

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANUEL L. SPILLMAN,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 203438

Recorder's Court

LC No. 96-003268

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of 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 natural life without the possibility of parole for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

First, defendant argues that there was insufficient evidence to support his conviction of first-degree murder, or in the alternative, that the trial court erred in denying defendant's motion for directed verdict. We disagree. When reviewing a trial court's denial of a motion for directed verdict, this Court must view the evidence presented by the prosecution, up to the time the motion was made, in the light most favorable to the prosecution to determine if the evidence was sufficient to justify a reasonable trier of fact to find guilt beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). When reviewing a claim of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Kozyra*, 219 Mich App 422, 428; 556 NW2d 512 (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). "The length of time necessary to 'measure

and evaluate a choice before it is made is incapable of precise determination'; all that is necessary is enough time to take a 'second look' at the actions contemplated." *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993). 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. *Graves, supra*, 224 Mich App 678; *People v Haywood*, 209 Mich App 217, 229; 530 NW2d 497 (1995); *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Intent is a question of fact to be inferred from the circumstances by the trier of fact. *People v Flowers*, 191 Mich App 169, 178; 477 NW2d 473 (1991).

Defendant argues that the evidence was insufficient to establish premeditation and his intent to kill in order to support defendant's conviction of first-degree murder. However, sufficient evidence of a pause in which defendant "had the ability to engage in the 'cool and orderly reflection' necessary to elevate his crime from second-degree murder to first-degree murder" was presented. *People v Plummer*, 229 Mich App 293, 302; 581 NW2d 753 (1998). While unarmed, defendant was involved in a fight with Trice in the Indigo Ballroom. After defendant was escorted from the Indigo Ballroom because of the argument, he "huddled up" with his friends in front of the door. Then defendant walked across the street to his car. When he returned from his car, he was carrying a handgun. From the evidence presented, the jury could infer that defendant went to his car to retrieve a gun. Moreover, defendant gave his girl friend the keys and told her to start the car as he returned to the Indigo Ballroom. This evidence was sufficient to establish not only that defendant had time to premeditate the killing but he also had the capacity for cool-headed reflection. *Plummer, supra*, 229 Mich App 301-302.

Kiambu Batts, who was about five feet away from defendant and witnessed the shooting, testified that from where he was standing in front of the Indigo Ballroom, he could see people on the stairs. Melvin Thomas, the bouncer, testified that Trice was on the stairs. Thomas and about two or three other people, including Rudolph Spain, Jr., the deceased, were trying to get Trice, who was toward the bottom of the stairs, to go back upstairs. Trice was belligerent and fighting to get downstairs.

From this evidence the jury could have inferred that defendant also saw Trice on the steps and that when he cocked his gun and aimed at the window of the plexiglas door, he intended to shoot and kill Trice. However, the bullet did not hit Trice; it hit and killed Spain. Under the doctrine of transferred intent, defendant's intent to kill Trice could be considered sufficient to satisfy the intent requirement as to the killing of Spain, the actual victim. *People v Youngblood*, 165 Mich App 381, 388; 418 NW2d 472 (1988). It is only necessary that defendant have the intent to kill, not that the intent to kill was directed at a particular person. *People v Lovett*, 90 Mich App 169, 172; 283 NW2d 357 (1979). Accordingly, the prosecution presented sufficient evidence to support defendant's conviction for first-degree premeditated murder.

Defendant also argues that the trial court abused its discretion when it allowed the prosecution to admit into evidence Kevin Colbert's preliminary examination testimony because the trial court

erroneously concluded that the prosecution had exercised due diligence in its efforts to secure Colbert's presence at trial. We disagree. Because a finding of due diligence is a finding

of fact, this Court reviews it for clear error. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). We review a trial court's ruling on admissibility of evidence for an abuse of discretion. *Briseno, supra*, 211 Mich App 14.

The Sixth Amendment of the United States Constitution, and art 1 §20 of the Michigan Constitution of 1963, "provide for face-to-face confrontation between a defendant and his accusers at trial." *People v Bean*, 457 Mich 677, 682; 580 NW2d 390 (1998); *People v Dye*, 431 Mich 58, 63; 427 NW2d 501 (1988). Defendant's right to confrontation is important because it enables the jury to judge the witnesses' demeanor. *Dye, supra*, 431 Mich 63. However, a transcript of a witness' prior testimony may be offered as evidence 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); *Dye, supra*, 431 Mich 65; *Briseno, supra*, 211 Mich App 14. The witness is unavailable when he is absent from the hearing and the proponent of his statements has used due diligence to procure his attendance. MRE 804(a)(5); *Briseno, supra*, 211 Mich App 14. The party wishing to have the witness' former testimony admitted must demonstrate that it made a reasonable, good-faith effort to secure the witness' presence at trial. *Briseno, supra*, 211 Mich App 14. The lengths to which the prosecution must go to produce a witness is a question of reasonableness. *People v Conner*, 182 Mich App 674, 681; 452 NW2d 877 (1990). "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).

In the instant case, the prosecution requested that the trial court admit into evidence Colbert's preliminary examination testimony because Colbert was unavailable. The trial court found that Sergeant Peterson made extraordinary efforts to find Colbert. Because the trial court found that extraordinary diligence was exercised, it excused the fact that Sergeant Peterson was only assigned the case four days before trial began. The trial court allowed the prosecution to read Colbert's preliminary examination testimony into the record at trial.

Based on the facts and circumstances of this case, the trial court's conclusion that the prosecution established a diligent, good-faith effort to produce Colbert was not clearly erroneous. *Dye, supra*, 431 Mich 67. Colbert testified at defendant's April 23, 1996, preliminary examination. Sergeant Peterson indicated that there were no notes in defendant's file indicating that there were any concerns about Colbert appearing for the preliminary examination. Although, Sergeant Peterson only began his efforts three or four days before defendant's trial began, his testimony demonstrated reasonable, good-faith efforts to secure Colbert's testimony at trial. *Watkins, supra*, 209 Mich App 4. Sergeant Peterson checked with relatives who did not know where Colbert was living, with area hospitals, morgues and jails, and he checked out Colbert's known address and the addresses of Colbert's aliases. Moreover, another witness, Reuben Rambus, indicated to Sergeant Peterson that Colbert knew about the trial but would not show up unless he was personally served. Accordingly, the prosecution established due diligence.

In addition, Colbert's preliminary examination testimony "bears the satisfactory indicia of reliability necessary for it to be read to the jury." *Conner, supra*, 182 Mich App 683. Colbert was thoroughly cross-examined at the preliminary examination by the same attorney that represented defendant at trial. Accordingly, Colbert's preliminary examination testimony was admissible as Colbert was unavailable and defendant had an opportunity to cross-examine Colbert at the preliminary examination. MRE 804(b)(1); *Dye, supra*, 431 Mich 65; *Briseno, supra*, 211 Mich App 14.

Affirmed.

/s/ Martin M. Doctoroff

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald