STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MILTON A. HARRIS,

Defendant-Appellant.

UNPUBLISHED
June 28, 2002

No. 231398
Wayne Circuit Court
LC No. 99-010817

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a bench trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to a term of forty to eighty years' imprisonment for the murder conviction, to be served consecutively to the mandatory two-year term for the felony-firearm conviction. We affirm.

Defendant's convictions arose out of the shooting death of Sammy Wright in Detroit on the evening of July 17, 1999. During the bench trial, Wright's sister-in-law, Anita Thomas, testified that on that evening, she saw defendant shoot a long gun at the apartment house she shared with Wright. Soon afterwards, she found Wright lying on the porch of the house, bleeding. Boguslaw Pietak, M.D., the assistant medial examiner for Wayne County, testified that Wright's body was covered with over twenty puncture wounds, likely caused by pellets from a shotgun. Further, he determined the cause of death to be a single shotgun blast. Pietak also testified that according to Wright's blood-alcohol content, he had been intoxicated at the time of his death.

City of Detroit Police Officer John Morell testified that he interviewed defendant on October 13, 1999. According to Morell, defendant gave the following details about the shooting after being advised of his *Miranda*[1] rights. Defendant did not know Wright. On the night in question, defendant happened to walk past Wright's house, and Wright pointed a handgun at him, saying "I'm going to kill me a bitch ass n----- tonight." Defendant then went home and walked past Wright's house again "two or three hours later," at which point Wright came out to the porch and said, "There's that bitch ass n----- now." Defendant then ran back to his house,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

retrieved his shotgun, and returned to Wright's house, yelling, "F--- that. You're not going to pull a gun on me again." According to defendant's own statement, an unnamed individual put his arm around him and attempted to persuade him to stop, but defendant rebuked this attempt. After Wright said, "I'm going on [sic] kill you," defendant discharged his shotgun. Then, because he perceived that Wright was coming after him, defendant shot again.[2] Defendant was drunk, but not "falling down drunk," during the shooting. After the shooting, defendant placed the shotgun in a garbage can, called his cousin, and later played basketball with a friend.

At trial, defendant did not present any evidence, and did not testify on his own behalf. In closing arguments the prosecutor asserted that defendant's actions were premeditated and deliberate, and that defendant committed first-degree murder. In response, defense counsel contended that the record evidence did not indicate that defendant possessed the specific intent to kill, and that his actions on the evening of the killing were not premeditated and deliberate. Notably, defense counsel focused his arguments entirely on the elements of first- and second-degree murder, and he did not argue that the record evidence supported a conviction of either voluntary or involuntary manslaughter. Although the information charged defendant with the offense of first-degree premeditated murder, MCL 750.316(1)(a), the trial court convicted defendant of the lesser-included charge of second-degree murder, as well as felony-firearm.

On appeal, defendant first argues that the trial court "made specific findings of fact concerning the circumstances surrounding the killing, but failed to apply the correct rule of law to those facts." Specifically, in spite of failing to raise this argument in the lower court, defendant now contends that the trial court's factual findings supported a conviction of voluntary manslaughter, MCL 750.321, rather than second-degree murder, because the court, by finding that defendant acted with "hot blood," essentially found that defendant acted as a result of adequate provocation. We disagree.

> When the right to a trial by jury has been waived by a defendant, the trial court, sitting as factfinder, must make specific findings of fact and state its conclusions of law. MCR 6.403; *People v Jackson*, 390 Mich 621, 627; 212 NW2d 918 (1973); *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). Factual findings are sufficient as long as it appears that the trial court was aware of the issues and correctly applied the law. [*People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).]

We review the trial court's findings of fact in a bench trial for clear error. MCR 2.613(C); *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). However, the trial court's ultimate conclusions of law are subject to de novo review. *People v Parker*, 230 Mich App 337, 342; 584 NW2d 336 (1998).

As noted, defendant was originally charged with the first-degree premeditated murder of Sammy Wright. To prove this offense, the prosecutor bore the burden of establishing beyond a reasonable doubt that defendant intentionally killed Wright and that the killing was premeditated

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[2] Four shots in total had been fired, according to Thomas' testimony and according to the shell casings found at the scene, but defendant only alluded to two shots in his statement.

and deliberate. *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000). Further, first-degree murder is a specific intent crime, and the prosecutor was also required to prove that defendant possessed the actual intent to kill. *People v Dykhouse*, 418 Mich 488, 496; 345 NW2d 150 (1984); *People v Herndon*, 246 Mich App 371, 386; 633 NW2d 376 (2001).

In contrast, the offense of second-degree murder is a general intent crime, *id.*, that is established where the prosecutor proves the following elements: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Kris Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). "Malice requires an intent to kill, an intent to do great bodily harm, or an intent to create a high risk of death or great bodily harm with knowledge that such is the probable result." *People v Neal*, 201 Mich App 650, 654; 506 NW2d 618 (1993). Moreover, as defendant points out in his brief on appeal, malice must be shown from circumstances "that do not mitigate the degree of the offense to manslaughter. . . ." *Id*. Unlike first-degree murder, second-degree murder does not require an actual intent to harm or kill, but only the intention to perform an act that is in obvious disregard of life-endangering consequences. *People v Mayhew*, 236 Mich App 112, 125; 600 NW2d 370 (1999).

Voluntary manslaughter occurs when the defendant kills during the heat of passion, the passion is the result of adequate provocation, and a lapse of time during which a reasonable person could control his passions does not occur. *People v Elkhoja*, ___ Mich App ___ ; ___ NW2d ___ (Docket No. 228734, issued 5/21/02), slip op at 15. "[A] voluntary manslaughter conviction requires proof sufficient to sustain a conviction of second-degree murder, along with evidence of provocation *as a mitigating factor*." *People v Darden*, 230 Mich App 597, 602; 585 NW2d 27 (1998) (emphasis in original).

After a careful review of the trial court's detailed findings of fact and conclusions of law, we are not persuaded by defendant's assertion that the court's findings support a conviction of voluntary manslaughter rather than second-degree murder. Contested issues at trial were whether defendant killed Wright with premeditation and deliberation and whether he possessed the specific intent to kill. After the prosecutor and defense counsel advanced their respective positions concerning the elements of premeditation and deliberation, the trial court made the following factual findings with regard to defendant's intent.

> The only issue really is that of intent because for first-degree murder the death must be, the defendant must have actually intended to kill the victim. He had to consider the pros and cons of killing and thought about it and chose his actions before he did it and there has to be real and substantial reflection for long enough to give a reasonable person [time] to think twice about the intent to kill.
>
> Now, in this case there was time and [the prosecutor] did point that out. The defendant was home, he was in a position of safety, he could have stayed there. If he felt he had been treated badly or dissed, in today's language, he could have chose[n] to ignore it. If he felt he had been threatened, he could have called the police, he could have taken any one of a number of actions but, nonetheless, the fact that he had time to think about it does not necessarily mean that it was premeditated *because it also has to mean that he had an actual intent to kill.*

From the testimony that I heard, it seems to me that his anger was such that it is not clear what his intent was. He clearly was angry from the language I quoted and he says in his own statement that he was yelling and that, when a guy he knew from the block told him to leave it alone, he shot and then shot again. Even after the guy said something, assuming that is correct that the guy started yelling at him, he shot again. So he did all of this while someone was pulling on him and trying to turn him around.

And it seems to me that, when I take into account his own statement, plus the testimony indicating that he might not have been able to even know exactly who the – he knew that it was the guy, but he didn't even know the guy's name and that he might not even have known that that was the person on the porch or been able to see whether he was armed or not. He had been drinking.

It just strikes me that there is nothing here that says that this gentleman went back to kill this person and I think, although I would agree that the fact that there's four shots doesn't mean he didn't intend to kill him. On the other hand, it doesn't necessarily mean that he did. I think the one shot, according to Ms. Thomas, was up in the air and, according to the defendant, was up in the air.

So it seems to me that he was so angry he was shooting at the house and, when the guy came out, he shot at him too.

So I just don't believe that I can find here that his actual intent was to kill. It seems to me his intent was to do great harm and he was so angry that he really almost didn't know what he was doing. He had been drinking which would feed into that anger and . . . he was going to shoot, as [the prosecutor] pointed out, whoever came out on that porch. He was going to keep shooting at the porch [and] at the house.

So I think he knowingly created a very high risk of death or great bodily harm knowing that death could result from his actions and certainly his actions were not justified and the excuse that the guy was going to, was yelling at him even after he fired the first shot, was not enough to justify the second shot. [Emphasis supplied.]

We acknowledge, as defendant repeatedly asserts in his brief on appeal, that the trial court, after concluding that the killing was not justified or excused, opined that "this was a shooting which came from hot blood." Defendant seizes on the trial court's use of this familiar terminology, arguing that it demonstrates that the trial court found this killing to be the result of adequate provocation. The logical result of this reasoning, according to defendant, is that a conviction of voluntary manslaughter is appropriate. However, we reject defendant's precipitous conclusion, given that the trial court went on to carefully clarify its conclusion in the following manner:

The defendant didn't calculate this. He just was so angry, he went home, got his shotgun, went back and started shooting, and, when the guy came out, he

shot him and I think that's all part of, goes to the inability to have – let me put it in the correct way.

I think all of that goes to show that there is nothing here that says that he specifically intended to kill Mr. Wright.

So therefore, I am finding the defendant guilty of murder in the second degree . . . .

Contrary to defendant's assertions, the record does not reflect that the trial court found that defendant acted as a result of adequate provocation when he killed Sammy Wright to the extent that a conviction of voluntary manslaughter is implicated. In other words, the trial court's findings in no way suggest that it concluded that the circumstances of this crime mitigated the offense from murder to manslaughter.[3] Rather, a careful and thorough review of the record, viewed against the backdrop of the contested issues at trial, indicates that the trial court's somewhat inartful reference to "hot blood" conveyed its finding that defendant (1) did not have the specific intent to kill Wright, and (2) did not act with premeditation and deliberation to support a conviction of first-degree murder. Indeed, the trial court unequivocally found that defendant "intend[ed] to do great harm," and "knowingly created a very high risk of death or great bodily harm knowing that death could result from his actions . . . ." Accordingly, we are not persuaded that defendant's conviction of second-degree murder for this cold-blooded killing should be vacated.

Defendant further contends that the trial court's factual findings did not support a conviction for second-degree murder because the court stated that defendant "knowingly created a very high risk of death or great bodily harm knowing that death *could* result from his actions. . . . (emphasis added). Defendant argues that this finding precluded a conviction for second-degree murder because such a conviction requires that the defendant have acted with "an intent to create a high risk of death or great bodily harm with knowledge that such is the *probable result*," see *Neal, supra* at 654 (emphasis added), not merely with knowledge that death or great bodily harm *could* result. Defendant contends that the court's finding supported a conviction for involuntary manslaughter, see *People v Maghzal*, 170 Mich App 340, 344; 427 NW2d 552 (1988), but not second-degree murder. However, the trial court also stated that defendant's "intent was to do great harm," a finding that in itself supported a second-degree murder conviction. See *Neal, supra* at 654. Moreover, it appears from a contextual review that the court's use of the word "could" was inadvertent and that the court meant to indicate the existence of a mental state in accordance with the *Neal* "probable result" standard. Accordingly, we disagree with defendant's suggestion that a vacation of the second-degree murder conviction is appropriate on this basis.

Next, defendant argues that the trial court erred by allowing the prosecutor to delete a previously-endorsed witness, Bobby Smith, from its witness list. Smith allegedly was standing

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[3] Further, defendant's assertion that the trial court "expressly found that defendant was acting out of passion, and implicitly noted that his extreme anger was the result of an adequate provocation" is not supported by the record.

outside Wright's apartment house next to defendant when the shooting occurred, and defendant contends that Smith's testimony would have supported a claim of self-defense.

The court held a hearing at trial to explore the reason for Smith's absence. Vozell Jennings, a Detroit police officer, testified as follows:

> *Q*. All right. Individually let's talk about some of the witnesses, specifically Mr. Bobby Dushan Smith. Did you make efforts to locate and serve Mr. Smith?
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> *A*. Yes, sir, I did. Mr. Smith was located and served on the east side of Detroit at his girlfriend's residence. He was picked up yesterday [the first day of trial] and dropped off in front of the court by my partner and never made it to the courtroom.
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> *Q*. So Mr. Smith was served and delivered to the court building prior to trial; is that correct?
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> *A*. That's correct. Once I became aware he was not in the courtroom, I had the officers look for him, sent the officers back out to that location and got no answer at his door.
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> * * *
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> *Q*. So they just went and picked him up, dropped him off outside the hallway and the officers that you had sent to pick this person up did not inform you that the witness was out there; is that a fair statement?
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> *A*. That is [a] fair statement. They dropped him off in front of the building.
>
> *Q*. Are you saying in front of the building or in front of the courtroom?
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> *A*. In front of the building, sir.
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> * * *
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> *Q*. And, in fact, there was what is called a Material Witness Warrant; is that a fair statement, detainer?
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> *A*. Yes, sir.
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> *Q*. What does a detainer mean?
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> *A*. Witness detainer gives us authority to take a person into custody based on the judge signing that order.
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> * * *
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> *Q*. And it was Judge Waterstone's [o]rder that this person be basically arrested and brought here . . . to testify in this particular matter; is that a fair statement?

A. Yes, sir, it is.

Jennings then acknowledged that no additional efforts had been made to locate Smith after he failed to appear for the first day of trial. The court decided that the police should make an additional attempt to locate Smith and adjourned the trial for over two hours for that purpose. On recommencement of the proceedings, Jennings indicated that he had sent an officer to locate Smith and that the officer had been unsuccessful in doing so. The court stated:

> All right. Well, I guess – not I guess, I know it is my view that again, while I'm disappointed that they simply dropped him off, I realize they're not required to actually bring him right up here although it probably would have been a good plan and would always be a good plan and I do appreciate that we made another effort to find him but it is his obligation to appear. He was served and I believe the People have complied with their obligation.

Defense counsel then asked for a twenty-four-hour adjournment in order to locate Smith. In response, the court stated:

> I appreciate that but it seems to the [c]ourt if he was going to be available, he would have been available today or yesterday and probably what has happened is, having been dropped off and decided not to come, he's undoubtedly making himself unavailable and I'm afraid any adjournment, however long it were, would not be long enough for him to appear. So I will deny that request.

Under MCL 767.40a(4), the prosecutor may at any time delete a witness from the list of witnesses he intends to call at trial "upon leave of the court and for good cause shown . . . ." See *People v Burwick*, 450 Mich 281, 288; 537 NW2d 813 (1995). If a prosecutor is unable to locate an endorsed witness, then good cause for striking the witness is demonstrated. See *People v Snider*, 239 Mich App 393, 422-423; 608 NW2d 502 (2000). As noted in *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000), "[t]he inability of the prosecution to locate a witness listed on the prosecution's witness list after the exercise of due diligence constitutes good cause to strike the witness from the list." The trial court's decision to allow a deletion from the prosecutor's witness list is reviewed for an abuse of discretion. *Burwick, supra* at 291.

We find no abuse of discretion here. Indeed, the police located Smith on the morning of trial and transported him to the courthouse. Smith was under court order to appear, yet he failed to do so. On the second (and last) day of trial, the police made additional efforts to locate Smith but were unsuccessful. Under these circumstances, the prosecutor demonstrated good cause for deleting Smith from the witness list. Defendant contends that the police, instead of merely dropping Smith in front of the courthouse on the first day of trial, should have ensured that Smith actually entered the courtroom and testified. To accept this contention would be to place an unreasonable burden on the prosecution. Indeed, by locating the witness, serving him, and transporting him to the courthouse, the police and prosecution were reasonably entitled to believe that the witness would be present at trial. On the facts before us, we simply cannot find that the trial court *abused its discretion* by excusing the absence of the witness at trial. *Id.*

Defendant further contends that the trial court erred by denying his request for a continuance to locate Smith. "This Court reviews a denial of a continuance for an abuse of

discretion." *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995). We discern no abuse of discretion here. Indeed, as noted by the trial court, Smith disappeared from the courthouse on the first day of trial and avoided the police the following day. Under these circumstances, the court reasonably concluded that Smith was avoiding testifying and that a continuance would be to no avail. Moreover, while defendant generally alleges on appeal that Smith's testimony would support a self-defense theory, defendant failed to make an offer of proof with regard to the potential testimony and gives no reliable indication on appeal regarding the substance of Smith's testimony. Accordingly, defendant has failed to demonstrate prejudice resulting from the lack of a continuance. See generally *People v Lawton*, 196 Mich App 341, 348-349; 492 NW2d 810 (1992). No abuse of discretion occurred.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell