

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE HAMILTON,

Defendant-Appellant.

UNPUBLISHED

January 22, 2002

No. 224954

Wayne Circuit Court

LC No. 99-005605

Before: Bandstra, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to two years' imprisonment for the felony-firearm conviction and to life imprisonment for the first-degree murder conviction. We affirm, but remand for a hearing on issues raised in defendant's motion for remand.

Defendant first argues that there was insufficient evidence to convict him of first-degree premeditated murder beyond a reasonable doubt. We disagree. We review claims of insufficient evidence in the light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding that the essential elements of an offense were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

To convict a defendant of first-degree murder, the prosecutor must prove that the killing was intentional and that the act of killing was premeditated and deliberate. MCL 750.316(1)(a); *People v Anderson*, 209 Mich App 527, 537; 531 NW2d 780 (1995). Premeditation and deliberation can be inferred from the surrounding circumstances, but the inferences cannot be merely speculative and must have support in the record. *People v Plummer*, 229 Mich App 293, 301; 581 NW2d 753 (1998); *Anderson, supra* at 537. Factors evidencing premeditation are: (1) the prior relationship between the parties, (2) the defendant's actions before the killing, (3) the circumstances of the killing, and (4) the defendant's conduct after the victim's death. *Id.* When the evidence establishes that a fight occurred prior to a killing, there must exist "a thought process undisturbed by hot blood" in order to convict the defendant of first-degree, premeditated murder. *Plummer, supra* at 301.

The evidence at trial established that May 21, 1999, was “senior skip day” and many young people went to Belle Isle in Detroit, Michigan. Tamika Franklin was on the island that day with friends, when Jimmy Lloyd squirted her with a water gun. They began arguing and pushed each other. Seeing this, Tamika’s brother, Dale Franklin, and her cousin, Devon Franklin, approached them. Devon got involved in the argument, and a physical fight ensued between Lloyd and Devon. Karnail Pitts, a friend of Devon, joined the fight and they both were punching Lloyd.

During the fight, defendant was sitting in the driver’s seat of the red Ford Explorer that he and his friends had driven to Belle Isle. Defendant had a nine-millimeter rifle that he carried with him when he was picked up from his home earlier that day and that he loaded on the way to Belle Isle. After noticing the fight, defendant stepped out of the vehicle and stood at the driver’s side for a short period of time watching the fight. Defendant then walked to the back of the Explorer, opened the hatch, and removed the loaded nine-millimeter rifle. Defendant approached the side of the vehicle with the gun, aimed the rifle, and shot at least two shots.

As this happened, the fight was still occurring; however, Pitts was getting up from the fight and was in the process of turning around to walk away from the fight. As Pitts jerked and then fell to the ground in front of the Explorer, defendant jumped back into the driver’s side and pulled away at a high rate of speed, running over Pitts. The police were in pursuit of the Explorer when it slammed into a tree, and finally came to an abrupt stop. When apprehended by the police, defendant was in the back seat of the Explorer, the passenger door was open, and he was attempting to retrieve and conceal an object. Pitts was pronounced dead later of two gunshot wounds to the back. Pitts also had multiple abrasions on his forehead and hemorrhage in the scalp consistent with being run over by a car.

When viewed in a light most favorable to the prosecution, there was sufficient evidence in this case for a reasonable jury to find defendant guilty of first-degree murder beyond a reasonable doubt because the circumstances of the shooting were consistent with premeditation and deliberation. Defendant brought the rifle with him to Belle Isle and loaded the weapon in the truck while en route. Further, there is no testimony that defendant was physically involved in the fight at any time, and the evidence showed that he observed the fight for a period of time before shooting. Because defendant was merely an observer, his thought process was undisturbed by hot blood. *Plummer, supra* at 301.

Defendant claims that he acted in defense of his friend, Lloyd, who was involved in a physical altercation with Pitts. In self-defense of another, the third party steps into the shoes of the individual threatened. *People v Heflin*, 434 Mich 482, 511-512 n 26; 456 NW2d 10 (1990). Even if the actor honestly and reasonably believed that the third person is in danger of death or serious bodily harm, the actor may not use more force in the defense of the third person than reasonably believed necessary to prevent harm to the defended person. *Id.* at 509-510 n 23. Lloyd may have been in danger, but he was only involved in a fist fight, and there was no evidence that anyone else had a weapon except defendant. Furthermore, Pitts was moving away from Lloyd when defendant shot him twice in the back. Defendant was not justified in using deadly force to defend Lloyd.

Defendant’s next argues that the district court erred when it bound defendant over on the charge of first-degree premeditated murder because the evidence at the preliminary examination

was not sufficient to establish premeditation and deliberation. We disagree. We review a district court's decision to bind over a defendant for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). An abuse of discretion occurs when an unbiased person, considering the facts the trial court relied on in making its decision, would conclude that there was no justification for the decision. *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 crimes charged. MCL 766.13; *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *Orzame, supra* at 558. Probable cause exists where there are reasonable grounds for suspecting that the defendant committed the crimes charged, supported by sufficiently strong circumstances to warrant a cautious person in believing that the defendant is guilty of the charged offenses. *Orzame, supra*. 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. *Hill, supra* at 469. Where the evidence both supports and negates the existence of an element, the defendant should be bound over and the factual issue resolved by the trier of fact. *Id.*

The evidence presented at defendant's preliminary examination supported defendant's bindover on the charge of first-degree murder. Tamika Franklin testified that she saw defendant with a long black gun, and no one else with a weapon. Defendant's friend, Darryl Lloyd, testified that defendant brought a nine-millimeter rifle with him to Belle Isle, and that defendant saw the fight, watched it for a time, then headed to the back of the truck, retrieved his gun, and fired two shots toward the fight. This evidence was sufficient to support defendant's bindover on the charge of first-degree murder. *Hill, supra* at 469.

Furthermore, a magistrate's erroneous conclusion that sufficient evidence was presented at the preliminary examination is rendered harmless by the presentation at trial of sufficient evidence to convict. *People v Johnson*, 427 Mich 98, 116; 398 NW2d 219 (1986). Therefore, any error at the bindover would be moot given that defendant was found guilty under a more stringent standard at trial.

Defendant next argues that the trial court erred when it denied defendant's motion for judgment of acquittal notwithstanding the verdict, or for a new trial because his first-degree murder conviction was against the great weight of the evidence. Defendant claims that there was overwhelming evidence that the incident occurred during a violent episode, defendant had a claim of defense of others, and that the episode happened very quickly so defendant did not have the time to form the requisite premeditation and deliberation. We disagree. We review a trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *People v Lemmon*, 456 Mich 625, 641; 576 NW2d 129 (1998). A verdict may be vacated only if it is not reasonably supported by the evidence and is more likely attributable to causes outside the record, such as passion, prejudice, sympathy, or some extraneous influence. *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993).

As noted above, the evidence established that the circumstances of the shooting were consistent with the premeditation and deliberation elements of first-degree murder. Defendant was never involved in the fight, he was only an onlooker before he decided to act, and there was no evidence to support the theory that defendant shot his rifle to break up the fight in defense of his friend. Defendant's argument is without merit.

Defendant also claims that the court's reliance on the testimony of Carlton Williams that defendant got out of his truck and stood there for a minute and then retrieved the gun and shot, was in error because the testimony was inconsistent with a prior statement given by the witness, and also inconsistent with the testimony of other witnesses. However, we may not resolve credibility questions and must defer to the trier of fact's assessment of Carlton Williams' testimony. *Lemmon, supra* at 646. The overwhelming evidence shows that the verdict is reasonably supported by the record, and therefore, defendant's first-degree murder conviction was not against the great weight of the evidence. The trial court did not err when it denied defendant's motion for judgment of acquittal notwithstanding the verdict, or for a new trial.

Defendant next argues that the trial court committed reversible error in refusing to instruct the jury on reckless discharge of a weapon, and not instructing the jury on involuntary manslaughter. We disagree. Any error in the instructions would be harmless under the circumstances that the jury rejected the options of convicting defendant of second-degree murder or voluntary manslaughter. *People v Raper*, 222 Mich App 475, 483-484; 563 NW2d 709 (1997). Defendant's claim that his counsel's failure to request an involuntary manslaughter instruction must fail for the same reason. Defendant cannot show the required prejudice where the jury rejected the option of convicting of the other lesser offenses. *Id.*

The final issue in this case involves allegations raised by defendant in a motion to remand filed in this Court on October 11, 2001. Defendant claims that James Lloyd would have testified that he was being attacked with a blunt object, that he was in fear of his life, and that he was saved from his attackers by defendant's gunshots. Defendant argues that the prosecutor should have produced Lloyd as a *res gestae* witness. Apparently, the prosecutor filed an amended witness list with Lloyd's name removed and defendant objected, arguing that he relied on the prosecutor's stated intention to produce Lloyd. The trial court ruled that the prosecutor was not obligated to produce Lloyd. In the alternative, defendant argues that his counsel was ineffective for failing to call Lloyd as a witness on defendant's behalf.

We find these arguments deserve consideration and remand this case to the trial court for a hearing on whether Lloyd would have provided exculpatory evidence, whether the prosecutor should have produced him as a *res gestae* witness, and whether defense counsel's failure to call Lloyd as a witness constituted ineffective assistance of counsel.

Affirmed, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White