

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ROBERT K. FITZNER,

Defendant-Appellant.

UNPUBLISHED
December 3, 2002

No. 233210
Oakland Circuit Court
LC No. 00-005163

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of second-degree murder, MCL 750.317, and felony firearm, MCL 750.227b.¹ The trial court sentenced defendant to a term of twenty-five to fifty years in prison for the second-degree murder conviction and a consecutive term of two years in prison for the felony firearm conviction. We affirm.

This case arises out of an altercation at a rave² party in Detroit, at which defendant shot and killed the victim after he pistol-whipped the victim in the face.

I. First-Degree Murder Charge

Defendant contends that the trial court erred by denying his motion for directed verdict on the first-degree murder charge. Defendant maintains that this allowed the jury to reach a compromise verdict because the prosecutor failed to prove premeditation or deliberation. We disagree.

“In ruling on a motion for a directed verdict, the trial court must consider in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

¹ Defendant appeals as of right.

² This Court takes judicial notice of the fact that a “rave” party is marked by dancing, music and drugs, often in an abandoned warehouse and typically “after hours.”

“To prove first-degree premeditated murder, the prosecution must establish that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate.” *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000); MCL 750.316. As this Court observed in *People v Kelly*, 231 Mich App 627, 642; 588 NW2d 480 (1998):

Premeditation and deliberation require sufficient time to allow the defendant to take a second look. The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. [Citation omitted.]

In *People v Abraham*, 234 Mich App 640; 599 NW2d 736 (1999), this Court further explained:

Premeditation and deliberation may be established by 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.* at 656, quoting *People v Schollaert*, 194 Mich App 158, 170; 486 NW2d 312 (1992).]

Viewing the evidence in a light most favorable to the prosecution, we hold that there was sufficient evidence of premeditation and deliberation to submit the first-degree murder charge to the jury.

A witness at the scene, David Dmytryszny, testified that defendant’s friend, Anthony Mullinax, exchanged hostile words with Dmytryszny and the victim that night, in defendant’s presence. Another witness testified that defendant appeared to have a verbal confrontation with the victim between fifteen and twenty minutes before the fatal shooting and that defendant appeared somewhat angry.

Regarding the shooting itself, a forensic pathologist testified that the victim was struck in the face with a blunt object and that the victim was shot from behind, with the muzzle of the gun in direct contact with the back of the victim’s head. This is consistent with the testimony of Kirsten Ellenbrook, who testified that, after the shooting, she overheard defendant admit that he pistol-whipped the victim and then shot him. Further, while defendant asserted a defense of accident and argued that the gun discharged once when he hit the victim on the back of the head, four shell casings from defendant’s gun were found in the vicinity of the shooting. Ellenbrook also testified that defendant changed his clothes after the shooting and she heard defendant say that, after he left the scene of the incident, defendant disassembled and disposed of the gun.

In sum, a reasonable juror could conclude that defendant and Mullinax argued with the victim twice during the evening and that defendant had a confrontation with the victim just minutes before the shooting. Further, the jury could conclude that, after pistol-whipping the victim’s face, defendant moved behind the victim, placed the gun on the back of the victim’s head, and deliberately pulled the trigger. This is supported by defendant’s actions after the shooting when he immediately disposed of certain incriminating evidence.³ Viewed in a light

³ Evidence showed that, around the same time defendant shot the victim, Mullinax shot the
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most favorable to the prosecution, there was sufficient evidence of premeditation and deliberation to submit the first degree murder charge to the jury.

Notwithstanding this evidence that would support a conviction for the greater offense, the jury convicted defendant of second-degree murder. Were we to find that the trial court erred by submitting the first-degree murder charge to the jury, the error would be reviewed under the harmless error standard. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998). However, because we find no error in the trial court's submission of the first-degree murder charge to the jury, the verdict was not a result of jury compromise and we need not address this issue further.

II. Sentence

Defendant's claims that the trial court abused its discretion in its upward departure from the sentencing guidelines.

Under MCL 769.34(3), "[a] court may depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure."⁴ This Court "review[s] for an abuse of discretion the trial court's decision that objective and verifiable factors constitute substantial and compelling reasons for departing from the guidelines' recommended minimum sentence." *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001).

Here, the parties agree that the trial court properly scored defendant's prior record and offense variables and that his scores placed defendant in the guidelines range of twelve to twenty years in prison for his murder conviction. The trial court found substantial and compelling reasons to depart upward from the guidelines range and sentenced defendant to a minimum of twenty-five years in prison. Defendant concedes that the factors the trial court considered were objective and verifiable, but says that the factors were either already taken into consideration in scoring the offense variables or were impermissible factors to consider in departing upward from the guidelines range.

Defendant asserts that the trial court should not have considered the fact that he attended the party while carrying a gun because this was already contemplated in offense variables one and two. Under MCL 769.34(3)(b):

The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

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victim's friend, Dmytryszny, above the ear.

⁴ "Our Supreme Court has held that substantial and compelling reasons must be based on objective and verifiable factors." *People v Izarraras-Placante*, 246 Mich App 490, 497; 633 NW2d 18 (2001).

Defendant received a score of twenty-five points for aggravated use of a weapon under OV 1, MCL 777.31, which provides that “[a] firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon.” The court also gave defendant five points for OV 2, MCL 777.32, which states that “[t]he offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.”

While the mere possession or use of a firearm is taken into account by the aforementioned offense variables, the trial court found especially compelling that defendant carried a loaded .45 caliber pistol to a party at which drugs were used and that defendant carried the gun in order to “be[] the toughest guy at the party” as demonstrated by the fact that defendant pulled out the gun at “a slightest hint of trouble.”⁵ Because these troubling and aggravating circumstances went beyond the mere discharge or possession of a weapon as contemplated under OV 1 and OV 2 and the trial court did not abuse its discretion.

Defendant further contends that the trial court abused its discretion because “[t]he fact that the weapon had been discharged in the course of an argument had already been considered in the scoring of offense variable six.” Under OV 6, MCL 777.36, the parties agree that defendant “had unpremeditated intent to kill, the intent to do great bodily harm, or created a very high risk of death or great bodily harm knowing that death or great bodily harm was the probable result.” However, defendant apparently takes issue with the trial court’s assertion that it found this crime particularly senseless because defendant pistol-whipped the victim after the victim “looked the wrong way at” defendant or his friend. We discern no abuse of discretion with respect to this factor. The brutal and unprovoked nature of defendant’s assault justified the trial court’s consideration and, as the trial court correctly observed, defendant’s actions “carr[y] with it . . . a viciousness and a kind of bullying [from which] the community must be protected.” Thus, it is clear that the trial court found that the offense variables did not adequately account for the egregious circumstances in this case.

Also, defendant alleges that the trial court should not have considered the fact that he left the scene after the shooting. Contrary to defendant’s assertion, however, the trial court did not conclude that defendant’s sentence should exceed the guidelines range because he subjectively lacked remorse. Rather, the trial court made clear that, given defendant’s explanation that his gun accidentally discharged while he was pistol-whipping the victim, defendant not only made no effort to attend to or assist the victim, he fled the scene, leaving the victim to die in an abandoned building. Moreover, the trial court emphasized that, after he ran from the scene, defendant disposed of his clothing and the gun and changed his appearance to avert suspicion. As the court correctly observed, this reflects “a kind of a coldness that is of concern.” Clearly, this is not an impermissible factor for the trial court to consider in its upward departure.

⁵ Defendant also takes issue with the trial court’s finding that defendant took the gun to the party in order to be “tough.” This was a logical inference from the evidence at trial and a permissible credibility determination; the record reflects that guns were not permitted at the party and, as the trial court made clear, it did not believe defendant’s explanation that he brought a loaded pistol to the party in order to sell it. Rather, as the court noted, defendant’s decision to pull out the loaded weapon with such slight provocation evidenced his true purpose in carrying the gun that night.

Finally, defendant alleges that the trial court abused its discretion by considering his release from FIA in its upward departure. This does not constitute an abuse of discretion. While the trial court did not assess defendant points for his prior record, it took into account his troubled past as evidenced by his recent discharge from a residential program through FIA and his commission of this crime within a short time thereafter. Not only was this an objective and verifiable factor, it suggests defendant's inability and unwillingness to conform his conduct to societal rules.

The trial court did not abuse its discretion in finding that "objective and verifiable factors constitute substantial and compelling reasons for departing from the guidelines' recommended minimum sentence." *Armstrong, supra* at 424.⁶

Defendant correctly notes that the trial court failed to state its reasons for departure on the required departure evaluation form. *Armstrong, supra* at 426. Therefore, we affirm defendant's conviction and sentence, but remand for the ministerial task of completing the guidelines' departure form. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad

⁶ Defendant claims that the trial court should have taken into account his family support and lack of drug use as positive factors in considering his sentence. Defendant and his counsel had the opportunity to emphasize positive factors at his sentencing hearing and the record reflects that the trial court was aware of the contents of defendant's presentence report, that it reviewed letters of support sent on defendant's behalf and that it was aware that defendant's family attended defendant's trial. We find no abuse of discretion in the trial court's assessment of defendant or this record.