

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMAR GAINES, a/k/a AMAR LATEEF GAINES,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 192386

Recorder's Court

LC No. 95-006914

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to a two-year mandatory term of imprisonment for the felony-firearm conviction, and to a consecutive fifteen to thirty year term of imprisonment on the second-degree murder conviction. We affirm.

Defendant first argues on appeal that the district court abused its discretion in binding him over on a charge of first-degree murder. We disagree. We review the decision to bind over a defendant for an abuse of discretion. *People v Goecke*, 215 Mich App 623, 628-629; 547 NW2d 338 (1996). In order to find that an abuse of discretion has occurred, the result must be so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*; *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

The trial court must bind over a defendant if the evidence presented at the preliminary examination establishes that the charged crime has been committed and there is probable cause to believe that the defendant committed the crime. *People v Whipple*, 202 Mich App 428, 431; 509 NW2d 837 (1993). At the preliminary examination, the prosecutor is not required to prove each element of the crime beyond a reasonable doubt. Circumstantial evidence and reasonable inferences arising from the evidence are sufficient to support the bindover of the defendant if such evidence establishes probable cause. *Id.* at 412-413.

In order to convict a defendant of first-degree murder, the prosecution must prove that the defendant intentionally killed the victim and that the act of killing was premeditated and deliberate. *People v Anderson*, 209 Mich App 527, 527; 531 NW2d 780 (1995). Premeditation and deliberation require sufficient time to allow the defendant to take a second look. *Id.* The elements of premeditation and deliberation may be inferred from the circumstances surrounding the killing. *Id.* Premeditation may be established through evidence of the following factors: (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.*

We conclude that the evidence presented at the preliminary examination was sufficient to support defendant's bindover on the charge of first-degree murder because there was evidence of premeditation and deliberation. Defendant had the opportunity to take a second look before shooting the victim: (1) he grabbed the gun and went into the kitchen; (2) walked from the kitchen out the front door; (3) stood on the porch after pushing the victim off the porch; and (4) spoke with the victim while pointing the gun at the victim's head. Defendant's actions of deliberately grabbing the gym bag, which he knew contained the gun, carrying it into the kitchen, walking back through the house and onto the porch, and then pointing the gun at the victim allow a reasonable inference of premeditation and deliberation. *Anderson, supra.*

Defendant and the victim had been arguing before the shooting and they had gotten into a physical altercation just before returning to defendant's home. These factors are some evidence of premeditation. *Id.*

Because we conclude that the evidence presented at the preliminary examination through direct eyewitness testimony established that a felony had been committed and that there was probable cause to believe that defendant had committed the crime, we hold that the trial court did not abuse its discretion in binding over defendant on a charge of first-degree murder. *Whipple, supra.* The trial court's decision to bindover defendant on the charge of first-degree murder was not so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Goecke, supra; Coleman, supra; People v Justice (After Remand)*, ___ Mich ___ (Docket No. 105352, issued May 16, 1997), slip op at 28-29.

Defendant also argues on appeal that there was insufficient evidence of malice necessary to support his conviction for second-degree murder. We disagree. In determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found 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 1201-1202 (1992).

The elements of second-degree murder are: (1) a death; (2) caused by an act of the defendant; (3) absent circumstances of justification, excuse, or mitigation; (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm (malice). *People v Bailey*, 451 Mich 657, 669; 549

NW2d 325 (1996). Malice may be inferred from the facts and circumstances of the killing. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993).

Defendant contests the trial court's finding of malice. Viewing the evidence in a light most favorable to the prosecution, we hold that a rational trier of fact could have found that defendant killed the victim with malice beyond a reasonable doubt. *Wolfe, supra*. Defendant grabbed the gun, which he knew was loaded, and pointed it at the victim's head with the intent to scare him. Defendant placed the gun directly against the victim's forehead, so that the gun was actually touching his head. Defendant intended to scare the victim because he did not want the victim to feel that he had gotten the better of defendant during the prior altercation.

We conclude that the fact that an individual would place a loaded gun next to another person's forehead is circumstantial evidence of an intent to inflict great bodily harm or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *Bailey, supra*. Since defendant's only excuse was accident, i.e., that he did not remember the gun going off or pulling the trigger, and we conclude that all the other elements of second-degree murder have been satisfied, we hold that sufficient evidence was presented to the trial court to support defendant's conviction for second-degree murder.

Affirmed.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad