

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PIERRE HARPER, a/k/a
DEON HARPER,

Defendant-Appellant.

UNPUBLISHED

September 29, 1998

No. 200600

Recorder's Court

LC No. 96-001306

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for first-degree premeditated 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 a term of natural life for the first-degree murder conviction, and two years for the felony-firearm conviction, the two sentences to run consecutively. We affirm.

Defendant's first claim of error on appeal is that the trial court was clearly erroneous in finding due diligence on the part of the prosecution in its attempts to produce a witness, Cara Mathis, for trial. We disagree. A finding of due diligence is a finding of fact, which we review for clear error. MCR 2.613; *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Briseno, supra*. An abuse of discretion will be found only if an unprejudiced person, considering the facts on which the trial court relied in making its decision, would conclude that there was no justification for the ruling. *Briseno, supra*. To determine whether the prosecution has demonstrated due diligence in attempting to locate and produce a res gestae witness, the test is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it. *People v Watkins*, 209 Mich App 1, 4; 530 NW2d 111 (1995).

Our review of the lower court record reveals that Officer Wimmer called several telephone numbers, went to the address Mathis gave as her residence, left telephone messages, spoke with a

representative of her employer, spoke with the post office, spoke with the Department of Social Services, spoke with the Detroit Board of Education, checked several jails and morgues, and attempted to contact Mathis' sister in several different ways, all in an attempt to locate Mathis. Given this factual setting, it cannot be said that the trial court was clearly erroneous in finding due diligence on the part of the prosecution in attempting to produce Mathis as a witness. Therefore, the trial court did not abuse its discretion in admitting Mathis' preliminary examination testimony into evidence.

Defendant argues that the prosecution should have done more in its attempts to produce Mathis as a witness. However, this argument cannot succeed because it imposes a duty on the prosecution which the test for due diligence does not require. Again, the test is whether good-faith efforts were made to procure the testimony of the witness, not whether increased efforts would have produced it. *Watkins, supra*, 209 Mich App 4. Defendant's arguments that the prosecution should have done more is contrary to the requirements for a finding of due diligence.

Defendant's second claim of error on appeal is that the trial court erred in failing to grant defendant's motion for directed verdict because there was insufficient evidence presented for the case to be submitted to the jury. Specifically, defendant claims that there was insufficient evidence of premeditation and deliberation. We disagree. In reviewing a trial court's decision regarding a motion for a directed verdict, we view the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine if a rational factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and 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." *Graves, supra*. These elements may be inferred from circumstances surrounding the killing. *Graves, supra*. 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. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995).

In the present case, there is a basis for concluding that defendant had adequate time for reflection. The testimony of Melvia Browning established that Hale and defendant were speaking with each other at the Apex Bar, and that Browning was sitting approximately ten to twelve feet from them. Hale told defendant that if defendant "messed" with his family, Hale would kill him. However, defendant did not respond to this threat. Defendant then left the bar sometime before midnight, and returned sometime later in the early morning hours. Defendant entered the bar, looked around, and then proceeded to the back of the bar near the bathroom. Defendant emerged from the rear of the bar and stood there for a few moments. At this time, Hale was speaking with a woman. Defendant approached Hale from behind and started shooting. Browning testified that she heard at least nine shots.

Viewing the evidence presented up to the time the motion for directed verdict was made, in the light most favorable to the prosecution, a rational factfinder could conclude that defendant formed the

homicidal intent before he left the bar, and then left the bar. A period of time then elapsed before defendant returned and began to shoot Hale. A rational factfinder could conclude that this time span between Hale threatening defendant and defendant shooting Hale established premeditation and deliberation by defendant.

Affirmed.

/s/ Roman S. Gibbs

/s/ David H. Sawyer

/s/ Martin M. Doctoroff