STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HENRY SAMS III,

Defendant-Appellant.

UNPUBLISHED
December 11, 1998

No. 201649
Recorder's Court
LC No. 95-006400

Before: Saad, P.J., and Kelly and Bandstra, JJ.

PER CURIAM.

Defendant was convicted following a bench trial of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to consecutive terms of two years' imprisonment for the felony-firearm conviction and life imprisonment for the second-degree murder conviction. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial committed error by refusing to review the preliminary examination transcripts when ruling on defendant's motion to quash the bind over, dismiss the charges, or reduce the charges following the preliminary examination. We agree, but find the error harmless. When reviewing a magistrate's decision to bind over a defendant for trial, a trial court must consider the entire record of the preliminary examination de novo, and may reverse only if it appears on the record that the magistrate abused his or her discretion. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

The magistrate "must bind the defendant over for trial if, at the conclusion of the preliminary examination, the [magistrate] finds 'probable cause' to believe that the defendant committed the crime." *Id.* at 558. Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Justice (After Remand),* 454 Mich 334, 344; 562 NW2d 652 (1997). To establish that a crime has been committed, a prosecutor does not need to prove each

element of the crime beyond a reasonable doubt, but some evidence of each element must be presented. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). When determining whether the crime has been established, the magistrate is not limited to determining whether evidence on each element has been presented, but rather, the magistrate is required to make a determination after an examination of the whole matter. *People v Stafford*, 434 Mich 125, 133; 450 NW2d 559 (1990), quoting *People v King*, 412 Mich 145, 154; 312 NW2d 629 (1981). Issues raised by defendant regarding the preliminary examination will not be considered on appeal where any error would have been harmless. *People v Staffney*, 187 Mich App 660, 663; 468 NW2d 238 (1991).

The elements of first-degree murder are: (1) the intentional killing of another; and (2) the 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." *Id.* The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. 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 trial court's failure to review the entire preliminary examination record is harmless error because the magistrate properly bound defendant over on the charge of first-degree murder. Regarding the first element of first-degree murder, the intentional killing of another, the prosecution presented evidence that that defendant put a gun to the victim's back and shot him, and both defense counsel and the prosecutor stipulated that the victim died from a gunshot wound to the back. As to premeditation and deliberation, evidence was presented that, before the shooting, defendant was looking for the victim and stated that the victim had "played" him and defendant was going to "check" him. Defendant was angry and upset. The victim arrived a couple minutes after defendant, and defendant asked the victim why he played him. Defendant then started beating the victim on the head with the butt of the gun. Defendant then shot the victim, and immediately after the shooting, defendant jumped in a car and left. Therefore, there was probable cause to believe that defendant committed the crime. *Orzame*, *supra*. Defendant was properly bound over for trial on the charge of first-degree murder. The trial court's failure to review the entire preliminary examination record was harmless error.

Defendant's next argument is that his statement to the police should have been suppressed because he was not competent to waive his *Miranda*[1] rights. We disagree. This Court must give deference to the trial court's findings at a suppression hearing. *People v Cheatham*, 453 Mich 1, 29-30 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996). This Court reviews the entire record de novo, but will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights "unless that ruling is found to be clearly erroneous." *Id.* at 30 (Boyle, J.), 44 (Weaver, J.).

In the present case, defendant was determined to be competent to waive his *Miranda* rights by the Recorder's Court Psychiatric Clinic, and both defense counsel and the prosecution stipulated to the admission of the Clinic's report at trial. The trial court's acceptance of the recommendation of the

Recorder's Court Psychiatric Clinic was proper, and its finding that defendant was competent to waive his *Miranda* rights was not clearly erroneous.[2]

Defendant's third argument is that the trial court abused its discretion in determining that the prosecution exercised due diligence to produce two missing res gestae witnesses. We disagree. "A trial court's determination of due diligence will not be overturned on appeal absent an abuse of discretion. That determination is a factual matter, and the court's findings will not be reversed unless clearly erroneous." *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992) (citation omitted). The test for due diligence 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).

Neither missing witness could be found over a period spanning several days, although a police officer visited addresses the witnesses had listed on their witness' statements, which were also their mothers' addresses. The officer also checked for them at addresses he got from the police computer. The officer further contacted other witnesses and made several telephone calls to various agencies in an effort to locate the missing witnesses. The trial court's determination that the prosecution had shown due diligence in attempting to locate and produce the missing res gestae witnesses was not clearly erroneous.

Defendant also argues that the court's verdict was against the great weight of the evidence. We disagree. First, granting a new trial on the ground that the verdict is against the great weight of the evidence is only proper where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Defendant was the only person to testify that the victim was reaching for a gun. Several witnesses testified that the victim was unarmed. One witness testified that defendant started beating the victim and, during that time, the victim put up his arms with his elbows facing out as if to protect his face and then defendant shot him. Also, in defendant's statement to the police, he stated that when the victim pulled up and got out of the car, defendant grabbed him and started hitting him, then pulled out a gun and shot him.

To the extent that defendant is arguing that the court's verdict was against the great weight of the evidence because the testimony of the prosecution's witnesses was inherently incredible and that the trial court improperly found that defendant's testimony was inherently incredible, we conclude otherwise. Resolving credibility questions is the exclusive province of the trier of fact. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993). The trial court apparently found defendant to be less credible than the witnesses for the prosecution. There was no error in this regard, and the trial judge, as trier of fact in this bench trial, had the duty to weigh the testimony and assess the credibility of the witnesses. *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982).The verdict was not against the great weight of the evidence, and the evidence does not preponderate heavily against the verdict.[3]

Defendant's final argument is that he is entitled to resentencing because his sentencing guidelines were improperly scored and his sentence was disproportionately severe. We disagree. "Appellate

courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied." *People v Mitchell*, 454 Mich 145, 178; 560 NW2d 600 (1997). The guidelines are tools and do not convey substantive rights to defendants. *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990). And, "because [the Supreme] Court's guidelines do not have the force of law, a guidelines error does not violate the law. Thus, the claim of a miscalculated variable is not in itself a claim of legal error." *Mitchell, supra* at 175. Review of challenges to the sentencing guidelines is limited. *Id.* at 175-178. "Where the trial court clearly explains the sentence and states that it is an appropriate sentence, . . . the proper scoring of the guidelines is mooted." *People v Phillips (After Second Remand)*, 227 Mich App 28, 38; 575 NW2d 784 (1997). In this case, the trial court clearly explained why it was imposing the life sentence. Therefore, defendant's argument regarding the proper scoring of the guidelines is moot.

As to the issue of proportionality, appellate review of a defendant's sentence is limited to whether the sentence violates the principle of proportionality. *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). The principle of proportionality requires sentences to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *Paquette, supra*.

Defendant was twenty years old at the time of sentencing. Defendant had several contacts with the criminal justice system as a juvenile and as an adult. In fact, defendant was on probation in another state when he committed the instant offense. Further, in this case, defendant shot the victim over a pack of cigarettes. Defendant spent time acquiring a weapon, looking for the victim, and then shot him after beating him. Considering the offense and the offender, defendant's sentence of life imprisonment for his second-degree murder conviction is proportionate, and therefore, was not an abuse of the trial court's discretion. *Milbourn, supra; Paquette, supra.*

We affirm.

/s/ Henry William Saad
/s/ Michael J. Kelly
/s/ Richard A. Bandstra

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

[2] It is unclear from defendant's appellate brief if he is solely arguing that he did not waive his *Miranda* rights on grounds other than he was incompetent to waive them or if he is also arguing that any waiver was not voluntary. In any event, assuming that defendant is arguing more than his competency to waive his rights, we conclude, as did the trial court, that defendant's statement was freely and voluntarily given. *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992).

[3] Further, contrary to defendant's vague assertion, sufficient evidence did exist to convict defendant. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find that the essential elements of second-degree murder and felony-firearm were proven beyond a reasonable doubt. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996), amended 453 Mich 1204; 551

NW2d 163 (1996); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). In addition, contrary to defendant's argument that the trial court should have considered the lesser included offense of manslaughter, the record clearly shows that the trial court did consider a manslaughter offense, but concluded that there was nothing in the evidence to reduce the crime to manslaughter.