

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW KEVIN BONDS,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 203802

Recorder's Court

LC No. 96-008861

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted 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). Defendant was sentenced to forty to sixty years' imprisonment for the second-degree murder conviction, the sentence to run consecutively to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the magistrate abused its discretion in binding defendant over on a charge of first-degree murder, and the circuit court erred in denying his motion to quash because there was no evidence of premeditation and deliberation. To review a circuit court's decision regarding a motion to quash an information, this Court determines if the district court abused its discretion in binding over the defendant. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

In the present case, the victim's two young daughters testified at the preliminary examination that they, defendant, and the victim were driving from Jackson (where they lived in a shelter) to Detroit. After defendant and the victim had exited the vehicle, defendant went to a house while the victim spoke with another woman. Defendant then exited the house and shot at their mother as she was talking with another woman. The victim ran to her vehicle for safety. Defendant, however, went forward and continued to fire the gun as he stood approximately two feet from the vehicle. The victim suffered from eight gunshot wounds to her body. Defendant attempted to cover his face with a mask, but only covered his neck and mouth area. We agree with the magistrate that there was "some level" of premeditation based on a probable cause standard. See MCR 6.110(E). "Where there is credible

evidence both to support and to negate the existence of an element of the crime, a factual question exists that should be left to the jury.” *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997). Accordingly, there was no abuse of discretion in permitting the trier of fact to conclude whether the factual circumstances satisfied the requirement of premeditation and deliberation.

Moreover, in *People v Hall*, 435 Mich 599, 602; 460 NW2d 520 (1990), the Supreme Court held that “an evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error.” Defendant, however, contends that his waiver of the right to a jury trial was not knowingly and intelligently made where the circuit court denied his motion to quash. Defendant contends that he was entitled to make the waiver decision based upon the appropriate charge of second-degree murder. In *People v Oster*, 67 Mich App 490, 499-500; 241 NW2d 260 (1976), this Court found that the defendant was erroneously bound over where there was no evidence of premeditation to support a first-degree murder charge. However, this Court held that the error did not warrant reversal and did not deprive the defendant of a voluntary waiver of his right to a jury trial, stating:

While it is a general rule that where the examining magistrate abused his discretion in binding a defendant over for trial, the conviction is to be reversed and the information quashed, those remedies appear to be proper only where the evidence was insufficient to bind him over on any charge. In the case at bar, although the magistrate erred in binding defendant over on a charge which includes first-degree murder, there was no error as to the lesser included offenses of second-degree murder and manslaughter.

We must reject defendant’s request to reverse his conviction and grant a new trial on the charge of voluntary manslaughter. We cannot predicate prejudice on defendant’s subjective fears relative to the wisdom of the jury system. Defendant was not coerced into waiving his right to a jury trial. If his trial had been before a jury, any prejudice to him because of the magistrate’s error could have been cured either by the trial court or on appeal. [*Id.*, pp 499-500.]

Indeed, in the present case, any prejudice suffered from the denial of the motion to quash was cured by the trial court when it granted the motion for directed verdict of the first-degree murder charge and considered second-degree murder. Therefore, defendant cannot assert that the denial of a motion to quash the bindover resulted in coercion into waiving his right to a jury trial. *Id.*

Furthermore, the statements by defendant’s counsel indicate that the motion to quash ruling had no bearing on the waiver. After the trial court denied the motion to quash, defense counsel stated that she had one more matter to address. Defense counsel then stated that when she had visited defendant three days earlier, defendant advised her of his decision to have a bench trial. Therefore, defendant’s contention that his waiver was not knowing and intelligent due to the denial of the motion to quash is without merit as the record indicates that defendant decided to waive his right to a jury trial three days before any decision on the motion to quash.

Defendant next argues that the trial court erred in the admission of gruesome photographs. The admissibility of photographic evidence is reviewed for an abuse of discretion. *People v Anderson*, 209 Mich App 527, 536; 531 NW2d 780 (1995). Because premeditation and deliberation were at issue in the trial, the photographs were relevant. *Id.* Further, there was no jury to inflame in this case, and, if the photographs were cumulative evidence as defendant contends, then they could not have been decisive of the outcome of the case. *People v Mackey*, 168 Mich App 154, 156; 423 NW2d 604 (1988).

Lastly, defendant contends that his sentence violates the principle of proportionality, and the reasons for the departure from the sentencing guidelines were inadequate. Here, the trial court cited the terrorization of the victim's daughters because they were in the back seat of the victim's vehicle as she was repeatedly shot in the front seat. There was also evidence of an attempt to cover up the crime because the victim's body and vehicle were separated and moved to different locations. The trial court also noted defendant's pattern of criminal behavior, which included two prior felony convictions (one of which was also a second-degree murder conviction) and two prior misdemeanor convictions.

Accordingly, the reasons for departure were adequately stated, the sentence does not violate the principle of proportionality, and the sentencing court did not abuse its discretion. *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995); *People v Castillo*, 230 Mich App 442, 448-449; ___ NW2d ___ (1998).

Affirmed.

/s/ Gary R. McDonald

/s/ Kathleen Jansen

/s/ Michael J. Talbot