STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HOLMES, JR.,

Defendant-Appellant.

UNPUBLISHED
October 31, 2000

No. 214418
Lake Circuit Court
LC No. 98-003375-FC

Before: White, P.J., and Talbot and R.J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, burning personal property over $50, MCL 750.74; MSA 28.269, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to natural life imprisonment for the first-degree murder conviction, and to 2-1/2 to 4 years' imprisonment for the burning personal property conviction, consecutive to two-years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in allowing a detective to testify regarding hearsay statements made by the victim's daughter. We find no merit to this claim. The record indicates that the testimony at issue was elicited as part of a separate record, outside the presence of the jury, and was not admitted into evidence.

Defendant next contends that the trial court erred in failing to grant a mistrial when the victim's father violated the sequestration order. We disagree. Defendant did not move for a mistrial below, and the record indicates that defense counsel expressly waived the sequestration order with respect to the victim's father. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). The victim's father was the first witness to testify and defense counsel consented to his remaining in the courtroom after he left the stand. Defense counsel also consented to the prosecution's decision to recall the witness later in the trial, and even proceeded to cross-examine the witness at that time. Defendant cannot "assign error

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

on appeal to something his own counsel deemed proper at trial." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Defendant's related claims that the trial court erred in failing to strike the witness' testimony and in failing to issue a cautionary instruction also lack merit. After defense counsel cross-examined the witness after he was recalled, he acknowledged that the prosecutor "didn't do anything improper" and was "not asking to strike any testimony," but wanted a cautionary instruction. Although the court stated that it would "think" about giving such an instruction, defense counsel did not object on the record to the instructions given and specifically approved them. *Carter*, *supra* at 215 (holding that the intentional relinquishment of a known right constitutes a waiver that precludes a defendant from raising an issue on appeal).

We find no abuse of discretion in the trial court's decision to admit photographs of the deceased victim into evidence. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). The photographs were relevant to prove intent and to corroborate the witnesses' testimony, *People v Mills*, 450 Mich 61, 71, 76; 537 NW2d 909, modified 450 Mich 1212 (1995), and the fact that the photos are gruesome or that defendant did not contest the physical circumstances of the killing or the nature of the fatal wound does not render them inadmissible. *Id.* at 76; *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998); *People v Ho*, 231 Mich App 178, 188; 585 NW2d 357 (1998). After independent review, we cannot conclude that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice. MRE 403; *Mills*, *supra* at 76.

Defendant next contends that the trial court erred in admitting portions of Omar Hawkins' statement to the police under the statement against interest and general exceptions to the hearsay rule set forth in MRE 804(b)(3) and (b)(6), respectively. Defendant specifically challenges Hawkins' statements that (1) Hawkins traded three stones of crack cocaine for the gun allegedly used in the offense, (2) that several individuals, including defendant, were present when the exchange took place, and (3) that defendant would borrow the gun from him on occasion.[1] Defendant argues that the trial court erroneously found that the declarant was unavailable to testify at trial, that the probative value of the statements was substantially outweighed by their prejudicial effect, and that their admission violated his constitutional right of confrontation. We find that any error in the trial court's decision to admit the contested evidence was harmless.

Where, as here, a statement against penal interest is used to inculpate the accused, the defendant's constitutional right of confrontation is implicated. See *People v Poole*, 444 Mich 151, 162-166; 506 NW2d 505 (1993). A preserved constitutional error that "'occur[s] during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence,'" is subject to harmless error analysis. *People v Anderson*, 446 Mich 392, 405; 521 NW2d 538 (1994) (citation omitted); see also *Carines*, *supra* at 774, citing *Anderson*, *supra*; *People*

[1] The trial court admitted statements (1) and (3) under MRE 804(b)(3); however, it is not clear whether the court admitted statement (2) under MRE 804(b)(3) or MRE 804(b)(6) or whether it used MRE 804(b)(6) as an alternative ground for the admission of each statement.

v Kelly, 231 Mich App 627, 644-645; 588 NW2d 480 (1998). "This requires the beneficiary of the error to prove and the court to determine, beyond a reasonable doubt that there is 'no reasonable possibility that the evidence complained of might have contributed to the conviction.'" *Anderson*, *supra* at 406 (footnote and citation omitted).

In this case, the contested statements were offered for the purpose of linking defendant to the murder weapon, a .38 caliber snub-nosed revolver. The statements did not specifically put defendant in possession of the gun on the day or time of the offense and were therefore of minor importance. The statements were also cumulative to other properly admitted evidence, including defendant's own statement to the police in which he admitted that he removed the gun from Thomas' trailer on the day of the offense. *Kelly*, *supra* at 644-645. Consequently, we conclude that there was no reasonable possibility that the admission of the contested statements might have contributed to defendant's conviction and their admission was therefore harmless beyond a reasonable doubt.

Defendant lastly contends that the evidence was insufficient to support his convictions. Defendant abandoned this issue by failing to address the elements of the crimes charged and which of those elements were not met or by failing to provide citation to authority in support of his claim. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999). Nevertheless, in reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find 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). It is well established that circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of the crime. *People v Crawford*, 232 Mich App 608, 616; 591 NW2d 669 (1998); see also *People v Bottany*, 43 Mich App 375, 377-378; 204 NW2d 230 (1972) (the identity of the defendant as the person who committed a crime may be established beyond a reasonable doubt by segments of circumstantial proof in combination even if each element standing alone might not be sufficient).

First-degree premeditated murder requires proof that that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999). Premeditation and deliberation require sufficient time to allow the defendant to take a "second look." *Id.*, quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992). These elements may be inferred from the circumstances surrounding the killing. *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation may be established through evidence of "(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 elements of first-degree felony murder are "(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of felonies specifically enumerated in [the statute]," including larceny of any kind. *People v Turner*, 213 Mich App 558, 566; 540 NW2d 728 (1995); MCL 750.316(1)(b); MSA 28.548(1)(b). Malice may be inferred from the facts and circumstances of

the killing, *Carines*, *supra* at 759, and firing a weapon at close range will support an inference of an intent to kill. *People v Ray*, 56 Mich App 610, 615; 224 NW2d 735 (1974). Larceny is the taking and carrying away the property of another with felonious intent and without the owners consent. *People v Gimotty*, 216 Mich App 254, 257-258; 549 NW2d 39 (1996).

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the statute. MCL 750.227b(1); MSA 28.424(2)(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998); *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Viewed in a light most favorable to the prosecution, the evidence established that the night before the incident, defendant was at a party where he may have overheard two other men discussing a plan to rob the victim, who had cashed a $312 check hours earlier. Charles Sanders, who testified pursuant to an agreement with the prosecution, stated that defendant told him that he had seen the victim with a large amount of cash and was apparently annoyed by the fact that she had money to "splurge" on things like a car and a house and that he "had to have it." After the party, defendant went to the victim's house where he spent the night with others, and was the last person to be seen with the victim before her murder the following day. According to Sanders, defendant said that he walked up to the victim, whispered something in her ear, and shot her in the back of her head. This account was corroborated in part by medical evidence establishing that the victim was shot at point-blank range in the back of the head.

The evidence further established that a police officer's lost gun, a .38 caliber snub-nosed revolver was used to commit the murder, and Sanders stated that defendant confessed to killing the victim with a ".38 snub caliber." Sanders also testified that defendant told him that he had dropped the gun off at the home of someone called "Nudie." Warren "Nudie" Thomas testified that defendant came to his home with a gun and wanted to leave it with Thomas but when Thomas refused, defendant placed the gun in a baggie. Under a Christmas tree outside Thomas' trailer, the police found the gun in a baggie in a McDonald's bag wrapped in black cloth. In a statement to police in which he implicated one of the men who had earlier discussed robbing the victim, defendant admitted that he had been given the gun wrapped in a McDonald's bag and black shirt, and that he had hid it outside the trailer.

There was also evidence that defendant was seen in possession of the victim's car and that he told one witness that he had approximately $300 in cash. Defendant had a wallet or purse similar to the victim's in which there was a card that may have had the name Carisa (the name of one of the victim's daughters) on it. Another witness told police that defendant offered her ATM and credit cards. Sanders also testified that defendant said he tried to pay someone fifty dollars to "get out of town or whatever," and one witness testified that she declined defendant's fifty-dollar offer to drive him to another city. This evidence, if believed, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that defendant killed the victim with premeditation and deliberation and/or during the course of an intended larceny, and that he was in the possession of a firearm at the time he committed the murder. While we agree that Sanders may not have been the most reputable of witnesses, his credibility and the weight accorded his testimony (which was corroborated with other

evidence) were issues for the jury to determine and will not be resolved anew by this Court. *Avant*, *supra* at 506; *People v McFall,* 224 Mich App 403, 412; 569 NW2d 828 (1997).

Defendant was also convicted of burning personal property over $50, which requires proof that (1) the defendant set fire to certain property, (2) the property burned was personal property, (3) when the defendant burned the property, he intended to set a fire knowing it would cause injury or damage to another person or property, and (4) the property burned had a fair market value of more than $50. MCL 750.74; MSA 28.269; CJI2d 31.4. Because proof of a fire alone gives rise to a presumption "that the fire was the result of accident or of some providential cause," the prosecutor must show that the fire was intentionally or wilfully set. *People v Lee,* 231 Mich 607, 612; 204 NW 742 (1925).

Viewed in a light most favorable to the prosecution, the evidence showed that the victim's car was completely destroyed by fire on the day she was murdered. On that day, a witness saw defendant arrive at his home in a car driven by a young woman, and return approximately three hours later in the same car in which he appeared to be the sole occupant. Testimony from a police officer and tracking dog handler established that there were two sets of footprints that led from the car up to the steps of Thomas' trailer. One set of footprints continued across the porch, down the steps, and ten or fifteen feet away where they stopped at the discarded Christmas tree and then led back to the trailer. Plaster casts of footprints found around the victim's car, Thomas' trailer, and other areas revealed two different footwear patterns, one of which came from Timberland boots. Sanders testified that defendant told him that "he had on some Timberland boots, and he exchanged them into some Adidas forms . . . [l]ike right after, I guess, the murder had occurred . . . ." During one statement to the police, the officer noted that defendant was wearing Adidas and that defendant stated that he had been wearing gray boots earlier that day. Although defendant told police that he had left the boots in his bedroom, they were nowhere to be found when the police searched the house.

In addition, the arson investigator testified that the fire was not caused by any defect in the electrical system but was "humanly set." The unusual burn patterns were indicative of use of an accelerant and a trained arson dog alerted to those areas of the car and to samples collected from those areas. Although scientific tests did not show traces of accelerant in those samples, the arson dog handler testified that his dog, who had been certified one hundred percent accurate every year since 1992, could detect traces of accelerant that the chemists' instruments could not. The police also found a blue rag by the car and, in his attempt to incriminate another man, defendant told police that he was present when it was set on fire and revealed that he knew a blue towel was present. In a later statement, defendant told police that he and an accomplice "took the car to dispose of it." The victim's father testified that he bought the car for approximately $12,500 one month before the crime, that it was intact when he last saw it, and was in working condition the day the victim was killed. This circumstantial evidence, if believed, was sufficient to enable a rational jury to infer that the elements of burning personal property over $50, including defendant's identity as the perpetrator of the crime, were proven beyond a reasonable doubt.

Affirmed.

/s/ Helene N. White
/s/ Michael J. Talbot
/s/ Robert J. Danhof