STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2005
v	No. 256064 Oakland Circuit Court
KIM ANITA LIVOUS, Defendant-Appellant.	LC No. 2003-189625-FC

Before: Cooper, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and sentenced as a habitual offender, second offense, MCL 769.10, to life imprisonment. She appeals as of right. We affirm.

I. Underlying Facts

Defendant's conviction arises from allegations that, on the night of February 24, 2003, she fatally stabbed her live-in boyfriend in the back. Defendant, the victim, and Paul Livous (defendant's brother) shared a Royal Oak Township house and, on the day of the incident, Paul's girlfriend, Vanessa Miller, was visiting. The house was described as a tri-level, with defendant's bedroom and a room padlocked with a combination lock on the second floor, Paul's bedroom on the lower level, and the kitchen and entrance on the main floor. The front door was sealed shut, and the only entrance to the house was through a door bordering the kitchen.

Miller testified[1] that, while visiting, she cooked a meal with defendant, and smoked crack cocaine with defendant and the victim.[2] According to both Miller and Paul, the victim was "in and out" of the house during the day. At one point, Miller heard defendant and the victim discuss a missing crack pipe, but did not otherwise see them arguing. Eventually, both Paul and Miller fell asleep in Paul's bedroom for approximately an hour. Both were awakened by

[1] Miller was unavailable for trial, so the court admitted her preliminary examination testimony.

[2] Miller indicated that, before she testified, defendant asked her not to reveal that defendant had smoked crack cocaine.

defendant calling for Paul. Miller heard defendant say that the victim "fell out." Paul went to the second floor, saw the victim lying on the floor, and began administering CPR. Paul indicated that the victim had snow on his feet; he did not see any blood. Miller called 911.

A responding Oakland County Sheriff sergeant testified that he was dispatched to a "man lying in the street" but when he arrived approximately two minutes later, he was met by Miller, who told him that the injured party was inside the house. The sergeant found the victim in a second floor bedroom, being administered CPR by Paul. The sergeant did not recall seeing any snow or other moisture on the victim's shoes. The sergeant and two deputies then began to administer CPR to the victim. According to police testimony, no one indicated that the victim had been stabbed. The victim was transported to the hospital, where a medical examination revealed that the victim had suffered "acute massive internal bleeding," caused by a single, "relatively small," stab wound in the back. The medical examiner explained that this type of wound would produce minimal blood and death within minutes.

After learning that the victim had been stabbed, the police searched the house and found a knife with blood on it in the padlocked room near defendant's bedroom. The parties stipulated that deoxyribonucleic acid (DNA) testing on the blood revealed that it matched a sample taken from the victim. According to the medical examiner, the confiscated "knife was consistent with the knife that inflicted [the victim's] wound," and that "it was almost a perfect match between the width of the blade and the hole in the [victim's] shirt."

An Oakland County Sheriff detective interviewed defendant, Paul, and Miller. The detective noted that, after defendant learned that the victim died, she did not inquire about the cause of death. According to the detective, there were "no consistencies" in defendant's statements, noting that, during a fifty-minute interview, defendant gave three versions of what occurred. Defendant first told the detective that the victim walked in the kitchen, ate a piece of stuffing, and walked upstairs. She followed him and saw him collapse. In her second version, defendant stated that she was in the kitchen when she heard a knock on the door. The victim went outside, came back about four minutes later, ate some turkey, and went upstairs. She followed him and saw him collapse. In her third version, defendant stated that she and the victim were in the kitchen, they heard noises outside, and she sent him to investigate. When the victim returned a few minutes later, he went upstairs, and defendant subsequently heard him collapse, but did not see him collapse. The detective acknowledged that defendant never admitted stabbing the victim.

II. Former Testimony of an Unavailable Witness

Defendant first argues that the trial court abused its discretion by determining that the prosecution exercised due diligence in attempting to locate Miller, and that the admission of Miller's preliminary examination testimony at trial based on MRE 804(b)(1) violated her rights under the Confrontation Clause of the federal and state constitutions.[3] We disagree.

[3] US Const, Am VI; Const 1963, art 1, § 20.

This Court reviews a trial court's evidentiary rulings for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Sabin (After Remand)*, *supra* at 67.

MRE 804(b)(1) governs the admission of former testimony if a witness is unavailable for trial. MRE 804(a)(5) defines "unavailable" to include a situation where the witness "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." If the declarant is determined to be unavailable, MRE 804(b)(1) permits the declarant's "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." See also *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Due diligence is the attempt to do everything that is reasonable, not everything that is possible, to obtain the presence of a witness. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988). The focus is whether diligent, good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Whether the prosecution exercised due diligence depends on the facts of each case. *Id*. This Court reviews a trial court's determination that due diligence was established for an abuse of discretion, *id*., and the findings of fact that underlie its due diligence decision for clear error, *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

The trial court did not abuse its discretion in determining that the prosecution exercised due diligence in its attempts to produce Miller at trial. After unsuccessful attempts to locate Miller, who was described as a "street person" and "a transient," an Oakland County Sheriff sergeant enlisted the assistance of the Oakland County Sheriff's Fugitive Apprehension Team. A Fugitive Team detective went to Miller's only known address, which was her sister's Detroit home. Miller's sister had not seen Miller in two months, and had "no idea" about her possible location. The detective went to Royal Oak Township where Miller was known to "walk[] the streets," and spent four hours one day and six hours the next day walking and talking to people about Miller, and passing out his business card in case anyone saw her. After learning that a local barber may have information about Miller, the detective went to the barbershop and spoke with the barber and several of his customers. Two of the customers indicated that they had seen Miller three days earlier walking in the same area where the detective had spent several hours searching for her. The detective also learned that Miller frequented a local gas station. The detective went to the gas station, and spent "a while" talking to people and sitting in the parking lot. Although one gentleman at the gas station was familiar with Miller, he had not seen her recently. The detective indicated that he followed all "leads." The detective also contacted various agencies in the area, including churches that assisted the homeless, hotels, and the Oakland County Jail. The detective indicated that because Miller had warrants in Detroit, he "knew she would not be in their jail."

