

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH N. WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED  
October 29, 1999

No. 205532  
Recorder's Court  
LC No. 96-004758

Before: Doctoroff, P.J., and Holbrook and Kelly, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, disinternment and mutilation of a dead body, MCL 750.160; MSA 28.357, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to life imprisonment for the second-degree murder conviction, 80 to 120 months' imprisonment for the disinternment and mutilation conviction, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred by denying his motion for a directed verdict of acquittal with respect to the first-degree murder charge because the prosecution failed to prove premeditation and deliberation. We disagree. When reviewing a trial court's decision regarding a motion for a directed verdict, this Court must consider the evidence presented by the prosecution up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997).

To convict defendant of first-degree premeditated murder, the prosecution was required to prove that defendant intentionally killed the victim and that 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, such as the prior relationship of the parties, the defendant's actions before the killing, the circumstances of the killing itself, and the defendant's conduct after the killing. *Id.*

Here, there was evidence that defendant admitted to killing the victim. The prosecution presented evidence that there were problems between defendant and the victim regarding club matters. Furthermore, there was evidence that defendant told his girlfriend that he shot the victim because the victim was trying to take his place as the leader of the club. At the party at which the victim was last seen, defendant was seen arguing with the victim. Later that night, defendant told a witness that “we took care of the problem.” When viewed in the light most favorable to the prosecution, the foregoing evidence was sufficient to support a finding that defendant killed the victim with premeditation and deliberation. Therefore, the trial court correctly denied defendant's motion for a directed verdict regarding the first-degree murder charge.

Defendant next argues that his confession was inadmissible because the prosecutor failed to establish the corpus delicti of the crime. We disagree. Whether the prosecutor sufficiently established the corpus delicti of the crime is a question of law, which we review de novo. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

Proof of the corpus delicti is required before the prosecution may introduce inculpatory statements of an accused. *People v McMahan*, 451 Mich 543, 548; 548 NW2d 199 (1996); *People v Williams*, 422 Mich 381, 388-392; 373 NW2d 567 (1985). The corpus delicti of murder requires proof of a death and proof of some criminal agency that caused the death. *McMahan*, *supra* at 549; *Williams*, *supra* at 392. Such proof must consist of evidence that is independent of the accused's confessions. *Id.* In the instant case, while the exact cause of the victim's death could not be determined, there was sufficient evidence, independent of defendant's confession, establishing the victim's death by criminal agency. Specifically, there was a history of tension and club related problems between defendant and the victim. The two were observed having a heated discussion immediately before the victim's disappearance. Finally, some of the victim's bones were removed from under the garage of a house that defendant used as his mailing address, and additional bones were later found inside a van that had been driven by defendant. Accordingly, there was no violation of the corpus delicti rule.

Next, defendant contends that the trial court abused its discretion by finding Carmen Orr unavailable to testify and allowing her preliminary examination testimony to be read into the record. We disagree. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Howard*, 226 Mich App 528, 551; 575 NW2d 16 (1997).

Orr was hospitalized during the trial and, therefore, was unavailable to testify for purposes of MRE 804(a)(4). Because Orr was unable to be present due to a physical illness, the prosecutor was not required to show due diligence in securing her presence as a witness. MRE 804(a)(4); *People v Gross*, 123 Mich App 467, 470; 332 NW2d 576 (1983). Furthermore, defense counsel admitted that he had thoroughly cross-examined Orr at the preliminary examination. MRE 804(b)(1). Under these circumstances, the trial court did not abuse its discretion by allowing Orr's prior testimony to be read into the record at trial.

Defendant next asserts that he was denied the effective assistance of counsel. We disagree. To demonstrate that he was denied the effective assistance of counsel, a defendant must show that

counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, a defendant must show that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 314. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

First, defendant claims that defense counsel was ineffective for failing to argue a violation of the corpus delicti rule at either the bind over stage or the motion to quash hearing. However, because the corpus delicti rule was not violated, defense counsel properly declined to make such an argument. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Second, defendant argues that defense counsel was ineffective because he elicited hearsay testimony from Sergeant Henahan at the preliminary examination that was later used by the prosecutor when arguing against defendant's motion to quash the first-degree murder charge. However, in finding sufficient evidence to affirm the district court's decision to bind over defendant for trial on the first-degree murder charge, the trial court mainly relied on Carmen Orr's testimony and defendant's actions after the victim was killed. Thus, defendant has failed to show that he was prejudiced by his counsel's elicitation of hearsay statements from Sergeant Henahan at the preliminary examination. *Pickens, supra* at 314.

Third, defendant asserts that defense counsel was ineffective for failing to have defendant's entire 1983 statement read into the record. However, given that evidence of polygraph results is not admissible at trial, it would have been fruitless to challenge the prosecutor's deletion of a reference to polygraph examination results in defendant's 1983 statement. *People v Barbara*, 400 Mich 352, 364; 255 NW2d 171 (1977). Thus, defendant's argument that defense counsel was ineffective because he failed to challenge the reference to the polygraph results in defendant's 1983 statement is without merit. *Darden, supra*.

Fourth, defense counsel's decision to reserve his opening statement until after the prosecution had rested its case was a matter of trial strategy. This Court will not second guess trial counsel's decisions regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; \_\_\_ NW2d \_\_\_ (1999). We therefore conclude that defendant was not denied the effective assistance of counsel.

Defendant next argues that his second-degree murder conviction was not supported by sufficient evidence. We disagree. When reviewing a challenge to the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution to 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of second-degree murder are 1) a death, 2) caused by an act of the defendant, 3) with malice, and 4) without justification or excuse. *People v Goecke*, 457 Mich 442, 463-464; 579

NW2d 868 (1998). Malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of the act is to cause death or great bodily harm. *Id.* at 464.

Here, the victim's death was established by scientific evidence establishing the identity of the victim. Furthermore, there was evidence that defendant admitted to two witnesses that he had killed the victim because the victim was attempting to take over the west side chapter of the Satan Sidekicks. Orr's testimony indicated that defendant admitted that he shot the victim in the head. In addition, defendant was seen in a heated argument with the victim just before the victim was last seen alive. When viewed in the light most favorable to the prosecution, the evidence was sufficient to justify a rational trier of fact in finding that the elements of second-degree murder were proven beyond a reasonable doubt. *Wolfe, supra*.

Defendant also argues that the evidence was insufficient to support his felony firearm conviction. However, because defendant failed to raise this issue in his statement of the questions involved, the issue was not preserved for review by this Court. MCR 7.212(C)(5); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Moreover, evidence that defendant admitted to shooting the victim in the head was sufficient to support defendant's felony firearm conviction.

Next, defendant asserts that his 1996 statement to the police was taken in violation of his right to counsel. We disagree. When reviewing the trial court's findings regarding a knowing, intelligent, and voluntary waiver of *Miranda* rights, this Court reviews the entire record de novo, but will not disturb the trial court's factual findings unless they are clearly erroneous. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996) (Boyle, J); *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992).

While defendant testified at trial that he repeatedly requested an attorney during three separate interviews, Sergeant Henahan and Lieutenant Ghougoian both denied that defendant made any such requests. The trial court resolved this credibility dispute in favor of the police officers. This Court defers to the trial court's assessment of credibility. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998); *Cheatham, supra* at 29-30 (Boyle, J), 44 (Weaver, J); *Howard, supra* at 543. Following a thorough review of the record, we find no clear error in the trial court's determination. *Sexton, supra*; *Cheatham, supra*.

Finally, defendant argues that his sentence violated the principle of proportionality. We disagree. This Court reviews sentencing decisions for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality. *Id.* at 636.

The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* Although a departure from the sentencing guidelines' recommended minimum sentence range, we find defendant's sentence of life imprisonment for second-degree murder to be proportionate to the seriousness of the

offense and the offender. *Id.* The sentencing court articulated appropriate reasons on the record for departing from the guidelines. We find no abuse of discretion.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly