

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE W. MOORE,

Defendant-Appellant.

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UNPUBLISHED

May 12, 2000

No. 209505

Wayne Circuit Court

LC No. 96-009756

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

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to thirty to fifty years' imprisonment for the second-degree murder conviction and for each of the assault with intent to murder convictions, the sentences to run concurrently but consecutive to the mandatory two-year felony-firearm sentence. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in ruling that his statement to the police was made voluntarily after a valid waiver of his rights protecting against self-incrimination. We disagree. The voluntariness of a statement is a question for the trial court's determination using a totality of the circumstances analysis. *People v Sexton*, 458 Mich 43, 67-68; 580 NW2d 404 (1998). When reviewing a trial court's determination of voluntariness, this Court must examine the entire record and make an independent determination. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). However, this court gives deference to the trial court's assessment of the weight of the evidence and credibility of the witnesses, and the trial court's findings will not be reversed unless they are clearly erroneous. *Id.*

At his *Walker*<sup>1</sup> hearing, defendant testified that before he gave his statement to the police, he was promised leniency and that any incarceration would be near his family. He also testified that he requested an attorney and was told that one would be provided when he went to court. Detroit Police Officer Barbara Simon testified that she did not make any promises to defendant and that defendant did not request an attorney. The trial court found that defendant had read and initialed each of the rights on

the constitutional rights notification form and signed the waiver. The court also stated that after hearing the testimony, it did not believe that any improper conduct, threats, or promises were involved in obtaining defendant's statement. We defer to the trial court's credibility assessment and conclude that its findings, which are supported by the record, were not clearly erroneous. *People v McElhaney*, 215 Mich App 269, 277; 545 NW2d 18 (1996).

Defendant also argues that the trial court erred in denying his motion to suppress his statement because Simon failed to include in the statement his claim that the shooting was accidental. We disagree. Simon testified that while defendant stated during an earlier conversation that he didn't mean to shoot the victim, he did not so state in response to her questions when she wrote down defendant's statement. Defendant was given an opportunity to correct any errors in the statement, but, after review, he declined to change anything. We find, therefore, that the trial court properly denied defendant's motion to suppress the statement.

Defendant next contends that the trial court erred in denying his motion to quash the first-degree murder charge because there was insufficient evidence of premeditation and deliberation. We disagree. This Court reviews de novo a trial court's determination of whether the district court abused its discretion in binding over a defendant. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). A district court must bind a defendant over for trial if, at the conclusion of the preliminary examination, the court finds probable cause to believe that the defendant committed the crime charged. MCL 766.13; MSA 28.931; *People v Etheridge*, 196 Mich App 43, 53-54; 492 NW2d 490 (1992). The prosecutor need not prove guilt beyond a reasonable doubt, but must present evidence of every element of the crime charged or evidence from which the elements may be inferred. *Id.* Where the evidence conflicts on the existence of an element, the defendant should be bound over and the factual issue resolved by the trier of fact. *Id.*

Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998). The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.* Here, preliminary examination testimony revealed that defendant entered the store with a rifle, hid the rifle beneath a spice rack, and left the store. When he returned to the store, defendant walked up and down the aisles, retrieved the rifle, approached the counter, pointed the gun directly at the head of one of the victims, and pulled the trigger. Because premeditation and deliberation could be inferred from the testimony, defendant's motion to quash was properly denied.

Defendant's final argument is that his sentence of thirty to fifty years' imprisonment, the minimum of which falls outside the recommended sentencing guidelines range of ten to twenty-five years, is disproportionate because the court failed to properly consider his youth and the fact that he had no prior record. We disagree. This Court reviews a defendant's sentence to determine whether the sentencing court abused its discretion by violating the principle of proportionality. *People v St. John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). A sentence must be proportionate to the seriousness of the offense and the defendant's criminal record. *Id.* The crucial test for proportionality is whether the sentence reflects the seriousness of the matter, and not whether it follows the recommended sentencing guidelines range. *People v Castillo*, 230 Mich App 442, 447-448; 584 NW2d 606 (1998). When a

sentencing judge departs from the guidelines, the reasons for the departure must appear on the record and on the sentencing information report. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987).

Here, the sentencing court stated on the record that it was departing from the guidelines because of the deliberate and intentional nature of defendant's acts. Defendant pointed the rifle directly at the back of the head of a store customer who was attempting to make a purchase and pulled the trigger, and then continued to fire at others, seriously injuring one of the store owners. The court also explained its departure on the sentencing information report. The viciousness of an offense is a legitimate consideration of a sentencing judge. *Castillo, supra* at 448. Accordingly, we conclude that the trial court did not abuse its discretion by departing from the guidelines, notwithstanding defendant's youth and clean record.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Michael J. Kelly

/s/ Jeffrey G. Collins

<sup>1</sup> *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).