STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE DEAN KELLY,

Defendant-Appellant.

UNPUBLISHED
May 20, 1997

No. 183620
Calhoun Circuit Court
LC No. 94-001954-FC

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury 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 28.424(2). Although defendant was sixteen years of age at the time he committed the instant offenses, he was sentenced as an adult to two years' imprisonment for the possession of a firearm conviction and a mandatory term of life in prison without parole for the murder conviction. We affirm.

Defendant first argues on appeal that insufficient evidence was presented during trial from which a reasonable jury could conclude that defendant acted with premeditation and deliberation when killing the victim. We disagree. In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515, modified 441 Mich 1201; 489 NW2d 748 (1992). "Inherent in the task of considering the proofs in the light most favorable to the prosecution is the necessity to avoid a weighing of the proofs or a determination whether testimony favorable to the prosecution is to be believed. All such concerns are to be resolved in favor of the prosecution." *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993). In addition, when deciding this issue, this Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Wolfe, supra*, 514.

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.

People v 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" and may be established through evidence of the following factors: "(1) the prior relationship of the parties; (2) the defendant's actions before the killing; (3) the circumstances of the killing itself; and (4) the defendant's conduct after the homicide." *Id*. Moreover, intent and premeditation may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Due to the difficulty of proving an actor's state of mind, minimal circumstantial evidence, and the reasonable inferences which arise therefrom, is sufficient to satisfy the elements of a crime. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991); *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

Here, we find that although the evidence may not *compel* the conclusion that defendant's acts were done with premeditation and deliberation, the evidence is sufficient to avoid the finding that the jury's verdict was based on mere speculation. See *People v O'Brien*, 89 Mich App 704, 710, 712; 282 NW2d 190 (1979). The evidence presented at trial indicated that defendant and the victim played video games during the early afternoon on May 3, 1993, that they engaged in a heated debate over who won, that defendant had a .22-caliber handgun in his possession, and that he left the premises for approximately six hours and later returned, at which time he and the victim resumed verbal confrontation. Then, while on the front porch of an apartment building, defendant was heard threatening to fight the victim and was seen pulling a gun out from under the couch he was sitting on and placing it into his pocket.

Thereafter, defendant walked to the road where he asked Caldwell (a witness who was present when the shooting occurred) for a ride, stating that he was "about to pop that nigger," and after Caldwell refused, he again approached the porch where the victim and two other men were standing. Approximately two minutes later Caldwell heard three shots and witnessed defendant run from the apartment building toward Elm Street. Following the shooting, defendant was seen running down Elm Street to a small park trail alongside the river, where a witness reported hearing a splash in the water. The .22-caliber handgun used to commit the murder was later found by police in the river. Finally, defendant reported nothing to the police and left Michigan the day after the shooting.

We conclude that this evidence presents a prior relationship establishing a motive or purpose for the killing, a weapon that was positioned in preparation for the homicide and conduct subsequent to the killing that suggests the existence of a plan. Moreover, given the evidence presented, we find that a reasonable jury could reasonably reject the conclusion that defendant instead acted in the heat of passion or with "hot blood." The evidence presented indicated that, although defendant and the victim argued throughout the day, the argument did not escalate into a physical confrontation. Further, rather than pulling the gun during a verbal exchange itself, the evidence suggests that defendant instead fired at the victim's backside and at a point when little or no arguing was heard.

Defendant next argues that the trial court abused its discretion in allowing the late endorsement of a prosecution witness three days into the trial. We again disagree. After the prosecution offered its opening statement and presented the testimony of two witnesses, it moved for the endorsement of a

witness who was allegedly present when the shooting in question took place and whom the police interviewed both at the scene and later at the police station. To explain the late endorsement of Angel Caldwell, the prosecution explained that when Caldwell was initially interviewed by police, she had given them a false name and address. Therefore, rather than issuing a subpoena to Caldwell, the prosecution instead unsuccessfully tried to secure the presence of a "Tonya Singer," a name that also appeared on its witness list and was given to the defense. Defendant now contends that Caldwell was a "known" res gestae witness for whom the prosecution had a duty to exercise due diligence in securing for trial.

Before its amendment in 1986, MCL 767.40; MSA 28.980 required the prosecutor to use due diligence to endorse and produce all res gestae witnesses. *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995). However, under the amended statute, the Legislature has eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be res gestae witnesses and has required only that the prosecution give initial and continuing notice of all *known* res gestae witnesses, specifically identify witnesses the prosecutor intends to produce and provide law-enforcement assistance to investigate and produce witnesses the defense requests. *Id*. at 288-289. Therefore, the statute in question, MCL 767.40a; MSA 28.980(1), "does not impose an obligation on the prosecutor to discover and produce unknown witnesses, either by the exercise of due diligence or some lesser burden " *Id*. at 287.

Here, we conclude that in accordance with the statute, what was known by the prosecutor was, in fact, provided to the defense. There is no question that the prosecutor advised defendant of all *known* res gestae witnesses, including "Tonya Singer," at least to the extent that that information had been made available to the prosecutor. Moreover, it is clear that although the prosecutor knew of at least one witness who allegedly had been present at the scene and had been interviewed by police, it was unaware of the existence of Angel Caldwell until after the trial started. Therefore, the prosecutor was not required to give advance notice of unknown witnesses. *Burwick, supra* at 291.

After the prosecutor has provided notice to the defense of all known res gestae witnesses, and has designated who will be produced at trial, MCL 767.40a(1); MSA 28.980(1)(1) allows the prosecution to delete from or add to the list of witnesses it will produce "at any time" as long as "good cause" is shown. *Burwick, supra* at 291. Endorsement or deletion from this list is within the discretion of the trial court and is reversible only where an abuse is found. *Id*.

We believe that there is no evidence to indicate that the prosecutor should have been suspicious of or question the assumed name that Caldwell gave to the police, at least until the subpoenas for trial were issued. Nor was there any evidence that the prosecution intended to surprise the defendant mid-trial. The trial court correctly concluded that the prosecutor made an honest effort to determine Caldwell's true identity after the discrepancy was brought to his attention.

We further believe that the court made every effort possible to protect defendant's right to a fair trial by making certain that the defense had access to all documents concerning Caldwell, as well as the opportunity to interview Caldwell. The trial court went so far as to give defendant the option to recall

any witnesses for the purpose of cross-examining them and the option to seek a continuance if defense counsel deemed it necessary after speaking to Caldwell.

Next, defendant argues that the sentencing court abused its discretion when it determined that he should be sentenced as an adult rather than a juvenile. More specifically, defendant contends that the court clearly erred in finding that he was not amenable to treatment within the juvenile system, because it came to that conclusion without first considering defendant's treatment and progress within the Ohio reformatory school where defendant was incarcerated for six months before his return to Michigan for trial in the present case. We disagree.

Pursuant to MCL 769.1(3); MSA 28.1072(3) and MCR 6.931(A), the trial court must conduct a juvenile sentencing hearing to determine if the best interests of the juvenile and the public would be served better by placing the minor in the custody of the juvenile offender system or by sentencing the juvenile as an adult. *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994). MCR 6.931(E)(3) provides a list of criteria to be considered by the court in making its determination, with each given weight as appropriate to the circumstances.

On appeal, we review the lower court's findings of fact for clear error, reversing only when it is left with a firm and definite conviction that a mistake has been made. The court's ultimate determination is reviewed for an abuse of discretion, where we look to the seriousness and overall circumstances surrounding the offender and the offense. *People v Passeno*, 195 Mich App 91, 103-105; 489 NW2d 152 (1992). Our review of the record indicates that the trial court carefully considered each of the necessary factors, made findings that were clearly supported by the evidence and did not abuse its discretion in deciding to sentence defendant as an adult.

The evidence presented during the juvenile sentencing hearing established that defendant had an extensive prior criminal record that was escalating in severity, that defendant had committed the instant homicide offense with no remorse or justification, that defendant had little concern or respect for others and would likely be a danger to society if released at the age of twenty-one. Further, we find that although the court may not have had specific details concerning defendant's six-month stay in Ohio juvenile facilities, there was overwhelming evidence presented from which the lower court could conclude that defendant was not amenable to treatment within the juvenile system. Evidence was produced indicating that defendant had had a lengthy, repetitive, and unsuccessful involvement with juvenile authorities while in Michigan, that he had failed to show any progress or willingness to change his behavior and that he was in fact defiant and uncooperative toward those who attempted to administer therapy and other forms of treatment. Moreover, there was evidence that defendant's behavior was actually getting worse, as defendant himself admitted when making specific reference to his incarceration in Ohio.

Finally, defendant argues that his mandatory sentence of life in prison without parole constitutes cruel and unusual punishment and, therefore, must be vacated. We disagree, and note that this Court rejected an identical argument in *People v Launsburry*, 217 Mich App 358, 363; 551 NW2d 460 (1996).

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman