STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANTONIO DORELL SWANSON,

Defendant-Appellant.

UNPUBLISHED
September 29, 1998

No. 196727
Recorder's Court
LC No. 95-011877

Before: Gribbs, P.J., and Sawyer and Doctoroff, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions 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). Defendant was sentenced to consecutive sentences of two years' imprisonment for the felony-firearm conviction, and life imprisonment without the possibility of parole for the first-degree murder conviction. We affirm.

Defendant claims that the trial court erred in denying his motion for a new trial because his first-degree murder conviction was against the great weight of the evidence and was not supported by sufficient evidence. He first argues that he was not the shooter, but if this Court finds that he was the shooter, he could not be guilty of first-degree murder because the shooting was not premeditated. We disagree. Whether to grant new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

When considering whether there was sufficient evidence to convict a defendant, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

The elements of first-degree, premeditated murder are: (1) the defendant intentionally killed the victim; and, (2) that the act of killing was premeditated and deliberate. *People v Graves*, 224 Mich App 676, 678; 569 NW2d 911 (1997). "Premeditation and deliberation require sufficient time to allow the defendant to take a 'second look.'" *Id*. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). "Premeditation 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.*

The prosecution presented evidence that defendant was involved in an argument at the victim's home. The victim told defendant to leave but, before leaving, defendant told the victim, "we'll be back." Defendant drove away but returned after two to five minutes. Defendant got out of the car with a gun, and shot the gun twice. After the first shot, the victim raised his hands above his head. The second shot struck and killed the victim. Evidence was presented that after the shooting, defendant got back into the car and drove away. This evidence, viewed in the light most favorable to the prosecution, was sufficient to prove, beyond a reasonable doubt that defendant acted with intent to kill formed after premeditation and deliberation. Therefore, there was sufficient evidence to sustain defendant's conviction.

Although one witness to the shooting could not identify defendant as the shooter, five other witnesses positively identified defendant as the shooter. The evidence presented a credibility contest regarding whether defendant was the shooter. Further, defendant claims that the shooting was done in the heat of passion because it happened within minutes of an argument, and because only two shots were fired; however, defendant did leave after the argument and then returned and shot twice, hitting the victim with the second shot. This also presented a credibility contest regarding whether the shooting was done in the heat of passion or was premeditated and deliberate. "[R]esolving credibility questions is the exclusive province of the jury even where the trial court would have reached a different result." *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993). The jury's finding that defendant was the shooter, and that he shot the victim with the intent to kill formed after premeditation and deliberation, was not against the clear weight of the evidence. Therefore, it was not an abuse of discretion for the trial court to deny defendant's motion for a new trial.

Defendant next argues that the trial court erred in finding that the prosecution exercised due diligence to try to produce a missing witness, and that the missing witness' testimony was improperly admitted. We disagree. A finding of due diligence is a finding of fact which will not be set aside by this Court absent clear error. MCR 2.613; *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). Further, the trial court has the discretion to admit evidence, and its ruling on admissibility is reviewed for an abuse of discretion. *Id.*

Former testimony of a witness is admissible in a later proceeding where that witness is unavailable to testify and the party against whom the testimony is being admitted had an opportunity to cross-examine the witness at that time. MRE 804(b)(1); *Briseno, supra*, 211 Mich App 14. The declarant is unavailable when he is absent from the hearing and the proponent of his

statement has used due diligence to procure his attendance. MRE 804(a)(5); *Briseno, supra,* 211 Mich App 14. The party wishing to have the declarant's former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the declarant's presence at trial. The test of good-faith efforts to secure the declarant's presence at trial does not require a determination that more stringent efforts would not have procured the testimony. *Id.*

The officer in charge of the case attempted to serve a subpoena on the witness, but was unsuccessful in finding her. The trial began on Tuesday, April, 16, 1996, the officer in charge did not try to locate the missing witness until Friday, April 12, 1996, but other police officers tried to locate her at least by April 5, 1996, and maybe prior to that. The officer's attempts to locate the witness included checking an address that the witness gave in a witness statement, and an address listed on a previous subpoena, contacting relatives and leaving his name, telephone number, and indicating why he was trying to contact her, and checking various jails, hospitals, the county morgue, social services, utility companies, the area post office, and the telephone company. The trial court's finding of due diligence was not clearly erroneous. The admission of preliminary examination testimony, after the trial court had found due diligence, was not an abuse of discretion because defense counsel stated, "admittedly, defense counsel cross-examined the missing witness at the preliminary examination." MRE 804(b)(1); *Briseno, supra,* 211 Mich App 16.

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Martin M. Doctoroff