Although defendant argued that the detective should have checked all local jails, particularly those in Detroit and Macomb County, the trial court noted that, because Miller had been seen on the streets three days before the search, "at least at that point in time she wasn't lodged in any detention facility." The prosecution is "not required to exhaust all avenues for locating [witnesses], but ha[s] a duty only to exercise a reasonable, good-faith effort in locating [them]." *People v Briseno*, 211 Mich App 11, 16; 535 NW2d 559 (1995). The trial court did not abuse its discretion in determining that the prosecution could not procure Miller's attendance at trial despite the exercise of due diligence.

Further, the preliminary examination provided defendant with an opportunity for cross-examination under a similar motive. MRE 804(b)(1). Defendant does not claim that the district court curtailed defense counsel's efforts to cross-examine Miller at the preliminary examination, and she offers no specific examples of additional questions that she was not able to pursue because of Miller's absence at trial. Defendant contends that the admission of Miller's preliminary examination testimony improperly deprived the jury of the opportunity to view Miller's demeanor, which was essential to judging her credibility. But MRE 804(b)(1) only requires that there be a prior opportunity for cross-examination under a similar motive. In sum, the trial court did not abuse its discretion by concluding that Miller's preliminary examination testimony was admissible at trial under MRE 804(b)(1).

Furthermore, because MRE 804(b)(1) is a firmly rooted hearsay exception, evidence admitted under the exception does not deprive a defendant of her constitutional right of confrontation. *People v Meredith*, 459 Mich 62, 69-71; 586 NW2d 538 (1998).

III. Sufficiency of the Evidence

Next, defendant argues that there was insufficient evidence to convict her of second-degree murder because there was no evidence that she was the "actual perpetrator." We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a 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). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514-515.

The elements of second-degree murder are: "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001) (citation omitted). Defendant does not challenge the individual elements of the offense. Rather, she alleges that there was insufficient evidence of her identity as the perpetrator. Identity is an essential element in a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must prove the identity of the defendant as the perpetrator of a charged offense beyond a reasonable doubt. *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, including the identity of the perpetrator. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996); *Kern*, *supra*. All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Evidence was presented that defendant, the victim, Paul, and Miller were the only people in the house at the time of the incident. There was no dispute that, when the victim collapsed on the second floor, Paul and Miller were sleeping in a lower level bedroom. In defendant's own statement to the police, she admitted being with the victim either immediately before he collapsed or when he collapsed. The medical testimony established that the type of wound inflicted would produce minimal blood and, although the victim could remain ambulatory for a few minutes, death would occur within minutes. When the police arrived, the victim was in defendant's second-floor bedroom. The knife identified as the murder weapon was found in a padlocked room next to defendant's bedroom. There was no evidence presented that any outside person had access to the padlocked room. The evidence showed that there was one entrance into the house via the kitchen, and defendant admitted being in the kitchen or following the victim upstairs before he collapsed. There was also evidence that defendant gave inconsistent statements to the police about what occurred before the victim collapsed.

From this evidence, viewed in a light most favorable to the prosecution, a rational trier of fact could reasonably infer that defendant stabbed the victim and hid the murder weapon. Contrary to what defendant argues, the lack of a confession or eyewitness testimony does not preclude a finding of guilt. Although defendant asserts that evidence supporting her conviction was weak, the jury was entitled to accept or reject any of the evidence presented. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). The evidence was sufficient to sustain defendant's conviction of second-degree murder.

IV. Instruction on Voluntary Manslaughter

Defendant's final claim is that the trial court erred when it denied her request for an instruction on voluntary manslaughter. We disagree. Generally, claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997).

Voluntary manslaughter is a necessarily included lesser offense of murder. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Consequently, when a defendant is charged with murder, an instruction for voluntary manslaughter must be given if supported by a rational view of the evidence. *Id*. "[T]o show voluntary manslaughter, one must show that the defendant killed in the heat of passion, the passion was caused by adequate provocation, and there was not a lapse of time during which a reasonable person could control [her] passions." *Id.* at 535. "The provocation necessary to mitigate a homicide from murder to manslaughter is that which causes the defendant to act out of passion rather than reason . . . [T]he provocation must be adequate, namely, that which would cause a reasonable person to lose control." *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998) (emphasis omitted).

We agree with the trial court that a voluntary manslaughter instruction was not warranted because there was no evidence to support it. Simply put, there was no evidence that defendant killed in the heat of passion, that there was adequate provocation, or that there was not a lapse of time during which defendant could not control herself. In fact, defendant's theory was that someone else committed the offense. Therefore, a voluntary manslaughter instruction would have been logically inconsistent with the defense. Because a rational view of the evidence did

not support a voluntary manslaughter instruction, it was not error for the trial court to refuse to provide that instruction.

Affirmed.

/s/ Jessica R. Cooper
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello