findings of fact, the trial court weighed the credibility of all of the witnesses, and determined that defendant's testimony could not be trusted. This Court generally defers to the trial court's superior ability to judge the credibility of the witnesses. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). Accordingly, we affirm the trial court's refusal to suppress defendant's statement to Henahan.

II

Next defendant argues that the trial court erred in denying his motion for directed verdict on the first-degree premeditated murder charge. We disagree. When ruling on a motion for a directed verdict, the trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by using the same standard as the trial court. *People v Daniels*, 192 Mich App 658, 665; 482 NW2d 176 (1992).

To establish first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim and the act of killing was deliberate and premeditated. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). 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 all the facts and circumstances surrounding the incident, including the parties' prior relationship, the actions of the accused both before and after the crime, and the circumstances of the killing itself. *Id*.

We believe that the prosecution presented sufficient evidence to justify the submission of the first-degree premeditated murder charge to the fact finder. The inculpatory evidence presented at trial included: 1) Sandra Cartwright's testimony that Ursula Jackson told her that Butter (which was defendant's nickname) had shot the victim; 2) Ralph Cartwright's testimony that he saw defendant chasing after the victim and shooting him with gun; 3) Edward Allen's testimony that defendant admitted to him that he shot a person; 4) a footprint found near the scene, which was consistent with a boot print taken from a boot of defendant's; and 5) an empty ammunition box of .40 caliber bullets and a .40 caliber shell found in defendant's home, which matched the .40 caliber shell casings found in the streets and areas surrounding Sandra Cartwright's home. Additionally, according to Officer Childs' testimony, defendant told her that witnesses could not have seen his face at the crime scene because he was wearing a hood. That evidence, and all reasonable inferences drawn therefrom, is sufficient to establish the elements of first-degree premeditated murder.

However, defendant claims that because the only bullet casing found at his home was a .40 caliber bullet, and the fatal bullet that killed the victim was a .32 caliber bullet, defendant could only have acted as aider and abettor. Defendant argues that there was insufficient evidence of aiding and abetting to permit a first-degree murder charge to go to the jury. We disagree.

To convict a person as an aider and abettor, the prosecutor must show that (1) a crime was committed either by the defendant or by some other person; (2) the defendant performed acts or gave encouragement that aided and assisted in the commission of the crime; and (3) the defendant either intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving the aid or encouragement. *People v Usher*, 196 Mich App 228, 232-233; 492 NW2d 786 (1992).

In the case at bar, Ralph Cartwright testified that he observed Jay Clay driving his Black Honda Accord near the Cartwright house prior to the shooting. Ralph also observed a person enter Clay's car after the shooting. Ralph further testified that Clay and defendant were friends, and he had previously seen them together. Moreover, Edward Allen testified that defendant told him that he and Clay were "rap partners" and that they had been involved in killing a person together. We believe, therefore, that the evidence presented by the prosecution was sufficient to warrant submission of the first-degree murder charge, under an aiding and abetting theory, to the jury.

III

Lastly, defendant argues that the trial court erred in denying his motion for new trial. We disagree. A motion for new trial may be granted where the verdict is against the great weight of the evidence or to prevent an injustice. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993). The trial court may also grant a motion for new trial if it finds that the testimony of the witnesses for the prevailing party was not credible. *Id*. at 477. We review the trial court's grant or denial of a motion for new trial for an abuse of discretion. *Id*.

In this case, the evidence for defendant was not so overwhelming, nor the witnesses for the prosecution so incredible, as to render the verdict unjust. Thus, the trial court's denial of defendant's motion for new trial was not an abuse of its discretion.

Affirmed.

/s/ Myron H. Wahls
/s/ Hilda R. Gage
/s/ Wesley J. Nykamp

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966).