

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PROPHET JERMELL PHILLIPS,

Defendant-Appellant.

UNPUBLISHED

September 24, 2009

No. 284677

Saginaw Circuit Court

LC No. 07-028599-FC

Before: Servitto, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of 60 to 90 years in prison on the convictions for second-degree murder, felon in possession, and CCW, to be served consecutively to 24 months on the felony-firearm conviction. We affirm.

Defendant's conviction arose out of the shooting death of Darnell Eiland. The evidence at the preliminary examination and at trial indicated that defendant and Donald "Fella" Isom were at a house with Eiland around the time he was shot. Isom's friend, Doretha Ransom, had driven with defendant and Isom to a vacant yellow home where Eiland had been occasionally staying. Isom had a gun, and defendant had indicated that he also had a gun, although Ransom never saw defendant's gun. Isom and defendant approached the house while Ransom waited in the car. Ransom heard gunshots and Isom and defendant returned to the car. Isom had been shot in the hand. Eiland's body was later found in the home.

Defendant first argues that the evidence was insufficient to bind him over for trial, particularly on the felony murder charge. The prosecutor had charged defendant and Isom with first-degree felony murder, with the predicate felony being the attempted robbery of Eiland. We review the bindover decision de novo to determine whether the district court abused its discretion in binding defendant over for trial. *People v Henderson*, 282 Mich App 307, 313; 765 NW2d 619 (2009). A bindover decision is proper so long as the prosecutor established probable cause that the defendant committed the charged crimes. *Id.* at 312.

To bind defendant over for trial on the felony murder charge, the prosecutor had to demonstrate probable cause that defendant had committed a murder in the course of a robbery, or had aided and abetted Isom in doing so. See MCL 767.39; see also *People v Robinson*, 475 Mich 1, 14; 715 NW2d 44 (2006) (observing that “one who aids and abets a felony murder must have the requisite malice to be convicted of felony murder, but need not have the same malice as the principal”). “Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant’s guilt.” *Henderson, supra* at 312, citing *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003).

Specifically, the prosecutor had to present evidence that Eiland was killed, that defendant had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, and that Eiland was killed while defendant was committing, attempting to commit, or assisting in the commission of robbery. MCL 750.316(1)(b); *People v Smith*, 478 Mich 292, 318-319, 733 NW2d 351 (2007) (elements of felony murder). With regard to the robbery element, plaintiff had to present evidence that defendant committed or attempted to commit the taking of property from Eiland by force, assault, or by putting Eiland in fear. MCL 750.530.

We find the preliminary examination evidence was sufficient to establish probable cause to bind defendant over on the felony murder charge. A witness testified at the preliminary examination that defendant and Isom had appeared at his home with a gun on the night in question and appeared to be attempting to rob him. The witness further noted that defendant later told him that Isom wanted to rob a few people that night. Another witness testified that defendant said Isom was going to kill another man that night, but that defendant had prevented the killing. Ms. Ransom testified that she saw Isom and defendant go to the yellow home, that she heard gunshots, and that when they returned to the car, Isom had been shot. Eiland was found dead in the yellow home a short time later. The above evidence, combined with that of other witnesses and the forensic evidence, was sufficient to create an inference that defendant aided and abetted in felony murder. See *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003).

Defendant next argues the trial court erred by denying his motion for a directed verdict. We review de novo a trial court’s ruling on a motion for a directed verdict, examining the record to determine whether a rational trier of fact could find that the prosecutor established the elements of the charged crime beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122-123; 631 NW2d 67 (2001). In our review, we must consider the facts in the light most favorable to the prosecutor. *Id.* Considering the facts in this light, we conclude that the evidence was sufficient to withstand defendant’s motion for a directed verdict on the lesser-included offense of second-degree murder.

Our Supreme Court has indicated that a defendant may be guilty of second-degree murder if the defendant aids or abets a principal in the commission of a murder with knowledge of the principal’s intent. *Robinson, supra* at 15 n 39. According to the Court,

a defendant must possess the criminal intent to aid, abet, procure, or counsel the commission of an offense. A defendant is criminally liable for the offenses the defendant specifically intends to aid or abet, or has knowledge of, as well as those

crimes that are the natural and probable consequences of the offense he intends to aid or abet. Therefore, the prosecutor must prove beyond a reasonable doubt that the defendant aided or abetted the commission of an offense and that the defendant intended to aid the charged offense, knew the principal intended to commit the charged offense, or, alternatively, that the charged offense was a natural and probable consequence of the commission of the intended offense. [*Id.*]

Thus, to overcome defendant's motion for a directed verdict, the prosecutor had to present evidence that defendant either committed second-degree murder himself or assisted Isom with knowledge that Isom intended to commit second-degree murder. The elements of second-degree murder are: "(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have lawful justification or excuse for causing the death." *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007), citing *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). "'Malice' is defined as an act done 'with either an intent to kill, an intent to commit great bodily harm, or an intent to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result.'" *People v Gillis*, 474 Mich 105, 138; 712 NW 2d 419 (2006), quoting *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). In other words, an intent to commit second-degree murder can be established through evidence of "intent to do an act in obvious disregard of life-endangering consequences." *Goecke, supra* at 466.

Here, a reasonable juror could have readily concluded from the trial evidence that the shot that killed Eiland could only have been fired by one of two people: Isom or defendant. The prosecutor was not required to establish that defendant pulled the trigger; so long as evidence was presented that defendant knew Isom had a gun and was willing to kill. The prosecutor met this burden by presenting a witness who testified that defendant said Isom was going to kill another man that had been the victim of an attempted robbery earlier that night. From this testimony a reasonable juror could have concluded that defendant had the intent to do an act in obvious disregard of life-endangering consequences, or that he aided and abetted Isom in committing such an act, with knowledge of Isom's intent.

Defendant's final challenge is to the scoring of offense variables (OVs) 1 and 2. MCL 777.31; MCL 777.32. We review the trial court's findings on the existence of particular sentencing factors for clear error. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003). There is no clear error if there is any evidence to support the trial court's findings. *Id.*, citing *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996); see also *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). The Court must affirm a sentence within the guidelines range unless the trial court incorrectly scored the guidelines or relied on inaccurate information in determining the sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

We find no error in the scoring of either OV. OV 1 requires that 25 points be assessed if a firearm is discharged toward a human. MCL 777.31(1)(a). OV 1 is phrased in the passive voice, and as such does not require specific proof that the offender discharged a firearm. Rather, OV 1 requires proof that "a firearm *was discharged* toward a human being." MCL 777.31(1)(a) (emphasis added). Here, the evidence established that a firearm was discharged toward Eiland

and that Eiland died as a result. This evidence supported the assessment of 25 points under OV 1, regardless whether defendant actually fired the gun that killed Eiland.

The scoring was also correct for OV 2, which requires the imposition of five points if “the offender possessed or used a pistol, rifle, shotgun, or knife or other cutting or stabbing weapon.” MCL 777.32(1)(d). As the trial court noted at sentencing, the police found three different calibers of bullets at the yellow home: .38, .40 and .45 caliber. The evidence established that the .45 caliber bullet came from a gun that was at the house, and that Isom was carrying a .40 caliber gun immediately after the shooting. Moreover, Ms. Ransom testified that defendant said he kept a gun on him, and several witnesses place defendant and Isom together around the time of Eiland’s death. The evidence thus supported an inference that defendant possessed a gun that fired .38 caliber bullets. The inference was sufficient to support the assessment of five points against defendant under OV 2.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra